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)

November 2007 – No. 4/2007

In this edition

GENERAL MANAGER'S COLUMN

POLICY QUERIES

USEFUL TIPS FOR MVA PRACTITIONERS

CONVEYANCING

LETTERS TO THE EDITOR

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General Manager's Column

EXECUTOR COURT BONDS

The AIIF provides bonds of security in favour of the Master, to attorneys who are applying to be appointed as executors of deceased estates. These bonds are provided at no cost, but are subject to certain limits.

I have pleasure in introducing readers to Julia Cebekulu, (pictured here) who is the member of our team who can assist practitioners who need to apply for such bonds.

Julia can be contacted for more information on the requirements for the issuing of bonds at 011 329 1941 or jcebekulu@glenrandmib.co.za.

NB. Please note that bonds can only be provided on an urgent basis, where a special appointment has been arranged with Julia beforehand.

RAF NEWS

Although the Road Accident Fund Amendment Act was signed into law in December 2005, it has still not come into force because the regulations needed to give effect to it have not yet been published. However, their implementation seems to be imminent and we will keep you advised.

THE NEW AGE OF MAJORITY
Section 17 of the Children's Act of 2005, in terms of which a minor child now becomes a major on reaching the age of 18, came into effect on 1 July 2007. On the advice of three of our panel attorneys, our Prescription Alert Unit sent out a newsflash stating that the effect thereof on minors' MVA claims is that:

> *"if the minor was involved in an identified accident on/or* ***after the 1st of July 2007****, the claim will prescribe* ***three years after the minor turns 18****. Claims of minors which arose before the* ***1st of July*** *2007 would still prescribe after the minor turns 21."*

This approach looks at the *date of accident* in relation to 1 July 2007.

It has since been suggested to us that, where the minor was 18 or older on 1 July 2007, the following interpretation of the effect of the reduced age of majority could also possibly be applied:

> *Prescription in respect of such a claim starts running on 1 July 2007, when the said Act provides that the Claimant, who prior to 1 July 2007 had not yet attained the age of majority, was now a major.*

This second approach ignores the date of accident and looks only at *the minor's age* as at 1 July 2007.

UNTIL THIS ISSUE HAS BEEN CLARIFIED, IT IS STRONGLY RECOMMENDED THAT THE SECOND MORE CAUTIOUS APPROACH BE ADOPTED BY PRACTITIONERS.

We certainly do not believe that the Act has retrospective effect, and that a claimant who was 19 or 20 years old on 1 July 2007, would be considered to be 1 or 2 years into majority and only have 1 or 2 years of the prescriptive period remaining.

NB. Please remember that the onus remains with the practitioner to ensure that the correct prescription date is calculated. No reliance should be placed on the views expressed above, which are only presented for your consideration.

Policy Queries

I enclose a copy of a summons from the liquidator of company X, which had previously been my client. The liquidator is claiming repayment of money which I had retained for fees and disbursements, shortly before company X went into liquidation. Please confirm that you will arrange to have this action defended on our behalf.

Kindly note that a claim for the repayment of fees and disbursements constitutes a claim arising out of or in connection with a trading loss, and as such, it is excluded in terms of the exception set out in clause 5.1.4 of the Scheme Policy. The underwriter does not provide indemnity for such a claim and you therefore need to make your own arrangements to either defend or settle the matter.

ANN BERTELSMANN,
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Useful Tips for MVA Practitioners

WAIVER BY FUND OF TWO-YEAR PERIOD IN TERMS OF REGULATION 2(3)

RAF v Ngubane (2007) SCA 114(RSA)

FACTS

The respondent (plaintiff) as the driver of a vehicle, was involved in a collision with an unknown motor vehicle on 8 December 2000. The plaintiff lodged a claim and later instituted action for compensation against the Fund in the Durban High Court.

The Fund raised a special plea to the effect that the plaintiff's claim had prescribed as it was lodged after the expiry of two years from the date of the collision. The plaintiff had, however, alleged in her particulars of claim that the Fund had agreed to pay 80% of the damages proved at the trial.

ISSUES

The court had to determine whether, on the facts alleged in the particulars of claim, the RAF had the authority to conclude such an agreement to compensate the plaintiff.

JUDGMENT

The court *a quo* held that the defendant had the capacity to enter into the agreement in question, which decision the Fund appealed.

It was common cause that the plaintiff had not complied with regulation 2(3) which required unidentified claims to be lodged within two years from the date of the accident. The plaintiff in the present case had lodged her claim six weeks after the deadline. However, a claims handler at the RAF had entered into an agreement with the plaintiff in terms of which he had agreed to pay 80% of the plaintiff's proven damages. This agreement was concluded after the period of two years had expired.

The Fund relied on the judgment in *Geldenhuys and Joubert v van Wyk and Another, van Wyk v Geldenhuys and Joubert and Another* 2005(2) SA 512 (SCA), by arguing that the lodging of a claim within two years is a precondition for the existence and enforceability of any claim against the fund in terms of s17 (1) (b) of the Act. They argued further that accordingly, neither the claims handler nor the Fund had the authority to "give life" to a claim after the expiry of the two year period and any such agreement would be *ultra vires* the act and regulations.

The court distinguished *Geldenhuys and Joubert* from the present case in that the former case concerned the validity of regulation 2(3), which was upheld. They also rejected the Fund's argument that a claim does not exist in the absence of compliance and contended that in the present case the claim came into existence at the time of the collision. The plaintiff's failure to lodge the claim with the Fund timeously, did not affect its existence at all, but what was compromised was her right to enforce the claim.

HELD

The court held that a statutory provision such as regulation 2(3) which was enacted for the special benefit of the Fund may be waived by it. By entering into the agreement to pay, the Fund (through the claims handler) had waived its right to demand compliance with the regulation requiring that claims be lodged within two years.

Accordingly the plaintiff had a claim enforceable by law, provided that she proved the agreement of compromise at the trial.

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Conveyancing

In our February 2007 edition (Conveyancing, pg 3), we dealt with the decision of *Engelbrecht v Merry Hill (Pty) Ltd and others* 2006(3)SA 238 (E). The matter was taken on appeal and our Claims Manager, Mr. Joseph Kunene, discusses the judgement of the SCA.

SECTION 19 OF THE ALIENATION OF LAND ACT 68 OF 1981

Merry Hill v Engelbrecht (2007) SCA 60 (RSA)

In a sale of land by installments, in terms of the Alienation of Land Act, the seller has a choice of following one of three courses of action if the purchaser commits a breach, namely:

(a) to enforce the acceleration of the payment of installments or other penalty stipulated in the contract;
(b) to terminate the contract; or
(c) to institute an action for damages.

Before exercising the choice, the seller has to give not less than 30 days' notice to the purchaser, which notice should be in writing and hand-delivered or sent by registered post. The notice *shall* contain, in terms of 19(2) (c) of the Act, *"an indication of the steps the seller intends to take if the alleged breach of contract is not rectified"*.

In an action by Engelbrecht against Merry Hill (Pty) Ltd, the latter had recorded, in its notice letter, that *"the Seller shall be entitled to claim immediate payment of the full balance of the purchase price … alternatively shall be entitled to cancel this contract."* Engelbrecht argued that the notice should not merely record what the seller is entitled to do (i.e. to regurgitate the three choices above), but should be specific as to what the seller *intends* to do if the breach is not rectified. The argument appears to have been based on the seemingly peremptory nature of the subsection. It was also based on the prior judgments of *Oakley v Bestconstructo (Pty) Ltd* 1983 (4) SA 312 (T) and *Miller v Hall* 1984 (1) SA 355 (D).

In *Engelbrecht*, the SCA accepted that the purpose of Chapter 2 of the Act, which includes Section 19, is to afford protection to a purchaser who pays by installments for the acquisition of land intended to be used mainly for residential purposes. According to the court, *"experience has shown this type of purchaser, generally, to be the vulnerable, uninformed small buyer of residential property who is no match for the large developer in a bargaining situation."*

The Court of Appeal held that the strict interpretation of subsection (2) (c), which requires the seller to make an election between the alternative remedies mentioned in (a)-(c) above, imposes an onerous obligation on the seller. The impact of this, according to the judgment, is that where the seller has postponed the election contractually, he gets deprived of the right of reservation. The earlier (formal) election in the notice would deprive the seller of a change of mind, if the purchaser were to fail to remedy the breach. In this regard, please also see *Walker v Minier et Cie (Pty) Ltd* 1979 (2) SA 474 (W).

The court found that the express wording of Section 19(2) (c) does not require an early election by the seller. The court found support in the ordinary language of the section. The dictionary meaning of the word *"indicate"* tended to suggest a notification of lesser exactitude, and the plural in *"steps"* to support the perception that the seller need not elect a single step.

It should be noted however that even before the SCA had pronounced on this issue in 2007 in the *Merry Hill* judgment, the WLD had, per Claasen J, made a similar decision in 2006 in *Van Niekerk v Favel* 2006 (4) SA 548 (W). The court held in that matter that the notice letter in *Van Niekerk* constituted a proper notice regardless of the fact that it had not indicated a particular step(s) that the Seller intended to take if the breach had not been purged. This judgment was overturned on appeal by the Supreme Court of Appeal in *Van Niekerk v Favel* [2007] SCA 124 (RSA). In doing so, the court reasoned that:

> *"The notice required in terms of s 19(1) is necessary only when the seller intends to enforce one or more of the remedies referred to in Sec 19, i.e. acceleration of the payment of any instalment, the enforcement of any penalty stipulation, termination of the contract, or payment of damages. If some other relief is sought, e.g. payment of the outstanding arrears or performance of what otherwise might be due under the contract, no notice in terms of s 19(1) is required."*

The Court held on appeal in *Van Niekerk* that the notice letter did not comply with the requirements of s 19. The relevant portion of the letter read as follows:

> *"U word ingevolge paragraaf 26 van die ooreenkoms dertig (30) dae geleentheid gegee vanaf ontvangs van hierdie kennisgewing om die versuime soos hierbo te herstel by gebreke waarvan kliënt sy keuse sal uitoefen wat hy regtens mag hê…"*

Clause 26 of the agreement in *Van Niekerk* had, *inter alia*, referred to a right to claim for *"enige verpligting wat op datum van beëindig agterstallig was..."*

The position therefore seems to be that Section 19(2) (c) will have been complied with if the seller, in its notice, indicates the steps he intends to take in the alternative and does not merely make an election between those alternative steps.

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Letters to the Editor

DEAR EDITOR
RE: RISK ALERT BULLETIN

As an advocate, I do not subscribe to the De Rebus within which comes your Risk Alert Bulletin.

But I do specialise in the field of professional negligence (usually acting for attorneys) and used regularly to receive Risk Alert.

For some reason, I don't anymore. This is a pity because I did make a contribution from time to time.

Do you think it is possible that you could put me on your distribution list and regularly let me have a copy of the Risk Alert Bulletin? I would greatly appreciate it.

Regards,
John Mullins SC

EDITOR'S NOTE

We will be providing Adv. Mullins with future copies.

We do not, *per se*, have a mailing list because the Bulletin is distributed in De Rebus, which is circulated to all practising attorneys. However, if practitioners require copies then they can access our website at www.aiif.co.za /riskalert, where there is an archive section containing past bulletins and the current one.

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