Bulletin
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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)

In this edition

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Risk Manager's Column

As I write this column, 2010 has just begun. By the time you read it, we are all sure to have forgotten that we had a break and be up to the eyeballs in work again.

While I have a moment to dwell on more personal matters, I wish you a year that is filled not only with great opportunities for you and your loved ones, but also great opportunities for you to make a difference to the lives of others.

Staff

I am delighted to announce that Zodwa Tshimbane has been appointed to the position of Assistant Claims Manager. She has *de facto* been competently carrying out many of the duties associated with the position over the past few months.

Zodwa joined the AIIF team in February 2005 as a Legal Adviser, after having been in practice for five years. She obtained both her B.Proc and L.LB degrees through UNISA. She is the proud mother of two gorgeous girls and still finds the time to be an avid reader and enjoy the great outdoors. She says she has enjoyed her time with the AIIF and looks forward to continuing to serve the profession going forward.

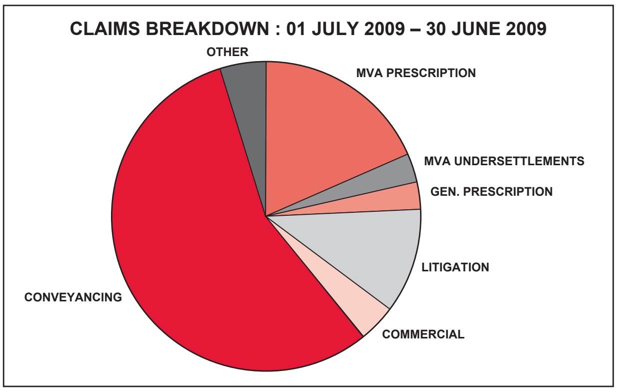
RAF increase in maximum amount for compensation for loss of earnings.

The amounts referred to in s17 (4A) (a) of the Road Accident Fund Act 56 of 1996 were adjusted to **R175 887** with effect from 31 October 2009.

Claims Statistics

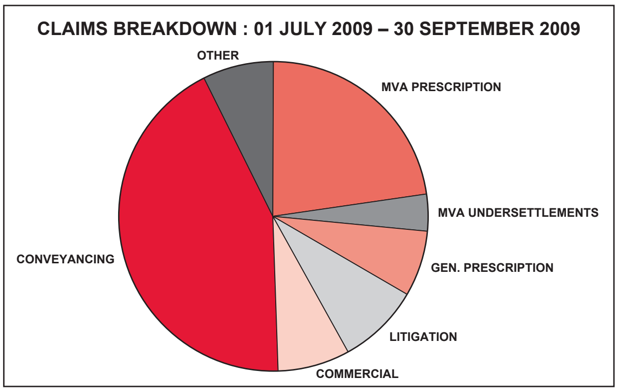
We had a record 624 claims and potential claims notified to us in the 2008/2009 year of insurance.

Graph 1, shows the claims breakdown for the period **1 July 2008 to 30 June 2009.** The two problem areas continue to be conveyancing (largely bridging finance matters) and MVA prescription.



Risk Managers Column continued...

As can be seen from **Graph 2** below, the breakdown for the period shows a similar pattern for the first quarter of the 2009 year of insurance.



NB: Not only are the numbers of claims increasing, but the value of claims paid out is on the increase, which could well necessitate the levying on premiums on the profession in the near future.

Prescription of claims against the State

Notice in terms of s 3 (2) of the Institution of Legal Proceedings against Certain Organs of State Act 2002.

In *Minister of Safety and Security v De Will* 2009 (1) SA 457 (SCA), the appeal court held that condonation could be applied for after the institution of proceedings, provided that the debt had not been extinguished by prescription. (See earlier opposing decisions in *Dauth & others v Minister of Safety and security* 2009 (1) SA 189 (NC) and *Legal Aid Board & Others v Singh* 2009 (1) SA 184 (NPD)

ELECTRONIC FUNDS TRANSFER (EFT)

Concerns have been raised by the LSSA and the Attorneys Fidelity Fund regarding the increased risks to practitioners in the use of EFT payment systems for transacting on their trust banking accounts.

The danger lies in the fact that there is no matching of a recipient's account number with an account name, which increases the risk of money being paid to an unintended recipient. This problem is exacerbated in the context of the nature of an attorney's practice, where money has to be paid to parties who are often only interacted with on a once-off basis (for example conveyancing transactions).

Policy Queries

Below are some of the questions about the policy that we get most frequently:

Q. At what stage must Glenrand MIB be notified if something goes wrong with a matter?

A. **In terms of clause 6.1 of the policy, immediate *written notice* must be given of any claim <u>or intimation of a claim</u>. We recommend that you advise us immediately you become aware of a potential problem. Our experienced claims handlers are willing to work with you, where possible. It may be that a claim can successfully be avoided, or damages can be mitigated, by taking steps at an early stage.**

Q. What happens if I have to incur costs in correcting an error made by me or my staff?

A. **You should discuss the problem with one of our legal advisers as these costs may qualify as approved costs in terms of clause 1.2 of the policy. (You will need the insurer's written consent before incurring such costs).**

Q. Will I have to pay my deductible regardless of the outcome of the matter?

A. **No. You will only need to pay a deductible (excess) if the claimant is paid damages or costs. (If the claimant's total damages and costs fall within your deductible, then you will only have to pay those amounts.)**

Q. Will my Law Society be advised of this problem? Will there be disciplinary action? Will I get a black mark against my records with my Law Society?

A. **All claims or circumstances notified to us are treated as confidential. The relevant Law Societies are not advised of your matter.**

Q. Where can I get a claim form?

A. **Once you have notified Glenrand MIB in writing, your legal adviser will send you a claim form and advise you of further requirements.**

Q. My conveyancing secretary has stolen client's money. Do I claim from the Attorneys Insurance Indemnity Fund of the Attorneys Fidelity Fund?

A. **Neither. You are not automatically covered for theft/misappropriation of trust money/property. You would need to have bought additional cover on the open market to protect you in this situation.**

RAF News

Constitutional Challenge on the RAF Amendment Act 19 of 2005 (Amendment Act)

Nicolette Koch, a partner at Adams & Adams gave the following update on their website:

"The following directive was issued by Judge Sapire on Tuesday 1 December 2009:

"1. The parties are to approach the Deputy Judge President (Acting) forthwith, who will allocate a date for hearing sometime after 15th February (2010).

2. Any opposing parties, and any persons seeking to be joined as a party to oppose or support the relief sought, are to file their affidavits relating to both the merits and joinder before close of business on 15th January 2010.

3. Answering affidavits may be filed by 29th January.

4. Applicants' heads of argument to be filed not less than ten days (not court days) before date of hearing, while those of Respondents including those seeking joinder are to be filed five days after service of Applicants' heads."

More recently, she has given the following update:

"Acting Deputy Judge President WJ van der Merwe of the North Gauteng High Court today confirmed that the review application launched by the Law Society of South Africa and ten others, in which certain sections of the amended Road Accident Fund Act are challenged, will be heard from 1 to 3 March 2010.

He further advised the parties that at this stage the Judge President of the North Gauteng High Court, B Ngoepe, will be hearing the application.

The allocation of the date is as a result of the directive issued by Judge Sapire on Tuesday 1 December 2009.

The Respondents will have until close of business on 15 January 2010 to file their answering affidavits. The Applicants' replying affidavits must be filed on or before 29 January 2010."

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Conveyancing

The following is one of the matters referred to the Attorneys Insurance Indemnity Fund, only after judgment was given in the **Eastern Circuit Court in George.**

Introduction

The plaintiffs sued the defendant for damages in the sum of R150 000.00 (later amended to R126 400.00.)

Background Facts

Mr and Mrs B (the Plaintiffs) signed an offer to purchase two erven in a security village for the sum of R67 500.00 each. The development was marketed on behalf of the developer/seller, by K properties (the Agent).

The conveyancer, W, (the Defendant) who had done all the legal work in connection with the development, was instructed by the Agent to attend to the transfer.

Thereafter the Plaintiffs paid the deposit into the Defendant's trust account. The conveyancer sent the Plaintiffs a letter confirming receipt of the Agreement of Sale and deposit and providing the Plaintiff with a receipt, a pro forma account, and an authority to invest the deposit.

All the documents reflected the details of the two erven and the pro forma account contained, inter alia, the following item:

"Opstel Koopkontrak, Toesien tot ondertekening en uitvoering 250.00

Almost a year later, on 12 April 2005, in a further letter, the Defendant informed the Plaintiffs that, in terms of the Agreement, they should, within 15 days of written demand, provide an approved guarantee for payment of the balance of the purchase price. The Plaintiffs made payment of the balance of the purchase price into the Defendant's trust account on 28 April 2005. (According to the Plaintiffs, the Defendant's conveyancing secretary had advised telephonically, that they could pay in the money any time before 30 April 2005.)

On 3 June 2005, the Plaintiffs who had bought the erven for resale, on sold one of them to a certain Mr D, for an amount of R150 000.00. The Plaintiffs later discovered that transfer of the erf to Mr D was not possible, as neither of the erven had been transferred into their names.

The Plaintiffs later discovered that the Agreement of Sale had not been accepted or signed by the Seller.

The Pleadings

In the Particulars of Claim, the Plaintiffs alleged that the Defendant owed them a legal duty to protect their interests. They alleged that this duty encompassed, *inter alia,*

- perusing the Agreement of Sale and presenting it to the seller for acceptance.
- advising the Plaintiffs if it showed any defects or omissions.
- not to make any misrepresentations regarding the transaction or the validity of the Agreement

They alleged that, had the Defendant carried out his duty towards them, there would have been a binding agreement, the properties would have been registered in their names, and they would have made a profit of at least R75 000 per erf on resale.

In his plea, the Defendant denied owing the Plaintiffs a legal duty and in particular any of the duties as pleaded by the Plaintiffs.

He averred that it was the Agent's duty to see to it that the Agreement of Sale was properly completed and signed.

He pleaded further, that, even if the Agreement had been signed by the Seller, the payment of the balance of the purchase price/guarantee had been out of time, and that the seller would have been at liberty to cancel the sale.

Judgment

The court isolated unlawfulness as being a central issue, citing the matter of *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) 150 (SCA) where the test for the existence of a legal duty in the case of pure economic loss was discussed as follows:

> The imposition of this legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional

Conveyancing continued...

norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public policy considerations require that such conduct, if negligent, should attract legal liability.

The court took cognisance of the fact that the legal duty of an attorney towards a person who was not his client, was recognised in our law, as set out in the judgement in *Road Accident Fund v Shabangu & Another* 2005 (1) SA 265, as follows:

> It is impossible to lay down an all-embracing test as to when an attorney will be held to owe a legal duty towards a person other than the client particularly where, as here, that person relies on a negligent misrepresentation inducing a contract, or on negligent omissions on the part of the attorney to safeguard that person's interests when the attorney is performing the duty the attorney owes to the client. The question of wrongfulness that pertinently arises in each of such cases is essentially one of legal policy.

The court also referred to the judgment in *Basson v Rimini and Another* 1992 (2) SA322 N where the following was said:

> In evidence, Mr Shelwell admitted, quite correctly in my view, that by accepting the appointment as conveyancer in respect of the transaction between the applicant and the first respondent, the second respondent became the agent of both parties.

The court held that:

1. The Plaintiffs had a valid claim against the Defendant based on his legal duty to ensure that the purchasers' interests were protected during the transfer process.
2. The Defendant accepted an instruction which, by virtue of his expertise as a conveyancer would affect the interests of third parties.
3. The Defendant received money in trust, rendered a *pro forma* account and debited fees in respect of professional services (in particular, "vir die *opstel van die koopkontrak*, en vir *Toesien tot ondertekening en uitvoering daarvan*".)
4. In these circumstances a legal duty exists in accordance with the professional standards that the community would expect from persons in the position of the conveyancer.
5. The negligent failure of the Defendant to protect the interests of the Plaintiffs was unlawful and rendered him liable for the damages suffered by the Plaintiffs as a result of his conduct.
6. The Defendant was ordered to pay the Plaintiffs the sum of R126 400.00 together with interest and costs.

Lessons learned:

It is clear that a conveyancer has a duty to reasonably protect the interests of both the purchaser and the seller and cannot 'hide behind' the fact that he was instructed by only the seller.

The conveyancer should ensure that all essential documents are in order before proceeding with further steps towards transfer.

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Professional Indemnity Insurance for Attorneys

Professional indemnity (PI) insurance protects the public and professionals, in the situation where the professional's negligent or wrongful conduct in the course of such profession, has caused someone to suffer a loss.

In addition to the usual short-term office/business insurance, attorneys need to ensure that they protect themselves adequately against professional indemnity claims by clients and/or members of the public.

The organogram below broadly illustrates the sources, functions and types of PI insurance available.

PI INSURANCE
(protection of public and the profession)

AFF
*Protects PUBLIC vs THEFT of trust money by attorneys
NB *no protection for attorneys*

AHF
*PI cover for Attorneys
*Attorneys' Executor Bonds
(administered by GlenrandMIB)

Open market insurance
*THEFT of trust money
*Top-up PI cover+

Many misconceptions exist about the differing functions of the AFF and the AIIF in relation to claims by the public.

THE AFF

In essence, the AFF provides protection to the public for losses arising from the misappropriation of trust money by attorneys or their staff.

One of the most common misconceptions held by attorneys, is that they themselves enjoy indemnity through the AFF for their/their staff's misappropriation of trust money. The AFF is a fund of last resort, which means that a claimant needs first to exhaust all remedies against the partners/directors of the practice before the fund comes to its assistance. **It is therefore essential that all attorneys with trust accounts carefully consider the risks of failing to buy cover for misappropriation of trust money on the open market.**

THE AIIF

The AIIF, a short-term insurance company, was incorporated by the Attorneys Fidelity Fund (AFF) as an association not for gain in terms of S21 of the Companies Act. Through the AIIF, practising attorneys automatically enjoy

Professional Indemnity Insurance for Attorneys continued...

a primary layer of professional indemnity cover at no cost, as the annual premium is paid by the AFF. This is unique worldwide.

The AIIF provides the attorney with indemnity against claims for losses suffered by a client or third party, as a result of a breach of mandate or negligence in the course of the conduct of the profession.

(The AIIF also furnishes bonds of security in favour of the Master in respect of attorneys who are appointed as executors of deceased estates. These are provided at no cost, and are limited to a maximum of R5,000,000 per bond, subject to an aggregate of R20,000,000 per firm, each year.)

The level of cover (limit of indemnity) provided by the AIIF ranges from R1,562,500 **per year** for a single practitioner, to R3,125,000 **per year** for practices comprising 14 or more partners/directors. This primary layer of insurance may be insufficient to protect your practice and you may need to consider buying additional "top-up" cover on the open market, to protect yourselves from the risk of being uninsured, in the situation where your claim/s in any one year exhaust the limit of indemnity.

There are also certain exclusions, such as claims that arise out of the provision of investment advice. For all the exclusions, please see the AIIF policy on the website (*www.aiif.co.za.*) A good broker should be able to advise you on how to get additional cover to suit your needs and "dovetail" with the primary layer provided by the AIIF.

It is standard practice in the PI market to provide cover on a "claims-made" basis. This has many advantages, but one of the disadvantages comes in where a practitioner retires. It may be that a claim is only made against the practitioner a year or two after s/he has retired. Fortunately, the AIIF policy specifically provides for indemnity in such a situation in clause 6.1.3 of its policy. **However, those practitioners who buy top-up cover should also buy "run-off cover" to protect them in respect of any portion of the claim not covered by the AIIF primary layer.**

The AIIF Board comprises 7 Directors who are members of the attorneys profession and 3 from the short-term insurance industry. Glenrand M.I.B. manages the AIIF and all claims and/or potential claims should be reported directly to them at:

Glenrand M.I.B. Professional Services
PO Box 2544
Randburg 2125
Docex 34 Randburg
Tel: (011) 329-1111
Fax: (011) 329-1984

Risk Management

In addition to buying insurance, it is essential that attorneys apply sound practice and risk management principles and procedures, so as to minimize the risks inherent in practice. The AIIF has put in place the following risk management initiatives, which can be used free of charge.

Prescription Alert

This is a computerized diary system available at no cost, in respect of statutorily time-barred matters (excluding those governed by the Prescription Act). For more information see www.aiif.co.za or contact Alison Smit on (021) 422 2830.

Risk Alert Bulletin

This quarterly publication appears as an insert in De Rebus. It seeks to alert practitioners to new legal developments from a risk management perspective. It also contains important information about the policy and claims. The current bulletin and back copies can be viewed on the AIIF website.

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(This is an article which I wrote for publication in the LSNP's Orde Nuus. I hope readers will find it useful.)

Useful tips for MVA Practitioners

Some suggestions on how attorneys can protect themselves and their MVA clients during this period of uncertainty about the future of the current RAF legislation.

Attorneys following the progress of the Constitutional Challenge on the RAF Amendment Act 19 of 2005 (Amendment Act), brought by an increased number of applicants, would most certainly be very aware of the running out of time for the lodgement of claims arising after 01 August 2008.

This is of great impending importance in respect of Hit and Run claims that carry a two year prescription period, of which the earliest claims are to start prescribing on 31 July 2010.

Even though the Application is set to be heard early in 2010, the judgment will most certainly be referred to, either the Appellate Division, or directly to the Constitutional Court. All claims that are affected by the constitutional challenge will have to wait until this notoriously lengthy process has run its course.

In the interim, claims that can be made in terms of the Amendment Act for accidents on and after 01 August 2008 are:

i. Claims for general damages for injuries resulting in 30% or more whole person impairment;

ii. Claims for loss of support and loss of income with an annual limit of R 175 887.00 (One Hundred and Seventy Five Thousand Eight Hundred and Eighty Seven Rand), with effect from 31 October 2009;

iii. Claims for Past & Future medical expenses for *non emergency* medical treatment limited to public hospital rates and where emergency medical treatment was provided on the higher tariff as published in the Government Gazette.

iv. Common law claim against the owner or driver only where the RAF is unable to pay or for secondary emotional shock.

It is therefore clear that practitioners will more often than not have to submit claims and hold them in abeyance while waiting for the outcome of the constitutional challenge or simply turn claims away.

Here I take an opportunity to recount the suggestions in our Risk Alert Bulletin of November 2008 (extract from SAAPIL

Useful tips for MVA Practitioners continued...

newsletter dated 20 August 2008) and elaborate thereon [with the help of www.gautenglaw.co.za (Report by N Koch)].

Please note that all the following suggestions are subject to a disclaimer with regard to any possible damages suffered by practitioners or their clients:

1. Read the Amendment Act and Regulations and if uncertain about anything consult with an appropriate expert colleague or counsel.
2. When taking a formal instruction ask the client to pay the disbursements to get the accident report and **RAF** medical report completed, lodge the claim and then wait to see what happens. Bearing in mind the following:
   a. A claim should be lodged with the RAF both in terms of the old act (disregarding the amendment act) and in terms of the new act.
      i. The covering letter should clearly state that:
         1. The lodgement of the claim is in terms of Amendment Act and, in the alternative, disregarding the Amendment Act;
         2. Invite the RAF to effect payment in terms of the Amendment Act, without prejudicing the balance of the claim, to be pursued at successful conclusion of the constitutional challenge.
   b. Do not settle claims in which the quantum could be different if some of the provisions of the RAF act are found to be unconstitutional. Rather, when in a position to do so, after the dies have elapsed, issue a summons and close pleadings before holding the matter in abeyance. A big consideration here is the impact it will have on the firm's cash flow when deciding how to proceed.
3. Alternatively, do not take an instruction, but keep a database of such clients, and once the LSSA Application has been finalised, you can then consider whether you want to take on the instruction or not.
4. Be frank with your client in respect of the limitations imposed on his/her claim as a result of the new act and the reduced compensation (if any) that your client will receive in terms of the new act.
5. Write to the insured driver/wrongdoer and inform him:
   a. Of the details of accident, the injuries suffered by the client and suggest that these were caused by his/her/its negligence;
   b. Explain that in terms of Section 21 the wrongdoer is excused from potential liability and that the constitutionality of this is being challenged;
   c. Should Section 21 be declared unconstitutional, that your client will claim the balance of his damages from him and/or the RAF and
   d. Recommend that the wrongdoer draw this potential claim to his/her/its public liability insurer's attention and request details of that insurance.

   Here one has to take heed of the fact that, until completion of the constitutional challenge, Summons cannot be issued against such a wrongdoer and many of these claims will in all probability become prescribed.

It is clear that there is no simple and quick solution. Decisions in this situation need to be made in the light of the merits of each potential claim and the capabilities of the firm. Each practitioner will have to decide on his/her policy for the acceptance of road accident victims' instructions and reassess his/her own situation after each step completed during the constitutional challenge.

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Letters to the Editor

1. Your issue of Risk Alert November 2009 No. 4 /2009 refers.

In the article on page 3 dealing with Electrical Compliance Certificates , please note that the second sentence of the second last paragraph therein: ... it (Deeds Office) will ask for proof that a certificate exists." is incorrect. The Deeds office will not and does not ask for such proof.

K Pillay
Registrar of Deeds Cape Town

Dear Mr/Ms Pillay

I really appreciate your input in response to the article we published on electrical compliance certificates. Your comments will be noted in the next Bulletin, with your permission.

Editor

2. I refer to Risk Alert Bulletin No. 3/2009.

Please assist by refraining from using a red print on your bulletin as it becomes quite difficult to read it. The black print is much more legible.

Kind regards

H Goga

Dear Mr Goga

Thank you for your e-mail of 14 August.

I have taken note of your comments about the red print and will forward them on to our publisher.

Editor

Dear Ms. Bertelsmann

With reference to the most recent Risk Alert Bulletin and thank you for the most useful article relating to possible pitfalls in Conveyancing matters which may result in claims. The article made for sobering reading.

In particular we refer to paragraph J of your article which relates to a Conveyancer's failure to obtain the consent of the Minister in terms of Section 3(1)(e) of the Subdivision of Agricultural Land Act 70 of 1970.

Please advise whether the Judgment in this matter has been reported and if so what the case citation is, so that we might read the Judgment. If it has not reported please advise whether it is possible to obtain a copy of the Judgment.

Regards

SAMANTHA WILHELMI

Dear Ms Wilhelmi

Thank you for your feedback about the article.

This matter was settled between the parties, before going to trial.

Editor