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 2009 – No. 4/2009

In this edition

Risk Manager's Column

Important Notice!

MANDATORY PRACTICE MANAGEMENT

The date for the commencement of ss 8 and 10 of the Judicial Matters Second Amendment Act 55 of 2003 has been fixed at 14 August 2009 (see GG32494).

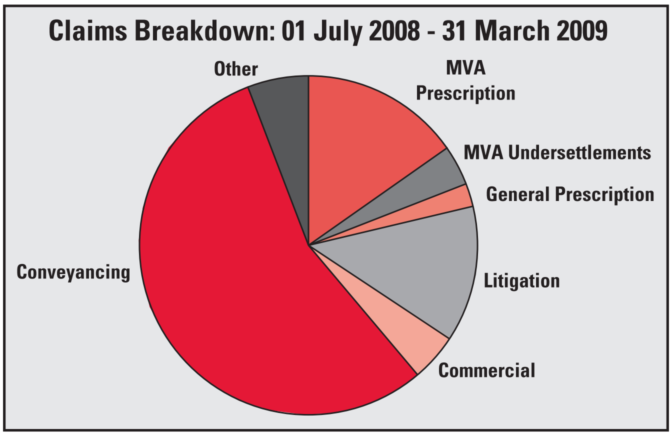
- It is now mandatory for all attorneys who are issued with a Fidelity Fund certificate for the first time after 14/08/09, to complete a practice management course to the satisfaction of the relevant statutory provincial law society.
- The 6-month long practice management course is offered after hours or on a distance basis by LEAD (the LSSA's Legal Education and Development division) but it may be done through any other accredited provider.
- The course must be completed by not later than 31 December of the year following that during which the first Fidelity Fund certificate was issued.
- EXTENSIONS may be applied for from the relevant statutory provincial law society.
- EXEMPTIONS may be requested from the LSSA Practice Development Committee by those attorneys who can show that they have sufficient experience or appropriate qualifications.

CLAIMS STATISTICS

As can be seen from the graph below, claims arising out of conveyancing transactions continue to occupy centre stage.

As at 14 October 2009, 625 claims have been recorded in the 2008 year, of which more than half are claims arising out of conveyancing instructions. Approximately two thirds of the conveyancing claims are bridging finance matters. Looking at it another way, roughly one third of all claims in the 2008 year are bridging finance matters.

Conveyancers please take heed! As I reported in the August bulletin (3/2009), the Board of the AIIF is looking seriously at implementing exclusions and/or penalty deductibles (excesses) in respect of certain matters, in particular those involving bridging finance.



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RAF News

Status of review application in the matter of LSSA and three others vs RAF and Minister of Transport

On Adams & Adams' website, Nicolette Koch gives the following update:

"On 30 September the Honourable Makgoga J granted permission to seven individuals to intervene and be joined as co-applicants in the application which was launched by the Law Society of South Africa and three others against the Road Accident Fund (RAF) and the Minister of Transport. They are applying for certain sections of the Road Accident Fund Amendment Act and its regulations to be declared unconstitutional and invalid.

The victims were all injured in road accidents after the Amendment Act and regulations came into effect on 1 August 2008. They stated in their founding affidavits that the amendments to the RAF legislation substantially reduced or totally denied them certain rights to compensation that they would have had, had they been injured before 1 August 2008.

The RAF served notices to abide by the decision of the court in all seven of the applications, but still sent counsel to address the court on the test to be applied in considering the applications of the intervening parties.

The court granted in favour of the seven intervening applicants. Makgoga J correctly noted that it was important for these seven applicants to intervene in the main application, as they will give a factual perspective to the court ultimately hearing the main application, on how the provisions of the Road Accident Fund Amendment Act and its regulations influence road accident victims in their daily lives.

In respect of the main application, the Minister of Transport and the RAF must deliver their answering affidavits by Monday 5 October 2009. The applicants will then have until 19 October 2009 to reply. Once all the affidavits have been filed, the applicants will be in a position to apply for a date for the hearing of the review application.

At this stage no indication can be given of when the main application will be heard by the North Gauteng High Court, but it seems that the application will probably only be heard late in 2009 or early in 2010."

Nicolette Koch has advised me that, as at the time I am writing this (14 October 2009) the respondents have not yet filed their answering affidavits that were due by 5 October.

Policy Queries

In the applications for a Fidelity Fund Certificate for the year ending 31 December 2010, there are 2 questions which did not appear previously:

1. *Does the practice purchase insurance cover to protect against the possibility of misappropriation of trust money or property?*

and if so... 2. *What is the extent of such cover?*

We would be pleased if you could advise us what the position is in respect of our insurance cover, insofar as same relates to the above 2 questions.

In clause 5.1.5, the Attorneys Insurance Indemnity Fund policy specifically excludes cover for legal liability "arising from theft by any principal, partner, director, candidate attorney, employee or 'in-house' consultant of the insured or of the insured's predecessors in practice of any money or other property referred to in Section 26 of the Act " (Attorneys Act 53 of 1979 (as amended)

The short answer is therefore "no". No such cover is provided in the primary layer policy. If you require such cover, you will need to buy it on the open market, through a reputable broker.

We are currently looking into possible risk management procedures to deal with the risk of misappropriation by staff, but in the interim, please ensure that you have systems and protocols in place to lessen the risks. We would value any comment or suggestions from practitioners in this regard.

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ELECTRICAL COMPLIANCE CERTIFICATES

Electrical installation regulations were published in 1994. They provided, *inter alia*, that every user or lessor of an electrical installation was required to have a valid certificate of compliance for that installation.

That the certificate was transferable was irreconcilable with the requirement that if there was a change of ownership of the premises in which the installation existed, the new user had to obtain a new certificate of compliance.

There was no prohibition on transfer until a new certificate was obtained.

The result was that there was no obligation on the seller of a property to procure a new compliance certificate prior to transfer. On the contrary, the regulations suggested that the onus was on the new owner/lessor to obtain a new certificate.

Most sale agreements dealt with this, not always satisfactorily, by including a provision to the effect that the seller had to provide the certificate.

New regulations were published on 6 March 2009. They provide that the user or lessor (who is not defined) may not allow a change of ownership if the relevant certificate of compliance is older than two years.

The Deeds Office will not police this obligation. It will ask for proof that a certificate exists.

Agreements of sale should still contain appropriate provisions regarding the certificate.

We extend our thanks to Selwyn Cohen of Eversheds for allowing us to publish the above note, which appeared in Eversheds' publication, Law News, for the third quarter of 2009.

UNDERTAKINGS TO BRIDGING FINANCE COMPANIES

The claims statistics show that the number claims based on undertakings given by attorneys practices has not declined. Instead, we still experience a steady influx of such claims.

In view of the above we have decided to publish some case studies in this and future bulletins, to alert attorneys and conveyancers to the types of undertakings and wording of bridging finance documents which should not to be signed.

Case Study 1

Firm X applied for bridging finance on behalf of a client (in this case the seller of an immovable property) from a bridging company that firm X does a lot of business with.

Below are some extracts from the bridging finance documents signed by the conveyancer:

> *The conveyancing attorneys (firm X) acknowledge that the monies received from Bridging Company Y are monies entrusted to it in trust as envisaged by Section 26 of the Attorneys Act 53 of 1979 and are hereby instructed and authorized by the seller to apply for financing of these funds from Bridging Company Y, which monies will be refunded by the seller and/or conveyancing attorney to Bridging Company Y, together with an interest fee... on transfer of the property.*

It is important to note that the conveyancer has "acknowledged" that liability arises in terms of entrustment as envisaged in Section 26 of Act 53 of 1979. It would seem that this statement may be incorrect and that such a deposit may well not an entrustment as envisaged by Section 26.

A further clause reads as follows:

Cancellation of sale of above property:

If the transaction is cancelled for any reason whatsoever, the amount due plus interest fees become payable and must be repaid by the client and/or conveyancing attorney within 30 days.

The undertaking by the conveyancer:

I, the conveyancing attorney, certify that all the above information and documentation in our possession... is true and correct. ***I bind myself and my firm to the above authorization and undertaking of the property seller. I undertake to pay to Bridging Company Y the loan amount plus interest fee... on registration or cancellation.***

The transaction was subsequently cancelled and the bridging company tried to recover from the seller, without any success.

Bridging company Y then sued firm X based on their signed undertaking. Given the wide wording of the undertaking, liability could not be disputed, even though the transaction did not proceed and this circumstance was beyond the conveyancer's control.

Conveyancers should under no circumstances accept liability in the event that a transaction is cancelled when signing an undertaking.

In most matters the bridging company provides you with a standard undertaking, but you should insist on drafting your own undertaking, protecting yourself and your firm.

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In the case of *Majolica Pottery (Venda) (Pty) Ltd v Barrow & Coetzee* 1999 1 SA 1166 (C) 1179, the court found that the unwarranted issuing of a summons which resulted in a default judgment, was defamatory.

Further, the case of *Heyns v Venter* 2003 3 All SA 176 (T) is authority for the proposition that malicious prosecution, actively pursuing criminal or civil proceedings which ultimately terminate, may also be considered defamatory.

As is evident from the aforementioned cases, the nature of the legal profession exposes attorneys to possible claims for defamation. Accordingly, we briefly discuss the law on defamation and the instances where an attorney may be immune from liability.

Defamation is the unlawful, publication of a defamatory statement, with *animus injuriandi*.

A statement is defamatory if it has the effect of injuring a plaintiff's reputation, by lowering the plaintiff in the estimation of the ordinary reader and right thinking members of society. An ordinary reader is considered to be a reasonable person of average intelligence and education.

Mohammed and Another v Jassiem 1996(1) SA 673 (A) at 703; *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) at 343] [*Mineworkers Investment Co (Pty) Ltd v Modibane 2002 (6) SA 512 (W)*;

Defamatory statements include statements which injure the reputation of the person concerned in his or her character, trade, business profession or office or which expose the person to enmity, ridicule or contempt (LAWSA).

DEFENCES

There are a number of defences that could be relied upon, which include jest, truth of the statement and in the public interest, fair comment and qualified privilege.

There are however, two defences which an attorney will usually rely on: fair comment and qualified privilege. These defences afford protection to attorneys, particularly in the course of litigation or civil proceedings, where full, frank disclosure may be required by deponents and witnesses in order for the issues to be ventilated properly.

FAIR COMMENT

The requirements for a successful defence as elucidated in *Johnson v Beckett* 1992 (1) SA 762 (A) 779 are that the statement must be a comment or an opinion and not a statement of fact, the statement must be fair, the factual basis must be true and clearly stated and the comment must have been of public interest.

Whether a statement amounts to a fair comment depends on whether or not the reasonable person would view it as a comment and not as an emphatic statement of fact. It must be clear that the statement is an opinion based on certain facts.

[*SA Associated Newspapers Ltd v Yutar* 1969 2 SA 442 (A)]

[*Yazbeck v Seymour 2001* (3) SA 695]

The comment need not be impartial or well balanced; "fair" in the context of this defence means comment which a reasonable person may have, even if prejudiced.

[*Hardaker v Phillips* 2005 (4) SA 515 (SCA)]

It will often be difficult for attorneys to rely on this defence, since it may not necessarily be in the public interest. Accordingly, the defence of qualified privilege is relied upon more frequently and is more likely to succeed if it complies with the requirements.

QUALIFIED PRIVILEGE

In order for attorneys to be protected by the defence of qualified privilege, the defamatory statement must be relevant to the issues and must not be made with malice or improper motive.

Was the statement relevant to the proceedings?

In the case of *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* and Others 2001 (2) SA 242 (SCA), the trustees of an insolvent estate alleged in an affidavit that the counsel representing the insolvent appellant had manipulated the attorneys in question to renege on certain undertakings made by the attorneys (to hand over certain documentation). The counsel therefore sued the trustees for the defamatory remarks. On appeal the court had to decide whether or not the remarks were protected by qualified privilege since they were made in the course of legal proceedings.

The court found that the test is essentially a value judgement where cognisance of the right to freedom of expression as well as the need for frank and full disclosures by witnesses and deponents should be taken into account on the one hand, and on the other hand, the dignity and reputation of the defamed person.

The court declined to set down rules to decide whether or not a defamatory statement was relevant to the proceedings. The court found that the test that needs to be applied is essentially a value judgment, giving due regard to all the issues which can be reasonably considered as having a bearing on the matter.

Although the court did not definitively find that an objective test must be applied in order to determine relevance, the court seemed to favour an objective approach, where the court found that reason and common sense should be applied in order to ascertain whether or not the statement was reasonably necessary for the advancement of the case.

The court found that the truth of the statements is irrelevant in ascertaining the relevance of the statement to the proceedings. The question that needs to be ascertained is whether or not the statements, at the time that they were made, were speculative.

Did the attorney act with malice or animus injuriandi?

When drawing up pleadings, attorneys need not believe in the truth of the evidence that will be furnished in support of the pleadings as long as he is not aware that the evidence is patently false. Mere recklessness is not sufficient to denounce the privilege.

[*Findlay v Knight* 1935 AD 58] [*Solomon v Van Leggelo* 1938 TPD 75]

During argument, attorneys/counsel are entitled to comment or make submissions regarding the inference to be drawn from the facts. A court will not find that there

Defamation continued...

was intention even where counsel felt that the manner in which he pitched his argument was not well founded.

[*Basner Appellant v Trigger* 1946 AD 83]

WHAT IS THE AWARD LIKELY TO BE?

There is no consistency in the awards granted for defamation since the courts consider a variety of factors such as the nature of the statement, the number of people who witnessed, heard or read it, the standing of the plaintiff in the community and the motive of the person making the defamatory statements.

[*Dikoko V Mokhatla* 2006 (6) SA 235 (CC)]

[*Mogale and Others v Seima* 2008 (5) SA 637 (SCA)]

In the recent case of *Mogale and Others v Seima* 2008 (5) SA 637 (SCA) the court awarded the amount of R12 000.00 finding that damages awards in defamation cases should not be punitive in nature. The amount awarded in Mogale is indicative that the courts do not award large sums for defamation and in some cases, the courts merely direct that an apology be made.

Notably, since defamatory statements published or made during legal proceedings have a limited audience, the courts have not awarded large amounts for defamatory statements made during the course of legal proceedings.

CAUTIONARY GUIDELINES

Since the aforementioned defences are limited, it would be prudent for attorneys to take heed of the following cautionary rules, in order to avoid making defamatory statements:

(a) Do not speculate about the motive of the parties to an action and/ or the attorneys and counsel;

(b) Avoid commenting on conduct of third parties or parties to proceedings particularly where there is an implication of improper or unprofessional conduct;

(c) Attorneys should avoid speculating where there is no evidence to support the allegations. Do not make statements couched as a fact where there is no evidence pertaining thereto [*Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA)] ;

(d) Attempt to obtain your client's full version prior to drawing up pleadings [*Findlay v Knight* 1935 AD 58];

(e) Where possible, put forward the version of your client, rather than identifying with the version or submitting a view based on the version. Avoid testifying under oath as to the version of your client;

(f) Where attorneys need to provide an opinion or view on allegations, comments should be made with direct reference to factual allegations [*SA Associated Newspapers Ltd v Yutar* 1969 2 SA 442 (A), *Yazbeck v Seymour* 2001 (3) SA 695];

(g) Do not rebuke or criticise opposing counsel and avoid speaking to opposing counsel when provoked or when in anger;

(h) Consider the tone of letters, pleadings and affidavits, avoid being sarcastic and using unnecessary adjectives;

(i) Avoid making statements or remarks in affidavits that are not pertinently relevant to the particular action or application [*Joubert v Venter* 1985 (1) SA 654 (A); *Blumenthal v Shore* 1948 (3) SA 671 (A)];

(j) Do not make false statements. Only make statements if there is a reasonable cause to make the statement, based on some objective fact;

(k) Attorneys should be careful not to elicit defamatory remarks from a witness, where it is clear that the remarks will be false;

(l) Comments on credibility should be made where it is pertinent and relevant to the proceedings;

(m) Do not harass, intimidate or use language which is offensive or rude whilst cross examining a witness [*Moolman v Slovo* 1964 (1) SA 760 (W)].

We thank Gus Fichardt, Merlita Kennedy and Raizel Davidow of Webber Wentzel for writing this comprehensive and informative article for us.

Prescription

Prescription is the most commonly raised special plea within our jurisprudence, but strangely it seems that there is still some debate on when it starts running, when it is interrupted and whether or not it starts running afresh or continues. We thought that it may be of interest for us to walk you through one of the claims currently administered by the Attorneys Insurance Indemnity Fund (AIIF), in which an attorney was sued by his erstwhile client for allegedly undersettling a claim against the Road Accident Fund (the RAF) and a special plea of prescription was raised.

BRIEF HISTORY

The attorney in question timeously lodged a claim with the RAF and the claimant thereafter received two offers of settlement from them. The first offer was rejected, but the second offer for R 35 366.00 was accepted and became the subject of this claim against the attorney.

The claimant consulted with the attorney and gave him instructions to accept the

Prescription continued...

second offer made by the RAF on the 26th August 2003. During the consultation, the attorney had advised the plaintiff to accept this offer, because he was concerned about the merits of the accident. He had previously consulted with one of the passengers in the claimant's vehicle at the time of the collision, who had explained that the claimant was the sole cause of the collision. The claimant denied the passenger's version and complained that he knew someone who had suffered fewer injuries than he, and who had received R80 000.00 compensation from the RAF. Nonetheless he gave the insured instructions to settle the claim.

The insured sent a letter to the RAF accepting the offer on the next day. The RAF sent a release form a month or so later. The plaintiff signed the release form on 06 November 2003.

THE ACTION

Summons was served on the defendant attorney on the 13th October 2006. A special plea of prescription was raised on the basis that the plaintiff had become aware of the cause of action on or before 12th October 2003.

The plaintiff did not reply to the special plea, but tendered argument at the hearing of the special plea. As expected the plaintiff argued that prescription only started to run once he had been advised by his current attorney that the defendant attorney had undersettled his claim.

The defendant relied on section 12 of the Prescription Act 68 of 1969:

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

While the plaintiff raised certain facts to negate the special plea, the main contention was that he would not have become aware of the claim until he was advised by an attorney. The defendant anticipated this argument and referred to the case of *Truter & Venter v Deysel* 2006(4) SA 168, in which the SCA had made it clear that the plaintiff had to be aware of the facts that give rise to the claim and that these facts did not include fault and unlawfulness because these were matters of law and could only be decided by the court.

In the present case the plaintiff had had a suspicion that the claim had been undersettled and this was sufficient to start the running of prescription.

THE OUTCOME

The North Gauteng High Court upheld the defendant's special plea and dismissed the plaintiff's claim. The plaintiff's application for leave to Appeal was dismissed; he has petitioned the Supreme Court of Appeal.

It would be interesting to see how the SCA might apply the principle enunciated in *Truter & Venter v Deysel* in this matter.

We will inform you of any interesting developments.

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Letters to the Editor

In response to the article entitled 'Red Flag Areas in Conveyancing Practice' which we published in the August bulletin (3/2009), we received a letter from a senior attorney suggesting that:

...the undermentioned sentence be added to (i) after the words from other countries.

"Where a purchaser acquires immovable property from any person who is not a resident of South Africa, the purchaser must withhold from the amount due to the non-resident seller, an amount equal to 5% of the amount due where the seller is a natural person, 7.5% of the amount due where the seller is a company and 10% of the amount due in the case of a trust. The withholding tax is an advance payment in respect of the tax ultimately payable by the non-resident seller when it submits its tax return to SARS.

The section introduces onerous responsibility on conveyancers entitled to any remuneration in respect of their services in connection with the disposal of the immovable property by the non-resident seller. The conveyancers are legally obliged to inform the purchaser in writing of the fact that the seller is not a resident for tax purposes and that the withholding tax provisions apply. If they know, or ought reasonably to have known, that the seller is not a resident for tax purposes, the conveyancer will be jointly liable for the payment of the amount which the purchaser is required to withhold, except that the liability is limited to the amount of remuneration or other payment receivable in respect of such services.

The withholding tax provisions are only applicable where the value of the property exceeds R2 million."

With kind regards

EBI MOOLLA

We are grateful to Mr Moolla for taking the time to make this suggestion. We have accordingly amended the copy of this article, which can be found on our website.