



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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Government Notice

OFFICE OF THE PRIME MINISTER

No. 86

1990

PROMULGATION OF ACT OF THE NATIONAL ASSEMBLY

The following Act which has been passed by the National Assembly and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 22 of 1990: Legal Practitioners' Fidelity Fund Act, 1990.

Act No. 22, 1990

**LEGAL PRACTITIONERS' FIDELITY
FUND ACT, 1990****EXPLANATORY NOTE:**

————— Words underlined with solid line indicate
insertions proposed.

ACT

To provide for the establishment of the Legal Practitioners' Fidelity Fund; and for matters incidental thereto.

(Signed by the President on 3 December 1990)

BE IT ENACTED by the National Assembly of the Republic of Namibia, as follows:-

Definitions.

1. (1) In this Act, unless the context otherwise indicates -

“Attorneys Act” means the Attorneys Act, 1979 (Act 53 of 1979);

“banking institution” means a banking institution as defined in section 1 of the Banks Act, 1965 (Act 23 of 1965), and registered, other than provisionally, or deemed to be registered as a banking institution in terms of section 4 of that Act;

“board of control” means the Legal Practitioners' Fidelity Fund Board of Control referred to in section 4;

“building society” means a building society as defined in section 1 of the Building Societies Act, 1986 (Act 2 of 1986), and finally registered or deemed to be registered in terms of section 4 of that Act;

“clerk” means an articulated clerk as defined in section 1 of the Attorneys Act;

“council” means the council of the society;

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“fidelity fund certificate” means a certificate issued in terms of section 19;

“fund” the Legal Practitioners' Fidelity Fund established by section 2;

“Minister” means the Minister of Justice;

“practise” means practise as a practitioner and “practice” has a corresponding meaning;

“practitioner” means any attorney, notary or conveyancer admitted to practise as such in terms of the Attorneys Act;

“prescribed” means prescribed by regulation;

“professional company” means a company referred to in section 23 of the Attorneys Act; and

“society” means the law society referred to in section 56 of the Attorneys Act; and

“this Act” includes any regulations made under section 30 or which remain in force in terms of section 31.

(2) Any reference in this Act to a practitioner practising in partnership, shall include a reference to a practitioner practising as a member of a professional company.

Establishment of Fidelity
Guarantee Fund.

2. There is hereby established a fund to be known as the Legal Practitioners' Fidelity Fund.

Purpose of Fund.

3. Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of -

- (a) theft committed by a practising practitioner, his or her clerk or employee, of any money or other property entrusted by or on behalf of such persons to such practitioner or to his or her clerk or employee in the course of such practitioner's practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity; and

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(b) theft of money or other property entrusted to an employee referred to in paragraph (cA) of the definition of "estate agent" in section 1 of the Estate Agents Act, 1976 (Act 112 of 1976), or an attorney or clerk referred to in paragraph (d) of the said definition, and which has been committed by any such person under the circumstances contemplated in those paragraphs, respectively, and in the course of the performance -

(i) in the case of such an employee, of an act contemplated in the said paragraph (cA); and

(ii) in the case of such an attorney or clerk, of an act contemplated, subject to the proviso thereof, in the said paragraph (d).

Fund to vest in and to be held in trust by board of control.

4. (1) The fund shall vest in and be administered by a board of control to be known as the Legal Practitioners' Fidelity Fund Board of Control.

(2) The fund shall be held in trust by the board of control for the purposes mentioned in this Act.

(3) The board of control may under its name sue and be sued.

Constitution of board of control.

5. (1) The board of control shall consist of -

(a) the president of the society; and

(b) three practitioners who had been practising law for a period of not less than ten years, elected annually by the council and of whom at least two shall not be members of the council.

(2) The council may appoint an alternate member from among its number to act in the place of the president of the society during his or her absence or inability to act as a member of the board of control.

Period of office of members of board of control.

6. An elected member of the board of control shall hold office until his or her successor has been elected and, unless another is elected in his or her place in any year, he shall be deemed to have been re-elected.

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Vacation of office by
members of board of
control.

7. (1) A member of the board of control shall vacate his or her office if he or she -

- (a) is subject to an order of a court declaring him or her to be of unsound mind or mentally disordered or defective, or is detained as a mentally ill person under any law;
- (b) ceases to be a member of the society;
- (c) becomes insolvent or makes any arrangement or compromise with his or her creditors;
- (d) ceases to practise or is suspended from practice;
- (e) is convicted of any offence which, in the opinion of the council debars him or her from serving as a member of the board of control;
- (f) resigns and his or her resignation is accepted by the council of the society; or
- (g) is removed from office under subsection (2).

(2) If a member of the board of control is unfit on account of continued ill-health for the duties of his or her office or is incapable of carrying them out efficiently, the other members may by resolution remove such member from office.

Chairman of board of
control.

8. (1) The board of control shall annually elect a chairman.

(2) If the chairman is absent from any meeting of the board of control, the board shall from among its number elect a chairman for that meeting.

Meeting of board of
control.

9. The board of control shall meet at such times and places as it or its chairman may determine from time to time.

Quorum.

10. Three members of the board of control shall constitute a quorum for any meeting thereof.

Decisions and chairman's
casting vote.

11. (1) A decision of the majority of the members of the board of control present at any meeting thereof shall, subject to the provisions of subsection (2), be the decision of the board of control.

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(2) In the event of an equality of votes at any meeting of the board of control, the chairman shall have a casting vote in addition to his or her deliberative vote.

Committee of board of control.

12. (1) (a) The board of control may appoint one or more committees to assist it in the carrying out of its duties, the performance of its functions and the exercise of its powers, and may at any time increase or reduce the membership of any such committee and may fill any vacancy on any such committee.

(b) The board of control may designate one of the members of a committee appointed by it under paragraph (a) as chairman of that committee and, if no such designation is made, the members of that committee may from among their number elect a chairman.

(2) The board of control may assign to a committee appointed by it under subsection (1), such of its powers as it may deem fit, but shall not be divested of any power which it may have assigned to a committee, and may amend or withdraw any decision of any such committee.

(3) The board of control may require any committee appointed under subsection (1) either generally or specially to enquire into and to advise the board of control on any matter in connection with the duties, functions or powers of the board of control.

Validity of resolution signed by all members of board of control.

13. A resolution of the board of control in writing and signed by all members of the board shall be valid although no meeting was held to pass that resolution.

Revenue of fund.

14. (1) The fund shall consist of -

- (a) the annual contributions by practitioners and interest paid to the fund in terms of this Act and the Attorneys Act;
- (b) the revenue obtained from time to time from the investment of the fund;
- (c) money given or advanced to the fund by the society;
- (d) money recovered by the fund in terms of this Act;

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(e) money received on behalf of the fund from any insurance company;

(f) other money lawfully paid into the fund.

(2) The board of control may from time to time invest such money of the fund as is not required for the purposes mentioned in this Act.

Banking account.

15. Money in the fund shall, pending the investment or application thereof in terms of this Act, be paid into an account at a banking institution or building society to the credit of an account to be known as the Legal Practitioners' Fidelity Fund Account.

Audit.

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

(2) A person appointed under subsection (1) shall, at least once in every year and not later than a date to be determined by the board of control, draw up a balance sheet and profit and loss account of the fund and forthwith submit certified copies thereof and of his or her report thereon to the chairman of the board of control and to the council.

Insurance contracts for purpose of indemnifying fund and practitioners.

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

(2) A contract referred to in subsection (1) shall be entered into in respect of practitioners generally.

(3) (a) A claimant against the board of control shall not have -

(i) any right of action against any person or company with whom a contract of indemnity has been entered into in terms of this section, in respect of such contract; or

(ii) any right to any money paid by the insurer in accordance with such contract.

(b) Money paid by the insurer in accordance with such contract shall be paid into the fund for appropriation by the board of control.

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Possession of fidelity fund certificates by practitioners practising on own account or in partnership.

18. (1) A practitioner shall not practise or act as a practitioner on his or her own account or in partnership unless he or she is in possession of a fidelity fund certificate.

(2) Any practitioner who practises or acts in contravention of subsection (1) shall not be entitled to any fee, reward or disbursement in respect of anything done by him or her while so practising or acting.

(3) Notwithstanding the provisions of this section the council may exempt any practitioner from the provisions of subsection (1) provided that such practitioner shall not be entitled to accept, receive or hold any trust money.

Application for and issue of fidelity fund certificate.

19. (1) A practitioner practising on his or her own account or in partnership, and any practitioner intending so to practise shall, unless he or she has been exempted in terms of the provisions of section 18(3), apply in the prescribed form to the secretary of the society 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 20.

(3) (a) Upon receipt of the application referred to in subsection (1), the secretary of the society concerned shall, if he or she is satisfied that the applicant has discharged all his or her liabilities to the society in respect of his or her contribution and that he or she has complied with any other lawful requirement of the society, forthwith issue to the applicant a fidelity fund certificate in the prescribed form.

(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.

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Contributions to fund by
practitioners.

20. (1) (a) Subject to the provisions of this section, every practitioner, practising on his or her own account or in partnership, shall annually when he or she applies for a fidelity fund certificate, pay the amount of R100, or such greater or lesser amount as may be fixed by the board of control from time to time, to the fund.

(b) Any practitioner referred to in paragraph (a) who commences to practise on or after 1 July in any year shall in respect of that year pay half of the contribution which is payable in terms of that paragraph for that year.

(2) When the board of control or the society on behalf of the board of control gives notice in writing to any practitioner who is liable to pay a contribution referred to in subsection (1), that the amount of the fund, including the investments thereof, and after deduction of the amount of all unpaid claims and other liabilities outstanding against the fund, is R3 000 000, or exceeds that amount, such practitioner shall, subject to the provisions of subsection (3), as from a date specified in such notice, no longer be required to pay the annual contribution referred to in subsection (1).

(3) When the board of control or the society on behalf of the board of control gives notice in writing to a practitioner referred to in subsection (2) that the amount of the fund, including the investments thereof, and after deduction of the amount of all unpaid claims and other liabilities outstanding against the fund, is less than R3 000 000, the provisions of subsection (1) shall, as from a date specified in such notice, again apply in respect of such practitioner, and any notice referred to in subsection (2) shall lapse.

(4) A practitioner who applies under section 19 for the first time for a fidelity fund certificate while the provisions of subsection (1) do not apply to a practitioner referred to in subsection (2) by virtue of the provisions of the latter subsection, shall pay a single contribution of R100 to the fund: Provided that the provisions of subsection (3) shall apply *mutatis mutandis* in respect of such practitioner.

(5) Notwithstanding the provisions of subsection (2), the board of control may require a practitioner in

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respect of whom the fund has been applied as a result of any of the circumstances referred to in section 3, to pay the annual contribution referred to in subsection (1) to the fund for such period as the board of control may determine.

(6) A practitioner who is not in possession of a fidelity fund certificate and who intends to commence to practise on his or her own account or in partnership, shall, before commencing so to practise, give notice of such intention to the secretary of the society, and he or she shall thereupon become liable to pay to the fund the amount of the contribution referred to in subsection (1) or (4), as the case may be.

(7) All contributions payable under this section shall be paid to the society, and the society shall remit the contributions to the board of control within thirty days of receipt thereof.

Payments from fund.

21. (1) Subject to the provisions of this Act, the fund shall be applied for the following purposes, namely -

- (a) all claims, including costs, payable in terms of this Act, and interest as provided in subsection (2);
- (b) in the discretion of the board of control, a contribution towards expenses incurred by a claimant in establishing his or her claim;
- (c) legal expenses incurred in defending any claim made against the fund or otherwise incurred in relation to the fund;
- (d) premiums payable in respect of contracts of insurance entered into by the board of control under section 17;
- (e) expenses incurred in the administration of the fund and investigations by the board of control or its committees in respect of matters which concern the fund, including allowances to members of the board of control in respect of their services or their reasonable travelling and accommodation expenses incurred;
- (f) in the discretion of the board of control, the bank charges or any portion thereof paid by a prac-

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tioner in connection with the keeping of a trust account referred to in section 78 of the Attorneys Act;

- (g) in the discretion of the board of control, the premium or any portion thereof payable in respect of a professional indemnity group insurance policy taken out in favour of practitioners;
- (h) in the discretion of the board of control, the costs or any portion thereof incurred by a practitioner in connection with the obtaining of a fidelity fund certificate;
- (i) in the discretion of the board of control, the defraying of the whole or any portion of the costs and expenses incurred by the society for the purposes of or in connection with any steps taken by it under section 22(1)(d), 78 or 83(13) of the Attorneys Act, including any order of costs that may have been made against the society;
- (j) loans and interest thereon;
- (k) other moneys which are payable or may be paid from the fund in accordance with this Act.

(2) The board of control may in its discretion pay an amount out of the fund as interest on the amount of any judgement obtained or of any claim admitted against the fund: Provided that -

- (a) such interest shall not run from a date earlier than the date on which the board of control received notice in writing by or on behalf of a claimant of his or her claim against the fund; and
- (b) the rate of interest shall not exceed the prevailing rate of interest prescribed under section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975).

(3) If the amount of the fund, including the assets thereof, is less than R100 000 or fifty per cent of the total income of the fund for the previous year (whichever is the greater), the board of control may in its discretion refuse to pay or postpone the payment of any amount in respect of the purposes contemplated in subsection (1)(a), (b), (f), (g), (h), (i) and (j).

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Board of control may make grants from fund for education or research in law and for enhancement of professional standards of practitioners.

22. The board of control may, if the amount of the fund exceeds the sum of R1 000 000, out of the excess in question -

(a) make grants with the approval of the council on such conditions as the board of control may determine with such approval -

(i) to any person or institution for tertiary education for the purposes of -

(aa) education or research in the science of law or in legal practice;

(bb) education or research in any related science or practice in so far as such education is given to a student of an institution for tertiary education at such institution, or in so far as such research is done at any such institution;

(ii) to any association or society of legal practitioners in a country which has been designated by the Minister by notice in the *Gazette* after consultation with the president of the society, for the purpose of enabling such association or society to facilitate the practice of law; and

(iii) for the purpose of the furtherance of the administration or dispensation of justice,

and may, with such approval, at any time when it deems fit, revoke such grant or any part thereof; and

(b) pay an honorarium or compensation to any person for services rendered at the request of the board of control with the object of enhancing the professional standards of practitioners.

Limitation of liability of fund.

23. (1) The fund shall not be liable to pay nor pay any amount in respect of any loss suffered -

(a) by any person as a result of theft committed by a practitioner while such practitioner is in the employment of any person who is not a practitioner;

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- (b) by the spouse of a practitioner as a result of any theft committed by that practitioner.
- (c) by any practitioner as a result of any theft committed by any partner or employee of that practitioner or by any employee of any partnership in which he or she is a partner;
- (d) by any practitioner as a result of any theft committed by any member or employee of a professional company of which he or she is a member;
- (e) as a result of any theft committed by any practitioner whose fidelity has been guaranteed by any person, either in general or in respect of the particular transaction, to the extent to which it is covered by the guarantee;
- (f) by any person as a result of any theft committed by any practitioner after such person has received a notification in writing from the secretary of the society or the board of control warning him or her against the employment or continued employment of such practitioner.

(2) A claim for reimbursement as contemplated in section 3 shall be limited, in the case of money entrusted to a practitioner, to the amount actually handed over, without interest, and, in the case of securities or other property, to an amount equal to the average market value of such securities or property at the date when written demand is first made for their delivery, or, if there is no average market value, the fair market value as at that date of such securities or other property, without interest.

(3) Only the balance of any loss suffered by any person after deduction from the loss of the amount or value of all money or other benefits received or receivable by such person from any source other than the fund, may be recovered from the fund.

Claims against fund:
notice, proof and extension
of periods for claims.

24. (1) No person shall have a claim against the fund in respect of any theft contemplated in section 3 unless -

- (a) written notice of such claim is given to the council and to the board of control within three

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months after the claimant becomes aware of the theft or by the exercise of reasonable care should have become aware of the theft; and

- (b) within six months after a written demand has been sent to him or her by the board of control, the claimant furnishes the board with such proof as the board may reasonably require.

(2) If the board of control is satisfied that, having regard to all the circumstances, a claim or the proof required by the board has been lodged or furnished as soon as practicable, it may in its discretion extend any of the periods referred to in subsection (1).

Actions against fund.

25. (1) No action shall without leave of the board of control be instituted against the fund unless the claimant has exhausted all available legal remedies against the practitioner in respect of whom the claim arose or his or her estate and against all other persons liable in respect of the loss suffered by the claimant.

(2) Any action against the fund in respect of any loss suffered by any person as a result of any theft committed by any practitioner or his or her clerk or employee, shall be instituted within one year of the date of a notification directed to such person or his or her legal representative by the board of control informing him or her that the board of control rejects the claim to which such action relates.

(3) In any action against the fund all defences which would have been available to the person against whom the claim arose, shall be available to the fund.

Subrogation.

26. On payment out of the fund of money in settlement in whole or in part of any claim under this Act, the fund shall be subrogated to the extent of such payment to all the rights and legal remedies of the claimant against any practitioner or any person in relation to whom the claim arose, or in the event of his or her death or insolvency or other legal disability, against any person having authority to administer his or her estate.

Exemption of fund from certain provisions of certain laws.

27. (1) The revenue of the fund shall be exempt from the provisions of any law relating to payment of income tax or any other tax or levy by the State.

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(2) Any provision 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 not apply to the fund.

Indemnification in respect of certain acts in good faith.

28. No action for damages shall be instituted -

- (a) against the fund, the board of control or any member, official or employee of the board of control in respect of anything done in the *bona fide* exercise or performance of its or his or her powers or duties in terms of the provisions of this Act; or
- (b) against the society, the council, any member of the council or official or employee thereof, in respect of any notification issued in good faith for the purposes of section 23(1)(f).

Preservation and disposal of records and documents in possession of board of control.

29. (1) Any record or document in possession of the board of control relating to any claim instituted against the fund shall, subject to the provisions of subsection (2), be preserved at the office of the secretary of the board of control.

(2) The chairman of the board of control may, after the lapse of five years from the date on which any claim to which any record or document relates is settled by the board of control or adjudicated upon by the court or rendered unenforceable by lapse of time, direct that such record or document be removed to some other place of custody or be destroyed or otherwise disposed of.

Regulations.

30. The Minister may, with the concurrence of the Judicial Service Commission and after consultation with the council make regulations relating to -

- (a) the method of payment and recovery of any contribution to the fund;
- (b) the form in which and the periods within which notice is to be given to the council 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 claims without recourse to legal proceedings;

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- (c) the form of certificates to be issued to practitioners and of declarations, applications, notices and documents to be used in relation to any application or refusal of any application relating to the fund;
- (d) the obtaining of evidence for the purposes of the fund that any person has been admitted to practise or is still practising or has ceased to practise, or as to the reason why any person has discontinued practice, and generally for the obtaining of information which is considered necessary or desirable for the purposes of determining the merits of applications for fidelity fund certificates or matters related thereto;
- (e) the election of a chairman and other office-bearers of the board of control;
- (f) the appointment, remuneration and dismissal of officers of the board of control;
- (g) the opening of offices for and the regulation of the management and administration of the board of control, including the manner and form in which all agreements, deeds and documents shall be drawn up and executed by, for or on behalf of the board of control;
- (h) the authorization of the board of control or any committee thereof to subpoena and examine on oath any person whose evidence is deemed necessary to enable the said board or committee to decide on the validity of any claim submitted against the fund;
- (i) generally, such other matters which may be considered necessary or expedient to be prescribed in order that the objectives of this Act may be achieved.

Repeal of laws and transitional provisions.

31. (1) The provisions of the Attorneys Act are hereby repealed or amended to the extent set out in the second column of the Schedule.

(2) For the purposes of section 18, a fidelity fund certificate issued under section 42 of the Attorneys Act before the commencement of this Act in respect of the year

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ending on 31 December 1990, shall be deemed to have been issued under section 19 of this Act.

(3) Any regulations made under section 81(2) of the Attorneys Act which were in force in Namibia before the commencement of this Act, shall remain in force in so far as any such regulations are compatible with the provisions of this Act.

32. This Act shall be called the Legal Practitioners' Fidelity Fund Act, 1990, and shall be deemed to have entered into force on 21 March 1990.

SCHEDULE

PROVISIONS OF THE ATTORNEYS ACT
REPEALED OR AMENDED

(Section 31)

| Provision | Extent of repeal or amendment |
|------------|--|
| Section 1 | <p>(a) The deletion of the definition of "board of control";</p> <p>(b) the substitution for the definition of "fidelity fund certificate" of the following definition:</p> <p style="padding-left: 2em;"><u>"fidelity fund certificate" means a certificate issued under section 19 of the Legal Practitioners' Fidelity Fund Act;</u></p> <p>(c) the substitution for the definition of "fund" of the following definition:</p> <p style="padding-left: 2em;"><u>"fund" means the Legal Practitioners' Fidelity Fund established by section 2 of the Legal Practitioners' Fidelity Fund Act, 1990;</u> and</p> <p>(d) the insertion after the definition of "fund" of the following definition:</p> <p style="padding-left: 2em;"><u>"Legal Practitioners' Fidelity Fund Act" means the Legal Practitioners' Fidelity Fund Act, 1990."</u></p> |
| Chapter II | The repeal of the whole. |
| Section 81 | The deletion of subsections (2) and (3). |