Bulletin

Risk Alert

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

RAF NEWS

2006 was a year of constant challenge as far as the RAF was concerned. We have reported in our previous Bulletins on some of these, such as the passing of the controversial RAF Amendment Act and the difficulties caused by the *Thugwana* decision on regulation 2 (1) (c).

At the time of writing this column, judgment has not yet been handed down by the Constitutional Court, on the constitutionality of the regulation, but as soon as we have received the decision, details will be posted on our website (www.aiif.co.za).

I am pleased, however, to begin the year on a more positive note. The Law Society of South Africa's MVA Committee has succeeded in securing an undertaking from the RAF to implement a system of third – party payee notification.

The RAF has confirmed that its systems have been revised and will automatically notify claimants of the amount of the awards paid to their attorneys of record, upon finalisation of their claims.

Practitioners, in turn, will be required to provide the full physical and postal addresses of the claimants when submitting claims to the RAF to ensure that details of claims settled are conveyed to claimants. Failure to do so will result in disciplinary action by the statutory law societies [2006(November) DR 11].

Because the theft of personal injury awards by attorneys is the second largest category of claims against the Attorneys Fidelity Fund, the new system will serve as a valuable risk-management tool.

(Speaking of Risk Management, the largest number of claims against the Attorneys Insurance Indemnity Fund ("AIIF") arises out of the prescription of MVA claims. The AIIF has also put in place a number of risk-management initiatives like this Bulletin, Prescription Alert and our website (www.aiif.co.za). We would also welcome suggestions for other risk management initiatives from practitioners.)

IMPORTANT NOTICE FOR EXECUTORS OF DECEASED ESTATES

Those practitioners who deal with larger numbers of deceased estates, please take note that the Board of the AIIF has agreed to an increase in the limit on the value of executor bonds per firm, *per annum*, from R10 million to R20 million.

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Policy Queries

On 12 December 2006 I received a summons for an amount of R1 100 000 **from my client, who alleges that I undersettled his MVA claim against the RAF in March 2006.**

On checking the schedules to the AIIF Policy for the period 1 July 2005 **to** 30 June 2006, **I noted that as a single practitioner, I am only entitled to cover to a maximum of** R1 000,000. **If the claim is settled for the full amount, will I have to pay the balance of** R100 000 **as well as my deductible of** R35 000**?**

There are various aspects that need to be considered:

1. The good news is that, unless you received a letter of demand prior to **30 June 2006**, the claim falls to be dealt with in terms of the policy for the period **1 July 2006** to **30 June 2007**. In that case, as a single practitioner, you enjoy the new limit of indemnity of **R1 250 000** per annum and you are therefore covered for the full amount claimed. (This is because ours is a **'claims-made' policy**, where the cover is in respect of a claim first made during the period of insurance, irrespective of when the liability arose – see Clause 1 of the Policy published in our May 2006 Bulletin)
2. If, however, you did receive a letter of demand before **1 July 2006**, then the previous policy for **1 July 2005** to **30 June 2006** applies (as that is the period in which the claim was first made) and your limit of indemnity is **R1 000 000**. In the latter case you might have to pay an amount in addition to your deductible of **R20 000** (the deductible of **R35 000** only applies to prescribed MVA matters and not to undersettlements.) Please note, however, if the claim were settled for **R1 100 000** the insurer would pay out the full limit of indemnity of **R1 000 000** and then your portion would be **R100 000** only (**R20 000** deductible and an additional **R80 000**).

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Useful Tips for MVA Practitioners

S17 (5) OF THE ROAD ACCIDENT FUND ACT 56 OF 1996 – CLAIMS BY SUPPLIERS OF MEDICAL SERVICES

Van der Merwe v Road Accident Fund 2006(3) SA 88 T

FACTS
G sustained injuries in an accident on **2 October 1998**, but did not claim compensation from the RAF. He received treatment from the appellant, an anaesthetist, on **20 February 2002**. The appellant submitted a claim to the RAF on **27 June 2002**. The latter raised prescription of the claim, but the former argued that the claim only arose on the date G was treated i.e. **20 February 2002**.

The court *a quo* found in favour of the RAF and the appellant appealed.

THE ACT
S17 (5) of the Act reads as follows:
(5) where a third party is entitled to compensation in terms of this section and has incurred costs in respect of himself or herself or any other person in a hospital or a nursing home or the treatment of any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may claim the amount directly from the Fund or an agent on a prescribed form, and such claim shall be subject, *mutatis mutandis,* to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.

HELD
That Section 17(5) of the Act empowers a supplier of medical services to claim payment of its account directly from the RAF, subject to certain conditions. This claim is competent even if the third party does not institute a claim or where he/ she has already instituted one or intends instituting such claim. However, this claim by a medical service provider does not operate separately from the claim by the third party and is subject, *mutatis mutandi*, to the provisions applicable to this claim.

As G and the appellant had failed to lodge a claim within three years of the accident (**2 October 1998**), both claims had prescribed.

Prescription Matters

WHEN DOES PRESCRIPTION BEGIN TO RUN – S 12(3) OF THE PRESCRIPTION ACT 68 OF 1969

Truter and another v Deysel 2006(4) SA 168 (SCA)

FACTS

D sued the appellants for damages sustained as a result of a series of operations they had performed on him during **1993**. The appellants raised a Special Plea of Prescription on the basis that the claim had become prescribed, as summons was only served in **2000**.

The chronology of events was as follows:

a) As early as **1994**, D had a suspicion that the appellants were negligent and wrote letters to the Medical and Dental council, instructed an attorney to prosecute a medical malpractice claim, consulted a number of ophthalmic surgeons and lodged a complaint with the Minister of Health
b) During **1999** D obtained a medico-legal report from a professor to the effect that he would not succeed with a negligence claim
c) During **2000** D received an opinion to the effect that the operations to his eye were done too quickly.
d) Summons was subsequently served on **17 April 2000**

ISSUES

The main issue before the court was when D had acquired knowledge of the alleged wrong committed by the appellants.

THE ACT

In terms of S12 (3) of the Prescription Act a debt becomes due, for the purposes of prescription, when the creditor acquires knowledge of the debtor and the facts from which the debt arises.

The trial court dismissed the Special Plea on the basis that knowledge of all the facts relating to the claim is required in terms of S12 (3) and that prescription only started to run in **2000** when D found an expert who was of the view that he was operated on in a negligent manner.

ON APPEAL

The SCA pointed out that knowledge of fault on the part of the debtor is not a requirement for prescription to commence running. What is required is that the plaintiff must have knowledge of the facts from which the debt arises. D had had such knowledge since **1994**.

The appeal was upheld on the basis that prescription began to run in **1994** and the claim had become prescribed when summons was issued in **2000**.

Conveyancing

(a) CANCELLING AN INSTALMENT SALE OF LAND – S 19 OF THE ALIENATION OF LAND ACT 68 OF 1981 (the "Act")

Engelbrecht v Merry Hill (Pty) Ltd and others 2006 (3) SA 238 (E)

FACTS

M sold two erven to E in terms of an installment sale agreement which was governed by Chapter II of the Act. In terms of clause 9 of the agreement, if the purchaser was in breach of the contract the seller could;
a) Claim immediate payment of the balance of the purchase price including all costs or
b) Cancel the contract and claim payment of all arrear installments.

The purchaser, E, paid some installments, but then fell into arrears. M's attorney addressed a letter to E demanding payment, failing which M would claim payment of the full outstanding purchase price plus costs or would cancel the agreement.

The letter was dated **8 August 2005** and stipulated a period of 32 days for payment. E only found the letter in **October 2005** and discovered that the agreement had been cancelled and that M was in the process of selling the properties. M advised E that a registered cancellation letter had been forwarded to him, but E had not received such letter and requested that a copy be forwarded to him.

E applied for an interdict preventing the transfer of the properties to third parties on the basis that the notice of **8 August 2005** was defective in that it did not give an indication of the steps M intended taking but merely contained a statement of the options available to M in the event of a breach.

Ss 1 of the above Act states that the seller must first notify the purchaser in writing of the breach and demand that the breach be rectified. If the purchaser fails to comply, only then can the sale be cancelled.

In terms of ss2, the above notice must contain the following:
a) A description of the breach
b) A demand that the breach be rectified within a certain period and
c) *An indication of the steps the seller intends taking if the breach is not rectified.*

HELD

That S19 is peremptory in terms and its purpose is to protect the purchaser.

That the notice should have stated what the seller intended doing if the breach was not remedied i.e. whether he intended canceling or claiming specific performance.

That the notice, in the present case, was invalid.

However, in the subsequent WLD decision of Van Niekerk and another v Favel and another 2006(4) SA 548(W), the court held that S19 (2) was merely directory and the seller did not have to specify the remedy, but could indicate an intention of taking several alternatives.

In view of these conflicting decisions practitioners acting on behalf of sellers in these circumstances should state specifically in the s 19(2) notice what steps they intend taking should the buyer fail to remedy the breach. The decision in Engelbrecht has now been taken on appeal and we will report on the outcome in future Bulletins.

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(b) EVICTIONS LAW HERE TO STAY FOR NOW

After the Supreme Court of Appeal (SCA) decision in *Ndlovu v Ngcobo; Bekker and Others v Jika 2003*, it was hoped that fears of the demise of the residential property letting market – and pressure from the major banks and landowners – would result in an amendment to the Prevention of Illegal Eviction and Unlawful Occupation of Land Act ("PIE"). Proponents for change wanted PIE's application to exclude former tenants and mortgagors who refused to vacate land after their leases were cancelled or their bonds foreclosed.

PIE required the court adjudicating an application for an eviction order to consider whether the eviction is "just and equitable", having regard to various factors. The Act changed the common law position that an owner could evict an unlawful occupier simply on the basis that he or she was the owner, and the occupier in unlawful possession, of the property.

The SCA held that "unlawful occupiers" include tenants and mortgagors who originally lawfully occupied the property but whose previously lawful possession subsequently became unlawful.

The pressure from the major banks and landowners did result in an Amendment Bill being published in March 2005. The Memorandum to the Amendment Bill submitted that the outcome of the decision of the SCA was neither desirable nor what had been intended. It proposed that PIE be amended so it applied only to persons who unlawfully invade land without the prior consent of the landowner, i.e. squatters, and specifically excluding defaulting tenants and mortgagors.

However, the Amendment Bill came under serious fire. Critics argued that the intention of PIE was to protect all vulnerable persons, and not only squatters, from unlawful eviction. The proposed exclusion of tenants from PIE would prevent vulnerable tenants from protection against unscrupulous landlords, or slumlords, creating the potential for a repeat of past abuses.

The portfolio Committee on Housing withdrew the Bill earlier this year, and there is no indication when amendments to PIE will be considered again. It is unlikely to be anytime soon.

In the interim, residential landlords should:

- abide by PIE's somewhat complex and time-consuming procedures to evict a defaulting tenant
- screen tenants carefully
- insist on at least two months' security deposit to cover the time it takes to obtain an eviction order under PIE
- be vigilant and act speedily once a tenant is in default

Nonetheless, landlords can take some comfort in recent court decisions. The courts, it seems, are becoming increasingly impatient with tenants' deliberate and prolonged unlawful occupation of properties without any substantive reason, and will not hesitate to grant eviction orders, together with appropriate costs orders, against defaulting tenants.

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