Risk Alert Bulletin

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GENERAL MANAGER'S COLUMN

There have been many newsworthy developments recently, for example, all our articles now appear in both English and Afrikaans, and our website has been launched at www.aiif.co.za. You can now log on to obtain further information regarding the indemnity provided, obtain our contact details and even download the latest copy of the Risk Alert Bulletin.

We have also discovered that there have been developments relating to the issue of the prescription of minors' claims as set out in the *Toerien* judgement, which I discuss below. The Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 was passed on 28 November 2002 and it will make practitioners' lives a lot simpler, where the calculation of prescription periods is concerned. (See Prescription *Matters* below).

The Judicial Matters Amendment Act of 2002 amends the Attorneys Act to allow the Attorneys Fidelity Fund to levy premiums on the profession in respect of group professional indemnity insurance cover. The good news for practitioners is that it may not at this stage be necessary to levy such premiums, because the Fund is presently giving consideration to requests from the profession to continue to provide the premium and also to lift the capping thereon. We will keep you advised of further developments.

TOERIEN UPDATE

Many of our readers have been anxiously enquiring about developments in the law surrounding the *Toerien* judgement. (See our February 2002 edition, in which the matter is fully discussed). I am pleased to advise that an unreported judgement was handed down in the TPD on 27 August 2001, in the matter of *R Scholtz v The Road Accident Fund*, in which the latter's Special Plea of prescription (under similar circumstances to those set out in *Toerien*) was dismissed. Needless to say, the RAF is taking this decision on appeal, and we will be monitoring developments.

In the meantime, those practitioners who have been faced with a notification from the RAF or a special plea of prescription, under similar circumstances to those described in the *Toerien* judgement, should please refer the RAF to the *Scholtz* matter.

Once again, I sincerely thank all those members of the profession who have taken the time to give us important feedback and to alert us to issues of relevance to risk management. Please continue to do so.

POLICY QUERIES

Q: Do I pay my deductible of R20 000 to the insurer up front, regardless of what amount is finally paid to the claimant, if any, and does my deductible change depending on the size of the claim?

A: *You only pay your deductible directly to the claimant or his legal representative, once the matter has been settled or a judgement has been obtained against you. If the matter is settled for less than your deductible, then you only pay the settlement amount (and party and party costs to the extent that they fall within your deductible).*

Your deductible remains the same regardless of the size of the claim.

Ann Bertelsmann, General Manager
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EVICTIONS FROM RESIDENTIAL PREMISES

Ndlovu v Ngcobo 2003(1)SA 113(SCA).

The application of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was extended to evictions from residential premises on **30 August 2002** in the above decision.

It is therefore important for practitioners to note that the procedural requirements laid down in the earlier SCA decision of *Killarney Property Investments (Pty) Ltd vs Mahamba & others* 2001 (4) SA 1222, now also applies to applications for eviction from residential premises.

In the *Ndlovu* matter, the Honourable court specifically referred to S4 of PIE, which contains both procedural and substantive provisions for eviction of an unlawful occupier. The procedural provisions in sub-sections 4 (2), (3), (4) and (5) are as follows:

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"(2) At least 14 days before the hearing of the proceedings contemplated in ss (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of ss (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

(4) Subject to the provisions of ss (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in ss (2) must-

(a) State that the proceedings are being instituted in terms of ss (1) for an order for the eviction of the unlawful occupier;

(b) Indicate on what date and at what time the court will hear the proceedings;

(c) Set out the grounds for the proposed eviction; and

(d) State that the unlawful occupier is entitled to appear before the court and defend the case and, *where necessary, has the right to apply for legal aid."*

The substantive provisions are contained in sub-sections 4 (6), (7) and (8) and are as follows:

"(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of State or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) A just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) The date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in Para (a)."

Practitioners are therefore urged to carefully follow the procedural and substantive provisions contained in the Act to avoid any future claims pertaining to professional negligence in this regard.

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USEFUL TIPS

FOR MVA practitioners

With acknowledgement to Lesley-Ann

Who to use when you sue - part 1

Clients very often need to be examined by one or more medical experts to determine the extent of their injuries, to advise on the best treatment and the cost thereof.

In order to determine which medical experts are needed for these types of claims we set out hereunder a summary of the experts most commonly briefed. The summary below constitutes Part 1.of a three part series to be published in future bulletins.

1. <u>ORTHOPAEDIC SURGEON</u>

This expert deals with injuries to the skeletal system and is instructed in neck and back injuries, the so-called "whiplash" claims as well as in cases involving fractured bones. An orthopaedic surgeon can comment on:

- The nature of the orthopaedic injuries, the prognosis, and the need for or future medical expenses (including treatment for headaches)
- The injured person's ability or inability to perform their previous type of work;
- Whether they will need to change jobs, will require future sick leave, or be forced into early retirement.

In relatively uncomplicated whiplash injuries, and injuries involving simple fractures, there is sometimes no need to appoint another expert, apart from an orthopaedic surgeon. This expert will help to prove what past medical and hospital expenses are accident-related, that past loss of work capacity was justified (which resulted in a loss of earnings), and recommends future medical expenses, discusses future loss of work/earning capacity, and helps to justify a suitable award for general damages by discussing the extent of the injuries sustained.

2. <u>NEUROLOGIST</u>

This expert deals with disorders of the nervous system and can be instructed when either dealing with a head/brain injury, or an injury to the body in which the nervous system has been affected e.g. "whiplash" claims. A neurologist can recommend future medical treatment for headaches in such claims.

He/she can also advise if surgery is necessary at which stage the injured person will be referred to a neurosurgeon. The neurologist justifies claims for the same heads of damage as the orthopaedic surgeon. If the neurologist indicates problems involving a head/brain injury, other experts such as a neurosurgeon, psychologist, psychiatrist, educational/industrial psychologist, speech therapist, etc will usually be recommended to further investigate the injury.

3. <u>NEUROSURGEON</u>

This expert also deals with the nervous system, but is more concerned with treatment of the injury by way of surgery. Often, in "whiplash" claims, an orthopaedic surgeon or neurologist will recommend the need for neck or back surgery, but the neurosurgeon will perform the operation if the surgery involves the nerves, as well as an orthopaedic component.

4. **OCCUPATIONAL THERAPIST**

Examines the injured persons and then sets up a regime to assist them to either adapt their environment to suit their altered needs, or to give the person the physical therapy and specialised equipment necessary for optimum recovery. This expert will also advise on:

- The possible need for assistance (either in the home or garden),
- The need for a caregiver or driver,
- Whether a house has to be converted to suit an injured person's needs.
- Whether or not the person will be able to return to work, and if so, to what extent.

5. **HAND EXPERT**

These are experts who specifically deal with hand injuries. They are recommended when dealing with amputated arms/hands/fingers. This expert will not only advise on future medical expenses, but also the injured person's ability or inability to work, having regard for the hand injury.

6. **MAXILLO-FACIAL SURGEON**

This expert is specifically concerned with injuries to the face, particularly the jaw and teeth. Future medical treatment will be recommended, and a prognosis given.

7. **PROSTHETIC AND ORTHOTIC CONSULTANT**

This expert can be consulted when orthopaedic appliances are needed to correct or support deformities, or to improve the functioning of moveable parts of the body. They can make a foot sole or shoe inners to hold the foot and ankle in correct alignment.

These experts are necessary when dealing with amputees, as they make prostheses (artificial limbs), and can also comment on the need for wheelchairs, etc. They will advise whether the injured/amputated limbs can function well enough to allow the injured person to return to some form of work.

8. **MOBILITY EXPERT**

There is some overlapping between a mobility expert and prosthetic and orthotic consultant. In addition, the mobility expert can also advise on whether the injured person (normally a paraplegic or amputee) will be able to drive an adapted motor vehicle.

Look out for Part 2. where we deal with Speech Therapist & Audiologists, Educational & Industrial Psychologists, Ophthalmologists & Optometrists, etc.

With acknowledgment to Lesley-Ann Marshall of Savage Jooste & Adams who compiled this article for us.

PRESCRIPTION MATTERS

The Institution of Legal proceedings Against Certain Organs of State Act 40 of 2002.

In terms of the above Act which was passed on 28 November 2002, the prescriptive period against any National or Provincial Department, a municipality or any person as defined has been extended to coincide with the prescriptive periods set out in the Prescription Act 68 of 1969.

SCHEDULE OF CHANGES IN PRESCRIPTIVE PERIODS EFFECTED BY THE ACT

RELEVANT ACT(S)	OLD PRESCRIPTIVE PERIOD	NEW PERIOD	NOTES
Defence Act 44 of 1957	3 years, no notice required	6 months notice, three years to serve summons	S113 of act 44 of 1957 repealed
Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970	2 years to serve summons	6 months notice, 3 years to serve summons	Entire act repealed
South African Police Services Act 68 of 1995	1 month notice + twelve calender months (1 year) to commence action	6 months notice, 3 years to serve summons	S 57 of act 68 of 1995 repealed

The schedule above merely serves as a guide and other Acts similarly affected by the "Institution of Legal Proceedings Act," include inter alia: -

a. The Black Administration Act 38 of 1927
b. The Merchant Shipping Act 57 of 1951
c. The Mental Health Act 18 of 1973
d. The Education and Training Act 90 of 1979 etc.

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CONVEYANCING

We list hereunder the last in our series of Risky Areas in Conveyancing Practice and trust that the column has been useful for practitioners.

1. Failure to reduce variations in the agreement to writing/ failure to record in writing essential facts, which have been agreed orally.

   Important terms should always be reduced to writing.

2. Payment of proceeds of a sale to the incorrect party e.g. paying only to one member of a CC where all members hold equal shares or payment only to the husband/ wife in conflict with a divorce settlement.

   Always peruse the conditions and the Deed of Sale thoroughly and ensure that you are aware of your client's full instructions. It is preferable not to become a party to agreements between third parties to the Deed of Sale e.g. retaining of furniture in exchange for exclusive shareholding.

3. Undue delays in passing transfer, opening Sectional Title Registries etc.

   Give clients realistic time periods for transfer so as to avoid unrealistic expectations. Always advise clients of delays in obtaining a clearance certificate etc.
   Prepare your Deed of Transfer very carefully so as to avoid delays in the Deeds Office.

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5. Administration of National Housing Subsidy Scheme funds and payment to unscrupulous developers before ensuring that obligations have been met in terms of the agreement.

   Please be advised that National Housing subsidy work is excluded in terms of the Professional Indemnity Scheme Policy and you should therefore take out additional cover if undertaking this type of work.

   Also always ensure that all obligations undertaken in terms of the contract with the Housing Board have been completed before making any payments to developers.

v. Sales of immovable property in instalments in terms of the Alienation of Land Act.

   Familiarise yourself with the terms of the Act.
   Always ensure that the recordal is registered immediately and remember that you have a duty to both the purchaser and seller.

LETTERS TO THE EDITOR

Dear Editor
Re: Share Block and Sectional Title transactions

Many of you will be involved in the management of share block schemes, or will own shares in share block companies, and will be involved in transactions relating to the sale of shares and cession of loan documents. It is highly important for you to note that:

1. stamp duty which was applicable on the transfer of shares in a share block scheme is now exempt;

2. transfer duty is now payable;

3. although transfer duty is not payable on properties valued at or below R100 000-00 it is still essential to obtain a transfer duty receipt/exemption certificate from the SARS before any shares are transferred to the purchaser;

4. Various forms need to be completed (usually by the company secretary/ auditors) for signature by the seller and purchaser for submission to the SARS. These include an original signed CM 42, Revenue 684 (declaration by purchaser) and Form A (Sellers declaration). The Receiver has the right to call for an evaluation no matter what the sale price is;

5. Directors of share block companies and managing agents should be aware that where a share block property is transferred and the duty is not paid within the prescribed period the public officer and the person from whom the shares were acquired (the seller) will be jointly and severally liable for payment of any transfer duty, penalties and interest. So be very careful in selling share blocks where there is a simultaneous conversion to sectional title. SARS deem this as 2 (TWO) dutiable transactions. Your agreement must deal with who pays the transfer duty on both transactions.

Alastair Lomas-Walker
Lomas Walker & Associates

Editor's Note
We thank Mr Lomas-Walker for his valuable contribution.

We are often faced with claims where Transfer duty or Vat has not been paid and the attorney is subsequently held liable. Our readers should therefore take note of the above and always look carefully at the issues of VAT, transfer duty etc. to avoid mistakes, which only become apparent once the transaction has been registered and which are then often not reversible.

Dear Editor
Re: Risk Alert 1/2003

I have read your Risk Alert Bulletin 1/2003 and on the last page you refer to the letter received from a firm of attorneys in Cape Town regarding a business proposition from somebody who had by his own admission stolen money from his ministry. This is a well-known scam and I must tell you that I receive at least one letter a week, in similar form, mainly from Nigeria.

It is not an attempt to send you money, but rather to get hold of your bank account and banking details so that they can defraud you. It is certainly not a scheme to launder money.

The best advice you could give practitioners is to place the letters in the waste paper basket as quickly as possible. I wrote to the Nigerian Consul in Pretoria sending him copies of the letters I received and suggested that he should lay criminal charges against these people because they have admitted to committing crimes. The Consul told me that it is not as easy as I might have thought.

Oliver Hart
Venn Nemeth & Hart

Editor's Note

We thank Mr Hart for his contribution and urge practitioners to take heed of the warning contained above.

On the same note, the above article also formed the basis of an article by Mr. Philip Landman of "Die Beeld" which was titled "*Prokureurs teikens in bedrogspel. Sindikaat wil geld in rekening sit om dit uit die VSA te kry.*"

We are pleased to note that not only is the readership of our bulletin increasing, but it's scope is also expanding beyond that of our targeted audience. We once again appeal to practitioners to provide us with feedback, suggestions and any new risk-management related developments.

Risk Alert Bulletin

ANN BERTELSMANN
GENERAL MANAGER