Bulletin

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Risk Alert

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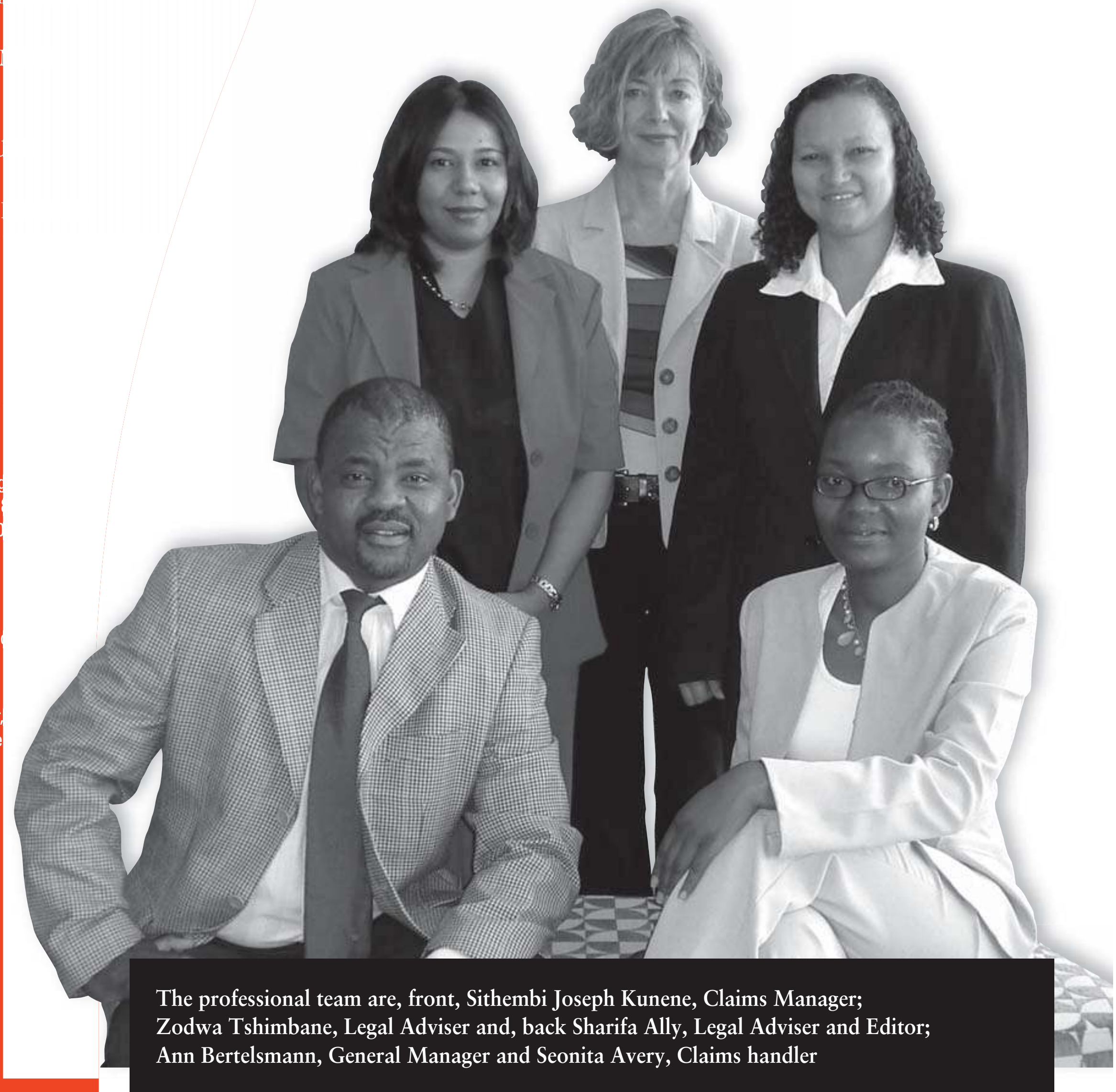
General Manager's Column

THE AIIF TEAM

Many readers have dealt with us, either in the capacity of an insured or a plaintiff's attorney. We have included the photograph below, so that you can in future, put a face to the person you are dealing with.



The professional team are, front, Sithembi Joseph Kunene, Claims Manager; Zodwa Tshimbane, Legal Adviser and, back Sharifa Ally, Legal Adviser and Editor; Ann Bertelsmann, General Manager and Seonita Avery, Claims handler

(THE GOOD) RAF NEWS

Regulation 2 (1) (c)

We first reported on *Thugwana v The Road Accident Fund* 2003 (1) SA 310 (T), and the impact of regulation 2(1) (c) ('the regulation') in our May 2004 Bulletin. Since then, all our Bulletins have dealt with the regulation and the various ways in which the courts have interpreted the *Thugwana* decision. This was done to provide updates to attorneys whose clients' claims had been repudiated by the Fund because of non-compliance with the regulation. It soon became clear to us that, without a constitutional court challenge, many of the most indigent "hit-and-run" victims would still be left without a remedy.

***Engelbrecht v The Road Accident* CCT 57/06**

As reported previously, we assisted a Cape Town law firm to challenge the constitutionality of the regulation in an appropriate matter. We are pleased and relieved to confirm that the regulation has now been declared unconstitutional (a full copy of the judgement is available as a link from our website at **www.aiif.co.za**).

Our Mr. Kunene, who has dealt with the matter from its inception, discusses the impact of the decision under, **"Useful Tips for MVA Practitioners."**

Mr Mampuru from Molema Mampuru Inc. has also provided some insight into the judgement; see **"Letters to the Editor."**

Million Rand Project

Most personal injury claims practitioners are now aware that the Road Accident Fund is currently implementing a scheme to facilitate a speedy resolution of pending claims.

The scheme is called the "Million Rand Project".

The move is to be commended and practitioners will be called upon to take a fairly robust view in dealing with these claims on both merits and quantum.

The inherent risk in this type of approach is that certain matters may be settled for significantly less than their actual value, if claimant decides to settle sooner rather than let the matter run its full course.

Practitioners should, therefore, exercise caution in their consideration of any offers of settlement where 'robust views' are adopted and claimants must be made fully aware of every factor that may affect the claim. Where the claimant elects to accept the offer, this should be confirmed in writing in the presence of witnesses.

ANN BERTELSMANN, GENERAL MANAGER
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Policy Queries

I have been served with a summons alleging professional negligence on my part. The particulars of claim consist of three claims (A, B and C) all of which arise from different causes of action by the same plaintiff.

Should the scheme decide to settle these claims, how will the deductible be applied i.e. will there be one or three deductibles?

Clause 3.1 of the policy provides that:
All claims arising out of one act or omission … shall be deemed to arise out of one event or occurrence.

In the present case, the claims *did not* arise out of one act/omission, but rather separate ones. Even though the plaintiff chose to institute one action, separate deductibles would be applied in respect of each claim, in the event of settlement.

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Prescription Matters

Barkhuizen v Napier
CCT 72/05

The long awaited judgement in the above matter was handed down on 4 April 2007.

Essentially, the court upheld the time bar period in an insurance contract on the basis that it was constitutional. We will discuss the decision in a future Bulletin.

The full judgement can be obtained at:
www.constitutionalcourt.org.za/hyperion-image/J-CCT72-05 *or*
www.deneysreitz.co.za/pdf/judgements/barkhuizen.pdf

SHARIFA ALLY, EDITOR
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Useful Tips for MVA Practitioners

REGULATION 2(1) (c) OF THE ROAD ACCIDENT FUND ACT 56 OF 1996

Engelbrecht v The Road Accident Fund CCT 57/06

On **6 March 2007**, the Constitutional Court, per Kondile AJ, delivered the long and eagerly awaited unanimous judgment in this matter.

The Constitutional Court had been called upon to decide on the constitutionality of regulation 2(1) (c) and argument was heard in the matter on **2 November 2006.**

The regulation had, since the first judgement in *Thugwana v The Road Accident Fund* 2003 (1) SA 310 (T), caused many problems for both practitioners and their clients. Matters were not helped by the judgment in *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA).

The regulation provides that "*the Fund shall not be liable to compensate any third party unless... the third party submitted, if reasonably possible, within 14 days after being in a position to do so, an affidavit to the police in which particulars of the occurrence concerned were fully set out*", and had, in recent years, been successfully used by the RAF to non-suit claimants in hit-and-run matters, where there had been non-compliance with the provisions of the regulation.

The Constitutional Court has now declared that regulation 2(1) (c) is inconsistent with Section 34 of the Constitution, and therefore invalid. The implication thereof is that the regulation is unconstitutional. The court was however very careful in circumscribing the implications of the declaration of invalidity. In this regard, the court order reads as follows:

"3. (i) ...

(ii) *Such declaration of invalidity will apply to and govern all claims instituted or to be instituted under the Road Accident Fund Act, 56 of 1996, which at the time of this order have neither prescribed nor been finally determined by judgments at first instance or on appeal or by settlement duly concluded."* (Underlining added)

The implication of the court order is that all matters that the courts have already pronounced on are not affected by the Constitutional Court's order. For cases like *Thugwana* and *Makwetlane*, nothing

Continued on page 4 ...

Claims Procedure

When an attorney becomes aware of a possible claim against his / her practice it is imperative that the claim be reported to us. Early notification is of paramount importance as the costs and time implications of dealing with a matter can be considerably shortened.

Procedure to follow:

1. If the insured becomes aware of a possible claim before any action is instituted against the firm, s/he must notify us in writing immediately (see clause 6.1 of the scheme policy) and, if appropriate, advise her/his client to consult with another attorney as s/he may be faced with a conflict of interest. It is also important to retain a complete and legible copy of the file of papers, which we will require for investigation purposes.

Claims should be notified to:

Ms Ann Bertelsmann
Docex 343, Johannesburg,
Fax: 011 329 1984, or
abertelsmann@glenrandmib.co.za

2. Once notification of the claim has been received, one of our legal advisers will send the insured a claim form, which is to be completed fully and returned. In terms of Clause 6.1, indemnity is conditional upon the claim form being properly completed.
3. All relevant documentation, including letters of demand, summonses should be forwarded to us. (See Clause 6.1.2)
4. Should the file of papers not be available for any reason, an insured would be expected to assist us with obtaining the file of papers from the RAF or other party involved. The insured is expected to render at her/his own cost, such assistance as may be required by the insurers (Clause 6.7.1).
5. Should the insured fail or refuse to provide assistance and remain in breach for a period of 10 days after receiving written notice from the insurer to remedy such breach, all benefits afforded by the policy may be withdrawn by the insurer (Clause 6.7.2).
6. The legal adviser will investigate the claim and make recommendations as to whether it should be settled or defended. In the former situation, the insured must pledge the deductible before the offer can be made. If the claim is to be defended, it will be referred to an attorney on our panel.
7. It is important to remember that the deductible is payable by the insured directly to the claimant's new attorneys, once a Release has been signed/court order made.

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… *continued from page 3*
can be done as they already have been determined by the courts. For those claimants, all is lost. It also means that cases, which were repudiated by the Road Accident Fund for non-compliance with the regulation, where the claimants did not, after such repudiation, issue summons, and the matters have become prescribed by effluxion of time, will not be revived by the court order. The court order is prospective rather than retrospective in nature.

In our August 2005 Bulletin, we suggested to attorneys that they should have summonses issued against the RAF while the constitutionality of the regulation was being tested in the Constitutional Court. Those that heeded the suggestion can now refer the matters back to the RAF for finalisation by the latter.

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Letters to the Editor

DEAR EDITOR
RE: RISK ALERT BULLETIN 1/2007
For your information, the *Van Niekerk v van Favel* 2006(4) SA 548(W) case in the WLD has also been taken on appeal to the SCA with leave of the court a quo.

Yours faithfully
GP Mills
Mills and Groenewald

The above decision was discussed in our February 2007 Bulletin under, "Cancelling an Instalment Sale of Land- S19 of the Alienation of Land Act 68 of 1981- *Engelbrecht v Merry Hill (Pty) Ltd and others.*"

We have also been advised that the Appeal in this *Engelbrecht* decision is still pending and we will report on this in the future.

DEAR EDITOR
REGULATION 2(1) (c) – SANITY FINALLY PREVAILS
The case of *Engelbrecht v The Road Accident Fund* is cold comfort for Messrs *Thugwana* 2004(3) SA 168 SCA and *Makwetlane* 2005 (4) SA 51 SCA. This is because, although the Court struck down the regulation as being inconsistent with Section 34 of the Constitution, it held that its decision does not apply retrospectively to cases 'which at the date of this order have either prescribed, or been finally determined by judgement at first instance or on appeal or by settlement duly concluded.'

Having said that, surely this decision is not intended to deprive *Makwetlane, Thugwana* and the army of claimants' whose cases have been decided in lower Courts from appealing to the Constitutional Court. I know of a few lawyers who, not brave enough to launch an appeal on behalf of their clients or simply lacking in funds, have been waiting in the wings for a Constitutional Court decision on the matter. I must confess, I am one of them. However that enquiry merits a separate discussion and I am too pleased with the decision for that.

Engelbrecht represents a decisive blow to the RAF's continual pursuit to deny accident victims much needed compensation. What I find most significant is the fact that the Court rejected the SCA's reasoning that claimants in hit-and- run cases do not have a right at common law against the unidentified driver. The Court, correctly in my view, held that it is not that the accident victim does not have a claim, but rather that he cannot enforce it because he cannot find the defendant. That actually, the very motor vehicle insurance scheme was created because of the fact that a claimant was not guaranteed success in recovering his damages, even if the driver or owner is identified.

The Judgment is far more significant for the fact that it represents the vindication of Constitutional Democracy and the concept of separation of powers. The Highest Court in the land found the Minister of Transport to have exceeded the powers granted to him by legislation (the RAF Act). The decision is also a reinforcement of Ponnan AJA's lucid minority judgement in the *Makwetlane* case, which with the greatest respect, made more sense.

The absurdity of regulation 2 (1) (c) was startling. A claimant who reported a case to the police, furnished all the details and helped draw a detailed accident report within a day or two of his collision, could be denied compensation because he did not make an affidavit.

On the one hand, the police have a policy that if you could not identify the vehicle that caused the accident, your case is a dead-end and therefore they could not open a docket and therefore no affidavit was made. On the other , even if as an attorney being instructed by such a claimant, you hastily prepare an affidavit and try to hand it to police, they simply refuse to accept it, because they don't have the facility to deal with those affidavits if they don't open a docket. The Court commendably exposed this fallacy and held that there was no connection between the regulation and its intended purpose of combating fraudulent claims.

Indeed, a person with fraudulent intent could be in a better position to receive compensation than a real victim, because if he/she knew about the 14 day rule, an affidavit could be deposed to even though they were not involved in the accident. Therefore far from combating fraud, the regulation could facilitate it.

The RAF's mandate is 'to give the greatest possible protection... to persons who have suffered loss...' However, one cannot help think that the RAF actually tries to fetter that mandate all the time by refusing compensation or providing the, 'least possible protection' to accident victims.

With this case, sanity finally prevails, but not without costs.

Letuba Mampuru
Molema Mampuru Inc.