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RISKALERT

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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 Website: 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 Website: www.aiif.co.za

RISK MANAGER'S COLUMN

THE PROFESSION'S CO-OPERATION IS REQUESTED: CLAIMANTS' ATTORNEYS PLEASE NOTE

The Attorneys Insurance Indemnity Fund (AIIF) is a non-profit company providing a primary layer of professional indemnity cover to the profession – currently at no cost to practitioners. It is funded by the Attorneys Fidelity Fund (AFF) by way of a single annual premium.

The purpose of the AIIF is twofold: it provides some **protection to the public**, in the event that they suffer damages as a result of a practitioner's failure to properly carry out a mandate and some **protection to the practitioner** in the event that a claim arises out of such failure. The primary purpose of this fund is to ensure that members of the public are placed in the position they would have been in, but for this failure.

Funds are limited and, as can be seen from the claims statistics on page 2-3, the value of claims is escalating at an alarming rate. So too are our **investigation costs – the costs of employing outside attorneys to litigate on behalf of insured attorneys**.

The AIIF employs admitted and experienced attorneys to deal with claims in-house. This of course is a more cost-effective arrangement than outsourcing this function to outside attorneys.

In the past, claimants' attorneys were sensibly and reasonably willing to cooperate in holding matters in abeyance and providing us with information necessary to properly investigate their clients' claims.

Inexplicably, this sensible approach seems to be something of the past and we are now frequently confronted with unreasonable and uncooperative claimants' attorneys, who refuse to hold matters over for a reasonable period to facilitate our investigations.

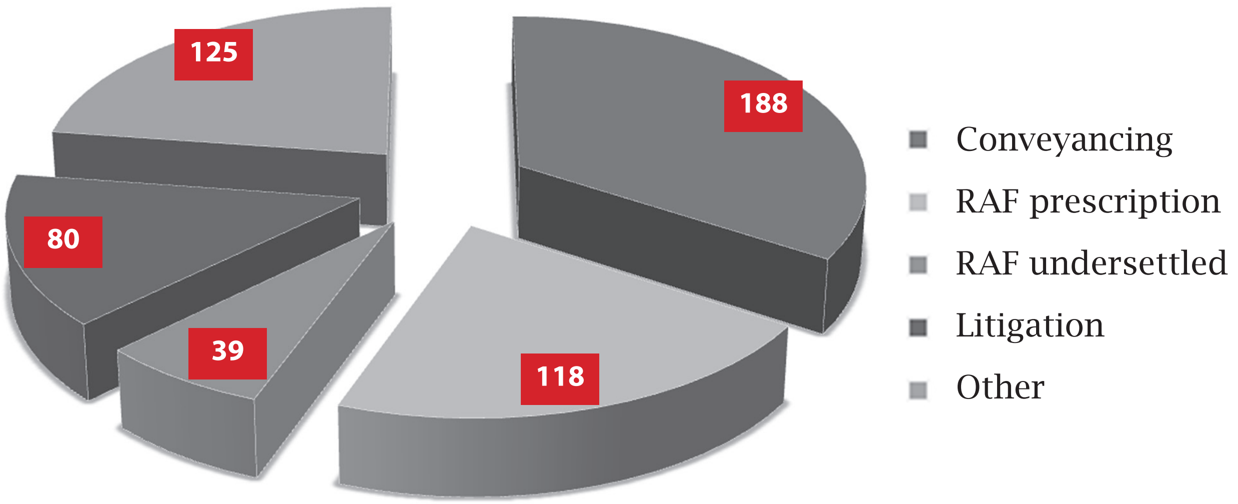
Clearly this approach is neither to the advantage of the client (who must ultimately pay attorney and own client costs and sit out the often cumbersome and lengthy court procedures) or of the AIIF which must unnecessarily fork out fees to instruct outside attorneys to defend matters.

THIS IS YOUR FUND! WE APPEAL TO ALL CLAIMANTS' ATTORNEYS TO ASSIST IN KEEPING DOWN LITIGATION COSTS BY NOT BEING OVERLY RIGID IN THEIR APPROACH TO THESE CLAIMS.

RISK MANAGER'S COLUMN continued...

CLAIMS TRENDS AS AT 30 JUNE 2012

Numbers of claims by claim type for the 2011 insurance year



This pie graph shows the distribution of claims by claim type for the **2011** year of insurance as at **30 June 2012**.

Table 1: Comparative Analysis : Number of claims notified 2011, 2010, 2009, 2008 and 2007 as at 30 June 2012

YEAR	2011	% of total	2010	% of total	2009	% of total	2008	% of total	2007	% of total
Conveyancing	188	34	**154**	31	**279**	46	**293**	55	**100**	33
RAF prescription	118	21	**101**	21	**118**	20	**94**	18	**71**	23
RAF U/S	39	7	**39**	8	**35**	6	**18**	3	**13**	4
Litigation	80	15	**77**	16	**55**	9	**62**	12	**58**	19
Other	125	23	**121**	24	**113**	19	**62**	12	**61**	20
TOTAL	550	100	**492**	100	**600**	100	**529**	100	**303**	100

This table compares the *numbers* of claims per claim type registered in the first twelve months of the past 5 years

The **number** of claims notified in the **2011** year as at 30 June, is higher than the numbers for the same 12-month period in all previous years other than 2009. This is an **increase of 12%** on the number for the same period in **2010.**

There is a **32% increase** on the total incurred **value*** for the same period in the **2010** year.

(*This is the sum of the amounts reserved and payments made.)

There has been an increase of 81% in the number of claims notifications between 2007 and 2011, which cannot be justified by the 24% increase in the number of practices in the same period.

RISK MANAGER'S COLUMN continued...

CONVEYANCING

The total incurred value of *conveyancing* notifications remains stable and is well below those in 2008 and 2009. However, the number of *conveyancing* notifications has increased by **22%** year on year. (There are fewer notifications registered in both the 2011 and 2010 years than for the same period in the 2009 and 2008 years.)

Included in the **188** *conveyancing* claims were **42** notifications of **unauthorised payments of trust money** with a total incurred value of **R6 716 943**. This is approximately 28**%** of the value of all *conveyancing* matters for the period and 9**%** of the total incurred value of all claims registered in the 12-month period.

Please see our article on the **unauthorised payments of trust money** in the February Bulletin (1/2012).

Conveyancing-related claims in other jurisdictions

According to an article by Catherine Baksi, which appeared in the *Law Society Gazette* on 10 September 2012, in the UK around 50% of the value of all professional indemnity claims against solicitors currently arises from *conveyancing* matters. Over the past few years, between 6 and 16.5% of claims arose out of mortgage fraud.

Looking at the claims statistics in the Australian publication *LawCover* around 41% of their claims arise from conveyancing matters (mortgage and lending and property).

OTHER CLAIM TYPES

The percentages of claims in the other claim types shown in **Table 1** remain fairly stable. However, there is an increase in the numbers of claims arising out of *general prescription* (**43**) which forms part of the "*Other*" claim type.

GENERAL PRESCRIPTION

This is the largest component of the "other" claim types and makes up approximately 8% of all the claims registered in the 2011 insurance year.

We have examined the circumstances surrounding these claims in greater depth to try and establish their underlying causes. There are various reasons why claims become prescribed, but in most cases practitioners simply have too few risk management procedures in place or fail to adhere to those procedures that are in place.

Where such procedures are in place, there are insufficient checks and balances to ensure compliance. In many cases the culprit is the perennial lack of supervision.

Please see some tips to avoid having your matters prescribe, in our article on ***General Prescription*** in the August Bulletin (4/2012) and retain the Prescription Table on page 5 of this Bulletin.

CLAIM TYPE	Total incurred 2011	Total incurred 2010	% Increase	Value per claim 2011	Value per claim 2010
RAF Prescription	**R18.5 million**	R13 million	**43**	**R157 481**	R128 863
RAF u/settlement	**R10.7 million**	R7.3 million	**48**	**R276 809**	R187 650
Litigation	**R8.4 million**	R6.4 million	**31**	**R105 174**	R109 271

The above table shows that the total incurred values of *Litigation, RAF Prescription and Under-settlement* claims show substantial increases year on year.

Litigation: Please see the article entitled *Litigation Do's and Don'ts* on our website www.aiif.co.za.

RAF Prescription: Please do not forget to register your firm and your RAF matters with Prescription Alert. (See our website or contact Lucia Snyman at (021) 422 2830).

RAF Under-settlements: Please see our article on this topic, which appeared in the LSNP's *Society News*, August 2012 and appears on our website.

Interestingly enough, it seems that negligence claims against personal injury firms for under-settlements are on the increase in the UK as well.

Professional negligence lawyers in the UK cite firms' reliance on under-qualified staff, a lack of face-to-face contact with clients, the "sausage factory" approach and failure to understand medical reports as factors contributing to the trend in claims for under-settlement of personal injury matters.

Ann Bertelsmann (Risk Manager AIIF)
ann.bertelsmann@aon.co.za

RISK MANAGEMENT TIPS

PRESCRIPTION

Act	Period
Apportionment of Damages Act 34 of 1956	*Extinctive prescription in respect of claim for contribution* ● 12 months from date of judgment or judgment on appeal (s2(6)(b)).
Attorneys Act 53 of 1979	*Claim against Attorneys Fidelity Fund ito s26 for loss or damage due to theft by attorney/employee* ● Within 3 months after claimant became aware, or should have become aware, of theft (s48(1)(a)). ● Within 6 months after written demand by board of control must furnish such proof as the board may reasonably require (s48(1)(b)).
Compensation for Occupational Injuries and Diseases Act 130 of 1993	*Claim for compensation* ● Must be lodged within 12 months of cause of action (s43(1)(a) read with section 44)
Contractual Prescription	Determined in each individual contract
Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002	3 years for actions against state organs or as contained in the Prescription Act (s2).
Prescription Act 68 of 1969	*Extinctive prescription* ● Usually 3 years for delictual and contractual debts (ss10, 11 and 12) ● 6 years for debts arising from bills of exchange or other negotiable instruments, or a notarial contract, unless a longer period applies under the Act (s11(c)) ● 30 years for judgment debts and mortgage bonds (s11(a))
Road Accident Fund Act 56 of 1996 and Road Accident Fund Regulations, 2008 GNR 770 in Government Gazette no. 31249 of 21 July 2008 **Note: Act commenced 1 May 1997; Regulations commenced 1 August 2008.**	*Where driver/owner identified:* ● 3 years to lodge a claim, and 2 years after that to issue summons (i.e. 5 years from date cause of action arose if claim lodged timeously) (s23(1) and (3)) *Where driver and owner unidentified:* ● 2 years to lodge a claim, and 3 years after that to issue summons (i.e. 5 years from date cause of action arose if claim lodged timeously) (reg 2(1)(b) and reg 2(1)(c))

RISK MANAGEMENT TIPS continued...

TABLE

Special Circumstances	Notice	Notice to	Condonation
If extinctive prescription period is governed by another law which prescribes less than 12 months, the other law applies (s2(6)(b)).	Notice of action to joint wrongdoer by Plaintiff or any joint wrongdoer, any time before close of pleadings (s2(2)).	Any joint wrongdoer	Court may give leave to sue joint wrongdoer where no notice was given of the action and the joint wrongdoer was not initially sued (s2(4)(a) and (b))
		The Council of the law society concerned and the board of control (s48(1)(a)).	If the board of control is satisfied that, having regard to all circumstances, a claim or the proof required by the board has been lodged as soon as practicable, it may in its discretion extend any of the periods referred to in (1) (s48(2)).
Airman and seaman in accident outside RSA resulting in death must be reported within 12 months after news of death received (s43(3))	Employee to employer as soon as possible (s38) Employer to commissioner within 7 days (s39(1))	Claim must be lodged with employer or commission or mutual association	
Known as time-limitation or time-bar clauses. *Barkhuizen v Napier* 2007 (5) SA 323 (CC) found that such clauses are permissible unless they contravene public policy. This will be the case where the time period within which such clauses require parties to institute action before their claim prescribes is so unreasonably short as to be unfair and contrary to public policy. In this particular case, the time-bar clause which required action to be instituted within 90 days of an insurance claim being repudiated was held to be reasonable, and therefore enforceable.			
	6 months to give written notice from when debt became due (s3(2)(a)). No process may be served before 30 days from date of notice (s5(2)).	Relevant state organ (s4) Process prescribed (s5)	S3(4)(a) and (b) – a debt may not be regarded as due until the creditor has, or should reasonably have had, knowledge of the identity of the organ of state and of the facts giving rise to the debt
A year is added on to the prescription period where creditors are minors, insane persons or persons under curatorship or who have been prevented by a superior force from interrupting the running of prescription (s13(1)(a)). The year begins to run from the date on which the impediment is lifted.			
Prescription does not run against minors, persons detained in terms of health legislation and persons under curatorship (s23(2)). However, prescription continues to run irrespective of legal disability of third party on claims where the identity of the driver and owner of the vehicle is unknown (reg 2(2)).	Legal proceedings cannot be commenced within 120 days of delivery of claim to the Fund (s24(6)).	Claim must be lodged with fund in accordance with s24(1)	

RISK MANAGEMENT TIPS continued...

In a recent Free State High Court decision, MH Rampai J had to deal with a claim against a firm of attorneys. The judgment deals at considerable length, with numerous issues relating to an **attorney's negligence** and what behaviours can be expected of the average attorney. (There were altogether 37 criticisms of the attorneys' handling of this mandate.)

MLENZANA V GOODRICK AND FRANKLIN INCORPORATED (2012) JOL 29026 (FSB)

A widow sued her erstwhile attorneys for negligently allowing her dependant's claim against the RAF to become prescribed.

The issues were separated, and the Court only had to adjudicate on the **issue of liability.**

The **professional negligence of the attorneys was in dispute**. To succeed, the plaintiff had to show that the defendant attorneys, **had failed to exercise the necessary skill, knowledge and diligence of an average attorney.**

The defendant attorneys contended that they had done everything that a reasonable attorney would have done in the circumstances, to obtain the information necessary to lodge the plaintiff's claim. They denied any negligence on their part and pleaded that they had been unable to submit the claim timeously, as a result of the failure of the plaintiff and her late husband's employer to furnish them with the required information and documents to enable them to obtain the necessary actuarial report to quantify the loss of support.

The plaintiff successfully argued that:

- The defendant should and could in any event, have lodged the claim because it had sufficient information to validly complete and submit the claim form.
- Alternatively, if it was found that the defendant did not have sufficient information to complete the claim form, the latter negligently failed to take reasonable steps to obtain the required information from the deceased's employer.

The plaintiff testified that she had furnished the defendant with documents including the deceased's identity document, death certificate, payslip, their marriage certificate, her identity document, the funeral undertaker's account, her address and contact number and the name of a certain Patrick (an eyewitness and her late husband's co-worker). She had also verbally informed the defendant that her husband was earning R5 100.00 per month at the time of his death.

The plaintiff had only been able to provide the name of the employer and the fact that he carried on business outside Bloemfontein. She was unable to provide his contact details.

The only outstanding information required by the attorney, was the employer's certificate of earnings and an actuarial calculation of the amount of compensation to be claimed.

The defendant's representative (S) who had dealt with the claim, was a junior attorney. S conceded that the plaintiff had verbally informed her that her husband earned R5 100.00 per month at the time of his death, but denied the plaintiff's evidence that she had also provided her with the deceased's payslip on 17 August 2004. S contended that she had only received the deceased's payslip after prescription.

The court found S's evidence in this regard unconvincing and pointed out that **she had no notes in her file** relating to the exact date of the specific consultation.

(Note the importance of accurate and comprehensive file notes!)

The defendant submitted that a precise actuarial assessment of the plaintiff's loss of support was required before the quantum of the claim in paragraph 8 of the claim form, could be validly completed.

The Court held that this contention was premised on the erroneous belief that any estimate of the amount claimed as compensation, which was unsupported by a precise actuarially assessed calculation, would not constitute substantial compliance.

Rampai, J discussed the legislation, authorities and case law on substantial compliance and concluded that S had had sufficient information to substantially comply with the requirements for lodging a claim with the RAF. He held that the defendant's opinion that a claimant was bound by the original amount claimed in the claim form was a clear misconception of the law.
He also looked at whether reasonable steps had been taken and **criticised numerous aspects of the handling of the matter**. **He concluded that a prudent, skilful and knowledgeable attorney would have handled the plaintiff's claim in a completely different way and that S did not have the requisite degree of knowledge, skill and diligence which, as an attorney, she was required to have.** He noted that, although she was a jun-

RISK MANAGEMENT TIPS continued...

ior with very little experience and training, she was left to run the defendant's RAF and conveyancing practices on her own. He criticized the firm's directors for putting S in at the deep end without equipping her to do the work properly. (There was a lack of supervision and ineffective delegation!)

INEFFECTIVE COMMUNICATION.

The plaintiff complained that the attorney was difficult to reach. She received no regular progress reports. Every time she went to see her attorney, she was merely told that the matter was receiving attention or that her attorney was not available.

The learned judge noted that S wrote a total of 14 letters, which apparently went astray and were never received or responded to by the client.

He stated that this was not good enough **if S did not ensure that the letters reached the client.**

Through a reference in one of S's numerous letters to client, it appears that a second consultation took place approximately 12 months after the initial consultation and after six letters had already been written and not responded to. There were **no proper notes made** at the consultation, and seemingly neither the problems in communication nor the alleged lack of cooperation from client were addressed. No alternative postal address was obtained. The court also criticized S for having repeatedly requested information and documents from client, which were already in her possession and failing to recognise the value of the information that she already had.

The initial consultation between the plaintiff and S, was held in Bloemfontein seven weeks after the accident. During that consultation S had noted that her client's physical address was 37739 Freedom Square, Bloemfontein, 9300; that her cellular contact number was 073 205 4668; and that she was unemployed at the time. The court noted that:

> ***"Bloemfontein is a very big city with many suburbs, street names and suburban post offices and postal codes. Any physical address without these features rings a warning bell. Such was the address given to the defendant in this matter. The defendant would have known that its client was a shack dweller and that postal deliveries to such informal communities were notoriously unreliable or completely non-existent."***

The Court referred to ***Slomowitz v Kok*** 1983 (1) SA 130 (AD) in which the trial judge, O'Donovan J, was quoted as follows on appeal:

> ***"[T]he residents of Vanderbijlpark are a floating community, most of whom do not own the houses in which they reside. Difficulties and delays with regard to service are of frequent occurrence in any Court. An ordinarily competent attorney having a proper perception of the importance to the plaintiff of her claim against the Fund, would not needlessly have run the risk of her claim being defeated on account of possible delays in effecting the service of a summons. To incur such a risk was negligent."***

The Court also referred to ***Mazibuko v Singer*** 1979 (3) SA 258 (W) where Coleman J said the following at 261 C – D:

> ***"The vagaries of postal deliveries to shack communities are well-known. An ordinarily competent attorney would have foreseen that letters mailed to a shack dweller were quite as likely to be delayed as to go astray."***

INEFFECTIVE INVESTIGATION

Rampai, J opined that on account of poor knowledge, skill and care, S made such onerous demands from her client that they would probably have discouraged and frustrated even a very prudent and cooperative client.

He expressed the view that, even though the employer's contact details had not been provided,
S herself could easily have ascertained these by:

- Contacting Telkom; or
- Contacting the deceased's co-worker Patrick ; or
- Employing the services of a tracing agent; or
- Obtaining information from the Bethal police for particulars of the owner of the vehicle driven by the deceased; or
- Sending a messenger to Theunissen to look for the information about the employer.

None of these steps was taken by S, who testified that she expected the plaintiff to travel to faraway places like Theunissen and Bethal, to get the required documents. Rampai J said:

> ***"There comes a time when a diligent attorney has to leave the comfort zone of his or her air-conditioned office and venture out to do some fieldwork in order to safeguard the interests of a client."***

RISK MANAGEMENT TIPS continued...

In this regard it was also noted that S had written only one letter to the employer in three years.

This was a chronicle of procrastination and neglect on the part of the defendant. Ms Smith's explanation was that besides the one letter she also called the employer, Mr. J.A. Smith and his wife in connection with the certificate of employment. The evidence revealed very scant details of the alleged cellular calls."

(Note the importance of accurate and comprehensive file notes!)

The court also criticized S for the fact that she was unaware of the legal remedies open to her to obtain further information from the uncooperative employer.
With regard to the investigation of the merits of the collision, it was noted that no eye-witness statements had been obtained prior to trial and the scene of the accident was never visited or photographed.

The Court held that, because of her lack of skill, knowledge, diligence and care, S had failed to appreciate the value of the vital information her client had supplied almost three years before the expiry date of the prescriptive period and that she had acted negligently, having regard to what was at stake, the available information and the time she had at her disposal before the date of prescription.

Ann Bertelsmann (Risk Manager AIIF)
ann.bertelsmann@aon.co.za

RAF MATTERS

ROAD ACCIDENT FUND ACT 56 OF 1996: Adjustment of statutory limit in respect of claims for loss of income and loss of support to **R199 716.00** (One Hundred and Ninety Nine Thousand Seven Hundred and Sixteen Rand) with effect from 27 July 2012

IMPORTANT MESSAGE: We have been advised that the Road Accident Fund intends appealing the judgment in *van Zyl MM v RAF* which we discussed in the August Bulletin (4/2012) -regarding the time period for the submission of the RAF 4 form.

Please look out for an article on RAF Passengers' Claims in our next edition in February 2013.

LETTERS TO THE EDITOR

Following on from correspondence from Gerard Jacobsen and Rowan Haarhoff about the RAF "CAP", Mr Haarhoff has submitted the following CORRECTION:

In my reply to Mr. Jacobson's query regarding the scope of s17 (4) of the RAF Amendment Act in the August edition of Risk Alert, I mistakenly wrote, "Use the last published CAP amount prior to the date of calculation as the commencement CAP amount", I should have said date of **"accident"** NOT date of "calculation". It should have thus read "*Use the last published CAP amount prior to the date of* ***accident*** *as the commencement CAP amount*". This is of course in accordance with the judgment in *Nhambe v RAF* in the North Gauteng High Court (unreported, Case No. 70721/2009).

Scams against attorneys are becoming increasingly prevalent – in South Africa and other jurisdictions world-wide. We are therefore planning to introduce a new column in the Bulletin entitled **"Scam alert!"**

For this column to be effective, we need regular information and updates from the profession on scams that have been attempted or successfully perpetrated against them.

We appeal to all practices to assist us in alerting the profession so that these fraudsters do not succeed!