

In this edition

1. General Manager's Column
2. 2004/2005 Scheme Policy
3. Letters to the Editor

## **GENERAL MANAGER'S COLUMN**

A copy of the Policy for the year **1 July 2004 to 30 June 2005** is included in this Bulletin. There have been no significant changes made this year. A recovery clause (6.14) has been added, but it does not introduce anything new. It merely clarifies the existing position pertaining to recoveries and who gets "the first bite of the cherry."

Because of space constraints, some of our regular columns (Useful tips for MVA practitioners and Prescription Matters) have been omitted. They will resume in the November edition.

### **RAF Matters**

Very briefly, there is further discussion of the *Thugwana* judgement in the letters column. Our Malcolm Padayachee is monitoring further developments in this matter

In a media statement released on 24 June 2004, the Acting Chairperson of the RAF's Board, Dr. Saths Cooper announced immediate measures taken by the board to stabilise the Fund. He stated that, "We are not underestimating the extent of the problem and our primary aim at this stage is to stabilise the current situation in order to return the RAF to a sustainable financial situation."

Briefly, according to Dr. Cooper, some of the steps taken are:

- A payment queuing system for all claims finalised, whereby claimants' attorneys receive moneys on a once-weekly basis.
- The implementation of a new verification system to authenticate claims, in view of the large number of fraudulent claims.
- An evaluation of existing service providers/ consultants to reduce reliance on them, reduce costs of the RAF administration and to enhance internal capacity.
- A review of business processes at the RAF
- Interactions with various key stakeholders, particularly the organised attorneys' profession. There has been agreement on a structured deferred payment system to lessen the cash flow crisis that the Fund faces etc.

Dr. Cooper further added that Parliament could assist the process, by speedily processing the finalisation of the Road Accident Fund Amendment Bill.

*It is therefore essential that MVA practitioners keep themselves apprised of developments relating to the RAF and the above Bill. I strongly recommend that you regularly refer to De Rebus and the media for the latest developments.*

### ***Road Accident Fund v B. Shabangu & Another, SCA 75\03***

On a happier note, I am pleased to report on a recent appeal court judgement that was decided in favour of an attorney against the Road Accident Fund

In the above judgement, the court had to consider whether an attorney, who innocently submitted a claim for compensation to the Road Accident Fund (“the Fund”) on behalf of an imposter claiming to be the widow of the deceased and the mother of his children, was liable to repay to the Fund the amount for which the fraudulent claim was settled.

On the facts of the case, the court held that, “the respondents owed no legal duty to the Fund to ascertain whether their client was indeed whom she purported to be either at the time when the respondents submitted the claim or when they disbursed the settlement amount. On the contrary it was the statutory function of the Fund to investigate claims.”

The court went on to say that even if the attorney had owed the Fund a legal duty, there was no negligence, on the facts.

*However*, the court cautioned that the judgement should not be interpreted to mean that an attorney is never obliged to make further enquiries before submitting a claim, as circumstances could arise where the attorney was actually put on her/his guard. When an attorney noticed a discrepancy s/he would be obliged to make further enquiries, because her/his failure to do so would amount to fraud.

The Appeal by the Fund was dismissed with costs.

### **Policy Queries**

**How do the options offered by the AIIF work? If I choose option 3 to reduce my limit of indemnity and deductibles by 75%, do I have to pay the 25% of my deductible immediately?**

In order to accommodate concerns expressed by a number of practitioners that the deductibles were too high, two years ago the AIIF introduced various options to reduce deductibles and limits of indemnity.

Option 1 (default option) corresponds with the limits of indemnity and deductibles offered in respect of the current policy. Option 2 and 3 reduce the limit of indemnity by 50% and 75% respectively, with a corresponding decrease in deductibles.

Regardless of your choice of option, your deductible is only payable in the event of a claim against you having been settled or judgment being obtained against you. If you have elected option 3, you will pay 25% of the deductible as set out in the policy, to the claimant.



**THE ATTORNEYS FIDELITY FUND**

**PROFESSIONAL INDEMNITY INSURANCE  
SCHEME**

**1 JULY 2004 TO 30 JUNE 2005**

## **PROFESSIONAL INDEMNITY INSURANCE**

In consideration of the **Attorneys Fidelity Fund**, for and on behalf of every insured (as defined in this Policy), having paid or agreed to pay the insurer named in the schedule the premium stated in the Master Policy.

The insurer agrees to provide an indemnity in the manner and to the extent stipulated subject to the terms contained in this policy and the schedules hereto.

### **1. INDEMNITY**

The indemnity granted in this policy is in respect of:

- 1.1 the insured's legal liability to any third party arising out of the conduct of the profession by the insured which legal liability is the subject of a claim first made on the insured during the period of insurance irrespective of when or where such liability arose.
- 1.2 approved costs in connection with any claim under 1.1.
- 1.3 approved costs of investigating and of being represented at any professional or judicial inquiry into any event or occurrence that may have given rise to or may reasonably be expected to give rise to a claim under 1.1.

### **2. DEFINITIONS**

- 2.1 "the Act" - the Attorneys Act No. 53 of 1979 (as amended);
- 2.2 "the Attorneys Fidelity Fund"- the Attorneys Fidelity Fund referred to in Section 25 of the Act;
- 2.3 "practitioner" - any attorney notary or conveyancer as further defined in the Act;
- 2.4 "approved costs" - all legal and similar costs and expenses which the insured may incur with the insurer's written consent which shall not be unreasonably withheld;
- 2.5 "the insured"-
  - 2.5.1 (a) every individual practitioner and
  - (b) every firm, partnership or incorporated practice consisting of one or more practitioners who, on the date on which the claim is made:
    - 2.5.1.1 is practising as such in the Republic of South Africa, and

- 2.5.1.2 is in possession of or would have been obliged to apply for a current Fidelity Fund Certificate in terms of Section 42 of the Act;
- 2.5.2 any former sole practitioner and any former principal, partner, director or consultant of the firm, partnership or incorporated practice referred to in 2.5.1, who is no longer a practising practitioner when the claim is made against him provided that the claim arises out of the conduct of the profession by such person or such firm, partnership or incorporated practice at a time when he was:
  - 2.5.2.1 practising as such in the Republic of South Africa and
  - 2.5.2.2 in possession of or obliged to apply for a current Fidelity Fund Certificate in terms of Section 42 of the Act;
- 2.5.3 in the event of the death, incapacity, insolvency or dissolution of any person or entity referred to in 2.5.1, 2.5.2 and 7, his or her estate, legal representative, heir or successor in title in respect of any claim arising out of the conduct of the profession;
- 2.6 “partner or director” includes any person who is
  - 2.6.1 *de facto* a partner or director of the insured or
  - 2.6.2 who is publicly held out to be a partner or director of the insured;
- 2.7. "conduct of the profession"- the activities of the insured acting as a practitioner and such activities which are legitimately conducted as part of a legal practice. In the event of a dispute as to whether a particular act or activity is conducted as aforesaid the matter shall be referred to the president of the statutory law society having jurisdiction over the insured whose decision shall be binding on the parties to this policy.

### **3. LIMIT OF INDEMNITY**

- 3.1 The liability of the insurer in respect of all claims and claimants' costs and expenses and approved costs shall not exceed the limit of indemnity specified in Schedule A.
- 3.2 All claims arising out of one act or omission or out of the dishonesty of any one person or any number of persons together or in collusion shall be deemed to arise out of one event or occurrence.

### **4. THE DEDUCTIBLE**

The insured shall be responsible for the first amount of any claim and claimant's costs and expenses arising out of one event or occurrence, but not exceeding the deductibles specified in Schedule A. The deductibles

shall only apply in respect of claims for breach of professional duty, but shall not be applied to approved costs.

## **5. EXCEPTIONS**

5.1 Unless specifically stated to the contrary this policy does not cover any loss, destruction or damage whatsoever or any legal liability of whatever nature:

5.1.1 directly or indirectly caused by or arising from or in consequence of or contributed to by nuclear weapons materials or by ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel. Combustion shall include any self-sustaining process of nuclear fission.

5.1.2 which is insured or would but for the existence of this policy be insured by any other policy or policies or guarantees except in respect of any excess beyond the amount which would be payable under such policy or policies or guarantees had this insurance not been effected.

5.1.3 arising from any event or occurrence which has been notified under any insurance in force prior to the inception of this policy.

5.1.4 arising out of or in connection with any trading losses or trading liabilities incurred by the insured or by any practice or business managed by or carried on by the insured.

5.1.5 arising from theft by any principal, partner, director, candidate attorney, employee or "in-house" consultant of the insured or of the insured's predecessors in practice of any money or other property referred to in Section 26 of the Act.

5.1.6 arising from or in terms of any judgement delivered or obtained in the first instance otherwise than by a court of competent jurisdiction within the Republic of South Africa.

5.1.7 arising out of or in connection with the provision of investment advice or the administration of any funds in contravention of the Banks Act 94 of 1990 (as amended), or as a liquidator in terms of the Agricultural Credit Act No.28 of 1996 (as amended)

5.1.8 arising out of or in connection with an order made against the insured to pay costs *de bonis propriis* in circumstances where the insured is acting in a capacity as attorney for one of the parties before the court which makes such order.

5.1.9 arising out of or in consequence of an instruction to the insured to invest money on behalf of any person other than an instruction to pay money into an account contemplated in Section 78 2(A) of the Act, 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 a particular matter or transaction which is already in existence or about to come in to existence at the time the investment is made. This exclusion does not apply to money which the insured is authorised to invest in his or her capacity as executor, trustee or curator or in any other similar capacity.

5.1.10 arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act 1997.

5.2 Unless specifically stated to the contrary this policy also does not cover:

5.2.1 any person who was in any way and at any time dishonest in relation to or in connection with any claim under this policy.

5.2.2 costs and expenses of litigation recovered by any claimant from the insured which are not incurred in and recoverable in the Republic of South Africa.

5.2.3 loss or destruction of or damage to any property whatsoever (including a computer) or any loss or expense whatsoever resulting or arising therefrom;

5.2.3.1 any legal liability of whatsoever nature;

5.2.3.2 any consequential loss;

directly or indirectly caused by or contributed to or consisting of or arising from the incapacity or failure of any computer

i. to treat any date before, during or after the year 2000 as the correct date or true calendar date, or correctly or appropriately to recognise, manipulate, interpret, process, store, receive or to respond to any data or information, or to carry out any command or instruction, in regard to or in connection with any such date; or

ii. to capture, save, retain or correctly to process any data as a result of the operation of any command which has been programmed into any computer, being a command which causes the loss of data or the inability to capture, save, retain or correctly to process such data in regard to or in connection with any such date.

A computer includes any computer, data processing equipment, micro-chip, integrated circuit or similar device or any computer software tools operating system or any computer hardware or peripherals and the information or data stored in or on any of the above, whether the property of the insured or not.

## 6. CONDITIONS

- 6.1 The insured shall give immediate written notice to the insurer of any claim or intimation of a claim. Once the insured has notified the insurer in terms of this clause the insurer may submit to the insured a claim form requiring the insured to provide all further information reasonably required by the insurer in respect of the claim or intimation of a claim. The insured shall not be entitled to the indemnity afforded by this policy until the insurer's claim form has been properly completed by the insured and returned to the insurer.
- 6.1.2 Every letter, claim, summons or process received by the insured, which evidences a claim or an intention to claim, shall be forwarded to the insurer immediately.
- 6.1.3 If the insured gives notice of any event or occurrence of which the insured becomes aware during the period of insurance which may give rise to a claim, then any claim in respect of that event or occurrence which is subsequently notified against the insured after the expiry of the period of insurance shall for the purpose of this policy be treated as having been made during the period of insurance.
- 6.2 The insurer waives any right of subrogation against any partner or director of the insured, unless such person has committed a dishonest or criminal act in relation to matters which are the subject of a claim under this policy.
- 6.3 In the event of a claim arising out of any dishonest act or omission of any partner, director or employee of the insured, the insured shall take all possible action to sue for and obtain reimbursement from any such person or from the estate or legal representatives of such person and any monies which but for such dishonesty would be due to such person from the insured or any monies of such person held by the insured, shall to the extent allowable by law be deducted from the insured's loss.
- 6.4 Any dispute or disagreement between the insured and the insurer as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, shall be referred for a final decision to a senior counsel agreed upon between the insured and the insurer or failing such agreement, nominated by the president of the statutory law society having jurisdiction over the insured.
- 6.5.1 Subject to the exceptions, the deductible and 6.1, 6.7.2 and 6.9 hereof, the insurer shall not seek to avoid, repudiate or rescind this insurance upon any ground whatsoever, including in particular non-disclosure or misrepresentation;
- 6.5.2 Where the breach of or non-compliance with any term of this policy by the insured other than 6.1, 6.7.2 and 6.9 has resulted in substantial prejudice to the handling or settlement of any claim against the insured,

the insured shall reimburse to the insurer the difference between the sum payable by the insurer in respect of that claim and the sum which would have been payable in the absence of such prejudice. Provided always that it shall be a condition precedent of the right of the insurer to seek reimbursement that they shall have fully indemnified the insured in accordance with the terms of this policy.

- 6.6 The insured shall not without the written consent of the insurer repudiate liability, negotiate or make any admission, offer, promise or payment in connection with any claim and the insurer shall be entitled, if it so desires, to take over the conduct in the name of the insured of the defence of any claim or to prosecute in the name of the insured at its own expense and for its own benefit any claim for indemnity or damages or otherwise against any person and shall have full discretion in the conduct of any proceedings and in the settlement of any claim.
- 6.7.1 The insured shall render at his or her own cost such assistance as the insurer may reasonably require and shall arrange to be available at his or her own cost for such interviews as may reasonably be required by the insurer or the legal advisers of the insurer.
- 6.7.2 Notwithstanding anything else contained in this policy, should the insured fail or refuse to provide assistance or to attend interviews stipulated in 6.7.1 and remain in breach of such clause for the period of ten (10) days after receiving written notice from the insurer to remedy such breach, all benefits afforded by this policy may be withdrawn by the insurer.
- 6.8 Unless otherwise expressly stated nothing contained in this policy shall give any rights against the insurer to any person other than the insured.
- 6.9 If any claim by the insured be in any respect fraudulent or any fraudulent means or devices be used by the insured or anyone acting on his or her behalf with his or her knowledge or authority to obtain benefits in respect of that claim all benefit under this policy shall be forfeited.
- 6.10 Whenever this policy provides for notice to be given to the insurer, such notice shall be given to:

**Glenrand M.I.B Professional Services**  
**PO Box 2544**  
**Randburg, 2125**  
**Docex 343 Johannesburg**  
**Telephone No. (011) 329-1111**  
**Fax No. (011) 329-1984**

- 6.11 The insurer may in its sole discretion, in the case of any claim for indemnity, pay to the insured or to the claimant, the limit of indemnity (but deducting in such case any sum or sums already paid as indemnity) or any lesser sum for which the claim or claims arising from such claim for indemnity can be settled and the insurer shall thereafter be under no further liability in respect of such claims for indemnity, except for the payment of costs and expenses of litigation incurred prior to the date of payment of such limit of indemnity or such lesser sum.
- 6.12 If the insured reasonably so requires he or she shall not be obliged to contest or prosecute any legal proceedings unless a senior counsel shall advise that there are reasonable grounds for contesting or prosecuting such proceedings, such senior counsel to be agreed upon between the insured and the insurer or failing such agreement, nominated by the president of the statutory law society having jurisdiction over the insured.
- 6.13 In the case of any conflict or divergence between the English and Afrikaans texts of this policy, the English text shall prevail.
- 6.14 All recoveries made in respect of any claim under this policy shall be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:
- i) the insured shall first be reimbursed for the amount by which its liability in respect of such claim exceeded the amount of indemnity provided by the policy or any other policy;
  - ii) the insurers shall then be reimbursed for the amount of their liability under the policy in respect of such claim;
  - iii) any remaining amount shall be applied towards the amount of the deductible borne by the insured in respect of such claim

## **7. SPECIAL EXTENSIONS**

- 7.1 Indemnity under this policy shall be extended to any candidate attorney or other person employed by the insured in an employer/employee relationship in the conduct of the profession by the insured, and such person shall be deemed to be an insured for the purposes of indemnity in terms of this policy subject to the terms, limits and conditions thereof.

## **8. SCHEDULE A**

Insurer: Attorneys Insurance Indemnity Fund  
(Association incorporated under Section 21)  
(Reg. No. 93/03588/08)

- 8.1 Master Policy: No. AIIF/MP/04/05

- 8.2 Period of Insurance: 1 July 2004 to  
30 June 2005  
(both days inclusive)
- 8.3 Situation risk: World-wide (subject to exceptions 5.1.6 and 5.2.2)

8.4 Limit of Indemnity:

- 8.4.1 The limit of indemnity in respect of 1.1 and 1.2 is determined by the number of partners or directors of the firm, partnership or incorporated practice referred to in 2.5.1 (b) on the date on which the event or occurrence occurred which gives rise to a claim against the insured in accordance with the following schedule:

| <u>No. of partners/directors</u> | <u>Limit of indemnity per period of insurance</u> |
|----------------------------------|---------------------------------------------------|
| 1 (Sole practitioner)            | R1 000 000                                        |
| 2                                | R1 000 000                                        |
| 3                                | R1 000 000                                        |
| 4                                | R1 000 000                                        |
| 5                                | R1 000 000                                        |
| 6                                | R1 000 000                                        |
| 7                                | R1 050 000                                        |
| 8                                | R1 200 000                                        |
| 9                                | R1 350 000                                        |
| 10                               | R1 500 000                                        |
| 11                               | R1 650 000                                        |
| 12                               | R1 800 000                                        |
| 13                               | R1 950 000                                        |
| 14 and above                     | R2 000 000                                        |

- 8.4.2 The limit of indemnity in respect of 1.3 is 25% of the limit of indemnity specified in the Schedule against 8.4.1.

8.5 The deductible:

- 8.5.1 The deductible is determined by the number of partners or directors of the firm, partnership or incorporated practice referred to in 2.5.1(b) on the date on which the event or occurrence occurred which gives rise to a claim against the insured and the type of matter which gave rise to the claim in accordance with the following schedule:

| <u>No. of partners/directors</u> | <u>Column A</u>                                                     | <u>Column B</u>     |
|----------------------------------|---------------------------------------------------------------------|---------------------|
|                                  | <u>Prescribed MVA claims</u><br><u>Deductible</u> <u>Deductible</u> | <u>Other claims</u> |
| 1 (Sole practitioner)            | R35 000                                                             | R20 000             |
| 2                                | R63 000                                                             | R36 000             |
| 3                                | R84 000                                                             | R48 000             |
| 4                                | R105 000                                                            | R60 000             |
| 5                                | R126 000                                                            | R72 000             |
| 6                                | R147 000                                                            | R84 000             |
| 7                                | R168 000                                                            | R96 000             |
| 8                                | R189 000                                                            | R108 000            |
| 9                                | R210 000                                                            | R120 000            |
| 10                               | R231 000                                                            | R132 000            |
| 11                               | R252 000                                                            | R144 000            |
| 12                               | R273 000                                                            | R156 000            |
| 13                               | R294 000                                                            | R168 000            |
| 14 and above                     | R315 000                                                            | R180 000            |

- 8.5.2 In the case of a claim for loss or damage in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (being a motor vehicle as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of the aforementioned Act) at any place within the Republic of South Africa, which has become prescribed in the hands of the insured, the deductible set out in 8.5.1 (Column A) will apply. Provided that if **Prescription Alert** a computerised diary system available to the insured has not been utilised or adhered to by the insured, the deductible as specified in 8.5.1 (Column A) will be increased by an additional 15%.

8.5.3 If a claim arises for reasons other than those set out in 8.5.2 the applicable deductible shall be as set out in 8.5.1 (Column B).

8.6 Agreed reduction in limit of indemnity and deductible

8.6.1 It is recorded that prior to the inception of this policy, certain firms, partnerships or incorporated practices referred to in 2.5.1 (b) entered into agreements with the insurer in terms of which such firms, partnerships and incorporated practices accepted a reduced limit of indemnity of 50% or 25% (as the case may be) of the indemnity otherwise afforded in terms of 8.4.1, on condition that such firms, partnerships or incorporated practices, would be liable for 50% or 25% (as the case may be) of the deductible specified in 8.5.1, for all claims made by these firms, partnerships or incorporated practices in terms of this policy.

8.6.2 Notwithstanding anything else contained in this policy, the terms of the agreements referred to in 8.6.1 shall be binding on the insurer and the firms, partnerships or incorporated practices concerned.

**Letters to the Editor**

**Dear Editor**

**Re: *Road Accident Fund v SF Thugwana SCA 575\2002 (Risk Alert 2\2004)***

I refer to our earlier discussion and confirm having advised you that the statement, “In conclusion, the court *held* that the Fund had 60 days, in terms of Section 24(5) of the Act, to object to the validity of a claim submitted, failing which the claim shall be deemed to be valid in all respects and commented that this could provide an answer to the Special Plea,” is somewhat misleading.

The court did not *hold that* but merely *stated that* Section 24(5) of the Act could provide an answer to the problem. This situation which the court foresaw, has however, now been changed by the ruling in *Krischke v Road Accident Fund* 2002\12891.

Here the Plaintiff’s attorney lodged the claim via Docex. The RAF received the documentation after the three- year period prescribed in terms of Section 23 of Act 56 of 1996 had lapsed. We consequently filed a Special Plea of Prescription.

Shortly before the trial date, the Plaintiff served a Notice of Intention to Amend in terms of Rule 28 alleging that the claim had not become prescribed because the Defendant did not object to the validity of the claim in terms of Section 24(5) within 60 days and consequently “the claim shall be deemed to be valid in law in all respects.” We filed an Objection to the proposed Amendment on the basis that it was bad in law.

The matter was heard before Jajbhay, J in the W.L.D and the application to amend was dismissed with costs. In essence, Jajbhay, J, found that Section 24 deals with procedure whilst Section 23 deals with prescription which is substantive law. The *Krischke* judgement, in my view, is a well reasoned judgement. Needless to say that the Special Plea of Prescription will be argued in due course. The effect of the *Krischke* judgment, I respectfully submit, is contrary to the last statement by your legal advisor Malcolm Padayachee in the Risk Alert Bulletin "it does seem however, in terms of this judgment (Thugwana) that the RAF may only rely on this Regulation if they have indeed objected to the validity of the claim in terms of Section 24(5) of the Act".

The *Krischke* judgment is the first reported judgment on Section 24(5) of the Act. It has now been ruled that Section 24(5) deals only with procedural issues and not issues of substantive law such as prescription (Section 23 of the Act) and I submit Regulation 2(1) (c) promulgated in terms of the Act.

**Thys Jacobs**  
**Deneys Reitz**

#### **Editor’s Note**

We thank Mr. Jacobs for bringing the above to our attention.

We can, however, advise that the attorney for Thugwana (*Road Accident Fund v Thugwana* 575\2002) has amended his replication to the Special Plea to the effect that the Fund did not object to the validity of the claim within 60 days. We will report on the outcome in future bulletins.

On 2 March 2004, an urgent notice regarding the Thugwana judgement was also issued by the Council of the Law Society of the Northern Provinces. In the notice, Mr. Ronald Bobroff (Vice President of the Society) indicated that the Council is giving urgent

consideration to the best way in which the judgement may be addressed, including an approach to the Constitutional Court if appropriate.

*In the interim, practitioners are again advised to ensure that the affidavit is lodged with the SAPS timeously even if there is a remote chance of the insured vehicle being unidentified.*

*If you are approached by a client well after he\ she was in a position to depose to the affidavit, then he\ she should be fully advised of the effect of this judgement and the danger that the claim may be repudiated.*

**Sharifa Ally, Editor**  
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