Bulletin

Risk Alert

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General Manager's Column

This is our first issue for 2009, which I am writing in early January.

With the economy the way it has been of late, a prosperous year will be difficult for most of us to achieve, so I will settle for wishing all our readers a year of contentment and peace.

I came across a quotation offering sound advice, which I have resolved to try to remember, when the year starts getting really hectic again.

"There are two things to aim at in life; first to get what you want, and after that to enjoy it. Only the wisest of mankind achieve the second." – Logan Pearsall Smith, essayist (1865-1946)

RAF NEWS

Adjustment of statutory limit in respect of claims for loss of income and loss of support

Section 17(4)(c) provides as follows:

Where a claim for compensation under subsection (1) includes a claim for loss of income...the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding-
(i) R160 000-00 per year in the case of a claim for loss of income

Section 17(4A)(a) further provides that:

The Fund shall, by notice in the Gazette, adjust the amounts referred to in subsection (4)(c) quarterly, in order to counter the effect of inflation."

On 12 December 2008, an adjustment of the statutory limit in respect of claims for loss of income and loss of support was published in GG 31680 (as envisaged in section 17(4A)(a).

In terms of the amendment, the amounts referred to in subsection 17(4)(c) are adjusted to R166 667-00 (one hundred and sixty six thousand six hundred and sixty seven rand) from **1 October 2008.**

NOTES ON THE RAF AMENDMENT ACT (RAFAA)

In our November Bulletin (4/2008), we listed some of the more controversial amendments.

We will deal with these issues, and the other important aspects of the Act, in more detail here and in future Bulletins (*see Useful Tips for MVA Practitioners*).

The LSSA has briefed counsel in relation to a challenge to the RAFAA and the new regulations. Practitioners are once again warned to exercise caution when accepting claims in terms of the new act until the Constitutional Court has judged the validity of the RAFAA (*see Letters to the editor – Bulletin 4/2008*).

Policy Queries

I don't want to formally report a potential claim against me, because I don't want to pay your deductible, unless a formal claim has been brought against me. I also don't want to have this reported to the Law Society or have it count against me as far as the insurance is concerned.

Please be assured that all information that you provide to us is strictly confidential. We do not pass any such information on to any of the Law Societies, and your notification of a potential claim will not affect your standing with the insurer. In fact, in terms of the conditions set out in clause 6.1 of the Scheme Policy, an insured is obliged to notify the insurer in writing, immediately there is any suggestion of a possible claim.

Also, you are only required to pay your deductible if and when the claim is paid.

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Useful Tips for MVA Practitioners

Why was it necessary to amend the RAF Legislation?

According to the RAF website:

1. To ensure the future sustainability of the RAF as
   * Its income, mainly from the fuel levy, does not keep pace with the value of the claims lodged with the RAF
   * The current deficit is over R20 billion
2. The limitations under the amended RAF Act are expected to improve the RAF's financial position to ensure its ability to pay claims in the future.

What is the position regarding merits?

Although the Satchwell Commission recommended a system of faultless liability, this has not materialised in the RAFAA.

As in the 1996 Act the claimant still bears the onus of proving that the injury or death was caused by the negligence or wrongful act of the driver or owner of the insured motor vehicle.

Prescription in respect of identified and unidentified claims

Unidentified claims must still be lodged **within two years** (Regulation 2 (1)(a) and summons served **within five years** (Regulation 2(1)(c) of the cause of action arising.

There are no exceptions with regard to any legal disability and prescription will still run in these circumstances. However, the requirements of physical contact and the 14-day period have been repealed.

Limited claims

The R25 000-00 limit (S 18 of the RAF Act 56 of 1996) in respect of passengers has been abolished. This is one of the improvements in the Act especially in respect of passengers in taxis who sustain serious accidents.

Claims previously excluded from liability

The following claims are now allowed:

– Passengers for reward on motor cycles

– In single vehicle accidents where the driver and claimants are members of the same household, or the driver is responsible for the maintenance of the claimant e.g. a child who is involved in an accident, will now have a claim where his father was the driver.

(With acknowledgement to Nicolette Koch, Adams and Adams, RAF Update 2008)

Payment in full and final settlement

What do the words "in full and final settlement" mean when they accompany a payment?

In their ordinary sense they seem to indicate an intention to settle but the debtor making a conditional payment may have one or two purposes in mind, either (1) to admit liability for a portion of the debt and intend his payment to extinguish the balance; or (2) to deny liability for the entire debt and make an offer of compromise in order to prevent or curtail legislation.

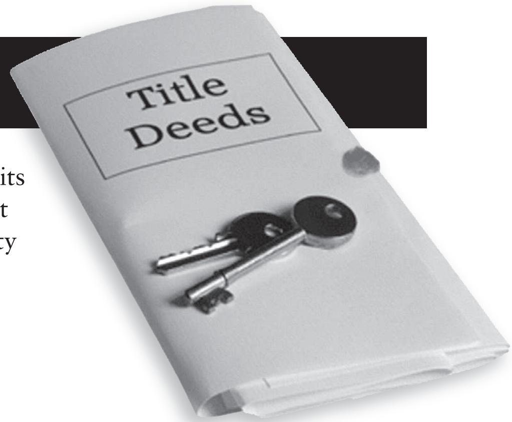
The question to be asked is: did the debtor intend to make an offer of compromise, or did he intend to effect payment of an admitted liability? The answer is often difficult to determine. In 1920 our Appellate Division recognised this and concluded that, an admission of liability in the amount offered is not in itself a conclusive indication that payment of an admitted liability was intended. If the court finds that payment of an admitted debt was intended, the accompanying words "in settlement" or "in full settlement" are regarded as annexing an unlawful condition and the payment may be found to be "unconditional."

If the creditor accepts the payment he will in the situation referred to in (1) above not be precluded from recovering the balance since no condition can be attached to payment of an admitted liability; but in the situation referred to in (2) above the creditor will be precluded from suing for the balance. Only if he rejects the offer and returns the payment may he sue for the full amount.

From the debtor's point of view, however, either kind of offer may protect him against liability for subsequent costs should the creditor in any litigation fail to establish a liability greater than the amount offered.

(Law News, Third quarter 2008, Routledge Modise In association with Eversheds)

Conveyancing



A) Customary marriages and ownership of immovable property

***Gumede v President of the Republic of South Africa* (2008) ZACC 23**

FACTS:
G was married by customary law in 1968, and this was the only marriage to which her husband was a party. The marriage broke down and her husband instituted divorce proceedings in January 2003. The parties owned two properties, the contents of which were valued at R40 000-00.

G did not work during the subsistence of the marriage, but maintained the household as well as the parties' four children.

ISSUES:
In terms of the Recognition of Customary marriages Act of 1998 (the Recognition Act), a customary marriage concluded after the commencement date of the Act (after 15 November 2000) is automatically in community of property. As G's marriage was concluded before the Act it was governed by customary law, which held that the husband is the head of the family and the owner of all family property. G was therefore not entitled to any assets upon dissolution of the marriage. The Recognition Act does, however, allow the court upon dissolution of a customary marriage, to exercise its powers in terms of the Divorce Act i.e. to order the transfer of property from one spouse to another

JUDGEMENT:
Moseneke DCJ examined the Recognition Act, which has the following effect:

1. Marriages concluded before the Act will continue to be governed by customary law
2. Those concluded after the Act will be deemed to be in community of property except where the parties agree otherwise.

In terms of 1. the husband is the head of the household and therefore has exclusive control over all family property. This was clearly discriminatory on the basis of gender and only women in customary marriages were subject to these unequal proprietary consequences.

HELD:
Moseneke DCJ held that the following provisions are inconsistent with the constitution and invalid:

1. Section 7(1) of the Recognition Act, in so far as it provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act, was governed by Customary Law
2. Section 7(2) of the Recognition Act, in so far as it distinguishes between a marriage entered into before and after the commencement of the Act
3. Section 20 of the Kwazulu Act on the code of Zulu Law because it provided that during the course of a customary union the family head was the owner of and has control over all property in the family home
4. Section 20 of the Natal Code of Zulu law because it provided that the family head was the owner of and has control over all family property in the family home
5. Section 22 of the Natal Code of Zulu law because it provided that the inmates of the kraal were, in respect of all family matters, under the control of and owed obedience to the family head

COMMENT
As all customary marriages entered into before the Act are deemed to

be in community of property, the following must be remembered when immovable property is transferred:

- **the written consent of the other spouse must be obtained**
- **the description of the parties to the deeds and documents must disclose that the parties are married in community of property**
- **if a party alleges that they have a lobolo-marriage, proof in the form of a registration certificate from home affairs must be obtained, *but practitioners must be wary of describing a party as being unmarried in the absence of a registration certificate, as section 4 of the Recognition Act clearly provides that the non-registration of the marriage does not affect the validity of the marriage.***

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(Gumede-a note, 11 December 2008, Ghostdigest.co.za)

b) The Subdivision of Agricultural Land Act 70 of 1970

The drafting of agreements relating to the sale of or subdivision of agricultural land still poses problems for some practitioners. One of the reasons for this is that clients often request attorneys to draft an agreement prior to obtaining consent from the Minister of Agriculture.

Geue and Another v Van der Lith and Another 2004 (3) SA 333 (SCA) is clear on the stance that the Court adopts. Here, it was found that if agricultural land is sold without the consent of the Minister being obtained prior to the contract being entered into, the agreement is *ab initio* void.

In terms of Section 3(e) i of the Subdivision of Agricultural Land Act 70 of 1970 (the "Act") "no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act 27 of 1956...unless the Minister has consented in writing".

The case of *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* (unreported) [2007] SCA 133 (RSA) caused quite a stir in the legal-, town planning- and surveying fraternities. The issue was the validity of an agreement of sale concluded in 2004 between Wary Holdings and Stalwo and whether the property sold at the time constituted "agricultural land" as described in the Act.

The dispute revolved around the meaning and applicability of a proviso to the definition of ***"agricultural land"*** as defined in the Act which provided that "land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 209 of 1993, which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such".

The proviso was intended to preserve the status of "agricultural land".

Wary Holdings contended that the sale was invalid due to the absence of the Minister of Agriculture's consent.

Stalwo contended that the proviso was intended for a limited period only and the Minister of Agriculture's consent was therefore not required.

At the date of the conclusion of the agreement the land was situated within the jurisdiction of the Nelson Mandela Municipality (NMM). Prior to the establishment of the NMM, the land was situated in the jurisdiction of the Port Elizabeth Transitional Rural Council and immediately prior to that, the land was classified as "agricultural land".

The SCA held that the **proviso only applied during the existence of transitional councils** and did not apply to this sale. The land was not "agricultural land" and accordingly the provisions of section 3(a) and (e)i of the *Subdivision of Agricultural Land Act* did not apply. The agreement was therefore valid and enforceable.

In short, the implication of the SCA judgment was that "agricultural land" did not exist anymore, but it excluded any such land declared by the Minister after consultation with the executive committee concerned and by notice in the *Gazette* to be "agricultural land" for the purposes of this Act.

Wary Holdings appealed the decision of the SCA in the Constitutional Court.

The Constitutional Court found that the proviso envisaged that the *status quo* be maintained, in that the land's classification as "agricultural land" be maintained whatever "fluidity" in respect of the urbanisation of land the Act otherwise entailed. It is unlikely that the legislature would have intended to tie the life of the proviso to the life of the initial interim structures. It was concluded that the proviso was therefore still applicable.

The Constitutional Court reversed the order of the SCA and the sale was declared invalid.

The principles of the *Subdivision of Agricultural Land Act* are therefore still very much alive and applicable to the sale and subdivision of agricultural land and practitioners should take these principles into account when consulted to draft agreements of sale.

(Full judgment: Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (CCT 78/07) [2008] ZACC 12 is available on the Constitutional Court's website).

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