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General Manager's Column

As always in the August edition, we publish the Policy for the current year, in English and Afrikaans, in a form that we strive to make easily accessible and user-friendly.

There are no changes to the wording of the Policy and we have fortunately been able to retain the same limits of indemnity and deductibles as before, without having to introduce any payment of premium by practitioners.

Regulation 2(1) (c) and the judgements in *Thugwana* and *Makwetlane* (see Bulletins No.1 and 2/2005) continue to be of concern to the insurance company, the profession and the public. There is a good chance that one such matter will be taken to the Constitutional Court in the near future and practitioners are urged not to allow their clients' claims to become prescribed in the meantime. We believe that where appropriate, summons should be served on the RAF, in order to interrupt prescription. Thereafter litigation should be pended by agreement, until there is a finding by the Constitutional Court. We will keep you advised on further developments in the Bulletin and on our website.

Very importantly, please note the discussion of substantial compliance with regulation 2 (1) (c) in the judgment of Blankenfell below, which makes some inroads into the harsh effects of Thugwana and may well be relevant to some of your matters.

Useful Tips for MVA Practitioners

Recent decision on Regulation 2(1) (c) of the Road Accident Fund Act 56 of 1996

KM Blankenfell v Road Accident Fund WLD (case A5043/2004)
(unreported)

Facts

The plaintiff's husband ("the deceased") died in a motor-vehicle collision on 25 September 2002. It was alleged that the unknown driver who collided with the deceased's vehicle, negligently caused the collision.

The plaintiff claimed for damages against the defendant in her personal capacity and in her capacity as mother and natural guardian of her three minor children.

The defendant raised a Special Plea to the effect that the plaintiff had not complied with the requirements of Regulation 2(1) (c) in that she had failed to submit within 14 days after being in a position to do so, an affidavit to the police in which particulars of the occurrence were fully set out.

The plaintiff pleaded to the Special Plea as follows:

1. On 2 October 2002, PH Atherton, an eye witness to the collision, submitted an affidavit to the police in which particulars of the occurrence concerned were fully set out
2. On 1 October 2002, Inspector GM Marshall submitted an affidavit together with photographs of the deceased's vehicle.
3. The plaintiff was not present at the scene of the collision and has no personal knowledge as to how the collision occurred.
4. The plaintiff submitted an affidavit to the defendant dated 18 March 2003
5. An advertisement was placed by the police in a local newspaper requesting assistance in identifying the unknown driver
6. Police attended the scene immediately after the accident and drew up a plan and key to a plan, and there is an affidavit by Sergeant J. van den Berg who attended at the scene in this regard. He also completed the Officers Accident Report (OAR).
7. The collision occurred on **25 September 2002** and the deceased died on the same day.

Further, that the affidavit by Mr Atherton contained a full description as to how the collision occurred and of the events thereafter. Photographs of the deceased's vehicle noted it to be severely damaged, if not totally wrecked.

In the OAR, Sergeant Van den Berg noted all the details of the collision including the particulars of the deceased, the time and place of the collision, the identity of the ambulance service and the break-down service which attended the scene.

There was therefore compliance, alternatively, substantial compliance with the Regulation.

Submissions

The defendant submitted that although the affidavit of Mr Atherton and of Sergeant Van Den Burgh had been submitted to the police within the 14 days, it was not done by or at the instance of the plaintiff.

Rabie J, in his judgement, discussed the *Thugwana* [2004(3) SA 169(SCA)], *Makwetlane* [SCA (case 649/02) unreported- 17 February 2005] and *Feerus* [WLD (case 9219/03) unreported 08.09.2004] judgments. In *Feerus*, Satchwell J referred to the fact that all the Regulation requires is the submission of "an affidavit". There is no indication that it has to be an affidavit deposed to by the claimant himself or herself.

The defendant further argued that the *Feerus* judgment could be distinguished from the present case in that there, the plaintiff took a positive step whereas in *Blakenfell*, the plaintiff did nothing.

According to Rabie J, the purpose of the Regulation is to place the police, and by implication, the defendant, in possession of all the necessary facts concerning the

incident as soon as possible in order to minimise the opportunity for fraud and to enable the Defendant to investigate the incident while the evidence is still fresh and available. In order to achieve this purpose it would not matter who deposed to the affidavit required to be submitted to the police.

The Honourable Judge further stated that it could never have been the intention of the legislature to deny a claimant his or her claim if the claimant has no personal knowledge of the particulars of the occurrence concerned, but in respect of which occurrence an affidavit fully setting out such particulars had already been submitted by a witness to the police.

In the present case, all the necessary information was available and submitted to the police except for the identity of the driver and his vehicle.

Held

“That exact compliance with the Regulation, in the sense of requiring the claimant to do something such as personally handing the affidavit to the police or have it done at her specific instance, is not required.

However, the claimant is primarily responsible to ensure that there is such an affidavit in the possession of the police within the time prescribed and if no such affidavit is presented, it is the claimant who will suffer the consequences by having his/ her claim denied.”

The Special Plea was dismissed with costs.

SHARIFA ALLY, EDITOR
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THE ATTORNEYS FIDELITY FUND
PROFESSIONAL INDEMNITY INSURANCE SCHEME

1 JULY 2005 TO 30 JUNE 2006

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 into 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:

**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/05/06 |

- 8.2 Period of Insurance: 1 July 2005 to
30 June 2006
(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>	<u>Other claims</u>
	<u>Deductible</u>	<u>Deductible</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

Letter addressed to our Prescription Alert unit

Dear Madam

Thank you for the timely reminder. I am well aware of the imminent prescription date. Mr. Rogers is my employee and works regularly with the file. I shall discuss the prescription issue with him and he can make the decision. At the moment his view seems to be that considering that the Fund is bankrupt anyway, proceeding with the claim is somewhat futile. It will cost him a great deal of money to obtain all of the medico-legal reports, etc necessary to proceed with the claim and he is understandably sceptical about spending even more money than he already has, only to lose that as well.

What is the view of Prescription Alert on this? I know the Cape Law Society has been talking to the Fund about their dire financial situation and seeking a way out but I haven't heard much more since then.

Regards,
Name withheld

Reply from Mrs. Ann Bertelsmann (General Manager)

Whatever you do, please make sure that you do not allow any of your clients' claims to become prescribed or it could end up costing you a lot more than the cost of medico- legal reports!