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

The long anticipated Road Accident Fund Amendment Act No. 19 of 2005 came into effect on 1 August 2008, catching many of us by surprise. The now notorious amendment introduces far-reaching changes to the Road Accident Fund Act of 1996.

Some of the more controversial amendments are, *inter alia*:

- the exclusion of claims for general damages save for "serious injuries"
- the capping of loss of income/support at **R160 000-00** per year
- the exclusion of damages arising from emotional shock which may be experienced by secondary victims
- the abolition of the common law right to claim damages (not recoverable from the Fund) from the driver or owner of the vehicle which caused the accident.
- the tariff to be applied for future medical expenses

On 8 August 2008, the RAF was interdicted from implementing its proposed direct payment system (DPS) to claimants. The application was launched by The Law Society of South Africa (LSSA), SAAPIL and another.

There will, no doubt, also be applications to challenge the validity of the Act and the Regulations. We will report further and we welcome any comments from practitioners.

NEW TEAM MEMBERS

Nomzamo Mati

I studied for the four year LL.B at the University of the Witwatersrand and graduated in March 2006.I practised as a candidate attorney at the University of the Witwatersrand Law Clinic. My main interests are litigation, labour law, evictions, family law and immigration law.

I am happy to join a team that plays such a critical role in instilling confidence in the profession.

Fatima Ebrahim

I studied at the University of Johannesburg where I graduated with an LL.B Degree in 2005. I served my articles at Whalley Van Der Lith Prinsloo Incorporated, where I was mainly involved in litigation.

I have a new found fondness for Insurance Law and have always had an interest in Commercial and Matrimonial Law. I enjoy reading and spending time with family and friends. I am very happy to be part of the AIIF team.

Policy Queries – Part 2

Please refer to our August 2008 Bulletin for Part 1

Claims-made policy

It is standard insurance practice in the PI market, to provide cover on a claims-made basis. It is generally better for both insurer and insured.

There are of course two possible disadvantages, which you have isolated and raised in your memorandum

1. Changes to the policy, for example the exclusion of specific types of work.

This problem can be overcome if:

1.1. The practitioner has bought top-up cover, which operates on a claims-made basis (as is the norm). The top-up insurance would "step down" to cover the work which has become uninsured.

1.2. The practitioner does not have top-up cover, but immediately notifies the insurer of circumstances out of which a claim may arise. In this case, any claim arising in a subsequent year will be deemed to have been made in the year that the insurer was notified. (See clause 6.1.3 of the scheme policy)

2. Retired practitioners

Fortunately, the primary PI policy differs from most other claims-made policies, in that it makes provision for indemnity where a retired practitioner receives notification of a claim arising out of an incident that occurred when he/she was still practising. (See the definition of 'the insured' clause 2.5.2 of the scheme policy).

Those practitioners who buy top-up cover should obtain "run-off cover" at the same time, to protect them in respect of any portion not covered by the primary layer.

As you correctly point out, there are very important life-lines for practitioners, in the form of "Top-up" and "Run-off' cover.

But, I would like to add yet another two, being cover for "misappropriation of trust money and fidelity guarantee cover." These are very often overlooked, sometimes because practitioners mistakenly believe that the AFF automatically provides such cover for them.

ANN BERTELSMANN,
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Important Notice

Banks – Certificates of Insurance

The AIIF constantly receives a stream of requests from practitioners, because banks insist on being given written proof of the level of PI cover carried, before the practitioners are allowed to provide them with professional services – principally in conveyancing matters. The plethora of requests for such certificates has become an administrative nightmare for the AIIF.

Mr. Andrew Stansfield, the Financial Director of the Attorneys Fidelity Fund has written to the major banks, in order to try and address the problem. He has suggested to them, that a solution to this problem is indicated by the fact that the primary level of cover provided under the AIIF's PI scheme is the same for all law firms countrywide, depending on the number of principals in each firm.

He has advised the banks that in order to solve the problem, the AIIF had decided to expand the information available on its website to the extent necessary for the banks to obtain the assurance they require.

He points out that any bank branch can easily establish from a firm on its panel the number of its principals at the time of the issue of instructions, and thereafter access the AIIF website at www.aiif.co.za to confirm the primary level of cover for that particular firm.

Both the main policy of insurance and the relevant schedules are available on the site for scrutiny by the practitioner her/himself as well as the banks and other interested clients.

NB: Most practitioners, who do work for the banks, will have had to buy top-up cover and will still need to obtain proof of that cover from their broker.

TRUST FUNDS – WARNING FROM THE ATTORNEYS FIDELITY FUND

Practitioners are urged to be vigilant regarding activity on their trust accounts. A fraud syndicate is randomly targeting attorneys by depositing stolen cheques into their trust accounts and claiming that such deposits were erroneous. They are holding themselves out to be representatives of the Attorneys Fidelity Fund and demanding attorneys to refund such deposits. Practitioners finding themselves in such a position are requested to contact the Attorneys Fidelity Fund on 021 424 5351.

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Useful Tips for MVA Practitioners

Section 23(2) of the Road Accident Fund Act 56 of 1996- Prescription of Claim

Road Accident Fund v Mdeyide (Minister of Transport Intervening) 2008(1) SA 535 (CC)

Facts

M (who is blind, illiterate and not gainfully employed) was involved in an accident on **8 March 1999** and was rendered unconscious.

M, accompanied by his wife approached an attorney on **17 September 1999** to obtain advice regarding the accident. His claim for compensation from the Road Accident Fund was lodged on **11 March 2002** more than three years after the date of the collision.

In terms of S23 (1) of the Road Accident Fund Act, the right to claim compensation prescribes three years after the date upon which the cause of action arose. Action was instituted against the RAF on **27 February 2004**, but they raised a Special Plea to the effect that the claim had prescribed in terms of S23 (1).

M argued that prescription only commenced running when he sought legal advice on **17 September 1999** which is in terms of S12 (3) of the Prescription Act . Also that, given his personal circumstances, he had no concept of time and space and was entitled to lodge after the three years.

Court *a quo*

The trial court dismissed the RAF's Special Plea on the basis that S23 (1) of the RAF Act was unconstitutional in that it limited the right of access to the courts by claimants.

Notshe AJ held that the above action provided a complete bar irrespective of the unusual circumstances of the case and referred the order to the Constitutional Court for confirmation.

On Appeal

The Fund argued that M did not have to rely on the constitutionality of S23 (1) of the RAF Act, because he could claim relief in terms of section 13 (1) (a) of the Prescription Act. The latter section protects persons under disability from the consequences of the running of prescription by delaying its completion until at least a year had lapsed after the disability in question ceased to exist. They also argued that "the term (insane person) in section 13 (1) (a) of the Prescription Act is not restricted to someone who needs to be detained as a patient in terms of mental health legislation, but includes a person of unsound mind who is incapable of managing his own affairs and who has no capacity to institute action (*RAF v Smith NO* 1999 (1) SA 92 (SCA).

According to Navsa AJ, the main problem in the case was the lack of proper enquiry into the plaintiff's capacity by both his attorney and the trial court. From the time that the attorney received M's medical records (which indicated that he had a head injury), he should have been more concerned about M's mental ability and capacity to litigate. If M had been of unsound mind he would, without the assistance of a curator, have lacked *locus standi* and the entire proceedings would be rendered void. The result might enable M to seek refuge in section 13(1) (a) of the Prescription Act which provides that prescription does not run against a person of unsound mind.

Judgment

The CC set aside the trial court's order regarding the validity of Section 23(1) of the RAF Act.

The matter was remitted to the High Court for an inquiry into M's capacity.

This case emphasis the need to carefully scrutinise the medical records and obtain expert opinions (in the form of medical legal reports).

Even if the MMF 1 form completed by the doctor who treated the client at the time of the accident indicates that no future medical treatment is expected, you need a medical legal report in almost all circumstances. Failing to obtain a report, leaves one open to the risk of under settlement in a matter. If your client or your firm cannot carry the cost of this disbursement

- ***arrange with the specialist for payment of the account on settlement of the claim by the RAF***
- ***attempt to persuade the RAF to send the client for a medical legal examination at their expense. (This is not always the best options as the report may be structured in such a way as to suit the defendant's case).***
- ***As a last resort send the client to another firm who is able to carry those costs.***

SHARIFA ALLY, EDITOR
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Conveyancing

UNDERTAKINGS TO BRIDGING COMPANIES

We have, in the past, reported that the scheme has experienced a sharp increase in conveyancing claims during the past few years. A large number of these claims arise out of undertakings by conveyancers to bridging finance companies.

In many instances the conveyancers sign the standard undertaking provided by the bridging finance company without having regard for the implications.

In order to protect your firm against such a claim we recommend the following:

1. Amend the undertaking to safeguard your firm should the transaction not proceed for some reason or another.
2. Never sign an undertaking that does

not give you the right to withdraw from the transaction when it is either cancelled by the parties or when the finance is withdrawn.

3. Do not confirm that the transaction is "unconditional and there is no outstanding requirement or impediment to the registration of transfer" until you have done a thorough investigation. This includes scrutinising the conditions of the title deed, as well as doing a preliminary finance check to ensure that adequate finance is available on date of registration. You should disclose to the affected parties any condition which may impact on the registration of the transaction.
4. Notify the bridging finance company if the transaction is delayed (taking more than the standard 90 days) or if the transaction is cancelled by one of the parties.
5. When providing multiple undertakings on one transaction, ensure that there will be sufficient funds available on registration to cover the balance due to the bridging company.
6. Ensure that your client's tax affairs are in order before you sign the undertaking, as SARS will require you to first settle any money due to them before you can honour the undertaking. This may leave you with a deficit in your account.
7. In most firms the conveyancing secretary is the person dealing with the matter from inception to registration. When the undertaking is brought to you for signature, make sure that the application for bridging finance is on file and that all necessary documents are signed and in your possession. Ensure that the preliminary finance check provides for sufficient funds to be available on registration before you sign the undertaking.
8. Always have a designated director/s in your firm to sign the undertaking. Many conveyancers only find out about the undertaking on registration when their conveyancing secretary informs them that there is a shortfall on the transaction. In many cases this is the first time that the conveyancer finds out that the firm gave an undertaking.
9. If a person is authorised to apply for finance on behalf of a Company or CC, ensure that you are in possession of the resolution. Compare the resolution to CIPRO in order to verify that the directors/members, who signed the resolution, are indeed the directors/members.

Bridging finance companies act on the strength of the undertaking signed by the conveyancer. Great care should be taken by conveyancers to ensure that that they will be able to honour the undertaking provided.

For a detailed discussion of undertakings by attorneys, please refer to *Ridon v Van der Spuy & Partners (Weskaap) Inc.* 2002 (2) SA 121 (C).

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Letters to the Editor

RE: RAF AMENDMENT ACT

The following procedures with regard to lodging of claims are suggested by Mr. Ronald Bobroff in the SAAPIL newsletter dated 20 August 2008

1. This protocol is given to members in good faith and subject to a disclaimer concerning any possible damages or loss suffered by members or their clients. Members should obviously read the Amendment Act and Regulations for themselves and where uncertainty prevails to consult with an appropriate expert colleague or counsel.
2. A claim should be lodged with the Fund both on the old basis (i.e. unlimited), and on the new.
3. The covering letter to the Fund should state the following:
   a. A claim is being lodged in accordance with the Amendment Act and, in the alternative, disregarding the Amendment Act;
   b. The latter is on the basis that the attorney in question is aware that the constitutionality of the Amendment Act is being challenged and that if the challenge is successful, it might be successful to a greater or lesser extent;
   c. Consequently, the Fund is invited to effect payment in accordance with the Amendment Act, without prejudice to the claim for the balance, which will be pursued if and when the constitutional challenge is successful.

A letter is to be addressed to the wrongdoer in the following terms:

1. Giving detail, and suggesting that the collision, and the injuries sustained by the attorney's client, was/were caused by the negligence of the wrongdoer;
2. Explaining that as the law stands, pursuant to the Amendment Act, the wrongdoer is excused from potential liability but that the constitutionality of the Amendment Act is being challenged;
3. If the constitutional challenge is successful only in respect of taking away of the common law right, then the wrongdoer will be exposed to liability to the attorney's client in respect of the difference between the client's actual damage and to that which he is entitled under the Amendment Act;
4. If, on the other hand, the challenge is more broadly successful, then that might result in the liability of the Road Accident Fund being increased and the wrongdoer being, to that extent (which might be the entire extent), excused from liability;
5. The wrongdoer is consequently requested to draw these facts to the attention of his/ her/ its public liability insurer and to furnish detail of that insurance (excluding claim number) to the attorney.

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