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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In this edition

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Risk Manager's Column

This edition of the *Bulletin* contains several "war stories", which may be worth distributing to your staff as illustrations of some of the things that can go wrong in practice. To make it easier to find them, the following image appears wherever there is a case study:

In the "Letters to the Editor" section, we have a letter from a legal bookkeeper who has been reading the *Bulletin* and has a good suggestion.

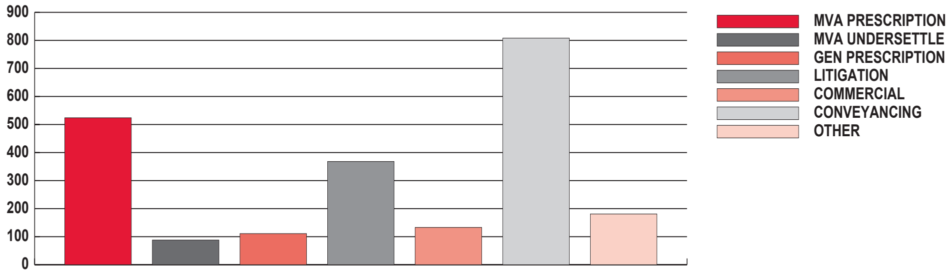
I appeal to all readers please to give us feedback on the *Bulletin*. We need to know what you find helpful and what you don't. We also need your risk management tips to pass on to other readers.

So much has been happening in the field of RAF practice. If you are an MVA practitioner, the RAF News section on page ? should be checked to make sure that nothing there has "slipped through the cracks" in your practice.

As at 30 September, we had received 118 claims in the 2010 year of account. It is perhaps too early for optimism, but this figure is lower than it has been for the past couple of years.

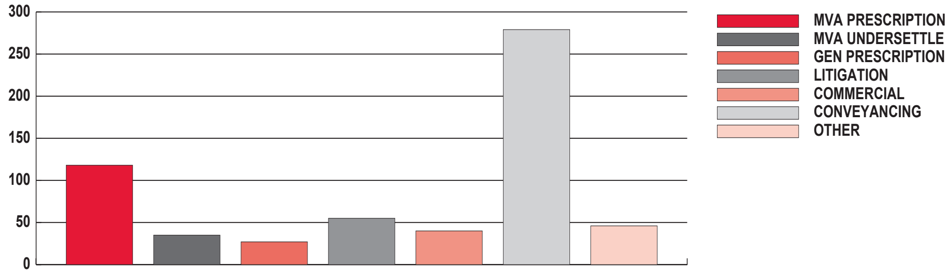
CLAIMS STATISTICS

CLAIMS BREAKDOWN (OVERALL): 01 JULY 2003 – 30 JUNE 2010



From the graphs above, it is clear that over the past 6 years, the majority of claims made against the profession has arisen from conveyancing matters. Following some way behind are the prescribed MVA's. Litigation (which is a fairly broad area) takes third place.

CLAIMS BREAKDOWN: 01 JULY 2009 – 30 JUNE 2010



When comparing the second graph, for the 2009/2010 year of account, one can see that, while the claims picture in the conveyancing area has worsened, prescribed MVA's and litigation matters have come down to a more acceptable level.

As is shown in the chart below, in the **2008** insurance year, **51.7 %** of the total incurred value for all claim types, was made up of claims that arose from conveyancing transactions. The total incurred for these matters is **R40,053,636** out of a total of **R79,585,647** in respect of all claim types.

The **2009** year looks slightly better with **46.5%** of the total incurred value for all claim types, being made up of conveyancing matters. The total incurred for these matters is **R35,910,741** out of a total of **R68,963,560.**

The picture may change in the 2010 year, since certain bridging finance matters have now been excluded. The Board of the AIIF is still considering putting in place remedial measures in respect of conveyancing, but this may not be necessary if there is a marked improvement in the number of claims reported in the 2010 year. There is still a chance that the deductibles for conveyancing matters may be increased to the same level as those for MVA matters.

Another area which is starting to cause some concern, is that of the under-settlement of MVA matters. These claims need to be monitored in the future as their numbers have increased and the amounts paid out are often higher than those for the ordinary prescribed MVA matters, as is borne out by the figures in the chart below. (See the further discussion under *RAF News* on page ?).

Another concerning trend is the increase in the number of claims where practitioners are paying out trust money without the written instructions of the depositor. This occurs across the various claim types. (See the case study on page 4 of the August *Bulletin 4/2010*.)

PLEASE REMEMBER THAT BACK COPIES OF RECENT BULLETINS CAN BE FOUND ON OUR WEBSITE (www.aiif.co.za)

1. CLAIMS AS AT 30 JUNE 2010 (summary of incurred position*)

* The incurred position takes into account all amounts already paid out in respect of capital and costs as well as amounts reserved for probable payment.

Claim Type	Period	No of claims	Incurred value	No. %	Val. %
Conveyancing	01/07/09 – 30/06/10	279	35,910,741	46.5	52%
Conveyancing	**01/07/08 – 30/06/09**	**276**	**40,053,636**	**51.7**	**50.3**
MVA Prescription	01/07/09 – 30/06/10	118	11,976,941	19.7	17.4
MVA Prescription	**01/07/08 – 30/06/09**	**108**	**11,602,293**	**20.2**	**14.6**
MVA Undersettlement	01/07/09 – 30/06/10	34	4,339,825	5.7	6.3
MVA Undersettlement	**01/07/08 – 30/06/09**	**17**	**4,043,820**	**3.2**	**5.1**
Litigation	01/07/09 – 30/06/10	55	5,079,135	9.2	7.4
Litigation	**01/07/08 – 30/06/09**	**67**	**7,204,097**	**12.5**	**9**
Total: All types	01/07/09 – 30/06/10	600	68,963,560		
Total: All types	**01/07/08 – 30/06/09**	**534**	**79,585,647**		

Risk management tips

The first two articles in this series about common problem areas in practice and managing these risks, dealt with a practitioner's relationship with his/her CLIENT. (The first one that appeared in the May *Bulletin* 2/2010, covered the broad area of **engagement management.** In the August *Bulletin* 4/2010, the second article in this series looked at **managing the expectations of client.**

This, the third article in the series, deals with **Managing the MATTER** itself.

1. ANALYSING THE FACTS AND THE LAW

It seems like stating the obvious, but before one can even begin to consider the legal issues and what strategies to adopt, you have to have the essential FACTS at your disposal. Until then, you are also not in a position to give your client unqualified advice.

1.1 Facts from client

It is essential that you obtain all relevant information from your client. This is not as easy as it might seem, for a number of reasons:

Your client may, *inter alia*;

- be economical with the truth and deliberately hide facts
- not think certain information is relevant to the matter
- not be aware of certain facts
- not have a clear recollection of facts and events
- be reporting what someone else has told him/her
- bend the facts to suit his/her version
- not understand your questioning.

You may, *inter alia*;

- fail to ask the right questions
- inadvertently put words into your client's mouth
- be in a hurry to terminate the consultation
- have delegated this "chore" to a junior member of staff
- have misunderstood your client
- have failed to take clear/comprehensive notes at consultation.

The conveyancing case study discussed later in this bulletin provides an illustration of the result of a practitioner's failure to obtain an essential piece of information i.e. that the seller had remarried in community of property. Because he did not have this essential fact at his disposal, the conveyancer did not include the spouse as a party to the agreement of sale, as was required by law.

You, as the attorney, are best placed to know what is, or might be relevant, and your probing questioning can often be helpful or even essential to your understanding of a matter.

Many years ago, as a candidate attorney, I took instructions from a man who was charged with assault GBH. He told me a long story. He had been picking up litter in the park in the course of his employment. He described in detail how he used his spiked stick to pick up the litter without having to bend down. He told me how he had heard a crashing noise in the public lavatories and gone in to investigate. He had seen that one of the doors had been smashed and when he looked around, a young man had lunged at him from the side, with a piece of the door in hand. What could he have done but defend himself with his spiked stick?

By this time I was feeling very sorry for my client, and was sure that he was going to be able to offer the court a good and credible explanation for the assault.

I asked him if he by any chance knew his assailant. It turned out this fellow actually had a name. More than that, he had been surreptitiously dating my (conservative) client's daughter. Worse still, he had got her pregnant!

1.2 Facts from the documents

It is the attorney's duty to carefully consider documents relevant to his mandate. Too often we encounter claims where this just does not happen and an essential aspect of the matter is overlooked. This may merely be a pure oversight, resulting from time pressure or fatigue. It could also be the result of the delegation of the matter or aspects thereof to an employee.

This happens more often than one would expect. A large number of conveyancing claims result from the conveyancer's (or his secretary's) failure to take note of the contents of title deeds, agreements of sale, instructions from banks and the like, for example:

- In one such claim, *the conveyancer failed to properly supervise his secretary or check the documents before signature. She had omitted the Homeowners' Rules (that appeared in the Deeds of Sale) from the Title Deeds*.

- Let's look again at the conveyancing case study on page?. The conveyancer failed to take note of the fact that the title deed reflected the names of both spouses as the joint owners of the property. He failed to cite the executor of the deceased spouse's estate as a party in the sale agreement.

- In another of our matters, X bank instructed the conveyancer to register a second bond over a property and paid the money to the mortgagor on date of lodging (as opposed to date of registration). The documents were rejected on lodging, when it was discovered that there had been an earlier attachment of the property and the bond could not be registered. The conveyancer (or his secretary) had failed to properly check the deeds office search, which would have revealed the attachment before lodging was attempted.

- In yet another matter, there was a clause in an agreement of sale, in which the mineral rights were reserved in favour of the seller of the immovable property.

The agreement was sent to the purchaser for signature and the latter amended the clause so that only one third of the mineral rights would be retained by the seller.

The conveyancer did not notice the change and proceeded to register the property without the reservation of the full mineral rights.

1.3 Facts that emerge from further investigation

There will of course always be additional facts that emerge as a matter progresses, such as those from documents obtained at discovery, or those obtained from other sources such as medical records.

All new facts need to be considered very carefully as they could seriously affect a client's case or strategy. Your client should be kept apprised of all new facts and developments. If necessary, discuss with him/her how it will affect the strategy and possible outcome of the matter. (It may even result in your having to amend the Letter of Engagement.)

1.4 The law/legal issues

It is only once you are sure of your facts that you can confidently analyse them, identify the legal issues and apply the law to the facts in order to give your client an unqualified opinion on the matter and suggest strategies.

There are relatively few claims arising from a practitioner's lack of knowledge of the law. I will therefore not dwell on this area, save to warn that sometimes practitioners become so bogged down in the facts of a matter that they can no longer see the wood for the trees. It is always a good idea to ask a colleague to look at the matter with fresh eyes. It is surprising how a colleague can quickly identify an issue that should have been staring you in the face!

2. DECIDING ON AND PLANNING AN APPROPRIATE STRATEGY

2.1 Client's objectives and expectations

I cannot emphasise enough, the importance of establishing what a client's expectations are and managing them effectively. (See August *Bulletin* 4/2010).

Once you have obtained the facts and applied the law to those facts, you will need to consider the possible ways forward in the light of your client's expectations and objectives.

The possible strategies should be discussed with client and his/her 'buy in" should be obtained on the most appropriate one. The pro's and con's and probable costs must be properly canvassed. Your Letter of Engagement should reflect your agreed course of action (and should be amended as changes to your mandate occur.)

At this point, it may be apposite to emphasise that practitioners need to be careful not to give the client advice of a **non-legal** nature. Very often the role of attorney can become blurred with that of confidante or financial/business advisor. This is a very risky situation, which can ultimately lead to a claim.

3. DEALING WITH A MATTER TRANSFERRED FROM ANOTHER ATTORNEY

Believe me. This is always risky, even if the matter is transferred between attorneys in the same firm. It can be a professional indemnity claim waiting to happen.

The facts need to be checked, as do the legal issues. No assumptions should be made. The difficulty very often lies in trying to reconstruct the developments in the matter up to the time it is transferred.

If the client has cancelled the mandate of the previous attorney, because of dissatisfaction with the progress of the matter, there is a good chance that the file may well be chaotic and the previous attorney uncooperative.

We have had several claims where the attorney took over a matter with disastrous consequences. In two such matters:

- The transferred file showed that the previous attorney (A) had lodged the claim and drafted and issued the summons. There was no proof of service on file. The client told the new attorney (B) that A had advised him that the summons had been served. B did not double check with the RAF. The summons had in fact not been served and by the time B discovered this, the five-year period for the service of summons had lapsed.

- In a similar matter, the claim became prescribed because the second attorney incorrectly assumed that the first attorney had lodged the claim with the RAF. Although there was a letter on file, addressed to the RAF and purporting to lodge the claim, for some reason it was never delivered. By the time the necessary enquiries were made, it was too late.

In the two cases discussed above, the practitioners were unaware that the clients' claims were close to prescription. However, we have dealt with numerous claims in which the practitioner agreed to take over a matter, being fully aware that prescription was imminent. This is risk management suicide! Of course the claimants ended up successfully claiming against the attorneys.

TAKE NOTE!

- Avoid accepting transferred files wherever possible.
- Avoid accepting matters where prescription is imminent and/or there is insufficient time to take the necessary action.
- Make no assumptions about the matter.
- Check all facts and legal issues (the prescription date on the file cover may well be incorrect).
- Peruse the file very carefully and make the necessary enquiries (from client, the previous attorney and any other parties involved) before accepting the mandate.
- Conduct proper engagement management (see *Bulletin* 2/2010).
- Manage your client's expectations (see *Bulletin* 4/2010).
- Manage the matter (as set out above).

RAF News

The amounts referred to in s 17(4)(c) of the Road Accident Fund Act 56 of 1996, as amended were adjusted to R180 750.00 as from 31 July 2010 by notice 116 in GG No 33399.

1. APPEAL BY LSSA AND THREE OTHERS

As readers will recall, the LSSA and three others launched an application challenging the constitutionality and validity of the Act and Regulations. The Honourable Fabricius AJ dismissed the whole of the application on 31 March 2010.

An Application for Leave to Appeal direct to the Constitutional Court against **certain parts** of the judgment was granted by the Constitutional Court on 12 August 2010 and immediately thereafter the appeal was argued. The Heads of Argument and background are available on the LSSA website (www.lssa.org.za) Judgment was reserved. At the time of writing, no judgment has yet been handed down.

2. ROAD ACCIDENT FUND BENEFIT SCHEME

A policy has been drafted for the restructuring of the RAF as a compulsory social insurance scheme (RABS) to be administered by the Road Accident Benefit Scheme Administrator (RABSA) and was presented to the Parliamentary Portfolio Committee on Transport in February 2010 and the National Council of Provinces in September 2010. The submission made against the introduction of this scheme by LSSA is available on its website. LSSA has been advised by the Department of Transport that comments are currently being analysed and thereafter, a report will be compiled for consideration by the Minister. During the February 2010 presentation it was stated that a public consultation process would be undertaken on the proposal and the LSSA has requested details.

3. RECENT CASE LAW ON PASSENGERS CLAIMS UNDER THE UNAMENDED ACT

Mvumvu and Others v Minister of Transport and Another (7490/2008).

In this matter, judgment was handed down in the Western Cape High Court by Bozalek J on 28 June 2010, ruling that:

1. Sections 18 (1) (a) (i) and 18 (1) (b) of the RAF Act 56 of 1996 as they stood prior to 1 August 2008, were inconsistent with the Constitution and invalid;
2. Section 18 (2) of the RAF Act 56 of 1996 as they stood prior to 1 August 2008, were inconsistent with the Constitution and invalid;
3. Such declarations of invalidity would apply to all claims to be instituted against the RAF Act 56 of 1996, which as at the date of his order:
   a. Had not prescribed; and

b. Had not been finally determined by judgments at first instance or on appeal; and

c. Had not been finally determined by settlement duly concluded.

4. *All such claims referred to in paragraph 3 above shall qualify for no greater compensation than that which would accrue under the provisions of the RAF Amendment Act, 19 of 2005, as it stood on 1 August 2008.

5. The order was referred to the Constitutional Court for confirmation of the order of constitutional invalidity.

The implications of point 4 of the order in regard to non-finalised matters arising out of accidents which occurred before 1 August 2008 are likely to cause some confusion amongst both practitioners and RAF staff. It should be noted that paragraph 4 of the order relates only to quantum of the claim and not any procedural requirements. In terms of the judgment passengers who rely for their claim entirely on the negligence of the driver of the vehicle in which they were travelling will have their claims limited as provided for in terms of the Amendment Act, i.e. general damages for "serious" injuries only and capped loss of earnings. Common law claims for the balance not covered by the RAF Act are unaffected.(By the way, the Amendment Act has a loophole in that it **does not** restrict past medicals and hospital expenses claimed as part of the main claim to UPFS rates!)

The Plaintiffs' attorneys are applying to the Constitutional Court for an order setting aside the order in paragraph 4 above. The RAF and Minister of Transport are in turn appealing against the whole of the order. It is intended that both applications will be heard on 4 November 2010, so it is possible that there will be a delay in settlement of such matters, pending the outcome.

4. RAF THREE YEAR PRESCRIPTION PERIOD DECLARED CONSTITUTIONAL

On Thursday 30 September 2010, the Constitutional Court handed down judgment in the case of *Road Accident Fund and Another v Mdeyide*.

This case deals with the limitation of the right of access to courts, protected in section 34 of the Constitution, by a statutory prescription period.

The Eastern Cape High Court declared the RAF's prescription period of three years unconstitutional because it imposed a complete bar to claims outside of the prescription period, no matter how unusual or exceptional the claimant's particular circumstances.

In casu, the respondent, Mr Mdeyide, is blind, illiterate and innumerate. His claim for compensation in terms of the Road Accident Fund Act (RAF Act) was lodged with the RAF, three years and three days after the date of the collision.

The matter was then referred to the Constitutional Court, which upheld, in a majority judgment, the appeal and the constitutional validity of the RAF's three-year prescription period on the assumption that section 23(2) protects claims of those persons who are *non compos mentis*.

(In a dissenting judgment Froneman J held that the challenged provision of the RAF Act was unconstitutional as the prescription period is too inflexible to be justified and, thus, potentially affects the most socio-economically disadvantaged individuals in society.)

5. CLAIMS FOR GENERAL DAMAGES FOR SERIOUS INJURIES UNDER THE AMENDED ACT.

An article on this topic and particularly the completion of the RAF 4 forms was written for us by Clement Shirilele and published in the August *Bulletin*, 4/2010.

We have been advised that at present (October 2010) any registered medical specialist may complete the RAF 4 form, and not only those who have attended the two RAF training courses, as no courses have been gazetted by the Minister of Transport. (Of course, the prescribed assessment method will have to be adhered to.)

It should also be noted that, after completion of an assessment with the AMA Guides (6th Edition*), where the result is less than a 30% impairment (WPI), the claimant may well be able to show that s/he qualifies in terms of the **narrative test**, which focuses on the permanent consequences of the injury to the individual, rather than on the nature of the injury itself.

* We have also been advised that only the 6th edition and not the 5th edition must be used, as there are great differences between the two editions.

6. MVA UNDERSETTLEMENTS

We only began reflecting MVA under-settlements as a separate claim type in the 2005/6 year. The numbers of these claims have increased year on year since then.

As can be seen from the table on page 1(?), MVA under-settlements have the highest average total incurred value per claim of all claim types in the 2008 year. At this stage, in the 2009 year, both conveyancing and under-settlements have the highest average value per claim. This could change if any of the under-settlement claims are amended upwards in the future, as tends to happen with these matters.

I selected a cross section of these claims for a closer analysis:

✔ In one such claim against a large firm, it was alleged that the minor's claim was under-settled for an amount of R71,438-00. The minor's mother had instructed the practitioner in her representative capacity and had pressurised him into settling the matter before additional medico-legal reports could be obtained.

It had not been completely clear from the seven medico-legal reports that had already been obtained by the practitioner, that the head injury sustained by the minor was a serious one. The Glasgow coma of 14/15 and the neurologist's report seemed to suggest that the head injury was a minor one. However, there were some statements in several of the reports that should have set off alarm bells.

Subsequent reports confirmed that the injury was in fact a serious one.

- ✔ A medium-sized firm was sued on the basis of an under-settlement in respect of a severe head injury sustained by a minor.

Again, as so often happens in these minors' claims, the mother insisted that the practitioner settle with the RAF without obtaining the necessary medico-legal reports. The practitioner was aware that the minor's Glasgow Coma of 11/15 and other symptoms suggested a serious injury, but bowed to pressure and failed to obtain the necessary reports.

Reports obtained subsequently by the claimant's new attorneys confirmed the severity of the injury.

- ✔ A single practitioner settled the claimant's claim against the RAF for R75,000-00 in respect of general damages and no undertaking for future medical expenses. The claimant claimed that the practitioner had failed to properly assess the injuries and damages, or to discuss the settlement with him (the claimant) and for ultimately under-settling the claim.

The practitioner had obtained an early medico-legal report from an orthopaedic surgeon, who had requested that he be allowed to re-examine the client a year later, on the basis that the latter's condition had not stabilised and there would probably be serious *sequelae*. The injuries were, *inter alia*, fractures to the right femoral head and superior pubic ramus.

The practitioner settled the matter without obtaining a further report. Subsequent reports obtained by the claimant's new attorneys supported a claim of under-settlement.

Briefly, the main lesson to be learned from the matters discussed above is that the MVA practitioner needs:

- ✔ **firstly, to put himself in a position where he can properly and independently quantify the claim (by obtaining and carefully scrutinising medical records and medico-legal reports) and**
- ✔ **secondly, to make sure that he does in fact give the client the appropriate advice regarding settlement and**
- ✔ **thirdly, to make sure that there is sufficient proof that such advice was given and**
- ✔ **fourthly, to be extra cautious where a minor is involved and if necessary insist that a curator *ad litem* be appointed to act in the minor's interest. ***

(*on a practical level the above fourth proposal may not be an option as the parents are the clients and would certainly not agree to such an appointment if they were the ones insisting on accepting an offer. The only real option is for the practitioner to withdraw and to document his/her reasons for doing so in a letter to clients (i.e. that it is not in the best interests of the minor to accept the offer).

Important note: ***PRACTITIONERS USING THE PRESCRIPTION ALERT SYSTEM***

In terms of the amendments to the RAF Act, where the claim arises out of an accident which occurred on or after **1 August 2008**, *general damages* can no longer be claimed, UNLESS the injury is classified as serious. **Where *general damages* are claimed, a separate RAF4 form needs to be lodged with the RAF.** The RAF1 and RAF4 forms need to be lodged within the 2 year (hit-and-run) or 3 year (accident) period (not necessarily simultaneously). If the RAF4 form is not lodged within this specified period, your client will not be able to pursue any claim for general damages. (i.e. the claim for *general damages* will effectively prescribe.)

You will need to advise Prescription Alert if you will be claiming for general damages, so that they can ensure that the Claim Type is correctly reflected to cater for the prescription date for the lodgment of the RAF4 form.

CASE STUDY

We have recently dealt with the following claim against a conveyancer:

BACKGROUND

Mr Y wished to buy a property in instalments from Ms X, for a purchase price of R220 000.00. When Mr Y approached the conveyancer, requesting that he assist in the drafting of an agreement of sale and registration of transfer, he had already paid Ms X instalments totalling R120 000.00.

At the time, the property was still registered in the names of Ms X and her deceased husband, Mr X. She provided the conveyancer with the title deeds which confirmed this, the marriage certificate in respect of her marriage to the deceased and the Letters of Executorship appointing her as executor of Mr X's estate. The estate had not yet been finalised. She omitted to advise the conveyancer that she had remarried after the death of Mr X. She had in fact married a certain Mr A in community of property.

The conveyancer drafted the agreement of sale between Ms X and Ms Y and both parties signed it. Neither the deceased estate nor Ms X's current husband, Mr A, were referred to in the sale agreement.

Once Mr Y had paid the full purchase price, Ms X refused to sign the transfer documents and demanded an additional R70 000.00 over and above the original purchase price of R250 000.00.

It was at this stage that Mr Y was advised by other attorneys, that the agreement of sale was void, both on the basis of non-compliance with the provisions of the Alienation of Land Act 68 of 1981 (as amended) and those of S15(2) of the Matrimonial Property Act 88 of 1984 (as amended).

THE RELEVANT LAW

<u>Alienation of Land Act 68 of 1981 (as amended)</u>

Section 2 (1) reads as follows:

No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereof or by their agents on their written authority.

Section 6 (1) (a) reads as follows:

A contract shall contain the names of the purchaser and the seller and their residential or business address in the Republic.

The agreement of sale did not comply with section 2 (1) in that only Ms X signed as seller. It was necessary for her to sign, not only in her personal capacity, but also in her capacity as executor of her deceased husband's estate. Mr A should also have signed the agreement (or given Ms X written authority to do so) as he and Ms X were married in community of property.

The agreement also did not fully comply with section 6 (1).

<u>Matrimonial Property Act 88 of 1984 (as amended)</u>

With reference to spouses married in community of property, section 15 reads as follows:

15(2) Such a spouse shall not without the written consent of the other spouse:

(a) Alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;

(b) Enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate.

In *Naidoo & another v Naidoo & another* (2009) JOL 22674 (N) the court had to decide whether or not a spouse, married in community of property, could avoid liability in terms of a settlement agreement to alienate property, which was signed by her spouse, without the written consent required in terms of section 15 of the Matrimonial Property Act.

On the facts of that matter, and taking into account that the wife had at all times been aware of the alienation and had actually co-signed a power of attorney to give effect to the transfer, the Court held that she was estopped from alleging that she had not given her consent in terms of section 15 (2).

The present matter can be distinguished from *Naidoo*. There was no suggestion that Mr A had known about or agreed to the alienation at any stage.

THE OUTCOME

Because of the invalidity of the agreement, Ms X was able to snatch at a bargain and Mr Y had little choice but to enter into a new agreement with Ms X (now calling herself Ms A) and her spouse, Mr A, at an increased purchase price of R320 000.00. The property was thereafter finally transferred into the Mr Y's name.

Mr Y claimed that the conveyancer had been professionally negligent and claimed the additional R70 000.00 paid for the immovable property from him as damages.

CONVEYANCER'S BREACH OF MANDATE

The conveyancer should have taken note of the fact that the property was registered in the names of Mr and Ms X. He was obliged to advise the parties that it was necessary to obtain consent in respect of the half-share belonging to the deceased estate and he should have drafted the agreement to make provision for signature on behalf of the estate. It is our view that his failure to deal with these aspects fell below the standard of conduct to be expected of a reasonably competent conveyancer.

The issues surrounding Ms X's marital status are less clear cut. Ms X omitted to tell the conveyancer that she had remarried. She used her previous married name and only provided him with the marriage certificate in respect of her marriage to Mr X. The title deed reflected Mr and Ms X as owners of the immovable property. She also gave him a copy of her Letters of Executorship.

In the absence of any other documents or clues indicating Ms X's new marital status, we are of the view that the conveyancer was entitled to rely on the information which Ms X provided to him and that he acted reasonably in the circumstances.

Mr Y also alleged that the conveyancer had been negligent in allowing him to pay money over to the seller prior to transfer and without security. Nothing really turns on this, as Mr Y was not claiming any damages in this regard.

LESSONS LEARNED

This case once again illustrates the folly of a conveyancer's failure to properly study and apply his mind to the contents of all the relevant documents, such as title deeds. Even what must have seemed to be a rather straightforward, run-of-the-mill instruction had some fairly complex aspects.

The issue of allowing a purchaser to make unsecured payments to the seller prior to transfer, although raised by Mr Y was not central to this particular claim. However, it could have been problematical if the circumstances of the matter had been different. In order to protect the purchaser, the agreement should have been registered in terms of S20 of the Alienation of Land Act.

What if Ms X had attempted to transfer the property to another purchaser in the interim and had refused to refund the payments?

In this particular case, the conveyancer cannot be blamed for having been unaware of the seller's correct marital status. However, a prudent conveyancer should be sure to obtain details of the parties' marital status. All parties should sign the necessary documents in the presence of the conveyancer and provide proof of identity.

We have had matters in the past, where a spouse has brought an imposter, posing as the other spouse, to sign the documents. The identity documents must be carefully checked. Do not accept copies sent by telefax.

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and

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LETTERS TO THE EDITOR

1.

THANKS FOR THE MOST INTERESTING PUBLICATION RE BULLETIN RISK ALERT AUGUST 2010 – NO 4/2010

Being a Bookkeeper at an Attorneys firm I suggest that we share some detail of fraudsters targeting attorneys trust accounts.

As a Bookkeeper I am very alert to these types of telephone calls to refund any overpayments or mistaken payments.

Bringing me to the fact that deposits into the trust account should be handled very carefully and not to be paid out on the same day or even later than 14 days.

I personally experienced a situation where we waited the full 14 days on a big cheque of over R500,000-00 and then made the outpaying, seems this was a big mistake as the cheque was fraud in the specific Bank.

To make this Bulletin of more value and user-friendly, please let us share the fraudsters schemes, and be alert!

Daleen Bekker
Bookkeeper

Dear Daleen

Thank you so much for your feedback. It is much appreciated.

I think your idea is great. I am very happy for bookkeepers to make such contributions to the Bulletin. We need to work together to ensure that these fraudsters do not get away with these schemes.

Ann Bertelsmann
Editor/Risk Manager

2.

RE: RAF CONFUSION

Risk alert alerted practitioners, that RAF4 and RAF1 can be lodged simultaneously or at any stage before the prescription date. The problems that I have encountered are:

1. We have submitted RAF 4 forms to hospitals that treated clients. One hospital phoned saying that its doctors do not complete the RAF4, but RAF has a panel of doctors used to complete the form.
2. We phoned the Durban branch and spoke to a number of persons who appeared to have no knowledge on how the form is used. Some of them were honest enough to say that they had not even seen the form.
3. One RAF official referred us to a particular secretary who, when contacted stated that RAF 4 is submitted only on request by RAF.

Yours faithfully

GWALA KASAMBARA & ASSOCIATES

We have advised Mr Kasambara to read the August Bulletin and our website.

3.

I ENJOY READING THE MONTHLY BULLETINS.

I, however have one suggestion to make, namely, is it not possible to use a type of **matt printing paper**, rather than the current **gloss printing paper.**

I usually read the bulletins under a fluorescent light in my office, which tends to shine if the bulletin is not held at the correct angle. For instance the yellow supplement to the De Rebus makes reading much easier. I have the same problem reading the De Rebus or any other glossy publication.

Best Regards.

At van Niekerk

What are other readers' views on this?

We extend our thanks to Jacqui Sohn, the Chair of the LSSA's RAF Committee for her invaluable assistance in preparing this section.

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