

No. 19, 1941.]

ACT

To amend the Attorneys, Notaries and Conveyancers Admission Act, 1934; to establish a fidelity guarantee fund for attorneys, notaries and conveyancers; to provide for the control and management of such fund and the payment of claims therefrom; and for other matters incidental thereto.

(Signed by the Governor-General in English.)
(Assented to 10th April, 1941.)

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:—

PART I.

AMENDMENT OF ATTORNEYS, NOTARIES AND CONVEYANCERS ADMISSION ACT, 1934, AND OTHER GENERAL PROVISIONS.

Definitions.

1. In this Act, unless inconsistent with the context,—

“conveyancer” in Part II does not include a conveyancer who was admitted and enrolled as such under the provisions of Act No. 23 of 1904 (Natal);

“fidelity fund certificate” means a certificate issued in terms of section *twenty-three*;

“fund” means the Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund established under section *eight*;

“principal Act” means the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act No. 23 of 1934), as amended;

“society” means a law society incorporated or established under any law, and in relation to any attorney, notary or conveyancer, the society of which he is a member.

Amendment of Afrikaans text of section 21 of Act 23 of 1934.

2. Sub-section (1) of section *twenty-one* of the principal Act, is hereby amended by the deletion in the Afrikaans version of the word “Enige” where it occurs for the first time and the substitution therefor of the word “Geen”.

Amendment of section 32 of Act 23 of 1934.

3. Section *thirty-two* of the principal Act is hereby amended—

(a) by the insertion after sub-section (1) of the following new sub-section:

“(1)*bis*. No person shall orally or by means of any written or printed matter or in any other manner whatsoever, directly or indirectly, either for himself or for any other person, canvass, advertise or tout for, or make known his preparedness or that of such other person to undertake, any work, whether for or without remuneration, in connection with the administration or liquidation or distribution of the estate of any deceased or insolvent person, lunatic, or person under other disability.”

(b) by the addition of the following proviso at the end of sub-section (5):

“Provided that it shall not be deemed to be a contravention of sub-section (1)*bis*. if—

(a) any board of executors, or trust company (not being a private company within the meaning of section *one hundred and four*, or any amendment thereof, of the Companies Act, 1926 (Act No. 46 of 1926)), licensed as such on or before the thirty-first December, 1938, under the Licences Consolidation Act, 1925 (Act No. 32 of 1925),

(i) has in its name or title words indicating that its objects or functions include work in connection with the administration, liquidation or distribution of any estate mentioned in sub-section (1) *bis*; or

- (ii) on signboards, nameplates, or notices exhibited on the premises in which it carries on business, on its stationery, or on its usual annual almanacs or in any advertisement in the public press, or in its annual reports or any report of the proceedings at an annual general meeting makes known by a simple statement to that effect that its objects or functions include any such work;
 - (b) any person in reply to a direct enquiry voluntarily made of him by someone else makes known the preparedness of himself or some other person to perform any such work;
 - (c) any shareholder or employee of a board of executors or trust company described in sub-paragraph (a) above canvasses another shareholder or employee of the same board of executors or trust company on behalf of such board or company;
 - (d) any attorney, notary or conveyancer or any commercial banking institution or any such board of executors or trust company indicates in any public notice required by law in connection with the liquidation or administration of any estate, that he or it does such work;
 - (e) any attorney, notary or conveyancer indicates in such form as may be approved by the law society of the Province in which he practises on any nameplate or signboard exhibited in or on the premises in which he practises or on any of his stationery or professional documents that he does such work;
 - (f) any person (not being a board of executors or trust company mentioned in sub-paragraph (a) or a company registered under the Companies Act 1926, (Act No. 46 of 1926), or any amendment thereof or a commercial banking institution) who on the twenty-first day of February, 1941, held a valid broker's or agent's licence issued under the Licences Consolidation Act, 1925, (Act No. 32 of 1925), on a signboard, nameplate, or notice, exhibited on the premises in which he carries on business, on his stationery or in any advertisement in the public press makes known by a simple statement to that effect that his business includes any such work.
 - (g) any accountant who is entitled to use any designation provided for by Act No. 13 of 1927, on a signboard or nameplate exhibited on the premises in which he carries on business, or on his stationery makes known by a simple statement to that effect that his business includes any such work: Provided that on the twenty-first day of February, 1941, he was such an accountant and by such means made known that his business included such work.
- (c) by the deletion in sub-section (6) of the words "sub-section (3) or (4)" and the substitution therefor of the words "sub-section (1) *bis*, (3) or (4)."

Insertion of new section 32*bis* in Act 23 of 1934.

4. The following new section is hereby inserted in the principal Act after section *thirty-two* :

"32*bis*. (1) Save as provided in sub-section (2), any person, not being a practising attorney, notary or conveyancer, who for or in expectation of any fee, gain or reward, direct or indirect, to himself or to any other person, draws or prepares or causes to be drawn or prepared any of the following documents—

- (a) any contract, deed or instrument relating to immovable property or to any right in or to immovable property, other than contracts of lease for periods not exceeding five years, conditions of sale or brokers' notes;

- (b) any will or other testamentary instrument ;
- (c) any memorandum or articles of association or prospectus of any company ;
- (d) any contract, deed or instrument relating to the creation or dissolution of any partnership or any variation of the terms thereof ;
- (e) any instrument or document relating to or required or intended for use in any action, suit or other proceeding in a court of civil jurisdiction within the Union,

shall be guilty of an offence and liable on conviction in respect of each offence to a fine not exceeding one hundred pounds and in default of payment thereof to imprisonment not exceeding three months : Provided that the words " fee, gain or reward direct or indirect " shall not include or apply to—

- (i) the salary or emoluments of an employee if no fee gain or reward is sought or obtained by his employer from the person on whose behalf the document was drawn or prepared, or
- (ii) any commission or other remuneration to which any person is or may be entitled either by law or otherwise for services rendered in his capacity as executor, administrator, trustee, curator, tutor or guardian by virtue of his appointment as such by any court of law or under the provisions of any will or other testamentary instrument, or as agent for any person holding such appointment.

(2) The provisions of sub-section (1) shall not apply to—

- (a) any person in the employ of a practising attorney, notary or conveyancer drawing or preparing or causing to be drawn or prepared any of the aforesaid documents in the course of his employment and on behalf of his employer ;
- (b) any agent referred to in section *twenty-one* of the Magistrates' Courts Act, 1917 (Act No. 32 of 1917), and any person in the employ of such agent, acting in the course of his employment and on behalf of his employer, drawing or preparing or causing to be drawn or prepared any of the aforesaid documents, in so far as such agent was prior to the commencement of this Act entitled to draw or prepare or cause to be drawn or prepared any of the aforesaid documents and charge a fee therefor ;
- (c) any person in the employ of the Government of the Union, the Railway Administration or of a provincial administration or of the Land and Agricultural Bank of South Africa drawing or preparing or causing to be drawn or prepared any of the aforesaid documents in the course of his duty ;
- (d) any trustee under the laws relating to insolvency or any executor, administrator or curator or any liquidator of a company drawing or preparing any such document in the course of his statutory duties and receiving such fees as may be allowed by law ;
- (e) any person who at the thirty-first day of December, 1938, was the manager or secretary or attorney in the employ of a board of executors or trust company or any branch thereof licensed as such under the Licences Consolidation Act, 1925 (Act No. 32 of 1925), in respect of any such document drawn or prepared by him in such capacity in so far as immediately prior to such date he in his said capacity was entitled to draw or prepare such a document and to charge a fee therefor ;
- (f) any practising advocate in so far as he would be entitled but for the passing of this Act to draw or prepare any of the aforesaid documents in the ordinary course of his profession ;

(3) Nothing in sub-section (1) or (2) contained shall in any way affect the provisions of the Natal Conveyancers Act, 1926 (Act No. 24 of 1926).

Obligation upon executors, etc., to provide security incapable of being waived.

5. The obligation to provide security imposed by any law upon executors, administrators, tutors, curators or trustees in insolvency, shall not be capable of being waived unless the instrument, by which they are nominated expressly directs that such security shall be dispensed with or unless a provincial or local division of the Supreme Court of competent jurisdiction on application grants special exemption therefrom.

Law society may institute private prosecution.

6. Any society may by any person authorized thereto in writing under the hand of the president thereof, prosecute for any offence against any provision of this Act or any other law relating to the admission or practice of an attorney, notary or conveyancer, or any regulation or bye-law made under any such law, and the provisions of any law relating to private prosecutions shall apply to all such prosecutions and a society shall for the purpose of any such last-mentioned law be a public body.

Court may forbid or restrain convicted person from continuing offence.

7. Any court which has convicted any person of an offence against any provision of this Act or any other law relating to the admission or practice of an attorney, notary or conveyancer, may, in addition to imposing any penalty prescribed by such law, issue an order forbidding or restraining such person from continuing such offence.

PART II.

ESTABLISHMENT OF ATTORNEYS, NOTARIES AND CONVEYANCERS FIDELITY GUARANTEE FUND.

Establishment of Fidelity Guarantee Fund.

8. There is hereby established a fund to be known as the Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund.

Vesting of fund.

9. The fund shall be vested in and administered by a controlling body consisting of the president for the time being of the society of each of the four provinces in addition to one member of each of the said societies to be elected by the council of each society during the month of June in each year. Each society shall have the right through its own council from time to time to appoint from amongst its members an alternate to the member elected by it.

Controlling body.

10. Such controlling body shall be known as "The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control" under which title it may sue and be sued and shall be hereinafter referred to as "the board of control."

Period of office.

11. An elected member of the board of control shall hold office until his successor has been elected from time to time and unless another is elected in his place in any year as provided for in section *nine* he shall be deemed to have been re-elected.

Vacation of office.

12. The office of a member of the board of control shall be vacated—

- (a) if he dies ; or
- (b) if he becomes of unsound mind ; or
- (c) if he ceases to be a member of the society which elected him ; or
- (d) if he becomes insolvent or makes any arrangement or composition with his creditors ; or
- (e) if he ceases to practise as an attorney, notary or conveyancer ; or
- (f) if he is convicted of any offence which in the opinion of the council of the society which elected him, debars him from continuing as a member of the board of control ; or
- (g) if he resigns and his resignation is accepted by his society and the board of control.

Meetings.

13. The board of control shall meet whenever necessary at such time and place as it may from time to time decide.

Election of office bearers.

14. The board of control shall annually elect its own chairman and vice-chairman and in the absence from any meeting of both of them shall elect a chairman for that meeting from amongst its number.

Quorum at meetings. Majority decisions and chairman's voting power.

15. Four members of the board of control shall form a quorum at its meetings and a decision of the majority of the members present at any meeting shall be the decision of the board: Provided that in the event of an equality of votes at any meeting the chairman shall have a casting vote in addition to his deliberative vote.

Resolution signed by all members effective.

16. A resolution in writing of the board of control signed by all the members thereof shall be of full force and effect without the necessity of holding a meeting to pass the same.

Fund to be held in trust.

17. The fund shall be held in trust by the board of control for the purposes hereinafter set forth.

Fund to be kept in separate bank account.

18. All moneys constituting the fund shall, pending the investment or application thereof in accordance with this Act, be paid or transferred into a bank for the time being carrying on business in the Union or a building society registered under the Building Societies Act, 1934 (Act No. 62 of 1934) to the credit of an account to be called "The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Account".

Moneys payable into fund.

19. The fund shall consist of—

- (a) all sums paid to or on account of the fund as annual contributions in accordance with the provisions of this Act in that behalf;
- (b) the income from time to time accruing from the investment of the fund as hereinafter provided;
- (c) all sums given or advanced by any society;
- (d) all moneys recovered by or on behalf of the fund in the exercise of any right of action conferred by this Act;
- (e) all moneys received on behalf of the fund from any insurance company;
- (f) any other moneys that may be lawfully paid into the fund.

Expenditure from fund.

20. Subject to the provisions of this Act, there shall from time to time be paid out of the fund as required—

- (a) the amount of all claims, including costs allowed or established against the fund as hereinafter provided;
- (b) all legal expenses incurred in defending claims made against the fund or otherwise incurred in relation to the fund;
- (c) all premiums payable in respect of contracts of insurance entered into by the board of control pursuant to section *thirty-one*;
- (d) all refunds made to a member or to his estate pursuant to section *thirty-three*;
- (e) the expenses involved in the administration of the fund, including allowances to members of the board of control in respect of their services or their reasonable travelling expenses incurred in connection with the management of the fund;
- (f) any expense previously authorized by the board of control which may be incurred by a society in accordance with the provisions of section *thirty-three* of the principal Act;
- (g) any loans and interest thereon;
- (h) any other moneys payable out of the fund in accordance with this Act or with regulations made under the provisions of this Act.

Audit of accounts.

21. (1) The accounts of the fund shall be audited by an accountant appointed by the board of control.

(2) Every person acting as auditor under this section shall, not later than the thirty-first day of August in each year, frame a balance sheet and profit and loss account of the fund and forthwith submit certified copies thereof and of his report thereon to the chairman of the board of control and to the council of each society.

Contributions to the fund by attorneys, notaries and conveyancers.

22. (1) Subject to the provisions of sub-section (2), every attorney, notary or conveyancer whether practising in one or more capacities either on his own account or in partnership, on making application in any year for a certificate under section *twenty-three*, shall, in addition to all other fees and subscriptions then payable by him, pay as an annual contribution to the fund a sum of ten pounds: Provided that if he commences to practice on or after the first day of July, he shall pay a sum of five pounds in respect of the year which ends on the following thirty-first day of December.

(2) If an attorney, notary or conveyancer who is not already in possession of a fidelity certificate intends to commence to practise on his own account or in partnership, he shall before commencing so to practise give notice of such intention to the secretary of the society of the province in which he intends to practise and he shall thereupon become liable to pay to the fund the amount of the aforesaid contribution.

(3) All contributions payable under this section shall be paid to the society and every society shall remit the amounts to the board of control as received or within seven days of receipt thereof.

Applications for
and issue of
fidelity fund
certificates.

23. (1) Every attorney, notary or conveyancer practising as such or intending to commence to practise as such, whether on his own account or in partnership, shall apply in the prescribed form to a secretary of a society for a fidelity fund certificate.

(2) Such application shall be accompanied by the contribution prescribed by section *twenty-two*.

(3) Upon receipt of such application and contribution, and if he is satisfied that the applicant has discharged all his liabilities to the society in respect of his subscription for membership thereof, such secretary shall forthwith issue to the applicant a fidelity fund certificate in the prescribed form which shall be valid until the thirty-first day of December of the year in respect of which it was issued.

(4) No fidelity fund certificate shall be issued unless and until the provisions of sub-sections (1), (2) and (3) have been complied with, and any certificate which may have been issued in contravention of this section shall not be valid.

Accumulated
fund not to
exceed £250,000.

24. No further contributions in accordance with section *twenty-two* shall be made to the fund at any time whilst the amount of the fund, including any investments thereof and after deducting the amount of all unpaid claims and other liabilities outstanding against the fund, at the preceding thirty-first day of December, is not less than two hundred and fifty thousand pounds.

Investment of
fund.

25. Any moneys in the fund which are not immediately required for the purposes thereof shall be invested in such Government or other securities as may be prescribed by regulation.

Application of
fund.

26. (1) Subject to the provisions of this Act, the fund shall be held and applied for the purpose of reimbursing persons who may suffer pecuniary loss by reason of the theft committed after the commencement of this Act by a practising attorney, notary or conveyancer, or by his clerk or servant, of any money or other property entrusted by or on behalf of such persons to him or to his clerk or servant in the course of his practice as such or whilst acting as executor or administrator in the estate of a deceased person or trustee in an insolvent estate or in any other like capacity: Provided that this section shall not be deemed to apply—

(a) to any loss suffered by any person through an attorney, notary or conveyancer whilst in the employ of any person other than another attorney, notary or conveyancer; or

(b) to any loss caused by any attorney, notary or conveyancer whose fidelity has been guaranteed by some other person, either generally or in respect of the particular transaction.

(2) Every action against the board of control in relation to the fund may, subject to the provisions of this Act and the regulations made thereunder, be brought in any provincial or local division of the Supreme Court within the jurisdiction of which the cause of action arose.

(3) No person shall have any claim against the board of control in respect of any theft—

(a) committed before the commencement of this Act; or

(b) committed after that date unless notice of such claim has been given in writing to the council of the society of the province in which such attorney, notary or conveyancer is practising and to the board of control within three months after the claimant has become aware of the theft.

Claims against
fund.

27. (1) The board of control may receive, and subject to the provisions of section *twenty-six*, settle any claim against the fund at any time after the commission of the theft in respect of which such claim arose, but no person may, without leave of the board of control, commence any action against the fund unless and until the claimant has exhausted all relevant rights of action and other legal remedies available against the attorney, notary or conveyancer (or his estate) in respect of whom the claim arose and against all other persons liable in respect of the loss suffered by such claimant.

(2) No person shall recover from the board of control an amount greater than the balance of the loss suffered by him after deducting from the total amount of such loss the amount or value of all moneys or other benefits received or receivable by him from any source other than the fund in reduction of such loss.

(3) No amount shall be paid or payable out of the fund as interest on the amount of any judgment obtained or of any claim admitted against the fund.

(4) No right of action shall lie against the board of control in respect of any loss suffered by any person by reason of any theft that may be committed by an attorney, notary or conveyancer at any time after the claimant or persons legally claiming under and through him have received a notification in writing from the secretary of a society or the board of control warning him or them against the employment or continued employment of such practitioner.

(5) No right of action shall lie against the board of control in respect of any loss suffered by the wife of an attorney, notary or conveyancer by reason of any theft committed by that attorney, notary or conveyancer or in respect of any loss suffered by any attorney, notary or conveyancer by reason of any theft committed by any partner of that attorney, notary or conveyancer or by reason of any theft committed by a servant of such attorney, notary or conveyancer or of any firm in which he is a partner.

(6) No action for damages shall lie against a society or any member or servant of a society or council or the board of control for any notification given in good faith and without malice for the purposes of sub-section (4).

Defences to claims against fund.

28. In any action brought against the board of control in relation to the fund, all defences which would have been available to the person against whom the claim arose shall be available to the board of control.

Subrogation to rights of action.

29. On payment out of the fund of any moneys in settlement in whole or in part of any claim under this Act the board of control shall be subrogated, to the extent of such payment, to all the rights and remedies of the claimant against any practitioner and any other person or persons in relation to whom the claim arose, or in the event of his death or insolvency or bankruptcy or other disability against his personal representatives or other persons having authority to administer his estate.

If fund insufficient to satisfy such claims balance to be charged against future accumulations.

30. (1) No money or other property belonging to a society other than the fund shall be available for the satisfaction of any judgment obtained in relation to the fund, or for the payment of any claim allowed by the board of control; but if at any time the fund is not sufficient to provide for the satisfaction of all such judgments and claims they shall, to the extent to which they are not so satisfied, be charged against future accumulations of the fund.

(2) The board of control may in its absolute discretion determine the order in which the judgments and claims charged against the fund as aforesaid shall be satisfied, and may, if the amount accumulated is not sufficient to satisfy all such judgments and claims in full, satisfy any such judgment or claim in whole or in part.

(3) Without limiting the discretion of the board of control it shall, in applying the fund towards the settlement of such judgments and claims as aforesaid, have regard to the following rules—

- (a) it shall take into consideration the relative degrees of hardship suffered or likely to be suffered by the several claimants in the event of their claims against the fund not being satisfied in whole or in part;
- (b) subject to paragraph (a), claims for amounts not exceeding five hundred pounds shall, unless in special circumstances, be satisfied in full before claims for amounts exceeding five hundred pounds are satisfied to a greater extent than five hundred pounds;
- (c) where all other considerations are equal, claimants shall have priority among themselves according to the dates of the judgments or the dates when the claims were admitted by the board of control, as the case may be.

Board may enter into contracts of insurance.

31. (1) The board of control may in its discretion enter into any contract with any person or company carrying on fidelity insurance business in the Union whereby the fund will be indemnified to the extent and in the manner provided by such contract against liability to pay claims under this Act.

(2) Any such contract shall be entered into in respect of attorneys, notaries and conveyancers generally.

Application of insurance moneys.

32. No claimant against the board of control shall have any right of action against any person or company with whom a contract of indemnity has been made under section *thirty-one* in

- Board may refund contributions in certain cases.
- Attorneys' etc. fidelity fund certificates.
- Attorneys practising without certificates.
- Attorneys may not act or recover fees whilst uncertificated.
- The like in relation to conveyancers and others.
- Fund exempt from income and other taxes.
- Fund exempt from insurance laws.
- Minister may make regulations for purposes of this Act.
- respect of such contract, or have any right or claim to any moneys paid by the insurer in accordance with any such contract of indemnity; but all such moneys shall be paid into the fund and shall be applied in or towards the settlement of relevant claims.
33. In the event of the death or on the retirement from the practice of his profession of an attorney, notary or conveyancer in respect of whom no claim has been made under this Act, or, if any such claim has been made, in respect of whom such claim has not been sustained, the board of control may in its discretion and after satisfying itself that no claim is likely to be made, pay to him or to his estate, as the case may be, a sum not exceeding the aggregate amount of his contributions to the fund.
34. No attorney, notary or conveyancer shall after the commencement of this Act, act or practise as such on his own account or in partnership unless he is in possession of a valid fidelity fund certificate.
35. Every person who directly or indirectly acts or practises as an attorney, notary or conveyancer on his own account or in partnership without having at the time a fidelity fund certificate then in force shall be guilty of an offence, and shall be liable on conviction to a penalty not exceeding one hundred pounds.
36. No person acting as an attorney (on his own account or in partnership) for any other person shall, after the commencement of this Act, sue, prosecute, defend or carry on any action or suit or any proceedings in any court unless he is in possession of a valid fidelity fund certificate, or shall be capable of maintaining any action or suit for the recovery of any fee, reward or disbursement for or in respect of any business, matter or thing done by him as an attorney whilst he was without such certificate.
37. No person acting as an attorney, notary or conveyancer (on his own account or in partnership) for any other person after the commencement of this Act, unless he is in possession of a valid fidelity fund certificate, shall be capable of maintaining any action or suit for the recovery of any fee, reward or disbursement for or in respect of instructions for, or drawing, preparing, ingrossing, stamping, registering or recording any deed, document or instrument whilst he was without such certificate.
38. The income of the fund shall be exempt from the provisions of any law relating to payment of income tax or any tax or levy by the State.
39. No provisions of any law relating to insurance (other than a law relating to the compulsory insurance of employees) or the provision of security in connection therewith shall apply to the fund.
40. (1) For the purposes of Part II of this Act the Minister of Justice after consultation as provided for in section *thirty* of the principal Act, may from time to time make regulations for all or any of the following purposes:
- (a) providing for the method of payment and recovery of any contribution;
 - (b) providing for the investment of so much of the fund as is not immediately required for the purposes thereof;
 - (c) prescribing forms and times of notice to be given to a society and the board of control in respect of claims against the fund and the particulars thereof, and the conditions subject to which and the extent to which the board of control may settle any such claims without recourse being had to legal proceedings;
 - (d) for providing forms of certificate to be issued to persons practising as attorneys, notaries or conveyancers, declarations, applications, notices and documents to be used in relation to any application or refusal of any application under Part II of this Act;
 - (e) for requiring any evidence that a person has been admitted to practise or is still practising or has ceased practising or has continued or discontinued practising as an attorney, notary or conveyancer, or as to the reason of any person discontinuing practice, and generally for the obtaining of information which may be considered necessary or reasonable for the purposes of determining the merits of applications for certificates or matters in relation thereto;

- (f) for the election of a chairman, vice chairman and other office-bearers of the board of control ;
 - (g) for the appointment, remuneration and dismissal of any administrative or clerical officers of the board of control ;
 - (h) for the establishment of offices for and the regulation of the management and administration of the board of control, including the manner and form in which all contracts, deeds and documents shall be drawn and executed by, for or on behalf of the board of control ;
 - (i) generally, for such other matters as may be considered necessary for the purpose of giving full effect to the intent of Part II of this Act.
- (2) Any regulations made by the Minister of Justice as aforesaid shall be published in the *Gazette*, and shall thereupon have the same force and effect as if they were enacted in this Act.

Short title and commencement.

41. This Act shall be known as the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act, 1941, and shall come into operation on the first day of January, 1942.