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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Risk Manager's Column

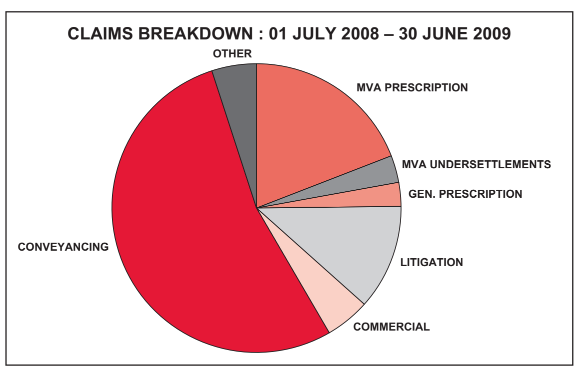
1. SPECIAL ALERT!

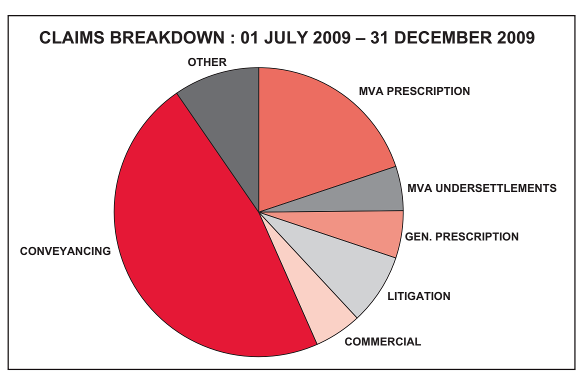
CONVEYANCERS PLEASE TAKE NOTE.

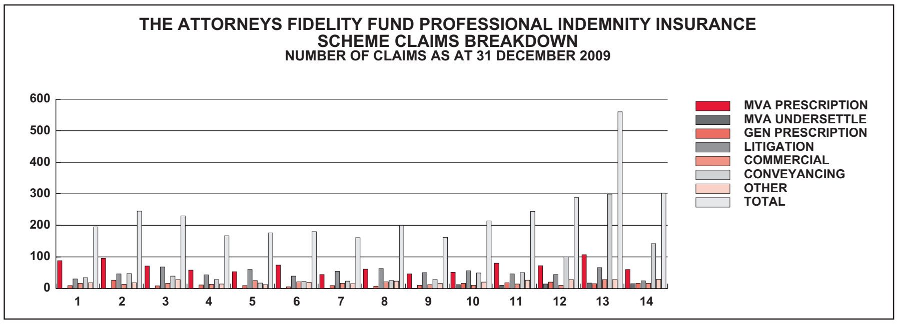
1. As from 1 July 2010, professional indemnity will be excluded for all claims arising out of the provision of bridging finance, except where such finance is obtained solely to enable the conveyancer to pay necessary disbursements, such as transfer duty and rates and taxes etc. In respect of those limited cases where indemnity is provided, it is possible that the 2010/2011 policy might also require that the conveyancer only sign undertakings that comply with certain specific requirements.

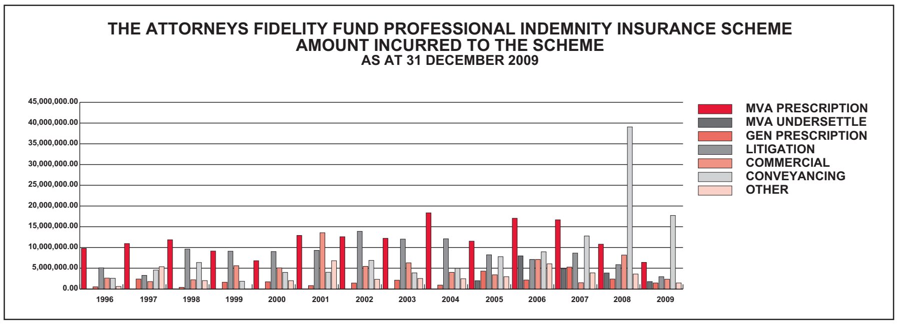
2. The Board has in principle decided that, in the near future, the deductible for conveyancing claims should be increased to those presently applicable to prescribed MVA matters (see the current Scheme Policy, Schedule A, clause 8.5.1, column A, which starts at R35 000 for a sole practitioner rising to R315 000 for a practice with 14 or more partners/directors.)

2. CLAIMS STATISTICS









As can be seen from graphs 1 – 4, the number and value of claims arising out of conveyancing transactions continues to increase year on year. In the 2008/2009 and 2009/2010 years they have overtaken prescribed MVA claims, both in number and value.

The table below shows that as at 31 January 2010, the total incurred to the insurance scheme for the 2008/2009 year's conveyancing claims was R42.3 million, of which 47% were claims that arose out of the provision of bridging finance undertakings by conveyancers.

CONVEYANCING (R42.3 million)		
PERIOD	BRIDGING FINANCE	OTHER
1 July 2008 – 30 June 2008	**R19.6 million** (47%)	**R22.7 million** (53%)

Given the claims statistics as at 31 December 2009 and the warnings given to the profession in our previous *Bulletins*, it can come as no surprise that, after consultation with the profession, the AIIF's Board has decided to amend the Scheme Policy to exclude the majority of bridging finance claims and to levy a heavier deductible on all conveyancing matters.

In this issue, the focus is primarily on managing the risk of claims against practitioners. We have introduced a new column entitled *Risk Management Tips*, which I hope readers will find helpful.

If any practitioners have practice or risk management tips of their own, we would be delighted to receive them and pass them on to the profession.

3. SOME MEASURES TO PROTECT YOUR CONVEYANCING PRACTICE

3.1 Bridging Finance

Avoid signing any undertakings to bridging finance companies, if at all possible. Otherwise, preferably only do so where the finance is strictly necessary to ensure the smooth running of the transaction.

We suggest that you also take note of the advice given by Hesma Strydom in her article which appeared in the November 2008 *Bulletin* (4/2008). Back copies of the *Bulletin* may be viewed on our website (www.aiif.co.za).

Some guidelines when signing an undertaking in respect of a conveyancing transaction:

- Ensure that the undertaking does not bind you if the transaction does not proceed.
- Ensure that you have the right to withdraw the undertaking if the transaction is cancelled.
- Notify the bridging finance company if the transaction is cancelled.
- Notify the bridging finance company if the transaction is delayed.
- Ensure that there will be enough funds available on registration, to cover the amount advanced and be particularly vigilant where more than one amount is advanced on one transaction.
- It may be prudent to ensure that all requests for undertakings are vetted and signed by one designated partner/director.
- Only confirm that the transaction is unconditional once you have properly satisfied yourself that there are no conditions or impediments to the registration.
- Do not commit yourself to a specific date on which transfer can be expected.
- In the case of a juristic person, a co-owner or joint owner of a property, ensure that the person instructing you has been properly authorised to apply for the financing.

- Make sure that you have checks and balances in place to ensure that the bridging finance company is paid out before the rest of the proceeds are disbursed.
- Put in a proviso that the undertaking is subject to any payment that may be required to be made to SARS in terms of the Income Tax Act.

3.2 Conveyancing in general

Please read our article *Red Flag Areas in Conveyancing Practice*, which appeared in the August 2009 *Bulletin* 3/2009 and can also be found on our website. Also take note of the following:

- Even if you are under time pressure, avoid taking the risk of failing to attend to basics like conducting thorough deeds searches. Many claims have arisen out of the conveyancer having failed to properly check the agreement of sale or the title deeds and overlooking planning and zoning restrictions.
- Again, time pressure is no excuse for delegating more and more responsibility and autonomy to your conveyancing secretary who, however experienced and efficient, has no formal legal training. Proper **supervision** is essential, as is the implementation of effective controls, checks and balances. We have dealt with numerous claims arising out of conveyancers' lack of supervision and control, which at best have led to simple errors and oversights and at worst to fraud. **Instances where fraud is being committed by trusted employees seem to be on the increase.** Please be aware that this situation can lead and has in some cases ultimately led to sequestration of the partners.
- A recurring problem that we come across in conveyancing matters, is the premature payment of trust money or payment to the incorrect party. Very often payments are made without the client's or depositor's written instructions. There are numerous instances where the conveyancer has merely signed off payment without thoroughly checking the matter.
- Conveyancing claims involving identity fraud are on the increase. Make certain that identification is produced and carefully checked. Documents must be signed in the conveyancer's presence. We have had several claims where the documents were fraudulently signed elsewhere or where the person signing in the presence of the conveyancer was an imposter, who did not have identification with her/him and only later faxed a copy of the identity document (by which time the conveyancer had no idea what the signatory looked like!).

Risk management tips

1. INTRODUCTION

In an ordinary year, we are notified of around 300 claims and potential claims. In the 2008/2009 year of account, we were notified of double that number and by halfway through the 2009/2010 we had already been notified of 300 claims. (see the graphs on page 1 and 2.)

As will be seen from the graphs, for convenience sake we initially categorise claims in terms of the area of law in which they arose, such as conveyancing. There are certainly problems and errors that occur, which are specific to a particular area of law, but we find that claims across the different areas have many common un derlying causes.

In this series of articles I hope to "drill down" to a certain extent, point out some common problem areas and make what I hope will be constructive suggestions for managing the risks.

In the course of my work with the AIIF claims over the past 13 years, I have met many well-respected, experienced, professional, intelligent, competent and honest practitioners, who have been obliged to concede that they acted negligently. **Claims against attorneys definitely do not only happen to others in the profession who may be inexperienced or incompetent.**

A surprisingly small proportion of claims arise from an attorney's lack of knowledge of the law and most claims are avoidable if the essential risk management principles and tools are applied.

If I were, off the top of my head, to choose three major causes of claims, I would say they were;

1) failure to obtain proper instructions from client and manage client's expectations;
2) inadequate supervision of staff coupled with a lack of checks and balances to pick up problems; and
3) failure to consider the attorney's ethical duties to the court, client and third parties.

The aim of this series of articles is to:

- reduce the chances of "claims prone situations" arising.
- Improve the way such situations are handled when they do arise.
- Ensure that there is evidence and a paper trail to effectively defend unfounded claims.

REMEMBER – RISK MANAGEMENT IS BASED MOSTLY ON COMMONSENSE!

2. ENGAGEMENT MANAGEMENT

In their book entitled *Managing Client Expectations and Professional Risk*, published by Streeton Consulting (Pty) Ltd in 1994, Ronwyn and Peter North cite what they regard as the **five essential ingredients** that govern the nature and structure of the attorney/client relationship as being:

- Setting up the engagement;
- Managing client expectations;
- Varying the terms of the engagement;
- Writing to the client; and
- Closing the engagement

After having undertaken an extensive research and claims profiling exercise for the Risk Management Project initiated by LawCover in the early 1990's, the Norths concluded that attorneys who were involved in PI claims often failed to satisfy one or more of these five essentials.

2.1 Setting up the engagement

Before I get into the detail of engagement management and in particular engagement letters, I believe that it is important to take one small step back, and look at asking the questions "Do I really want this client?" and "do I really want this matter?

On the website of New South Wales' professional indemnity insurer, LawCover, there is an article delightfully entitled *I hear you knocking – Is this a problem client?* (see http://www.lawcover.com.au/filelibrary/files/Publications/Lsjarticles/LSJMarch09.pdf) This article looks at *inter alia* the screening of clients, the dangers of accepting a client who is transferring a matter from another attorney and the question of conflicts of interest. It ends by suggesting a number of questions that you need to ask before accepting a client or an instruction, such as:

- Do I/we have the necessary expertise, time and resources to handle the matter?
- Are there time constraints associated with the matter that are capable of being met?
- Am I being pressurised into accepting the matter by an existing valuable client, close friend or family member?
- Does the client have realistic expectations as to the outcome that can be achieved?

To these questions, I would most certainly add a further one and that is:

- Is this client transferring the matter to me from another attorney?

2.1.1 *Letters of Engagement/Written Mandates*

Introduction

An engagement letter defines the legal relationship (or engagement) between a professional firm (e.g., law, investment banking, or accountancy firm) and its client(s). This letter is essentially a contract stating the terms and conditions of the engagement, principally addressing the scope of the engagement and the terms of compensation for the firm.

In many international jurisdictions like Australia, Scotland and Canada, it has become compulsory for attorneys to enter into detailed written letters of engagement with their clients.

This is not the case in South Africa, but many firms are becoming alive to the benefits of recording their mandates and ancillary agreements with clients in a formal and detailed document.

Bruce Ritchie, Director of Professional Practice at the Law Society of Scotland, said about the introduction of compulsory letters of engagement: "Many solicitors already provide such information in writing and we have had rules about conveyancing work for some time, but making it a requirement for all ensures uniformly high standards throughout the legal profession and clients will know where they stand from the start.

"It simply makes good business sense. It is very important that all the information given to a client is clear and that any terms which are unfamiliar to the client are explained if necessary. Clients should also be advised on the potential consequences of late or non-payment for work carried out by their solicitor, i.e. that the solicitor may stop working on the client's behalf until payment has been made. This protects both parties and we hope will prevent the problems which can occur when solicitors have to withdraw at a late stage.

"It is important for some clients to be aware of what level of service they can expect for their fee – for example the client might want emails rather than phone calls at work – and this is something they could agree with their solicitor in writing at the beginning. The introduction of these practice rules will remove the potential for confusion or misunderstanding and should help reduce the number of complaints against solicitors."

We strongly urge all firms, whether large or small, to introduce the uniform use of tailor-made letters of engagement into their everyday practice.

Essentials/checklist:

- Identity of the client. The engagement letter should be backed by the required FICA process in the case of new clients. Make sure you know and record whether the client is acting in his/her personal or a representative capacity. (NB. If client is representing an entity, make sure you know and record the nature of the entity, its full name and other essential details and very importantly, whether client has been properly mandated to instruct you on the entity's behalf)
- Any additional parties to be included in the representation
- Primary responsible attorney & any other attorneys/assistants to be associated with the matter
- Details of the mandate/scope of work to be done. Specific areas to be included in order to avoid any misunderstanding about responsibilities and deliverables. Any unusual or specific instructions should be recorded
- Specific areas not to be included
- What the client can expect from the firm including time-frames if important to client

- What the firm expects from the client/ client responsibilities (eg documents data etc)
- Deposit required
- Holding and investing of client's money (if applicable)
- Fee structure. Basis on which fees and disbursements will be charged, frequency of billing and payment terms (many claims arise out of fee disputes – to be discussed more fully in the future)
- Termination of mandate by client
- Circumstances allowing for termination by firm
- Initial interview form and instructions (information to be verified by client)
- Instruction to sign and return (this **must** be done)
- Goodwill provision – thanks for business and offer to discuss anything not understood
- It may be a good idea to have client agree to a *domicilium citandi et executandi* (To cater for the situation where client cannot be contacted at the address originally provided).

(Some practices use a general engagement letter setting out their terms of business without specifying the actual services to be performed and then a specific engagement letter repeating those terms and also specifying the scope of work and the responsible persons etc.)

Update Engagement Letters to reflect changes in the scope or timing etc. Written addenda should be prepared and be signed by client.

CASE STUDY 1.

Attorney A, from a large well-established practice received a call from a prospective new client, B, who said he was in the process of selling his luxury German car to Mr C for Rx. He advised that the parties had agreed that the purchase price should be paid into an attorney's trust account.

Attorney A took telephonic instructions from B, and thereafter, sent a letter to B *inter alia* setting out his firm's requirements in terms of FICA.

Before attorney A had received a response to the letter, the amount of Rx was paid into the firm's trust account (ostensibly by C) and B had telephoned to confirm that a cash payment had been made and the vehicle had been delivered to C. He requested that Attorney A expedite payment to him, after deduction of the necessary fee.

When confirming payment with the bank, attorney A failed to ascertain whether payment was made in cash or by cheque. He arranged for payment of the balance, after deduction of the fee, into B's account.

Well that seems to have been a quick and easy fee earned, with very little work involved. Sadly, **Attorney A was the victim of a classic scam!**

A few days later he discovered that payment had been made by cheque, which had been returned by the bank because of a lack of funds in the account.

Needless to say, neither B nor C could be traced and the account into which the money had been paid had been closed.

Lesson learned:

With the benefit of hindsight, there are numerous mistakes that Attorney A made and lessons to be learned, in this seemingly straightforward matter. **But one of the initial fundamental mistakes was his failure to properly carry out the engagement process.** It is essential to know who you are dealing with before you take on a new client.

CASE STUDY 2

Attorney D was consulted by Mr E, who advised him that he had been severely injured in a motor vehicle collision, whilst he was a passenger in the vehicle of his good friend, Mr F.

From Mr E's description of the collision, it was clear that Mr F, the driver of the vehicle in which he was a passenger, was solely to blame for the collision.

Attorney D says that he advised Mr E that he would only have a limited claim against the Road Accident Fund, and that he would have to claim against Mr F, or his insurer, for the portion of his claim not recoverable from the RAF.

Attorney D further insists that Mr E was horrified at the idea of claiming from his friend, Mr F and that his instructions were only to pursue the limited claim against the RAF.

After a period of four years had elapsed, Attorney D received a summons from a new firm of attorneys acting on behalf of Mr E, in which it was alleged that he had allowed the common law claim against Mr F to become prescribed. Attorney D had no written evidence to confirm Mr E's instructions not to pursue a claim against Mr F. He also had no file note to support his version of events.

Lesson learned:

In a situation where a client makes an important decision or gives any unusual instruction, the attorney needs to ensure that;

- The consequences are fully explained to the client, in language that s/he understands and
- The discussion is minuted and confirmed in writing.

This is again an instance where the attorney could have protected himself by properly carrying out the engagement process and recording the instructions in an engagement letter.

Sample Engagement Letters

I have included two examples of engagement letters, which merely suggest some approaches that can be taken when drafting these letters. It would be a good idea for your practice to adopt its own preferred style and approach and to design a unique, standard letter that all its practitioners can use and adapt to individual circumstances.

EXAMPLE NO. 1.

[Date]````

.........-.-

[New Client]

RE: *Employment of* ____ *by* _______________________________________
_

Dear _____________________________:

Thank you for selecting _______________________ to represent you with respect to ______________________________
______. This letter will confirm our recent discussion regarding the scope and terms of this engagement.

Our firm has agreed to represent you in this lawsuit. I personally will supervise the case. However, it is anticipated that other lawyers and legal assistants in the firm also will work on the case.

[Give some detail of the anticipated services, and discuss any limitation on the scope of the representation.] All of our services in this matter will end, unless otherwise agreed upon in writing, when there is a final agreement, settlement, decision or judgment by the court.

Not included within the scope of our representation are appeals from any judgments or orders of the court.

Appeals are subject to separate discussion and negotiation between our firm and you. Also not included in the scope of this agreement are services you may request of us in connection with any other matter, action or proceeding.

You have agreed to pay for our services based on the time we spend working on the case. My current hourly rate is R________ per hour. The rates of our associates currently range between R________ and R________. Legal assistants, who will be utilized where appropriate to avoid unnecessary attorney fees, currently are charged at R________. These rates are subject to change once a year, usually in December. Generally you will be billed for all time spent on your matter, including telephone calls.

We will forward billing statements monthly. They will contain a description of services, including the date, the person rendering the service, the amount of time involved, and a description of the task accomplished. Monthly statements also will itemize money we have advanced on your behalf (disbursements) such as service and filing fees, expert witness fees, charges for investigation, travel and accommodation, telephone calls, photocopies and telefaxes.

As discussed, our current estimate for this engagement is R________. **[Detail items the estimate covers and does not cover.]** This estimate is imprecise as my knowledge of the facts at this time is limited. We will advise you if fees will be significantly higher than this estimate. At such time, you may decide to restrict the scope of our efforts or we may make other adjustments. This estimate does not include disbursements.

You have paid us the sum of R________ as a deposit against fees and disbursements, which we have deposited to our trust account. After your receipt of monthly statements, we will pay the amount of the statement from the trust account. If any portion of the deposit is unexpended at the conclusion of the case, it will be refunded to you. If the deposit is expended, you have agreed to pay subsequent monthly statements on receipt. An interest charge of one and one-half percent per month is charged on statement balances not paid within 30 days of billing.

You will appreciate we can make no guarantee of a successful conclusion in any case. However, the attorneys of this firm will use their best efforts on your behalf.

[Include any special disclosures that may be appropriate, such as potential conflicts of interest, client confidentiality issues, etc.]

If this letter fairly states our agreement, will you please so indicate by signing and returning the enclosed copy. If you have any questions or concerns, please call me to discuss them.

We greatly appreciate the opportunity to represent you on this case and look forward to working with you.

Yours sincerely

EXAMPLE NO 2.

Dear Mr…………………………

Thank you for instructing us to act in this matter. Please read this letter carefully, as it constitutes the basis of the agreement between us. If there is anything you do not understand or do not agree with, please contact me immediately.

Your instructions

You are starting up a small business called "Brightwood" which will manufacture wooden educational toys. You have instructed me to draw up employment contracts for your staff, and to include the following special provisions:

……………………………………………………………………………

My advice

I have advised you that the following Laws are applicable to your employment relationship and that their provisions will need to be taken into account in drawing up the employment contracts:

……………………………………………………………………………

Matters outside the scope of your instructions

Please note that I have not and will not be providing you with any advice on tax or patent matters. I recommend that you seek advice from a tax attorney or your accountant and from patent attorneys.

Our charges

I confirm having advised you that we require an upfront deposit of R…………., before I can start work on this matter.

I attach a separate document giving you information about our charges. Please take note that, if at any time our account is unpaid for longer than 30 days, we reserve the right to refuse to carry out any further work on your behalf until payment has been made.

Please sign and return a copy of this letter and the document of charges, to confirm your instructions. As soon as I have received these, and have confirmation that your deposit has been paid, I will begin work on the contracts.

Yours sincerely

2.1.2 Deciding not to accept a mandate

If for any reason, you decide not to take on the client or the matter, for example if there is a conflict of interests, it is sound practice to send the "client" a **non-engagement letter**. Such a letter will ensure that both parties are agreed that no mandate has been accepted by the attorney and will provide proof in the event that any claim arises against the attorney out of an alleged mandate to act.

Non-engagement checklist

- Disclaimer on investigation of merits of the matter
- Areas of possible conflict (if applicable)
- Advice to seek other representation/ opinion
- Warning on prescription etc

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Useful tips for MVA Practitioners

MVA practitioners please note that although the serious injury report form RAF4 does not necessarily have to be lodged simultaneously with the RAF1, it must be lodged within the two-year period for "hit & run" claims and the three-year period for other claims.

If this is not done, then your client will be unable to pursue any claim for general damages. You will need to ensure that for claims involving serious injuries, which arose on or after 1 August 2008, both the RAF! And RAF4 have been timeously submitted.

TAKE NOTE:

The two-year period for lodgement of the RAF4 and RAF1 forms for "hit & run" claims arising out of MVA's which occurred on 1 August 2008 expires on 31 July 2010.

(Our thanks go to Nicolette Koch of Adams & Adams for alerting us to the risk of overlooking the cut-off period for the submission of the RAF4.)

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PROFESSIONAL NEGLIGENCE CLAIMS: But he was negligent …

A common misperception that prevails amongst attorneys prosecuting professional negligence claims is that, if the attorney was negligent, the Plaintiff automatically has a valid claim against the attorney.

The case of Santam Insurance Company Limited vs Fiveash & Cloete (an unreported judgment delivered by Jones J in the Eastern Cape Division of the High Court Case No 80/97 delivered on 22 January 1998) is over ten years old, but it is instructive in illustrating that, in order to hold an attorney liable for professional negligence, the Plaintiff has to go further than just proving negligence.

The *Santam* case concerns a professional negligence claim against a firm of attorneys who had been instructed to recover damages against one Tsheqashe, but who had allowed the claim to become prescribed.

In their Plea, the firm of attorneys admitted that, had the claim not become prescribed, the Plaintiff would have obtained judgment against Tsheqashe for an amount of R70 150.00, but they pleaded that the Plaintiff had not suffered loss because Tsheqashe was a man of straw.

At the trial, the Plaintiff called Tsheqashe as a witness. Tsheqashe testified that he was 64 years old, a qualified tractor driver with a code 10 license who rented a house in Cathcart with his wife and three children, all of whom were dependent on him. He was unemployed, having been retrenched, and was not in receipt of a pension. Whilst employed, he had earned a nett salary of R1 125.37.

The Court considered this evidence and found that Tsheqashe was indeed a man of straw, and that even if the attorneys had issued Summons and obtained a judgment against him, the judgment would have been worthless.

The Court found that the Plaintiff had failed to prove that, by allowing the Plaintiff's claim to become prescribed, the attorneys had caused the Plaintiff to suffer damages. The Court dismissed the Plaintiff's claim with costs.

The case shows clearly that the inquiry does not begin and end with negligence. It is critical also to establish whether the Plaintiff suffered damages, as a result of the attorney's negligence; in other words, whether the Plaintiff would have succeeded in his or her initial claim, had the attorney performed his or her mandate.

The action for damages, after all, is to place the Plaintiff in the position he or she would have occupied had the delict not been committed. Similarly, where there is a claim based on a breach of contract, the fundamental rule is that the innocent party should be placed in the position that he or she would have occupied, had the contract been properly performed.

Salma Munshi
Director
Joubert Galpin and Searle Attorneys

RAF News

By now the judgement handed down on 31 March 2010 by the Honourable Fabricius AJ, dismissing the application of the LSSA and others against the RAF and Minister of Transport, is old news. At the time of writing this column, I have no information about what further steps, if any, the Applicants intend taking.