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)

May 2008 – No. 2/2008

In this edition

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General Manager's Column

RAF NEWS

The CEO, Jacob Modise, has once again warned that the RAF's cash reserves are dangerously low and the Fund faces a shortfall of R5bn this year. Modise has said, "the cash crunch has reached a level where it is difficult to conduct the business of the (Fund)".

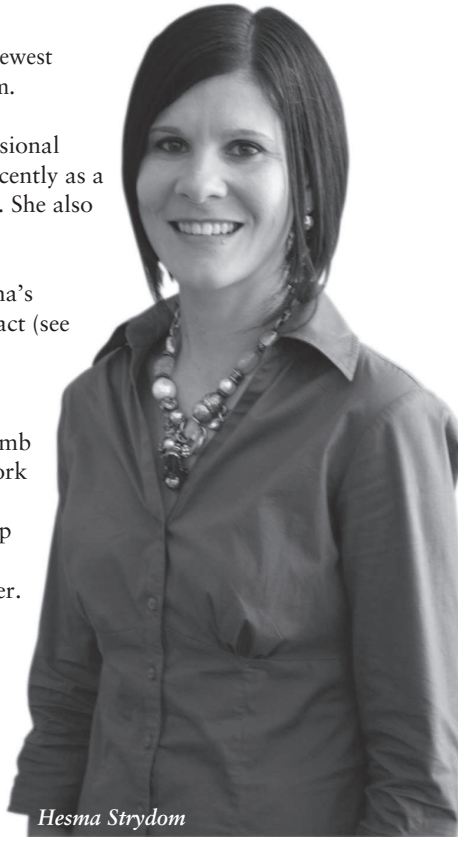
The Nonkwali judgement (discussed below) could also have an impact on the dwindling resources of the Fund. Here, the SCA ruled that a claimant could amend her claim to include a head injury, even though the amendment was almost four years after the collision. There is a concern that this judgment may open the floodgates for claimants who discover injuries linked to accidents which occurred many years ago.

NEW STAFF MEMBER

I am very happy to introduce and welcome the newest member of our professional team, Hesma Strydom.

Hesma is an admitted attorney, notary and conveyancer. She previously practised as a professional assistant at Strydom Botha Attorneys and more recently as a conveyancer at Fourie, Stockenström & Fismer Inc. She also has an LL. M in Estate Planning.

The scheme has experienced a sharp increase in conveyancing claims in the past three years and Hesma's expertise in this field has already made a positive impact (see "Transfer Duty or VAT" below)



Hesma Strydom

OTHER

The tongue in cheek article on page 3, "Boot These Dumb Office Practices" (Texas Lawyer) shows how we can work smarter, not necessarily harder.

My team and I recently attended a two day workshop on "Business Writing" which emphasised the benefits of writing in plain English for both the writer and the reader. This is something we, as lawyers, resist to a certain extent, but it could make all our lives much easier.

In the words of Samuel Coleridge:

If men would only say what they have to say in plain words how much more eloquent they would be.

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Policy Queries

In my capacity as conveyancer, I collected deposits from the purchasers of certain sectional title units. My client, the Developer instructed me to pay over the deposits as soon as I had received them from the purchasers as he needed the capital to complete the units.

I instructed my Conveyancing Secretary to telephone the purchasers to obtain their permission to release the deposits prior to transfer. She failed to do so and merely paid over the deposits as and when she received them.

The Developer has gone into liquidation and I now have claims from all the purchasers. Please confirm that these claims will all be treated as arising out of one event and that I will only have to pay one deductible, as they all arose from the act of the Developer in instructing me to pay over the deposits.

Unfortunately, your query about the deductible is not so straightforward. Each case must be looked at with reference to all facts and circumstances.

In terms of clause 3.2 of the Scheme Policy, "All claims arising out of one act or omission … shall be deemed to arise out of one event or occurrence". This refers to a negligent act or omission of the insured attorney which gives rise to the claim/claims and has nothing to do with a third party's actions.

Your act or omission as the insured attorney/conveyancer would need to be analysed carefully in order to establish whether or not the claims arise out of one event or occurrence

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Boot These Five Dumb Office Practices – Part 1

Most firms are striding proudly into the 21st century, investing in technology, finding more efficient ways to work and touting these advances to clients. Yet behind the scenes, large remnants of yesterday's procedures remain, like house guests who have overstayed their welcome. They get in the way, cramp our styles and eat up much of our saved time and money.

Here are just a few of the biggest wasters of law firm time and resources.

E-mail: a tree's worst nightmare
In one particular case, I have more than 700 e-mails waiting to be entered into the electronic database. After entering them, I must print them all and place them in correspondence folders. This is in addition to more than 3,000 e-mails I've already processed over the case's three-year life.

I'm not likely to ever finish archiving that mountain of e-mail. As a legal secretary, I have briefs to file, dockets to maintain, travel to arrange, discovery to draft and telephone calls to answer. Fortunately, no one is likely to notice my backlog, since no one actually reads e-mails in the file or in the database. When lawyers want to see e-mails, they do the obvious: read them in Outlook.

While a court might hold that e-mail correspondence is equal to paper or fax in every legal sense, it does not follow that e-mails must be filed in the same way. They are too brief, repetitive, convoluted and numerous for traditional methods of archiving.

Filling drawers full of folders with reams of printed e-mails is a stunning waste of time, trees, money and space. It's time legal secretaries, paralegals and, yes, even lawyers started using the built-in archiving function that comes with e-mail software.

Correspondence déjà vu.
I receive a letter by fax, enter it into the database and file a paper copy. Three days later, I receive by mail what appears to be a second copy of the same letter. But a good legal secretary never assumes two documents are identical just because they appear so at first glance. It takes a careful comparison to be sure.

If only I could have back all the time I've spent analyzing incoming mail to make sure it is, indeed, something we've already received by e-mail, fax or both. And this doesn't even count the time I spend sending my own lawyers' correspondence by two or three different means.

There was a time when new communication technologies remained untested and a little suspect, but that time is long

past. If anything, e-mails and faxes are more reliable than physical mail.

Some attorneys are wont to claim non receipt of anything that wasn't sent at least two different ways, but they are a small minority. For everyone else, multiple sending is a waste of time and resources.

Courts can be just as susceptible to this problem as lawyers. One year into its mandatory electronic filing and service program, the U.S. District Court for the Southern District of Texas still sends orders by fax as well as e-mail. Why?

E-file, then refile

Opposing counsel e-files a lengthy brief and appendix with the court. Instantly, my lawyer and I receive an e-mail containing a link to the filed document, and I print the file-marked copy. But three days later, a 6 inch stack of paper arrives in the mail from opposing counsel – the same brief and appendix, not file-marked. It's trash I can't throw away. Somehow, I have to shoehorn it into my bulging file cabinets.

I know of no court that offers e-filing and still requires service of paper copies on e-filing registrants. Lawyers who persist in this practice should have their computers confiscated.

Part 2 will be published in the August issue.

www.ghostdigest.co.za
(Taken from 'Legal Technology')

Useful Tips for MVA Practitioners

A) *Nonkwali v Road Accident Fund* (105/2007) [2008] ZASCA 3 (6 March 2008)

FACTS

The appellant (Nonkwali) was involved in an accident on **16 October 2001** in which she sustained serious bodily injuries. She instituted action in terms of S17 (1) of the Act against the Fund.

On **10 June 2005 (almost four years later)**, Nonkwali amended her pleadings to include a head injury which had not been included in the claim form. It was argued that this injury was only discovered after lodging the claim.

The Fund raised a Special Plea that:

1) the claim form did not comply with S24 for failure to specify such injury *alternatively*
2) such claim had prescribed as it was not instituted within 3 years of the accident.

The Trial court upheld the Special Plea on both grounds.

ON APPEAL

Nonkwali argued that the additional claim did not introduce a new cause of action, but was merely a new item of damages. It was, therefore, not necessary to amend her claim form to avoid prescription.

The Fund argued that the appellant had not complied with S24 of the Act as she was obliged to submit a claim form which included a medical report in respect of the head injury.

Maya JA dismissed the Fund's argument by stating that it was not necessary to amend the claim form to include the additional injury. The amending of the summons was sufficient.

Further, that Nonkwela's head injury claim did not "constitute a new cause of action, but was merely an additional item to her original cause of action."

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Conveyancing

TRANSFER DUTY OR VAT?

It is important during negotiations about and the drafting of an Agreement of Sale that practitioners consider the **VAT status of the Seller** to determine if VAT or transfer duty is payable on a transaction.

The VAT status of the Purchaser is not important, but only indicates if the purchaser will be able to claim the transfer duty that he has paid on a transaction back from SARS.

Very often practitioners neglect to take into account the VAT status of the Seller where the purchaser is not a registered VAT vendor. They do not make provision for payment of 14% VAT and the Seller (who is a VAT vendor) has to pay the VAT out of the proceeds of the purchase price.

Always use the **Vat status of the Seller** as your starting point to determine if VAT or transfer duty is payable on a transaction.

SALE OF A GOING CONCERN

The sale of a going concern is governed by the provisions of section 11(1) (e) of the Value Added Tax Act, 89 of 1991.

The following must be included in the Offer to Purchase in order to

qualify for the exemption:

1. The property is sold as a *going concern*, being the *rental of the premises for business purposes* (give here a short description of the type of activity that is conducted on the property);
2. The business will be an income earning activity on date of registration of transfer;
3. The seller is a registered VAT vendor with VAT registration number: (*state the VAT number*);
4. The purchaser is a registered VAT vendor with VAT registration number: (*state the VAT number*).

The following should be added as a separate paragraph:

In the event that SARS finds that the transaction is not the sale of a going concern and is not a zero rated transaction, the purchaser will be liable for the payment of VAT levied on the purchase price.

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EASY REFERENCE TABLE

SELLER	LIABILITY FOR VAT/ TRANSFER DUTY	PURCHASER	LIABILITY FOR VAT/ TRANSFER DUTY
1. Seller is a registered VAT vendor	Seller is liable for payment of 14% VAT	1. Purchaser is a registered VAT vendor	Purchaser is not liable for payment of any tax. VAT can be claimed from SARS
2. Seller is a registered VAT vendor	Seller is not liable for payment of VAT	2. Purchaser is not a registered VAT vendor	Purchaser is liable for payment of 14% VAT
3. Seller is not a registered VAT vendor	Seller is not liable for payment of any tax	3. Purchaser is a registered VAT vendor	Purchaser is liable for payment of transfer duty and can claim it from SARS as input tax
4. Seller is not a registered VAT vendor	Seller is not liable for payment of any tax	4. Purchaser is not a registered VAT vendor	Purchaser is liable for payment of transfer duty

Letters to the Editor

AGE OF MAJORITY RE: RISK ALERT BULLETIN 4/2007

A "Practice Note" dealing with the New Age of Majority appeared in the January/ February De Rebus (2008(Jan/Feb) DR 48. This article contained several references to our article in Bulletin 4/ 2007.

It was not clear to us whether the article disagreed with the stance we had taken and we asked Mr. Leon Dicker (the author) to please clarify. This is what he said:

1. I agree that the Children's Act 38 of 2005 does not operate retrospectively. However, the view that a claimant, who was 19 or 20 years old on 1 July 2007, should be considered to be 1 or 2 years into majority and only have 1 or 2 years of the prescriptive period remaining is in my view incorrect.
2. In terms of s 23(2) of the Road Accident Fund Act 56 of 1996 (the RAF Act), prescription does not run against a minor.
3. Any claimant under the age of 21, who turned 18 on or before 1 July 2007, became a major on 1 July 2007. Before that date, all such claimants were still minors, and prescription could not, according to the plain wording of s 23(2) of the RAF Act have started running in respect of their claims.
4. However, all such claimants became majors on 1 July 2007 and therefore, prescription started running on that date. Their claims would, therefore, become prescribed at midnight on the night of 30 June 2010.

EDITOR'S NOTE

We thank Mr. Dicker for his comments. The above accords with the cautious approach we have adopted (see Bulletin 4/2007). We have always, however, maintained that the act was not retrospective.

Indeed, our Prescription Alert system was extensively updated to change the Prescription date of claimants who were between 18, 19 or 20 years old as at 1 July 2001.

We trust that this clarifies the position.

The change in the age of majority has stimulated much debate. Please also refer to the 'Letters to the Editor' column in the May *De Rebus* where advocate Klopper sets out his views.

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