# Risk Alert Bulletin

A Joint Publication of the ATTORNEYS FIDELITY FUND and the ATTORNEYS INSURANCE INDEMNITY FUND (ASSOCIATION INCORPORATED UNDER S21 OF ACT 61 OF 1973)

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## GENERAL MANAGER'S COLUMN

As you will see from the graph below, by far the largest number of claims against attorneys arises out of litigation and the prescription of MVA matters. These are obviously areas in which attorneys need to take special care, which is the reason for our emphasis on them in our Bulletin.

In the MVA area we have more information in this edition on Regulation 2 (1) (c) and more case law (*see the Makwetlane case discussed below*).

Another area that is beginning to concern us is the operation of trust accounts. This is so particularly in the light of the spate of relevant legislation such as the Financial Intelligence Centre Act 38 of 2001 (FICA) and the decision in the *Hirshowitz Flionis* case discussed below. In this regard see also *Ridon v Van der Spuy & Partners (Weskaap) Inc*. 2002 (2) SA 121 (C), which was discussed in Bulletin No 3/2002.

| MVA. PRESCRIPTION | GEN. PRESCRIPTION | LITIGATION | COMMERCIAL | CONVEYANCING | OTHER | |
|---|---|---|---|---|---|---|
| 945 | 229 | 651 | 259 | 379 | 272 | 2,735.00 |
| 34.55 | 8.37 | 23.80 | 9.47 | 13.86 | 9.95 | |

**CLAIMS BREAKDOWN : 01 JULY 1993 - 30 JUNE 2004**

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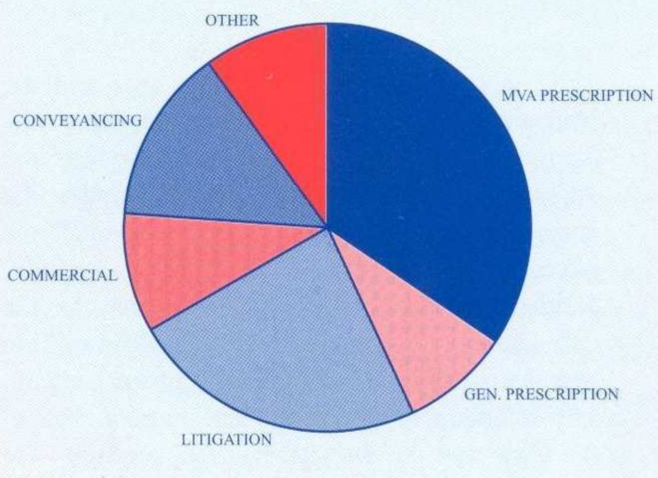
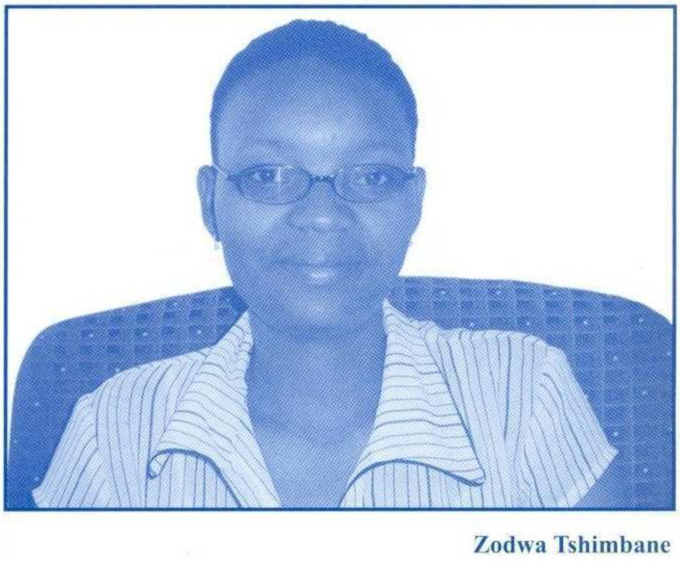



## STAFF CHANGES

Regrettably, Sarah-Lee Engelbrecht and Malcolm Padayachee have moved on to greener pastures, but I am pleased to say that our Editor and Risk Manager, Sharifa Ally has again joined the claims team full-time. We welcome her back.

We also welcome **Zodwa Tshimbane**, who joined the claims team in February 2005.

Zodwa is an admitted attorney who obtained her B.Proc degree through the University of South Africa (UNISA) and completed her articles at Borman-Rapela attorneys. She attended the Practical Legal Training School of the Law Society of the Northern Provinces. She practised for 2 ½ years as a professional assistant at Tim Chauke Attorneys and Swart Inc. respectively and is currently completing her LL.B through UNISA.



**Zodwa Tshimbane**

## In this edition

# POLICY

Please take note that the new policy, which incepts on 1 July 2005, will contain some amendments to allow for third parties to approach the insurer directly, in certain limited circumstances. The new policy will be published in full in the August edition of the Bulletin and on the website.

**ANN BERTELSMANN, GENERAL MANAGER**
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# USEFUL TIPS for MVA Practitioners

***a) Road Accident Fund v Bennett Lefu Makwetlane SCA (case 649/02) unreported 17-02-2005***

**Validity of Regulation 2(1) (c) of the Road Accident Fund Act 56 of 1996**

**Facts**

The respondent instituted action against the appellant in the Johannesburg Magistrate's court for damages arising out of an accident which occurred on **6 May 1999**. It was alleged by the respondent that an unknown motor vehicle negligently collided with him whilst he was a pedestrian.

The trial court dismissed the respondent's action holding that he had not complied with the regulation, in that he did not submit, 14 days after being in a position to do so, an affidavit to the police in which the particulars of the occurrence concerned were fully set out. The court a *quo* reversed the finding of the trial court and dismissed the appellant's special plea holding that the regulation was *ultra vires*.

**Appeal**

Following the earlier decision of *Thugwana*, the court held that the regulation was not invalid in law.

***We have discussed the far reaching consequences of Thugwana in previous Bulletins. As Makwetlane has now confirmed Thugwana, practitioners are again referred to the "Letters to the Editor" column of our Bulletin No. 1/2005 which can also be accessed on our website at www.aiif.co.za.***

***It has also recently come to our attention that the Road Accident Fund is raising the lack of compliance with regulation 2(1) (b) which requires the claimant to take all reasonable steps to establish the identity of the owner/ driver of the vehicle concerned. Please advise us if the Fund has objected to a claim/s on the above basis, so that we can look at ways of addressing this added problem.***

**SHARIFA ALLY, EDITOR**
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# UNIDENTIFIED DEPOSITS INTO ATTORNEY'S TRUST ACCOUNTS

***Bartlett and Another v Hirschowitz Flionis (W) (case 2914/2002) unreported, 9-7-2004***

**1. Introduction**

It behoves attorneys and other professionals who operate trust accounts to ensure that they positively identify the source of all deposits into their trust accounts and that they disburse such monies deposited only in strict accordance with the instructions of the persons or entities to which the funds belong. The severity of failing to comply with this requirement was explicitly illustrated in the above unreported judgement of Schwartzman J.

**2. Facts of the case:**

The facts of the case are succinctly outlined below.

- The first plaintiff was a practising attorney and was the sole director and shareholder of the second plaintiff. The defendant was a partnership of attorneys.

- On or about 3 March 1999, the first plaintiff caused an amount of R3, 1 million to be deposited into the defendant's trust account held at Nedbank, Braamfontein. The money was deposited into the account by means of a clearance voucher issued by Standard Bank

- The Standard Bank clearance voucher and the Nedbank deposit slip, while evidencing the payment and deposit of the money into the defendant's trust account, did not identify the person on whose behalf Standard Bank made the payment into the defendant's trust account. Neither did the first plaintiff convey to the defendant the fact that the amount of R3, 1 million was deposited into the defendant's trust account. The defendant for all intents and purposes was of the view that the money was deposited into the defendant's trust account on behalf of its client C

Gambino, that it was to be held in trust on behalf of such client, and that it was to be disbursed on the instructions of the said client.

· On 6 April 1999, the plaintiff demanded the return of the sum of R3, 1 million and when the defendant refused, launched the present action.

### 3. Judgement

The plaintiffs' pleaded case was that by reason of the deposit into the defendant's trust account, the defendant owed the plaintiffs a duty of care that obliged it to:

i) identify the "entrustor" of the funds;

ii) determine the purpose for which the money had been entrusted;

iii) utilise the money in accordance with the entrustor's instructions;

iv) account to the "entrustor" for its use of the funds; and

v) exercise the requisite skill, care and diligence expected of an attorney in dealing with or utilising and/or disbursing trust money.

· In its defence the defendant, while admitting that R3, 1 million was paid into its trust account, alleged that it was received and held in trust on behalf of its client C Gambino, and that it was dealt with in accordance with Gambino's instructions.

· The plaintiff relied on the uncontradicted expert evidence of Mr Vincent Faris, a forensic accountant who, after commenting on the statutory duties of an attorney in respect of trust monies, expressed the view that the second plaintiff was a trust creditor of the defendant as defined by the Law Society Rules, in the amount of R3.1 million. Mr Faris also conceded that because neither the Standard Bank clearance voucher nor the Nedbank deposit slip, reflected the details of the person who deposited the R3, 1 million into the defendant's trust account, the defendant should have ensured that the R3, 1 million went into a separate suspense account until such time as the defendant or Nedbank ascertained who had put the money into the trust account and why.

· Schwartzman J having accepted Mr Faris's testimony then went on to answer in the affirmative the question whether the R3,1 million was entrusted to the defendant. Further, that the defendant had no right to deal with it unless and until it ascertained its source and purpose of the payment.

· The Honourable Judge also answered in the affirmative the question as to whether the defendant owed and breached a duty of care to the plaintiff and accepted that money deposited into an attorney's trust account is not his or her property as outlined by Section 78(7) of the Attorneys' Act 53 of 1979. He also confirmed that where money is so deposited, it is incumbent upon an attorney to deal with such money strictly in accordance with the client's instructions. Further, that where the identity of the person or client making a deposit is not known the money can only be dealt with once the client's identity has been ascertained and then, only in accordance with such instructions. On these facts, the Judge found that the defendant owed the plaintiff a duty to ascertain the identity of the person who paid the R3, 1 million into the defendant's trust account and thereafter a duty to act in terms of such person's instructions.

· The defendant has launched an appeal against the entire judgement and is adamant that the Honourable Judge erred in finding that the money was entrusted into the defendant's trust account and following from that, that the defendant subsequently owed the plaintiff a duty of care.

### Conclusion

***1. This judgement confirms the principal that it is incumbent upon all attorneys to verify the identity of persons who deposit money into their trust account and to dispose of such funds from their trust account only in accordance with the instructions of such persons.***

***2. It must be borne in mind though that the events giving rise to this claim occurred before any statutory intervention in the form of the Financial Intelligence Centre Act 38 of 2001, which now seeks to place a statutory obligation on all persons operating trust accounts to identify the source of all such deposits.***

**KHADIJA BHOOLA (WEBBER WENTZEL BOWENS)**
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# PRESCRIPTION MATTERS

**Update on *Barkhuizen v Napier* (T) (case 33129/01) unreported 17.09.2004**

In Bulletin No. 1/2005, we reported on the above decision which held that the time bar clause in an insurance policy was unconstitutional as it infringed on the plaintiff's right of access to the courts, which limitation was not reasonable and justifiable in terms of section 36(1) of the Constitution.

In *Metcash Trading Limited v Credit Guarantee Insurance Corporation of Africa Limited* 2004(5) SA 520(SCA), the court had to consider whether the appellant failed to lodge it's claim timeously and whether the respondent was liable to the appellant in terms of the policy.

The policy in question contained a clause providing that the insurer would not be liable for any claim which was not lodged within a period of one year after the occurrence of the cause of loss. The insurer was notified of the event immediately in a letter which recorded that it was "official notification of a pending claim, which would be raised as soon as details were received." However, the first demand for indemnity was only made two years later.

The court held that the demand was made after a period of one year had elapsed and hence the claim was lodged out of time.

The decision of *Metcash* appears to conflict with that of *Barkhuizen*. The former case is also a decision of the SCA and binding on all lower courts. However, the court in *Metcash* did not consider the constitutionality of time bar clauses.

*Barkhuizen* was decided on the basis of a stated case (i.e. no evidence was led), which may have affected the outcome of the judgement. It was also a decision of the TPD and is therefore binding in that division only, but it would have persuasive value in other divisions of the High Court.

***In view of the above decisions, insureds and practitioners should ensure that claims are lodged timeously and that summons is issued within the period provided for in the relevant policy. If, however, the date has been missed, there may be constitutional grounds for challenging the validity of the provision, particularly if the period allowed is an unreasonably short one.***

**SHARIFA ALLY, EDITOR**
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***(With acknowledgement to Ms. D. Donnelly of Routledge Modise Moss Morris)***

# Letters to the Editor

**Dear Editor**

We refer to your comments in the February 2005 edition of the Risk Alert Bulletin regarding Regulation 2(1) (c) of the Road Accident Fund Act. You state that the affidavit "must be deposed to by the person who suffered damages." With respect, we draw your attention to the as yet unreported judgement of Satchwell J in *Feerus, TP v RAF* (WLD) (case 9219/03) unreported 08.09.2004, where it was held that a proper interpretation of the regulation meant that anyone with direct knowledge of the accident could submit an affidavit to the SAPS. It is not necessary for the person who suffered damages to personally depose to the affidavit. We trust you will convey this decision to your readers.

Many thanks
**Craig Lucas**
**Zanli van der Merwe**

**Editor's note**

We thank Mr. Lucas for alerting us to the above judgement.

**Practitioners please take note:**

We have provided the Training and Development Department of the Road Accident Fund with a copy of the above judgement. The Fund advised us that there is also a "proviso" to the requirement that the affidavit "must be deposed to by the person who suffered damages" in that where a claim is brought by dependants, minors, mentally ill/insane/brain damaged third parties who may not be in a position to depose to the affidavit, they will not be able to insist on the affidavit in terms of this judgement.

**RiskAlert Bulletin**

**Please note that the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice.**

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