



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

The first four months of the year have flown and much has happened in the field of law since the previous bulletin went to print. Both the courts and the legislators have been extremely busy.

The Consumer Protection Act and Regulations came into effect on 31 March 2011. We, as practitioners need to consider how this Act affects us in our provision of services to clients.

The Constitutional Court gave judgment on passenger claims in the *Mvumvu* matter (see the discussion on page 5).

There is no specific column on conveyancing matters in this edition, but those involved in conveyancing work are urged to read the column entitled "Risk Management Tips".

For those who litigate in the Magistrate's Courts, please read the article on the new rules in the "Litigation" column.

## CLAIMS TRENDS (as at 31 December 2010)

**Table 1: Total numbers of claims notified over previous 4 years (full 12 months)**

| YEAR                  | 2009       | % of Total | 2008       | % of Total | 2007       | % of Total | 2006       | % of Total |
|-----------------------|------------|------------|------------|------------|------------|------------|------------|------------|
| Conveyancing          | 282        | 47.4       | 276        | 52.0       | 99         | 36.0       | 47         | 21.6       |
| RAF prescription      | 117        | 19.7       | 109        | 20.6       | 70         | 25.5       | 68         | 31.2       |
| RAF under-settlements | 38         | 6.4        | 17         | 3.2%       | 12         | 4.4        | 10         | 4.6        |
| Litigation            | 52         | 8.7        | 62         | 11.7       | 43         | 15.6       | 39         | 17.9       |
| Other                 | 106        | 17.8       | 65         | 12.3       | 51         | 18.5       | 54         | 24.8       |
| <b>TOTAL</b>          | <b>595</b> |            | <b>529</b> |            | <b>275</b> |            | <b>218</b> |            |

The above comparative table (Table 1) shows a sharp increase in the number of conveyancing claims reported in the 2008 and 2009 years.

An analysis revealed that this increase in conveyancing claims resulted from problems in matters involving the provision of **bridging finance** (BF).

As practitioners will know, most BF matters have been excluded from cover in the 2010 policy. (Clause 5.1.11) *The comparisons in Tables 2 and 3 below, demonstrate that this exclusion was successful in bringing down the number and value of claims.*

## Risk Manager's Column continued...

As seen in Table 2, 278 potential claims had been notified in the 2010 year as at 31 December 2010. (Total A). This is an improvement on numbers for the same six-month period in 2009 and equal to the 2008 numbers.

However, 34 of these claims (12%) arose out of excluded BF transactions and will not be entertained. This means that there are *effectively* 244 claims (in non-excluded claim categories) for the first six months of the 2010 year.

**Table 2: Comparative Analysis : 2010, 2009, 2008 and 2007 as at 6 months**  
Number of claims notified (*including* bridging finance for 2010 year)

| YEAR                | 2010       | % of Total A | 2009       | % of Total A | 2008       | % of Total A | 2007       | % of Total A |
|---------------------|------------|--------------|------------|--------------|------------|--------------|------------|--------------|
| <i>Conveyancing</i> | 105        | 38           | 142        | 46.5         | 153        | 55           | 41         | 26           |
| RAF prescription    | 50         | 18           | 60         | 19.5         | 42         | 15           | 27         | 17           |
| Litigation          | 45         | 16           | 24         | 8            | 28         | 10           | 37         | 24           |
| Other               | 78         | 28           | 80         | 26           | 55         | 20           | 53         | 33           |
| <b>TOTAL A</b>      | <b>278</b> |              | <b>306</b> |              | <b>278</b> |              | <b>158</b> |              |

**Table 3: Comparative Analysis : 2010, 2009, 2008 and 2007 as at 6 months**  
Number of claims notified (*excluding* bridging finance for 2010 year)

| YEAR                | 2010       | % of Total B | 2009       | % of Total B | 2008       | % of Total B | 2007       | % of Total B |
|---------------------|------------|--------------|------------|--------------|------------|--------------|------------|--------------|
| <i>Conveyancing</i> | 71         | 29           | 142        | 46.5         | 153        | 55           | 41         | 26           |
| RAF prescription    | 50         | 21           | 60         | 19.5         | 42         | 15           | 27         | 17           |
| Litigation          | 45         | 17           | 24         | 8            | 28         | 10           | 37         | 24           |
| Other               | 78         | 32           | 80         | 26           | 55         | 20           | 53         | 33           |
| <b>TOTAL B</b>      | <b>244</b> |              | <b>306</b> |              | <b>278</b> |              | <b>158</b> |              |

Table 3 shows the changes to the figures when the 34 BF claims are taken out of the equation. The exclusion of BF matters has therefore resulted in a reduction of around 12% of the number of claims notified to us during the first 6 months of the 2010 year.

Table 4 below shows the values of claims, taking into account all amounts already paid and amounts reserved for payment of capital and costs (total amount incurred).

*Comparing the 2009 and 2010 years (at 6 months), there was an effective 50% reduction in the number of conveyancing claims, year on year and an effective 20% reduction in the total number of claims, year on year.*

## Risk Manager's Column continued...

Table 4: Total amount incurred (excluding bridging finance in 2010 year)

| YEAR                | 2010<br>R  | % of<br>Total | 2009<br>R  | % of<br>Total | 2008<br>R  | % of<br>Total | 2007<br>R  | % of<br>Total |
|---------------------|------------|---------------|------------|---------------|------------|---------------|------------|---------------|
| <i>Conveyancing</i> | 11 102 375 | 37            | 17 661 753 | 52            | 17 002 175 | 46            | 8 729 985  | 28            |
| RAF prescription    | 6 498 000  | 22            | 6 382 200  | 19            | 5 511 626  | 15            | 4 337 980  | 14            |
| Litigation          | 3 664 550  | 12            | 2 952 658  | 9             | 2 798 096  | 7             | 8 639 945  | 27            |
| Other               | 8364161    | 28            | 7 080 651  | 21            | 11 943 470 | 32            | 9 826,997  | 31            |
| Total incurred      | 29 629 086 |               | 34 077 262 |               | 37 255 397 |               | 31 534 907 |               |

*The total incurred value of conveyancing claims as at 31 December 2010 was substantially lower in the 2010 year than it had been for the same period in the three preceding years!*

Ann Bertelsmann  
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## Court Bonds

### THE AIIF EXECUTORS' BONDS OF SECURITY 2011

As a benefit in addition to the Professional Indemnity insurance, the AIIF offers Executor Bonds of Security free of charge to the profession. These bonds of security are offered only to practising attorneys who are appointed as executors and not as agents. The bonds are limited to the value of R5 million per estate, and up to R20 million per practice per year.

The application form and requirements can be accessed on our website [www.aiif.co.za](http://www.aiif.co.za) or you can contact the following people for assistance:

Mrs Julia Cebekulu by telephone on (011) 329 1941 or by email on [jcebekulu@glenrandmib.co.za](mailto:jcebekulu@glenrandmib.co.za)

Ms Palesa Moloi by telephone on (011) 329 1683 or by email on [pmoloi@glenrandmib.co.za](mailto:pmoloi@glenrandmib.co.za).

**Please take note that the AIIF does not provide any other Bonds of Security i.e. Curator's bonds, Liquidator's bonds etc.**

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## Message from the Attorneys Fidelity Fund

### ARE YOU TOO BUSY TO SAFEGUARD THE REPUTATION OF YOUR FIRM?

It is natural for one to develop trust for people that one has worked with over a period of time. Practitioners who practice in partnerships or incorporated practices tend to develop

a relationship of trust with their co-partners/directors over time. The same applies to sole practitioners/partners/directors in the case of their employees, for example, professional assistants, candidate attorneys, secretaries, paralegals and bookkeepers.

It is often necessary for the effective running of a practice, that there is some delegation of tasks and

responsibilities. When employees carry out tasks on behalf of the practitioner, it is essential that there is adequate supervision.

Some employees like paralegals are able to work independently. For example a conveyancing paralegal/secretary is able to independently draw all documents relating to a conveyancing transaction, be it

## Message from the Attorneys Fidelity Fund continued...

bond or transfer documents. The conveyancer would only be required to check and sign the documents, and attend at the deeds office to register the transaction concerned.

The advantage of this for the practitioner is that s/he can concentrate on “more important” issues/tasks for the business and not have to do everything him/herself. The disadvantage is that if the practitioner does not take the time to go through the document/s and/or file, to satisfy him/herself that what s/he is authorizing is in fact a valid transaction he/she is opening his firm up to legal and reputational risks.

The Attorneys Fidelity Fund handles claims relating to theft/misappropriation of clients’ trust monies by attorneys. There are many instances where it has come to light that it was one partner who was involved in the misappropriation (without the knowledge of the other partner/s). In other instances it has come to light that it was a secretary who stole the money from the firm’s trust account. This has even happened

regardless of the fact that the firm had the necessary control measures in place, such as that two or three directors have to sign cheques or do the EFT authorizations.

It is often difficult to comprehend how the other partners could claim to have had no knowledge of the theft. How could they claim to have not been involved while they are the ones who assisted by authorizing the payments? The problem is often the fact that the other partner/s were just not prepared to check and make sure that they understood the underlying transaction (because they were too busy or were just too lazy). In some cases it is because the other partner was simply too trusting of his/her fellow partner or employee (as the case may be) to verify the details of the transaction.

The danger consequent to this is that by the time the fraudulent activity finally gets detected, millions could have been stolen already. Further the partners/directors would be sued jointly and severally for the actions of one partner/director. What would follow would be that the partners/directors would be suspended and/

or struck off the roll of practising attorneys. Even if it is found that the other partners/directors “had no hand” in the fraud, the firm would have suffered a reputational damage already. They would also incur legal costs in defending the partner/s/director/s that were not involved.

The message is clear – do not be too busy to safeguard your business against reputational and legal risk. Take time to satisfy yourself about the validity of each and every transaction you are authorising, no matter how burdensome it feels to do so.

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*Although Ms Ndima’s article concentrates on the misappropriation of trust money by a colleague or employee, the views expressed by her on adequate supervision and checking of documents also apply to claims for negligence against attorney’s practices. (See the article on “Supervision” below)*

## Risk management tips

Topics in this series so far:

- Engagement Management (*May 2010*)
- Managing client’s expectations (*August 2010*)
- Analysing the Facts and the Law (*November 2010*)
- Deciding on and Planning an Appropriate Strategy (Part 1) (*November 2010*)
- Deciding on and Planning an Appropriate Strategy (Part 2) (*February 2011*)

### SUPERVISION (PART 1)

**PLEASE NOTE!** What follows is by no means definitive on this topic. It does not involve “rocket science” but rather requires a common sense approach by practitioners.

I have attended courses in other jurisdictions, and read widely on and around the topic of supervision. There is generally agreement by most on the essentials. From these various sources, combined with my own experiences in practice and the handling of claims against practitioners, I have tried to distil some key ideas. Most practitioners will have their own

ideas and methods, but I hope this article gives some food for thought anyway.

#### THE IMPORTANCE OF SUPERVISION

In the previous article in the series entitled *Risk Management Tips* (*Risk Alert Bulletin* 1/2011), I touched on the topic of **delegation** in the context of implementing strategy and managing matters.

In running a successful practice and carrying out a client’s mandate, it is often essential to delegate responsibility to others, for fulfilment of parts or the whole of the mandate.

Delegation certainly does not remove a practitioner’s responsibility to client.

The buck still stops with you! When there is delegation, it is essential that controls are in place to ensure quality service to client. Where appropriate, there must be effective **supervision** of delegates.

**Supervision need not be synonymous with disempowerment, micro-management or nit-picking. In fact effective supervision is none of these negative things.**

**In my view, it should empower while providing broad guidelines, appropriate training, review and constructive feedback.**

**The building blocks are the softer skills like inspiration, respect, openness, two-way communication and leading by example.**

### THE BENEFITS OF SUPERVISION

Effectively supervised staff =

- satisfied clients
- confident, motivated staff
- successful teamwork
- an efficient, successful practice

### THE CONSEQUENCES OF FAILURE TO SUPERVISE STAFF

#### Failure to properly supervise staff is unprofessional conduct!

- The LSNP Rule 89.16 states that it is unprofessional or dishonourable or unworthy conduct to fail to adequately supervise staff.
- The KZNLS Rule 14 (vii) states that it is misconduct to carry on practice “at an office which is not under the direct and personal supervision of –  
(aa) the member, or  
(bb) a partner of the member, or  
(cc) a practitioner who is employed by the member.”
- The FSLs has a similar rule (17(13) requiring that the practice be continuously under the direct and personal supervision of a practising attorney.

I mentioned in the first article in this series (*Risk Alert Bulletin* 2/2010) that one of the **major causes of claims** was inadequate supervision of staff coupled with a lack of checks and balances to pick up problems. Principals in a practice are, of course, vicariously liable for the wrongs and mistakes of their employees.\* An unacceptable proportion of claims against practitioners arises out of the fact that there was little or no effective supervision of staff.

*\*TAKE NOTE. Principals are also jointly and severally liable for the actions of their co-principals. Lately, there has been a marked increase in claims arising out of lack of mutual supervision amongst co-principals.*

Ineffective supervision can lead to:

- claims against your practice for professional negligence/breach of mandate;
- claims against your practice for misappropriation of trust money or fraud;
- loss of dissatisfied clients;
- disciplinary action by your professional body (see text box left);
- orders against you for costs *de bonis propriis* (which are excluded from cover in the scheme policy);
- unhappy, unmotivated staff;
- lack of teamwork and a stressful working environment;
- damage to your practice’s reputation; and
- decreased profitability.

### WHAT NEEDS TO BE DONE?

For larger practices, it is desirable to have dedicated practice and risk managers to free up the rest of the professional staff to bring in the fees.

For smaller practices this is not usually possible and it is left to one or two busy practitioners to attend to both the effective running of the practice and the earning of fees. Be that as it may, *every practice*, regardless of size, needs to have its own comprehensive, well co-ordinated **risk and practice management plans and policies** in place.

Successful plans used by well-run practices usually incorporate, *inter alia*, policies and procedures for delegation and supervision, such as:

- A procedure for **checking all incoming documents and correspondence**, including e-mails. This may be time-consuming, but gives a good insight into what is happening in the firm and surprisingly often, an early warning of problems.
- The use of **file audits/reviews**. These need to be conducted regularly, particularly in the case of new or junior staff. (It is a good idea, for risk management purposes, to review the files of even the most senior practitioners.)
- Regular **meetings** or brain-storming sessions to discuss interesting or problematic matters and/or new legal developments. These can be very helpful in getting staff to discuss the problem in that file that just keeps being put to the bottom of the pile!
- Effective **mentoring systems**, an **open-door policy** and the encouragement of mutual respect and openness between employers and the employed, which also tend to draw out problems while they are still manageable.

It goes without saying that different degrees and styles of supervision are required for different co-workers and different types of matters/duties. By all means delegate, but ensure that the nature of the task is matched to the qualifications and experience of the delegate. The supervision style adopted will also depend on these factors.

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*To be continued in the next issue.*

## Useful tips for MVA practitioners

### PASSENGER CLAIMS

*Mvumvu & Others v Minister of Transport and Road Accident Fund*, Case No.CCT 67/10 (2011)ZACC1

On 17 February 2011, the Constitutional Court confirmed the ruling of the Western Cape High Court in declaring invalid, the

so-called “passenger claims” set out in sections 18(1)(a)(i) 18 (1) (b) and 18 (2) of the pre-amendment Road Accident Fund Act 56 of 1996 (i.e. as it was prior to 1 August 2008).

However, the invalidity was suspended for a period of 18 months from 17 February 2011, to enable

Parliament to “cure the defect”. It should be noted that, although sections 18(1)(a)(ii), 18(1)(a)(iii) and 18(1)(a)(iv) had not been challenged and were not covered by the declaration of invalidity, the court expressed the view that they suffered from the same defect as the challenged sections and opined that it would be

## Useful tips for MVA practitioners continued...

desirable for Parliament to “address the plight of those affected by these subsections as well”.

The Court ordered further that, if the 18 months lapsed without Parliament having cured the defect, then the order of invalidity would come into force with immediate effect, but would “not apply to claims in respect of which a final settlement has been reached or a final judgment had been granted before the date of the order.” Therefore the order will not apply retrospectively to any matter that was already settled on 17 February 2011. However, all other claims in terms of the challenged sections will be unlimited “as if the cap had never been enacted”.

Attorney **Jacqui Sohn**, warns that the declaration of invalidity has to be read with sections 21 and 19 of the Act. Practitioners should be aware of the fact that common law defendants will have a complete defence to any claims by passengers where those claims had not been finalised as against the RAF as at 17 February 2011. She says that *“Anyone settling a passenger claim with the RAF on a limited basis after 17 February 2011 is at risk if the quantum of the claim, in fact, exceeds that amount.”*

Ms Sohn also points out that care should be taken not to allow any potential common law claim by a passenger to prescribe as against another third party or the RAF. She uses the following example to illustrate: Where Parliament, in deciding the amount of compensation to which applicants are entitled imposes monetary restrictions (such as the original proviso in the judgment

of the Western Cape High Court) then the uncovered portion will still, in terms of section 21 of the RAF Act, form the basis of a common law claim.

**Nicolette Koch** of Adams and Adams warns that, if Parliament does nothing in the interim, the order of invalidity will be effective from 16 July 2012 and passengers will be entitled to unlimited claims for the full extent of their proven damages.

Ms Koch makes the following recommendations for practitioners:

- Do not settle any claims in which the cap of R25 000 is applicable, where the value of the claim exceeds that amount;
- Ensure that prescription is interrupted in terms of both **lodgement of claim and service of summons**;
- Once pleadings have closed, the matters should be held in abeyance until the earliest of either the date on which Parliament amends the act, or 16 July 2012, when it will be known to what extent the passengers will be entitled to compensation;
- If you have an instruction to proceed against a wrongdoer for the balance of the damages, I would suggest you interrupt prescription of the common law claim by issuing summons and then keeping the action in abeyance pending the dates referred to in the previous bullet.

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## PASSENGERS CLAIMS AND THE RAF 4 REPORT

*In the light of the Constitutional Court decision in the Mvumu case, Attorney Ronald Bobroff gives the following advice:*

Given that it is not known whether Parliament will legislate to the effect that passengers injured pre-1/8/08 will be entitled to damages in terms of the RAF Act prior to the 2008 Amendments or after same, the question of Serious Injury Reports arises.

Should Parliament provide that general damages are limited to “seriously injured” passengers, completion of a RAF Form 4 would be required to be lodged within the appropriate prescriptive period. Whilst one would hope that Parliament will provide a reasonable period after the promulgation of its new passenger legislation within which to lodge the RAF Form 4, one cannot take this for granted.

It may therefore be prudent in passenger claims where the R25 000 cap would previously have applied and where the victim is regarded as being seriously injured, either in terms of the AMA Guide or the Narrative Regulation, for Attorneys to have the RAF Form 4 completed and served timeously on the RAF.

**Ronald Bobroff**  
*President SAAPIL/  
Member LSSA RAF Committee*

## Matrimonial Matters

### MAINTENANCE ORDERS AND DECEASED ESTATES

Practitioners need to be alert when dealing with divorce matters where maintenance is included in a divorce settlement agreement.

In the case of *Kruger v Goss and Another* [2009] ZASCA 105 the SCA held that a spouse is free to bind his/ her estate to pay maintenance after his/ her death, failing which the surviving spouse will have no claim against the deceased estate.

In the **Kruger’s** case, the crux of the appeal was whether an order for rehabilitative maintenance pursuant to a decree of divorce, is enforceable against the deceased’s estate.

Briefly the facts of the case were as follows:

Ms Denise Emmerentia Goss (Goss) and Mr Fred Loll Stephanus Kruger (Kruger) were married out of community of property with the exclusion of the accrual system.

Approximately three years after marriage the parties divorced. The court when granting the divorce, made an order, *inter alia* that Kruger pay Goss rehabilitative maintenance in an amount of R6 000.00 per month for a period of 57 months.

Kruger passed away on 29 September 2006. By the time of his death he had made 33 out of the envisaged 57 payments to Goss.

Kruger’s son was appointed as the executor of the deceased estate.

Goss lodged a claim against the deceased estate for the remainder of maintenance in the amount of R144 000.00 (24 x R6 000.00). The executor rejected her claim.

Goss brought an application in the Pretoria High Court, seeking an order declaring the estate liable to pay her the remainder of the maintenance together with interest.

The court *a quo* granted Goss the relief that she sought, together with costs.

It was against this order that the appeal was brought.

The SCA referred specifically to section 7 (2) of the Divorce Act 70 of 1979 and the common law.

The SCA stated that the common law views the duty of support which spouses owe each other,

and consequently the liability for maintenance, as incidents of the matrimonial relationship. Termination of the relationship by death brings the duty of support to an end.

The SCA held that the court *a quo* had erred in finding that the deceased estate was liable to pay Goss (as the former wife) the outstanding maintenance. The court confirmed the common law position that the duty to maintain ends at death. It however emphasized that a spouse is free to bind his/ her estate to pay maintenance after death. In the present case the court found that there was, however, no express provision for the maintenance order to be binding on his estate.

Practitioners need to be alive to the implications of this judgment.

They will have to consider its consequences when dealing with issues of maintenance. They need to advise clients that for a maintenance order to be binding on the maintaining spouse's estate, a provision to this effect must be expressly included in the Settlement Agreement. In the absence of such a provision, the maintained spouse will have no claim against the former husband's estate.

- The judgment of *Kruger v Goss and Another* [2009] ZASCA 105 can be found at [www.supremecourtofappeal.gov.za](http://www.supremecourtofappeal.gov.za)

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## Litigation

### NEW MAGISTRATE'S COURTS RULES

The new Magistrate's Court rules came into operation on 15 October 2010 (the commencement date).

It seems that there is much debate amongst the experts about whether or not the new rules apply to actions which were instituted prior to their commencement.

One view is that the new rules apply to all proceedings in the Magistrate's Courts on or after the commencement date, regardless of when they were started.

The alternative view is that the old rules will apply to proceedings that began prior to the commencement date, until finalization thereof.

Advocate Danie van Loggerenberg's opinion on the applicability of the former Magistrate's Court rules to pending proceedings, appears on the Law Society of the Northern Province's website and in the January/February edition of *De Rebus*.

In essence, Advocate van Loggerenberg submits that the former rules apply to all proceedings that commenced prior to 15 October 2010, by virtue of the

provisions of section 12(2)(c) and (e) of the Interpretation Act 33 of 1957. He submits further that they will continue to apply to those proceedings until they have been concluded.

He makes the point that there is nothing in the new rules that expressly affects pending matters. He argues that there is nothing that rebuts the presumption against the retrospective operation of statutes.

I discussed this opinion with Advocate van Loggerenberg, who advised me that the question had by no means been settled yet.

The Chairman of the LSSA's Magistrate's Court Committee, Graham Bellairs, confirms that the issue is still being considered and debated by practitioners on the Magistrate's Court Committees.

He also referred me to *Transnet v Ngcezula* 1995 (3) SA 538 (AD), a case which he informs me has been cited as authority for the proposition that old matters continue under the new rules.

*Transnet* considered the effects of the repeal of s64(3) of the South African Transport Services Act on the rights

to claim for injury under that Act. The AD rejected the argument that the right to claim under s64(3) of the Act was purely procedural. It stated *obiter* (at 552F-G) that the provisions of S12(2)(e) would apply if it were so. It held, however, that s64(3) dealt with both substantive and procedural law.

The Rules of court are of course purely procedural and in this regard, the case is distinguishable from the present enquiry.

Practitioners are urged to familiarise themselves with the changes that have been brought about by the new rules.

For example, the old Rule 10 as we knew it has disappeared. This means that there are no more lapsed Magistrate's Court summonses to worry about, if your proceedings were instituted after the commencement date.

On the other hand, if proceedings commenced before then – until there is clarity on how the new rules will operate – it would be wise to protect your client (and practice) by making application to extend the life of the summons.

## Letters to the Editor

In the Risk Alert Bulletin of August 2010 it is stated that if the RAF 4 is not lodged within the 2 year period in a hit-and-run claim, the claim for non-patrimonial loss will prescribe. I cannot see this as a third party claim is one indivisible claim and does not consist of separate claims for medical costs, loss of earnings, pain and suffering etc. – See *Mntambo v Road Accident Fund* 2008 1 SA 313 (W) at 318I – 319D; *Nonkwali v RAF* 2009 4 SA 333 (SCA). In my view, once the claim has been lodged on a Form 1 within the 2 year period the Form 4 can be lodged at any time thereafter but before the lapse of the 5 year period in terms of s 24(3). In terms of the once-and-for-all rule prescription for the unitary third party claim will run from the date of the accident – *Evins v Shield* 1980 2 SA 814 (A). The non-disclosure in the initial claim form of the existence of a serious injury should also not be fatal as the claim can be amended at any time after lodging of the claim. To err on the side of caution I would complete the Form 1 indicating a claim for non-patrimonial damage irrespective of whether I intend having a Form 4 completed and lodged. Nor will the introduction of a claim for non-patrimonial loss constitute the introduction of a new cause of action. All that the distinction of serious and non-serious injury does is to indicate whether the RAF will be liable for such a claim in terms of the Act (as amended). In essence the unitary justifiable claim of a claimant who suffers a bodily injury is not dependant on whether his/her injury is serious or not.

Prof. Hennie Klopper

Thank you for your interest in the content of our Risk Alert Bulletin and your views on the submission of the RAF 4.

Regulation 3 (b) (i) states that “the serious injury assessment report may be submitted separately after the submission of the claim at any time before the expiry of the periods for the lodgement of the claim prescribed in the Act and these Regulations;” (my emphasis)

Regulation 3 (c) states that “The Fund...shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations.....” (my emphasis)

In the light of these provisions could you please clarify how this obstacle in the Regulations can be overcome if the report is lodged after the two or three year lodgement date?

Ann Bertelsmann

In my view the provisions of section 23(3) override the regulations and provide that no claim lodged in terms of section 24 will prescribe before five years after the date of the accident. This section was not amended by the RAFAA of 2005. The regulations cannot shorten the periods and if they have the effect of denuding a claimant's claim will be held to be unlawful – see *Engelbrecht v RAF* 2007 6 SA 96 (CC). The point is that the claim for general damages is part of one claim. A claim for general damages (serious injury) cannot prescribe or lapse separately

Prof Hennie Klopper

I think we will still urge our readers to err on the side of caution. Your arguments might well prove useful in situations where the RAF4 has for one or other reason, not been lodged within the prescribed two or three year periods.

Ann Bertelsmann

It would seem that there is little or no appreciation for the fact that a third party claim is not a claim created by the RAF Act but is a common law claim to which every individual is entitled. Nothing in the RAFAA of 2005 detracts from this principle. I agree that it is the wiser thing to lodge as suggested in the Bulletin in order to obviate any room for a technical rejection of a claim for non-patrimonial damages based on “serious injury” as described in the RAFAA of 2005 and its regulations and the consequent costly legal armwrestling ensuing therefrom.

Prof Hennie Klopper

### DISCLAIMER

Please note that the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice. Ann Bertelsmann, Risk Manager, Glenrand MIB, 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](http://www.aiif.co.za)