Bulletin

August 2011 – No. 4/2011

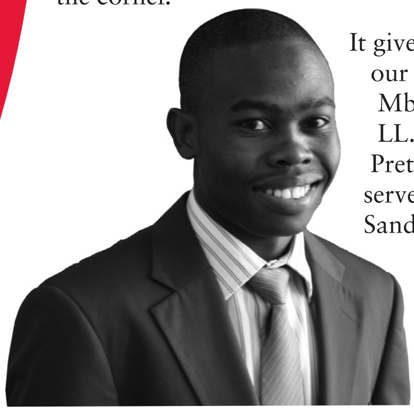
Risk Alert

A joint publication of the Attorneys Fidelity Fund and the Attorneys Insurance Indemnity Fund (A Non Profit Company, Registration No. 93/03588/08)

In this edition

Risk Manager's Column

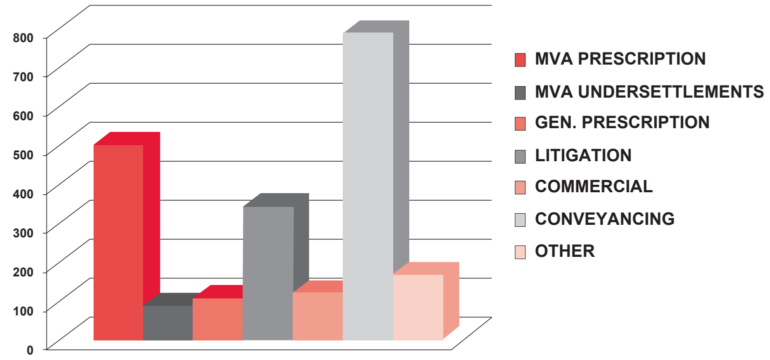
I hope that readers have managed to keep warm during what, at the time of writing, seems to be an exceptionally cold winter. When you read this, it will hopefully be a lot warmer, with spring just around the corner.



It gives me great pleasure to introduce our newest Legal Adviser, Siphephelo Mbuli aka Sips, who obtained his LL.B degree from the University of Pretoria in 2008. Thereafter he served his articles with Deneys Reitz, in Sandton, and was admitted as an attorney of the High Court in May 2011.

CLAIMS TRENDS

Graph Claims breakdown (overall): 01 July 2003 – 31 March 2011



As can be seen from the above graph, on average over the past 8 years, the majority of claims arose out of the conveyancing area of practice. RAF prescriptions have been responsible for the next highest number of claims over that period. During the 2008 and 2009 years, while the number of claims arising out of RAF prescriptions declined, the numbers of conveyancing related claims continued to grow.

This upward spiral of conveyancing matters has fortunately not continued in the 2010 year.

When comparing the 2009 and 2010 years (at 9 months), we found that there was an effective 50% reduction in the number of conveyancing claims, year on year and an effective 22% reduction in the total number of claims, year on year.

Attorneys Fidelity Fund,
5th Floor, Waalburg Building,
28 Wale Street, Cape Town 8001.
PO Box 3062, Cape Town, 8000,
South Africa, Docex 154.
Tel: (021) 424 5351
Fax: (021) 423 4819
E-mail: attorneys@fidfund.co.za
www.fidfund.co.za

Prescription Alert, 2nd Floor,
Waalburg Building, 28 Wale Street,
Cape Town 8001.
PO Box 3062, Cape Town, 8000,
South Africa, Docex 149.
Tel: (021) 422 2830
Fax: (021) 422 2990
E-mail: info@aiif.co.za
www.aiif.co.za

Risk Managers Column continued...

The table below illustrates that, in the first three quarters of the 2010 year, the total number of claims against RAF practitioners for prescribed and under-settled claims (**100**), is similar to the number of claims made against conveyancers (**94**).

The total incurred value of conveyancing claims is **R16 207 655**, while the total for both types of RAF matters is **R13 932 854**.

YEAR	2010 Number of claims	2010 Total incurred value
Conveyancing	94	R16 207 655
RAF prescription	77	R10 012 001
RAF under-settlements	23	R3 920 853
Total RAF	100	R13 932 854

What is also apparent from the above table is that claims arising out of alleged **under-settlements of RAF matters** account for a large proportion of claims against RAF practitioners. These claims are usually avoidable.

Please read my article on this topic on page 5 of the *Risk Alert Bulletin* 5/2010. Please also look out for another article on this topic in the November *Bulletin*. I will also be doing a comprehensive article on the topic, which should go up on the website in the near future.

Although there has been some improvement in the number of claims notified, those arising out of RAF, conveyancing and litigation matters are still unacceptably high. Practitioners are urged to better manage the risks in their practices, and to remain alive to all new developments in the law.

Ann Bertelsmann
abertelsmann@glenrandmib.co.za

Conveyancing

SUBSTITUTION OF CONVEYANCERS

Resolution 18 of 2009 which was passed at a Registrars of Deeds Conference reads as follows:

> **"18/2009 Substitution of executing conveyancers**
>
> It has become established practice to substitute executing conveyancers in the power of attorney to pass transfer or mortgage properties, at will and without the approval of the grantor of the power of attorney. Should the grantor not agree to such substitution, in the form of initialling the inclusion? Resolution: Yes, the grantor and witness must initial this substitution to prohibit possible fraud however, where the power of attorney makes provision for substitution, substitution is permitted without full initialling."

The Deeds Registries Act was passed in 1937. It has been amended many times and, in its amended form, is still the main statutory regulator for the registration of deeds and other transactions relating mainly to immovable property.

Section 20 of the Act requires deeds of transfer to be executed in the presence of a Registrar by the owner of the land or by a conveyancer authorised by a power of attorney to act on behalf of the owner.

Section 50 of the Act which relates to the registration of mortgage bonds prescribes the same requirement.

It is very seldom that a mortgagor or transferor appears personally before the Registrar. Usually a power of attorney is granted in favour of a conveyancer. The power of attorney/new deed of transfer/mortgage bond has to be prepared by a conveyancer. This must be indicated by the signature of the preparing conveyancer at the top right hand corner of the document. In terms of the regulations that signature imposes serious obligations on the preparer.

Usually powers of attorney to execute a deed of transfer or mortgage bond contain the following provision:

> "… I/We … hereby nominate and appoint … [names to be inserted] with power of substitution to be my attorney and agent and to appear before the Registrar of Deeds or any other competent official in the Republic of South Africa and then and there as my/our act and deed declare that…"

Conveyancing continued...

Registrar's Circular 6 of 2010 reads as follows:

> "3. Registrars Conference Resolution 7/2010 reads 'The name of a conveyancer, not disclosed on the Power of Attorney, may be inserted on the Power of Attorney with full initialling, alternatively a deed of substitution, by the conveyancer appointed in the Power of Attorney, may be lodged; provided that the Power of Attorney makes provision for substitution. RCR 49 of 1962 and RCR 18 of 2009 are hereby withdrawn.' "

The procedure for registration of transfers and mortgage bonds is that the nominated conveyancer signs (executes) the deed in the office of the Registrar who then signs it. That is when the registration is completed.

For many years execution of some deeds has often been carried out by conveyancers who were not appointed by the transferor/mortgagor, but whose names were inserted in the power of attorney after signature by the grantor. This was usually done in the Deeds Office and without the knowledge or consent of the grantor. This occurred when none of the conveyancers in whose favour the power was executed was able to appear when the deed or bond was ready for execution. The conveyancer who would actually sign merely inserted his name in the power of attorney.

In fact, in at least one deeds office, there was for many years in the room where registrations took place, an old fashioned typewriter available to enable the name of the conveyancer who would actually do the inserted in the power of attorney. This was done whether or not there was a power of substitution granted in the power of attorney.

We thank Selwyn Cohen for kindly agreeing to allow us to use this article, which he wrote for Eversheds' *Law News,* April 2011.

The consequences of an improper substitution are very serious for all. The registration may be ineffective. Please carefully consider the consequences for your own practices.

Risk management tips

SUPERVISION (PART 2)

In Part 1, in the previous *Bulletin* (2/2011), I dealt with supervision in an attorney's practice in general terms. In this article, I deal with the topic in relation to specific role players in the practice.

SUPERVISION OF SUPPORT STAFF

Very often, as practitioners, we rely heavily on our efficient support staff. A good personal assistant is an asset that few busy practitioners can do without. Because of this, we sometimes lose sight of the fact that, although an assistant may be excellent at her/his job, *s/he does not have the years of legal and ethical training that give the attorney an understanding of the broader issues surrounding a matter and any actions taken in that matter.*

It can be a serious mistake to allow your assistant to become used to making unlimited, independent decisions and acting on them. **Empowerment is important, but independence needs to be balanced with careful training, set boundaries and support.** It is both a danger to your practice and unfair and demoralizing to support staff, when too much responsibility is assigned to them.

It is important that personal assistants and other support staff are warned about the dangers of giving out advice, information or documents in any matter or context. They should be encouraged to ask for help from professional staff.

Some years ago, we had a claim that arose out of an assistant (A) having undertaken to assist a debtor (B), who had come into the office to make an arrangement to pay off a debt. B had mentioned to A that she had received a summons from another firm of attorneys, in a different matter.

A took a "deposit" of R200 and drafted an "Appearance to Defend" the action. She gave the document to B and told her to deliver it to the plaintiff's attorneys. A failed to tell B what further steps to follow thereafter and inevitably, the plaintiff obtained a judgment against B.

Risk management tips continued...

Support staff members also need to be made aware of the dangers of failing to immediately bring correspondence and other important documents and pleadings to the attention of the professional staff.

We regularly receive claims in which important documents like notices of bar have been filed away without their having been brought to the attention of the attorney concerned. Disastrous consequences usually follow!

A messenger's lack of understanding about the consequences of failing to serve and file documents timeously is another cause for a number of claims.

SUPERVISION OF PARALEGALS

It is mostly in the area of conveyancing, that claims arising out of the failure to supervise paralegals occur. *Most of these matters do not arise from the paralegal or conveyancing secretary's lack of knowledge or experience in this field. They far more often stem from a lack of formal legal training and lack of adequate supervision.*

The reader may be excused for finding the following facts unbelievable: Having worked for the firm for a number of years, the conveyancer's legal secretary (A) was competent and trusted. So much so, that, when the conveyancer (B) went away on business (as he frequently did) he even went so far as to sign blank trust cheques for A to complete in his absence! In the end, of course the inevitable happened and in the region of R3 million was misappropriated by the secretary.

In dealing with conveyancing claims, we often find that the conveyancer does not check or review the conveyancing files at any time during the course of the transaction. The files that we receive when investigating claims, are sometimes very scanty.

In our experience, the conveyancer sometimes knows very little about his/her matter and is unable to give us an adequate account of what went wrong. When the inevitable claim comes, the conveyancer has to bring the secretary to consultations with our legal advisers. She is sometimes the only one who knows anything about the matter. There is sometimes an element of fraud or dishonesty on the part of the paralegal.

A large number of our claims arise because of the free rein given to paralegals/secretaries. In some practices these trusted and powerful employees have been allowed to create little "empires" in which they run deals with estate agents and bridging finance companies. Some move money between files, obtain finance on transactions without the permission of the conveyancer and/or the seller/purchaser and of course some manage to make payments to themselves, their debtors or their family and friends.

Some conveyancers sign off payments or documents without carefully checking the file. Because there is no supervision and there are no file audits or no other thorough checks and balances, these problems are only discovered when it is much too late.

In a series of bridging finance claims against a conveyancer (A) his secretary (B) had attended to a number of unauthorised bridging finance transactions. A only got wind of this when B came to him for signature of one of the cheques and he requested the file.

B had been working with minimal supervision, as she was a senior conveyancing typist, and A trusted her judgment.

In one claim the secretary (A) had had to amend certain transfer documents, as the property description was incorrect. She felt sorry for the client because of the delays in the matter. She decided to make it quicker and easier for the client (B). Instead of asking B to come and sign the documents again, she forged B's signature to the amendments.

The amended property description became the centre of a dispute.

The unfortunate A apparently had the best of intentions, but clearly had no understanding of legal ethics and the implications of what she was doing. She should have been properly trained and more effectively supervised.

In the same vein, many secretaries allow clients to sign documents without witnesses present. The "witness" subsequently signs the documents. ***There are clearly ethical problems and dangers in this practice.***

In one such matter, the Homeowner's Rules referred to in the Deed of Sale were omitted in the Title Deeds. This omission had to be rectified for all the properties in the development, at considerable expense.

In another matter, a deeds search had revealed that there was an attachment of the property. Despite this, the secretary attempted to register a second bond over the property, in favour of the mortgagor. The bond could not be registered. Unfortunately, the money had already been paid over to the "mortgagee" on date of lodgment.

SUPERVISION OF CANDIDATE ATTORNEYS

Generally speaking, a candidate attorney (CA) enters your offices knowing little or nothing about practice. S/he will have acquired some knowledge of the law, legal principles and research, but will need to be trained and mentored to become a "fit and proper" practitioner, who has learnt something about the running of legal matters and successful, ethical practices.

From discussions with a cross-section of CA's, it seems that each practice has its own way of dealing with this phenomenon.

The methods range broadly between the following two extremes:

- The CA is immediately given a pile of files that the other professionals do not want. S/he must sink or swim. The practice is busy and there is certainly no time to spend on training people who will not bring in fees and still have to be paid a salary. This CA spends a lot of time telephoning colleagues and friends for advice on what to do in these files. S/he learns to be independent and live by her/his wits, but the dangers to the practice inherent in this approach are obvious.
- The CA receives good theoretical training and then is circulated for certain periods of her/his articles with practitioners in various fields of law, so that s/he can be exposed to as many areas of practice as possible. The problem is, so I am told, practically, s/he does not learn much. S/he learns how to do the menial tasks, like photocopying, serving and filing, paginating court files, or conducting limited research. S/he is usually not allowed to take part meaningfully in any matter, or to run a matter on her/his own. This extreme will probably protect your practice against potential claims, but certainly will not empower the CA or properly fulfil your duties as a principal.

The ideal probably lies somewhere between these two extremes. This will entail some delegation coupled with *effective* supervision which *should* as stated before, *empower while providing broad guidelines, appropriate training, review and constructive feedback. The building blocks are inspiration, respect, openness, two-way communication and leading by example.*

The candidate attorney (S) was given the responsibility for the running of a claim against the Road Accident Fund. He failed to lodge the claimants' claim within 3 years of the date of accident and the claim became prescribed.

From the file notes it is clear this claim became prescribed because there was not enough supervision of S who dealt with the file. She made a note on file, wherein she stated that she had asked that Y fill in the amounts to be claimed. She noted that Y was rude and did not help, he told her to do it herself.

If Y had looked at the file he would have realized that the claim was prescribing 5 days later. S lodged the claim two days late.

It is clear that the inexperienced candidate attorney was left to run the matter by herself without sufficient guidance and supervision and this resulted in the claim prescribing.

SUPERVISION OF OTHER PROFESSIONALS

Although this article focuses to a certain extent on effective supervision of administrative or junior staff, it is no less essential that all other professional staff (ranging from professional assistants through to senior attorneys) be supervised. Even single practitioners need to establish methods for self-supervision and self-assessment.

Clearly, the level and methods of supervision will be tailored to the supervisee's level of experience, ability and proven track record.

As we have seen in the news in recent months, even your most trusted senior colleagues can let you down!

Risk management tips continued...

The bank instructed the practice to register a bond over a property. The conveyancer employed by the practice, confirmed to the bank that the bond had been registered, when no bond was in fact registered. (It transpires that staff members were paid bonuses for meeting their monthly targets and this seems to have been the reason for the deception.) The bank paid the "mortgagee" and also the conveyancer's fees.

The deception only came to light at a later stage, when the debtor defaulted on mortgage payments. By this time the conveyancer had left the employ of the practice. The bank had no security for the outstanding balance.

Useful Tips For MVA Practitioners

We have received a very helpful suggestion from Mr D Van Vollenhoven, a Port Elizabeth practitioner. He suggests that we provide readers and members of Prescription Alert with relevant High Court decisions relating to claims for general damages for "serious injury".

He suggests that we encourage RAf practitioners to submit case studies and experiences with the RAF and any other information to us for the purposes of sharing them with other RAF practitioners.

Given that this is "uncharted territory" for all concerned, this seems like a good idea.

WE THEREFORE ASK THAT RAF PRACTITIONERS PLEASE ASSIST US, THEMSELVES AND THEIR COLLEAGUES BY BECOMING INVOLVED WITH THIS INITIATIVE.

Please forward all information to Alison Smit, Systems Manager, Prescription Alert, *asmit@aiif.co.za*.

Case law on serious injury claims.

We thank Roelf Nel of Independent Actuarial Consultants (Pty) Ltd, for the following case study which he kindly agreed to allow us to republish from his newsletter. For any queries, he can be contacted at Roelf.Nel@iac.co.za Tel: 021 422 4373

1. **Serious Injuries – The Interrelationship between the AMA Guides and the Narrative Test as Set Out in *Daniels & 2 Others v RAF*, Cape of Good Hope Provincial Division, Case No: 8853/10**

This decision was made in relation to the application of the 3rd respondent in this matter, one Ntombiko Priscilla Sunduzwayo. She was injured in a motor vehicle accident on 9 April 2009. At the time, she was working at a bus terminal in Philippi, Cape Town, as a passenger-tout for long distance buses and taxis to the Eastern Cape. She was struck down by a motor vehicle while crossing a road and sustained severe injuries to her lower leg. As a result, she is unable to resume her work as a tout, an occupation which requires her to run about physically in search of potential passengers.

She contended that the consequences of her injuries on her quality of life render it appropriate to characterise the injuries as 'serious' within the meaning of the proviso to s 17(1) of the Act and she proposed to claim compensation for general damages.

As she could not afford to pay the R 7 000.00 required for a serious injury assessment report she submitted a request to the Fund for financial assistance in respect of the required serious injury assessment on 4 September 2009. On 19 April 2010, after her attorney had made various follow up inquiries, the Fund refused the request for financial assistance. The Fund contended that it was liable to pay the costs of a serious injury assessment only in the event that the claimant had sustained serious injuries that resulted in not less than '30% permanent body impairment'. A telephonic enquiry by the applicant's attorney obtained confirmation from the relevant functionary at the Fund who had been dealing with the matter that he had not considered the narrative test to ascertain the seriousness, or lack thereof, of the injury.

In the court papers the Fund stated that if a request for financial assistance in respect of a serious injury assessment is not sufficiently substantiated to establish a *prima facie* indication of a serious injury it will not fund further investigation into the seriousness of the injury or its consequences. It further stated that the so-called narrative test is there to cover those isolated and rare cases where the objective criteria of the AMA6 are not met. It is a fallback position.

The court stated that the narrative test falls to be applied as an integral part of any serious injury assessment and this is indeed confirmed by the content of part 5 of the RAF4 form, which gives effect to regulation 3(1)(b)(iii) of Road Accident Fund Regulations (2008). There is nothing in regulation 3(1)(b) which suggests that the narrative test should be applied only in 'rare and isolated cases'. The functionary of the Fund who declined the third applicant's request in terms of regulation 3(2) (b) gave no consideration whatsoever to the possible effect of the application of the narrative test and plainly did not consider that the narrative test fell to be applied together with AMA Guides as 'a collective' and not as a fallback procedure when the AMA guidelines had not been met.

The decision by the Fund to decline the third applicant's request in terms of regulation 3(2)(b) of the Road Accident Fund Regulations (2008) was set aside.

PLEASE NOTE: *This decision was not a direction by the court that the applicant's request for financial assistance should be granted. Her application was, in effect, simply referred back to the RAF for proper consideration. The court emphasised that its finding went only to the manner in which the applicant's request had been dealt with by the Fund and did not suggest what the result should be after proper consideration of the request.*

2. ***Francisco Thomas Juscilino Nhambe v Road Accident Fund*, Case No 70721/2009, North Gauteng High Court 10 November 2010.**

Space does not permit full analysis of this case. A copy appears on our website under the heading "RAF matters".

The plaintiff claimed damages for bodily injuries which fell to be dealt with in terms of the amended RAF Act.

Pre-trial, the merits were settled 80/20 in favour of the plaintiff and the quantum of general damages and loss of income were the only issues to be dealt with.

The court refused the RAF's application for a postponement and the trial proceeded.

The RAF4 had been completed by a medical practitioner. The plaintiff had obtained a report from an orthopaedic surgeon.

Tuchten J held : "*...the defendant is in my view precluded by the concession that the merits of the plaintiff's claim have been disposed of, from raising any procedural objection to the plaintiff's claim for general damages.*"

He found that, on any evaluation (i.e. whether in terms of the amended Act and Regulations or on general principles) the plaintiff had suffered a serious injury and should be compensated by way of general damages.

Tuchten J, also decided that the legislature did not intend the claim for loss of income to depend on the length of time which elapsed before the matter came to court and therefore held that the applicable cap was that at the date of injury and not date of trial.

NB: Jacqui Sohn opines that these findings are likely to be attacked by the RAF in similar matters. She notes that *in this particular case they were caught unprepared, had not objected to the assessment as "serious" by the Plaintiff's doctor, had not specifically pleaded that the injuries were not "serious" as defined in Regulation 3, had not referred the Plaintiff to their own medical experts and were refused a postponement by the presiding judge.*

ADJUSTMENT OF THE STATUTORY LIMIT IN RESPECT OF CLAIMS FOR LOSS OF INCOME AND LOSS OF SUPPORT.

In GG 34233 29 April 2011: *The Road accident fund hereby, in accordance with section 17 (4A) (a) of the Road Accident Fund Act, Act No. 56 of 1996, as amended, adjusts and makes known that the amounts referred to in subsection 17 (4) (c) are hereby adjusted to R185 289.00 (One Hundred and Eighty-Five Thousand Two Hundred and Eighty Nine Rand), with effect from 30 April 2011.*

Ann Bertelsmann
abertelsmann@glenrandmib.co.za

Litigation

Debt Collection – the *in duplum rule and the NCA*

In the following judgment, the court has interpreted s 103(5) read with s 101(1)(b) to (g) of the National Credit Act 34 of 2005 (NCA).

***Nedbank v The National Credit Regulator* 662/2009 & 500/2010) [2011] ZASCA 35 (28 March 2011)**

F R Malan JA, upholding the judgment of B R du Plessis, in the North Gauteng High Court, held that:

"*Once the amounts referred to in s 101(1) (b) to (g) that accrue during the period of default, whether or not they are paid, equal in aggregate the unpaid balance of the principle debt at the time the default occurs, no further charges may be levied. It is not that a moratorium against payment is introduced by s 103(5): no amount in respect of fees costs and charges may 'accrue' any further. Put differently, no enforceable right to the charges outlined in s 101(1)(b) to (g) thereafter arises.*"

Practitioners running debt collection practices or advising clients on debt collection and contracts in terms of the NCA are urged to carefully consider how this judgement will affect the way in which they deal with the collection of fees, costs and interest as set out in s 101 (1) (b) to (g) of the Act.

Ann Bertelsmann
abertelsmann@glenrandmib.co.za

Letters to the Editor

Referring to the correspondence between Professor Hennie Klopper and me, which was published in a previous *Bulletin* (2/2011), **Jacqui Sohn** writes as follows:

I would just like to say that I entirely agree with Professor Klopper's view on the indivisibility of a claim which has its roots in delict and as such arises all together and all at the same time.

We did raise this as one of our many objections to the Regulations in the original application in the Pretoria High Court.

Regulation 3 is still open to attack as ultra vires the Act (to the Supreme Court of appeal) and on all the other grounds which were dismissed in Pretoria but were not taken on appeal in the Constitutional Court application.

As we approach the first three year time bar on 31 July 2011 the practical difficulties and ambiguity of the regulations become more and more apparent. However, if one does have a clear cut "serious" injury and can lodge the RAF 4 Form within three years, then I doubt whether anyone would want to take a chance in making a test case on this issue.

Perhaps a way to challenge this (as a test case) would be to pick a case where the RAF have written their now standard letter in response to the lodgement of a RAF FORM 1 in which general damages is claimed and they state that prescription is not interrupted in regard to this head of damages?

Risk Alert is your Bulletin so please tell us what you would like to see in it. Readers can send suggestions to abertelsmann@glenrandmib.co.za

Ann Bertelsmann, Risk Manager, Aon, 288 Kent Avenue, Randburg, 2194, PO Box 2544, Randburg, 2125, Docex 34 Randburg, Tel: 011 329 1943, Fax: 011 329 1984
Website: www.aiif.co.za