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

RISKALERT

NOVEMBER 2013 NO 5/2013

IN THIS EDITION

RISK MANAGER'S COLUMN
- What to do when things go wrong in your office 1
- Claims trends as at 30 June 2013 2

GENERAL PRESCRIPTION MATTERS
- Fatima Ebrahim discusses the decision in *Apdol v RAF* 2013 (2) SA 287 GNP, regarding the effect of the change of the age of majority in the Children's Act 38 of 2005 on a dependant's RAF claim, which arose before the change was enacted 3

RAF MATTERS
- Adjusted figure for the statutory limit for loss of earnings/support as at 31 July 2013 3
- In her article, *The Road Accident Fund – the past, the present and the future*, Rene Julius looks at recent changes to and clarification of the law in this area of practice 4
- RAF prescription case study 6

ESTATES
- Discussion of PPS *Insurance Company Limited v Simon Michael Mkhabela* (159/2011) [2011] ZASCA 191 (14 November 2011) and the effects of a nominated beneficiary having predeceased the policy owner. Edited by Mr H. Goga of Hussan Goga and Company 7

LITIGATION
- The Superior Courts Act 8

LETTERS TO THE EDITOR 8

AIIF: Ann Bertelsmann, Risk Manager, Aon, Risk Solutions, The Place, 1 Sandton Drive, Sandton • PO Box 1847, Parklands, Johannesburg 2121 • Docex 34, Randburg • Tel: 011 944 7966 / 8127 Fax: 011 944 8065 • Website: www.aiif.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

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

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.

Attorneys Fidelity Fund South Africa
Your Champion in the Legal Profession Since 1941

RISK MANAGER'S COLUMN

WHAT TO DO WHEN THINGS GO WRONG IN YOUR OFFICE

Ann Bertelsmann, Risk Manager

We are all human and imperfect - so sometimes mistakes in an attorney's office are by and large unavoidable. That is why your primary professional indemnity cover is in place!

The way a practitioner deals with the fallout from an error made by his/her office, can make a great difference to the client's response to the situation.

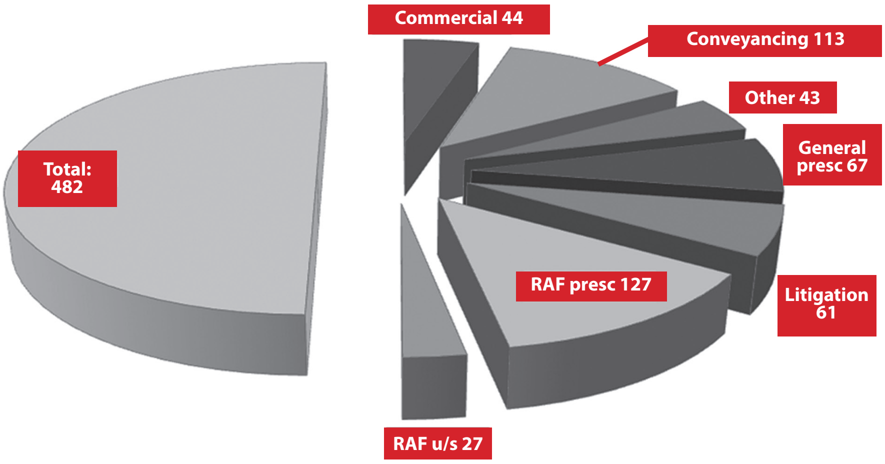
As soon as the error is discovered:

- Notify your insurer/s of the circumstances that might ultimately lead to a claim against your practice (see clause 6 of the scheme policy that can be found on our website at www.aiif.co.za).
- Call your client in and explain what has happened and what the possible consequences might be (without directly admitting negligence or making any offers to settle the matter).
- Advise your client that you have reported the circumstances to your insurers.
- If the problem can be resolved by some remedial action on your part, obtain the go-ahead from your insurers and discuss the proposed further steps with your client.
- If the problem cannot be resolved, then recommend that your client obtains independent legal advice.
- Make dated file notes of all discussions with your client and confirm the contents of these discussions in a letter or e-mail to your client.
- Make sure that you retain a full and legible copy of your file of papers (including the cover). You may give the file to your client.

RISK MANAGER'S COLUMN continued...

CLAIMS TRENDS FOR THE 2012 YEAR (AS AT 30 JUNE 2013)

NUMBER OF CLAIMS BY CLAIM TYPE FOR THE 2012 INSURANCE YEAR (AS AT 30 JUNE 2013)



Comparative Analysis: Number of claims notified as at 30 June - for the 2012, 2011, 2010, 2009 and 2008 years

YEAR	2012		2011		2010		2009		2008	
Conveyancing	113	*23%*	188	*34%*	154	*31%*	279	*46%*	293	*55%*
RAF prescription	127	*26%*	118	*21%*	101	*21%*	118	*20%*	94	*18%*
RAF U/S	27	*6%*	39	*7%*	39	*8%*	35	*6%*	18	*3%*
Litigation	61	*13%*	80	*15%*	77	*16%*	55	*9%*	62	*12%*
Other	43	*9%*	43	*8%*	121	*24%*	113	*19%*	62	*12%*
General Prescription	67	*14%*	35	*6%*						
Commercial	44	*9%*	47	*9%*						
TOTAL	482	*100%*	550	*100%*	492	*100%*	600	*100%*	529	*100%*

Notes:

A comparison of the **2012** and **2011** years, as at 30 June, reveals that:

- Year on year, there has been a **12% decrease** in the **total number of claims** notified.

- *Conveyancing* notification numbers have **reduced** by **40%** year on year, but they still represent an unacceptably large slice of the claims pie. **40 (35%)** of these **113** claims (valued at **R4.8 million)** arose out of the ***unauthorised or premature payment of trust funds.***

- *Litigation* claims notification numbers have **reduced** by **24%** year on year.

- ***RAF/MVA prescription*** notifications have **increased** in number, year on year, by almost **8%**. (**They are ahead of all the other claim types including *Conveyancing*, both in number and value.)**

- *General Prescription* claims notifications are beginning to move into the spotlight, with an **increase** of **45%** in number, year on year.

Caution: RAF practitioners please note!

Problems and uncertainty arising from the frequent changes to the RAF legislation since the new Act came into force in 2008, are beginning to be reflected in the claims that are currently being reported. They are also reflected in the numerous and sometimes conflicting judgments handed down in recent RAF cases.

Therefore, please make sure that you and your staff pay particular attention to the effects of recent case law and the various pieces of new legislation and regulations that apply to your matters.

If you are in doubt, please contact the relevant committee of your law society for advice. Please also look at the current and past copies of this *Bulletin* for updates on RAF-related issues and read the article by Rene Julius on page 4 of this *Bulletin*.

GENERAL PRESCRIPTION MATTERS

Apdol v Road Accident Fund 2013 (2) SA 287 (GNP)

Background facts

The plaintiff (Ms Apdol) suffered a loss of support as a result of her breadwinner's having being killed in a motor vehicle accident on 19 June 2004. The plaintiff, who was born on 16 February 1988, was a 16 year old minor on the date of the fatal accident.

The plaintiff brought a claim against the Road Accident Fund (RAF) to recover her loss of support as a result of her breadwinner's death.

In terms of s 23 (2) of the RAF Act, prescription only commences to run once a claimant becomes a major. Furthermore, at the date of the accident, the **Age of Majority Act 57 of 1972** was applicable and provided that a minor only attained majority at the age of 21.

Accordingly, the plaintiff lodged her claim with the RAF on 25 August 2010, when she was 22 years old. Thereafter, summons was served on the RAF on 27 February 2011 and the RAF raised a special plea of prescription to the plaintiff's claim.

The RAF's special plea was premised on the fact that on 1 July 2007 (almost three years after the accident in question – *and when the plaintiff was already 19 years old*) the **Children's Act 38 of 2005** came into operation. This Act reduced the age of majority from 21 to 18 years.

The RAF thus argued that –

- the plaintiff had attained majority on 1 July 2007;
- she ought therefore to have lodged the claim on or before 30 June 2010 ; and
- her failure to do so had resulted in her claim becoming prescribed.

It was argued on behalf of the plaintiff that –

- when the cause of action arose, the Age of Majority Act was in force and in terms of this Act, the age of majority was 21 years;
- the Children's Act could not have retrospective application and the plaintiff's rights could not be adversely affected by this Act's amendment of the age of majority; and
- accordingly, prescription against the plaintiff would only start to run when she turned 21 years old (16 February 2009).

Held

Judge Prinsloo considered the arguments and referred to section 12 (2) of the **Interpretation Act 33 of 1957** relating to the effect of a repeal of law, which states that:

> *"Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not –*
>
> a) *revive anything not in force or existing at the time at which the repeal takes effect; or*
>
> b) *affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or*
>
> c) *affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or*
>
> d) …
>
> e) *affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."*

The learned judge came to the conclusion *in casu* that the legislature did not intend the Children's Act to have retrospective application. He also referred to the rights of minors and children entrenched in the Constitution and the Bill of Rights and held that the finding contended for by the RAF did not promote the spirit, purport and objects of the Bill of Rights as intended by the requirements of s 39 (2) of the Constitution of South Africa.

He thus held that the plaintiff's claim had not prescribed and that the special plea of prescription raised by the RAF should accordingly be dismissed.

Fatima Ebrahim, Legal Advisor AIIF
Fatima.ebrahim@aon.co.za

RAF MATTERS

Adjustment of statutory limit for loss of income and loss of support .
In the *Gazette* of 28 July 2013 (BN 148 of 2013) the figure was adjusted to **R210 192.00** (Two hundred and Ten Thousand One Hundred and Ninety Two Rand) with effect from **31 July 2013**.

NEWS FLASH

RAF practitioners please note that, in terms of a directive from the RAF's COO, as from 17 October 2013, **no undertakings will be issued for future medical expenses** for **non-serious injuries**. Presumably the RAF will, in future, be paying cash for these expenses.

The Road Accident Fund – the past, the present and the future

As is to be expected, the legislative changes to the Road Accident Fund (RAF) have brought with them uncertainty and angst for legal practitioners who practice in this arena. Fortunately, the legislature and the judiciary have managed to develop the law in order to shed light on many of these uncertainties, albeit at a very gradual pace.

Below is an overview of the changes made and what the current legal position is regarding the various elements of claims against the RAF.

Road Accident Fund Act 56 of 1996 (The Old Act) – applicable to all claims that arose **on or before 31 July 2008**

General damages	Claimant compensated for proven injuries sustained and *sequelae*
Loss of earnings	Claimant compensated for proven loss
Loss of support	Claimant compensated for proven loss
Future medical expenses	Injured claimant awarded an undertaking
Past medical expenses	Proven amount awarded
Single vehicle collision passengers	Claim against RAF limited to R25 000.00
Right of recourse against wrongdoer	Available to passengers in single vehicle collisions

With the number of road accidents increasing, as well as various other factors, the coffers of the RAF began to feel the strain. A way had to be devised to still provide compensation to victims of road accidents whilst ensuring the financial stability of the RAF. This prompted the enactment of the Road Accident Fund Amendment Act.

Road Accident Fund Amendment Act 19 of 2005 (The New Act) – applicable to all claims that arose on or after 1 August 2008

General damages	Only awarded if injuries are proven to be serious (and no compensation for shock/ emotional trauma)
Loss of earnings	Capped – Currently maximum of R210 192.00 per annum
Loss of support	Capped – Currently maximum of R210 192.00 per annum
Future medical expenses	Injured claimant awarded an undertaking
Past medical expenses	Proven amount awarded
Single vehicle collision passengers	Claim against RAF not limited, treated as any other passenger
Right of recourse against wrongdoer	There is no right of recourse against the wrongdoer (except for shock/emotional trauma)

Despite various constitutional challenges the provisions of the "New Act" remain in force, save for the provisions relating to a tariff in respect of non-emergency medical treatment.

What has not withstood constitutional challenge is the fact that, in terms of the old Act, passengers who were involved in single vehicle collisions, prior to 1 August 2008, were still limited to a maximum of R25 000.00. This was found not only to be unconstitutional but inconsistent with the purposes of the new Act. In order to rectify this situation, the Transitional Provisions Act was formulated.

Road Accident Fund (Transitional Provisions) Act 15 of 2012 (TPA) – applicable to all passengers' claims that arose **on or before 31 August 2008** and had not been finalised prior to this Act's coming into effect **(13 February 2013)**

In terms of this Act a plaintiff can elect to have his/her claim administered in terms of the "Old Act" failing which, it will fall to be dealt with in terms of the "New Act".

RAF MATTERS continued...

Old Act

General damages	Limited to a maximum R25 000.00 provided the provisions of sec 18(1)(a) of the old Act are met
Loss of earnings	Limited to a maximum amount of R25 000.00
Loss of support	Limited to a maximum amount of R25 000.00
Future medical expenses	Limited to a maximum amount of R25 000.00
Past medical expenses	Limited to a maximum amount of R25 000.00
Right of recourse against wrongdoer	The claimant reserves his/her right of recourse against the wrongdoer

***NB: The total value of the award made by the RAF cannot exceed R25 000.00**

New Act

General damages	Limited to a maximum of R25 000.00 unless the injuries are proven to be serious
Loss of earnings	Capped – Currently a maximum of R210 192.00 per annum
Loss of support	Capped – Currently a maximum of R210 192.00 per annum
Future medical expenses	Injured claimant awarded an undertaking
Past medical expenses	Proven amount awarded
Right of recourse against wrongdoer	There is no right of recourse against the wrongdoer (except for shock/emotional trauma)

Regulations

In addition to the abovementioned amendments, the RAF regulations have also recently undergone certain changes, particularly regarding the procedure to be followed and the requirements to be met in declaring an injury to be serious. Because these regulations have been the source of great uncertainty and consequent litigation, the regulations were amended (and came into effect on 15 May 2013) in an attempt to provide more clarity.

It is important to note that the regulations were amended to exclude specific injuries that are not to be regarded as serious. (There seem to be differing views on whether or not these regulations apply only to claims that arose on or after 15 May 2013.) The rejection, acceptance and/or referral of a serious injury report is to take place within **90 days**.

A definition for "complications" was provided and a **cap of R 2 650.00** was placed on the Serious Injury Assessment costs. The regulations also provided that a request for assistance to have the injury assessed must be in writing and the determination of such finding must be within **60 days**. Also, the Registrar must refer disputes to the Appeal Tribunal, within **60 days** and provision is made for assistance to third parties to obtain a statutory medical report.

Case Law

As previously mentioned, the various changes to the legislation governing the RAF have brought about uncertainty, which has resulted in litigation surrounding the points of uncertainty.

Of particular interest is the appeal in the matter of ***Van Zyl v Road Accident Fund*, 34299/2009, SGHC.** The finding of the Supreme Court of Appeal will have serious consequences as it will establish the time frame allowed for the submission of a serious injury assessment (SIA) report and as a consequence, when claims for general damages will prescribe. This appeal is expected to be heard early in 2014. Both the Law Society of South Africa (LSSA) and the AIIF have applied to be joined as *Amicus Curiae.*

The case of ***Road Accident Fund v Duma* (202/12) and 3 related cases (Health Professions Council of South Africa as Amicus Curiae) [2012] ZASCA 169 (27 November 2012)** has also provided clarity. The case confirms that a court does not have the power to establish whether or not an injury is serious and that when a question arises regarding the severity of an injury that such conclusion is to be draw by the Health Professions Council of South Africa. It was also established that the claimant must be physically examined by the medical practitioner completing the SIA report and s/he cannot simply rely on medical records alone. The court also confirmed that a "medical practitioner", as contained in the "new Act", refers only to those practitioners registered under the Medical and Dental Profession Act. It was confirmed by the Court that the Narrative Test is not an independent or isolated method of establishing the existence of a serious injury. It is thus necessary for the Whole Person Impairment Test to be conducted first, after having eliminated those injuries which are automatically considered to be non-serious injuries in accordance with the Regulation 3(1)(b)(i). Only once it has been established that the claimant has not suffered a 30 per cent or more whole person impairment may the Narrative Test be applied.

It is important to bear in mind that none of the amendments have affected the running of prescription in so far as it relates to the lodging of claims and the issuing of summons against the Road Accident Fund. It is thus essential to lodge a claim within 3 (three) years of the collision (two years if the insured driver/vehicle is unidentified) and to issue summons within 5 (five) years of the collision.

Although a lot of light has been shed on the legislation governing RAF claims, through amendments and case law, there is still room for a lot of development within this sphere of law and it is thus essential that legal practitioners constantly keep abreast of all developments.

Rene Julius
Senior Associate, Routledge Modise Inc
ReneM@rmlaw.co.za

RAF MATTERS continued...

RAF PRESCRIPTION CASE STUDY

In summary, the attorney gave the background to this claim as follows:

"I discovered that the matter had lapsed while I was checking the pending cabinet. The matter was scheduled for action on 9 April 2013, but was somehow omitted from the diary."

1. 30 September 2009	First consultation with client.
2.	Waited to get clarification from a judgment that was to be handed down by the Constitutional Court in respect of serious injury claims.
3. 27 May 2011	Requested outstanding documentation from client.
4. 2 June 2011	Requested duly completed RAF 1 form from hospital.
5. 13 July 2011	Prescription Alert notified.
6. 1 October 2011	My secretary left the firm and new secretary appointed.
7. 7 October 2011	Requested original hospital file contents from client, who had to bring same in to enable hospital to complete the RAF 1 form.
8. 16 February 2012	Appointment obtained with Dr T, for client to obtain a Serious Injury Report or completion of the Narrative Report.
9. 1 March 2012	Hand-delivered original hospital records obtained from client to hospital, together with payment.
10. 1March 2012	Filing clerk resigned and left.
11. 1 April 2012 -	New filing clerk started.
12. 2 April 2012	I went on leave.
13. 11 April 2012	I returned to work, when I noticed that this matter had prescribed on **9 April 2012.**
14.	**"Prescription Alert had sent us a reminder, but unfortunately new filing clerk P just filed it into the file and did not hand it to my new secretary or anybody else in the offices."**
15. 16 April 2012	We only received the duly completed RAF 1 form from hospital on this date.

Consider what went wrong and how prescription could easily have been avoided.

POST MORTEM/TAKE-OUT TIPS

- The matter was only diarised for the prescription date, when it would have been too late to follow up on outstanding issues, like obtaining the RAF 1 form – the practitioner should have diarised to a date well in advance of the prescription date.
- The existing diary system is clearly flawed. It should be supplemented with checks and balances to ensure that files that do not come out on diary are followed up.
- While awaiting the Constitutional Court judgment, or at least immediately thereafter, the practitioner could have attended to items 3 to 7.
- The new staff (secretary and filing clerk) should have been properly **trained** to ensure that they followed the **firm's procedures** (which should ideally be in writing). They needed to understand the nature of the work done by the firm and the importance of bringing ALL documents and correspondence to the attention of one of the legally qualified staff.

For general tips on avoiding prescription or under settlements of RAF matters, please contact Lucia Snyman at the Prescription Alert Unit [(021) 422 2830] and ask her for a copy of *the Risk Management Kit*, which is available at no charge.

ESTATES

PPS Insurance Company Limited v Simon Michael Mkhabela *(159/2011) [2011] ZASCA 191 (14 November 2011)*

Background:

Ms MLM Sebata was the owner of a life policy issued by PPS Insurance Company Limited. Ms Sebata had nominated her mother, Ms HM Mkhabela, as beneficiary of the policy in the event of her (Ms Sebata's) death. She had reserved the right to cancel or change the nomination of beneficiary at any time but did not do so. Ms Mkhabela died on 26 May 2007 and Ms Sebata died on 12 August 2007. The executor of Ms Mkhabela's estate claimed the proceeds of the policy. The Court of first instance dismissed the claim with costs and directed that the proceeds of the policy be paid over to the executor of Ms Sebata's estate.

The judgment was overturned on appeal. The full bench of the South Gauteng High Court (SGHC) held that the insurance agreement entered into between Ms Sebata and PPS Insurance Company Limited was for the benefit of Ms Mkhabela and further held that as the nomination had not been revoked by Ms Sebata during her lifetime, the agreement was valid as between Ms Mkhabela and PPS Insurance Company Limited and therefore on the death of Ms Sebata, the proceeds under the policy accrued to the estate of Ms Mkhabela.

Parties to the Supreme Court of Appeal (SCA) action:

First Appellant: PPS Insurance Company Limited

Second Appellant: Sanlam Trust Limited

Third Appellant: Supreme Letlakana Sebata (executor of the estate of the deceased policy owner, Ms MLM Sebata)

Respondent: Simon Michael Mkhabela (executor of the estate of the deceased beneficiary, Ms HM Mkhabela)

Judgment:

The SCA upheld an appeal against the judgment of the full bench of the SGHC. The SCA agreed with the full Court's view that the nomination of Ms Mkhabela as beneficiary under the policy constituted a *stipulatio alteri*, which was capable of being accepted on the death of the policy owner. The SCA, however, held that it is only on the policy owner's death that the nominated beneficiary is entitled to accept the benefit and the insurer is obligated to pay the proceeds of the policy to the beneficiary. It accordingly held that Ms Mkhabela had no vested or enforceable right to claim the benefit and that she (Ms Mkhabela) merely had an expectation to receive a benefit that fell away upon her death. The proceeds of the policy accordingly accrued to the estate of Ms Sebata and not to the estate of Ms Mkhabela.

Implications for executors:

The SCA judgment is of particular importance to attorneys attending to the administration of deceased estates. It confirms the principle that where a nominated beneficiary predeceases a policy owner, then in the absence of a further nomination by the policy owner, the proceeds thereunder are payable to the estate of the policy owner and not the nominated beneficiary. The proceeds under the policy must therefore be claimed by the executor in the estate of the policy owner and duly accounted for in the liquidation and distribution account.

The SCA judgment is to be welcomed. The judgment of the full Court would have created immense practical problems. Executors in a deceased estate would have experienced considerable problems in circumstances where the nominated beneficiary under the policy had died many years before the policy holder. It would have meant re-opening an estate that had already been finalised.

Many thanks to Mr Hussan Goga for editing the above article and providing an opinion on the implications it has for practice. Editor.

LITIGATION

On 13 August 2013, President Zuma signed the **Superior Courts Bill** into law and it came into operation on 23 August 2013 (see GN 615, GG36743/12-08-2013).

The Superior Courts Act 10 of 2013 repeals *inter alia* the Supreme Court Act 59 of 1959 (passed during the apartheid era) and according to the Presidency, it provides a legislative framework for the re-organisation and rationalisation of the structures of the High Court and its jurisdictional areas, primarily with a view to enhancing equal access to justice.

It also aims at enhancing the administration of the magistracy by placing magistrates in every division of the High Court under the control of the Judge President of the division concerned.

(Practitioners may wish to read articles in *De Rebus* (2013 (Oct) *DR* 14 and 60) for a fuller discussion of this Act.)

LETTERS TO THE EDITOR

Please would you send me an electronic version of the November 2012 issue of the "Risk Alert" magazine as I would like to send it to one of our clients.

Would it be possible for you to send me copies when they come out as I think there is a lot of valuable information in there for me?

Name withheld

Reply:

You can find the current and past issues of the Bulletin on our website at www.aiif.co.za .

Please let me know if you are unable to find them.

(Editor's note: I have had several other requests from attorneys who wish to be placed on our "mailing list". Please note that you will of course also find a hard copy of the *Bulletin* as an insert in *De Rebus* and in electronic form as an insert in the digital *De Rebus*. *Ghost Digest* also regularly posts the *Bulletin* on its website.)

The Editor
Risk Alert

Dear Sir/Madam

I write to you in my capacity as Chairperson of the Deceased Estates, Trusts and Planning Committee of the Law Society of South Africa.

My committee resolved on 22 February 2013 that a summary of the attached judgment be published in Risk Alert in view of its importance to fiduciary practitioners.

Kind regards
H Goga
HUSSAN GOGA & CO.

See the discussion of *PPS Insurance Company Limited v Simon Michael Mkhabela* (159/2011) [2011] ZASCA 191 (14 November 2011) on page 7.