RISK ALERT BULLETIN

NOVEMBER 2005 No. 4/2005

1. GENERAL MANAGER'S COLUMN

By the time this Bulletin lands on your desk, you will most probably be frantically trying to clear that spot, so that you can go on holiday with some peace of mind. I wish you a happy, relaxed holiday season and safe driving, particularly in view of the recent developments in the MVA field discussed below.

a) Road Accident Fund Amendment Bill

After many years of negotiation, the Bill was finally approved and signed by the Portfolio Committee on Transport on 7th September 2005, from whence it proceeded to the National Council of Provinces for approval.

Some of the more significant changes introduced by the Bill are:

- **Claims for loss of income**. These will be limited to **R160 000-00** per annum.
- **Passenger claims**. The **R25 000-00** limit has been totally removed and passengers can claim for the same benefits as any other third party
- **General damages**. These will only be allowed if the claim is serious
- **Emotional shock for witnesses to the accident.** These will not be allowed, but the witness may still sue the party who was responsible for the accident in terms of the common law
- **Medical costs.** Compensation for reasonable costs will be based on *public health tariffs*
- **Common-law claim**. The right to sue a driver for damages over and above the new limits has been removed, except for witnesses' emotional shock as mentioned above.

According to the Minister of Transport, Mr. Jeff Radebe, *"the Bill does not change the system of compensation, but merely limits the levels of compensation whilst ensuring that the Fund does not discriminate against certain classes of Road users."*

It remains to be seen whether or not a no-fault system of benefits will be implemented in accordance with recommendations of the Satchwell Commission. We will keep you updated in future Bulletins.

2. POLICY QUERIES

Who is liable for the costs incurred in relation to a professional indemnity claim?

The policy covers all costs, fees and expenses incurred in the investigation, defence or settlement of a claim. An insured is only liable for the first amount of the claim (including the claimant's party and party costs) arising out of one event (and of course any amounts over the limit of indemnity).

The Policy also makes provision for approved costs which are incurred, *"in connection"* with any claim as long as the written consent of the insurer has been obtained, e.g. the rescission of a judgement taken against a client. No deductible is applicable in respect of approved costs.

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Attention all practitioners

Erratum: English Risk Alert Bulletin, August 2005

The deductible for a sole practitioner is **R20 000-00** and not **R2000-00** as reflected on page 4, clause 8.5.1 in Column B, point no.1.

3. FUNDS HELD IN SECTION 78 (2A) ACCOUNTS

It has come to the attention of the Attorneys Fidelity Fund that some practitioners are under the mistaken impression that they have no legal liability to make good the loss by reason of theft of funds deposited in terms of subsection 78(2A) of the Attorneys Act ("the Act").

Subsection 78(2A) of the Act provides that:

> "Any separate trust savings or other interest-bearing account –
>
> (a) Which is opened by a practitioner for the purpose of investing therein, on the instructions of any person, any money deposited in his trust banking account; and
>
> (b) Over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity,

Shall contain a reference to this subsection."

In the event of the theft of such funds by, for example, a member of staff, the principals in the practice are accordingly liable to reimburse the owners of the funds for their loss.

The confusion may in some way be attributable to a misunderstanding of the provisions of subsection 47(1)(g) of the Act, which provides that the Fund shall not be liable in respect of any loss suffered –

> "By any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person…….."

Subsection 47(5) goes on to provide that for the purposes of subsection (1) (G)

> "……a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person -
>
> (a) to pay the money into an account contemplated in section 78(2A) 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 any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and over which investment the practitioner exercises exclusive control as trustee, agent or stakeholder or in any fiduciary capacity;"

Moreover, subsection 47(6) of the Act provides that

> "Subsection (1) (g) does not apply to money which a practitioner is authorised to invest where the practitioner acts in his or her capacity as executor, trustee or curator or in any similar capacity".

What does this mean? Quite simply, practitioners and their partners are –

1. Liable for loss suffered as a result of theft of monies deposited in terms of subsection 78(2A) of the Act. However, if the principals in the practice are unable to make good the loss in whole or in part, the Fund will do so.

2. Where money is deposited with a practice purely for investment purposes in the ordinary sense, the principals in the practice will be liable. The Fund will **not** be liable.

3. However, if funds are deposited in an account opened in terms of subsection 78(2A) for the reasons described in subsection 47(5)(a) the principals will be liable to make good the loss, with the Fund making good the balance of the loss in the event of the principals not being able to reimburse the depositors fully.

4. The principals will be liable for any loss if the funds were invested in circumstances contemplated in subsection (6) to the extent that they are able. Again, in the event of the principals not being able to reimburse the loss in full, the Fund will make good the balance of the loss suffered.

Mr. John Moorhouse, Executive Director (The Attorneys Fidelity Fund)

The above article emphasises the need for practitioners to adequately cover themselves by purchasing top-up cover for the specific work they undertake and to ensure that they are covered for theft/misappropriation of trust monies.

It also highlights the fact that your clients do not enjoy the protection of the Attorneys Fidelity Fund where the money is deposited solely for investment purposes

4. USEFUL TIPS FOR MVA PRACTITIONERS

Legal costs and Writ of execution

Road Accident Fund v Novathile Nnosa and the Sheriff Pretoria Central **2005 (4) SA 575 T**

Facts

The first respondent's action for damages against the applicant was settled. It was a term of the settlement *(which was not made an order of court)* that the applicant would pay the first respondent's agreed or taxed party and party costs.

The capital in terms of the settlement was paid, but no agreement was reached on the quantum of costs. The first respondent's attorney taxed a bill of costs and later caused a warrant of execution to be issued against the applicant pursuant thereto.

Issues

a. Whether the first respondent could issue the writ of execution without there having been a judgement in his favour *and*

b. Whether the *allocatur* amounted to a judgement for the purposes of execution

Judgement

The court referred to Rules 45(1) and (2) of the Uniform Rules of Court, which provide for two requirements to be met before a writ of execution can validly be issued for the recovery of costs, namely:

- A judgement or order of court awarding costs to a party; *and*
- An agreement on costs or taxation of the bill of costs by the Taxing Master.

The court held that, "A taxed bill of costs alone is not enough to levy execution on an undertaking to pay costs. An *allocatur* does not amount to a judgement for the purposes of execution. Prior to execution the first respondent should have obtained a judgement as well as the taxing master's *allocatur*." The application to set aside the writ of execution was accordingly upheld.

Practitioners should therefore ensure that such settlements are made an order of court <u>and</u> that their bills of cost are taxed or settled before writs of execution are issued.

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5. PRESCRIPTION MATTERS

<u>Acknowledgements of debt- S 12(1) of the Prescription Act 68 of 1969</u>

***Stockdale and another v Stockdale* 2004(1) SA 68 (C)**

Facts

The plaintiffs issued summons against the defendant, out of the Magistrates' Court, based on two acknowledgements of debt signed by the defendant on **1 February 1991.** The defendant's Special Plea to the effect that the claims had become prescribed was successful in the court *a quo*.

On appeal, the court had to decide whether, in light of the specific terms of the acknowledgements of debt, and the relevant background circumstances, prescription began running on the debts immediately (i.e. with effect from **1 February 1991).**

Held

S12 (1) of the Prescription Act expressly requires that:

> *Prescription shall begin to run as soon as the debt is due.*

The court held that a distinction needed to be drawn between the coming into existence of the debt on the one hand and the recoverability thereof on the other. Here, the acknowledgements of debt placed no immediate obligation on the plaintiff regarding payment of the loan. No specific date for demand had been fixed in the document and no condition was linked to the demand.

Further, that based on the peculiar circumstances of the case, the giving of notice was necessary for Prescription to commence and this was only given in a letter dated **24 October 2000.**

The Appeal was upheld.

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6. CONVEYANCING

Advertising for Lost Deeds

Previously when an original deed had been lost or destroyed and it was necessary to obtain a certified copy thereof from the Registrar of Deeds in lieu of the original, a notice of intention to apply for the issue of the certified copy had to be published in a newspaper circulating in the area where the property was situated as required by the regulations to the Deeds Registries Act.

In terms of these regulations a period of 21 days from the date of publication of the notice had to lapse before the application for the issue of the certified copy could be lodged with the Registrar of Deeds. This 21 day period very often caused delays in the registration of transfer of properties as well as additional costs for advertising which it has been found served no purpose.

The regulations have now been amended and as from 21 June 2005 the advertising for lost deeds is no longer required.

With acknowledgement to Brian Kew of Werkmans Attorneys (Property Werks, Volume 49/ July 2005)

7. LETTERS TO THE EDITOR

Dear Editor

Re: Risk Alert Bulletin 3&4/2005

I noted with interest your reporting, in recent editions of Risk Alert, on the as-yet-unreported decisions of Satchwell J in *Feerus v RAF* and Rabie J in *Blankenfell v RAF.*

In both cases, the individual judges came to the assistance of claimants who had not strictly complied with Regulation 2(1) (c) in that they had not themselves submitted the affidavit required by Regulation 2(1) (c), by concluding that substantial compliance was sufficient, and that so long as someone filed an affidavit with the police fully setting out particulars of the occurrence within 14 days thereof, that would be sufficient.

As you say, this does make inroads into the harsh effects of *Thugwana*, but there is another important side to the coin which was, I think, not considered in either judgment and which causes one to question the correctness thereof. In this regard:

(a) Cloete JA pointed out in *Thugwana* (in para.[7]) that a "claimant [who] is physically or mentally incapable of making an affidavit" is excused from having to do so.

In my experience, that has been the saving of many a claimant;

(b) But if *Feerus* and *Blankenfell* are correctly decided, then that might not be so. Because if substantial compliance is sufficient, and if that means that Regulation 2(1) (c) can be complied with provided someone having knowledge of the facts files an affidavit with the police within 14 days, it follows that a claimant who is herself incapable of compliance because she has no recollection of the collision, will not be excused provided she could have persuaded someone else who did have knowledge of the collision to file an affidavit, if she fails to do so within 14 days;

(c) This result, which in many cases would be even harsher than that envisaged by Cloete JA in *Thugwana*, would only be avoided if one were to conclude that Regulation 2(1) (c) is capable of substantial compliance, but that substantial compliance is not required. Only if one were to so interpret the sub-Regulation (and to my mind, I don't think one could) could one achieve the happy result that a claimant who didn't herself comply can be saved by someone else doing so, whilst a claimant who couldn't herself comply is not punished for not having persuaded someone else to do so. The alternative is to conclude that both *Feerus* and *Blankenfell* are examples of "hard cases making bad law".

Perhaps you should consider drawing the above to the attention of your readers, at least on the basis that for so long as *Feerus* and *Blankenfell* stand, an attorney representing a claimant in an unidentified vehicle case should consider not only whether his/her client can furnish an affidavit, but also whether there aren't others who can because if there are, it might well be that the prudent attorney would arrange for the witness or witnesses to file affidavits within 14 days of the occurrence, so as to ensure compliance with Regulation 2(1) (c).

Anonymous

Editor’s note

We are once again extremely grateful to our esteemed contributor for the input and urge practitioners to heed the advice contained above.