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RISKALERT

AUGUST 2014 NO 4/2014

IN THIS EDITION

Our contact details will be changing in or about September 2014. Please consult our website or Prescription Alert for changes.

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RISK MANAGER'S COLUMN

Ann Bertelsmann, Risk Manager

There has been a most pleasing response to our reminder about the self-assessment questionnaire and the Prescription Alert registration form included in the May *Bulletin* 2/2014. Completed questionnaires and firm registrations have been coming in steadily. Thank you all for responding. If you have any questions about the questionnaire, please read the *Letters to the Editor* column (pg 8).

All practitioners, but especially conveyancers, please take note of Ken Mustard's comments on ***Royal Anthem Investments 129 (Pty) Ltd v Yuen Fan Lau and Shun Cheng Liang*** **(941/2012 [2014] ZASCA 19 (26 March 2014)** on page 6. *We get numerous enquiries from the conveyancing profession when faced with a situation similar to the one the conveyancers were in in this matter.*

COURT BONDS

The Attorneys Insurance Indemnity Fund (AIIF) offers bonds of security in favour of the Master, to practising attorneys appointed as Executors in deceased estates, as an added benefit to the Professional negligence cover.

These bonds (up to **R5 million** per estate and **R20 million** per firm per year) are currently issued to the profession at no cost to the executor or the estate.

Please note: Bonds will NOT be issued in the following instances:

1. Where the attorney is appointed as an agent and not as an executor.
2. The day to day administration of the estate will not be done by the executor or members of staff within the executor's offices and under the supervision of the executor.
3. Where the administration of the estate will be done by an estate administration company/trust, even if the company or trust has been established by practising attorneys.
4. The co- executor is not a practising attorney.
5. The attorney is appointed in any other capacity such as a liquidator or curator.

The application forms and requirements are available on our website www.aiif.co.za.

Alternatively you may contact **Ms Haniffah Mbela** on **011 944 7761** or email haniffah.mbela@aon.co.za or **Ms Patricia Motsepe** on **011 944 7954** or email patricia.motsepe@aon.co.za .

Zodwa Mbatha,
Claims Manager AIIF

RISK MANAGER'S COLUMN continued...

CLAIMS TRENDS

Correction: **In the July Bulletin (3/2014) we published the total incurred values for the 2013** insurance year. There was a typographical error in the heading which should have read AS AT 31 MARCH 2014 and not 2013. *Please note that the insurance year runs from 1 July to 30 June of each year, so although we were already in 2014 at the time, the insurance year remains the 2013 until 30 June 2014.*

Below is a graph showing the number of claims for the same period.

GRAPH 3: NUMBER OF CLAIMS BY CLAIM TYPE FOR THE 2013 INSURANCE YEAR (AS AT 31 MARCH 2014 [Q1,2 AND 3] = 9 months)

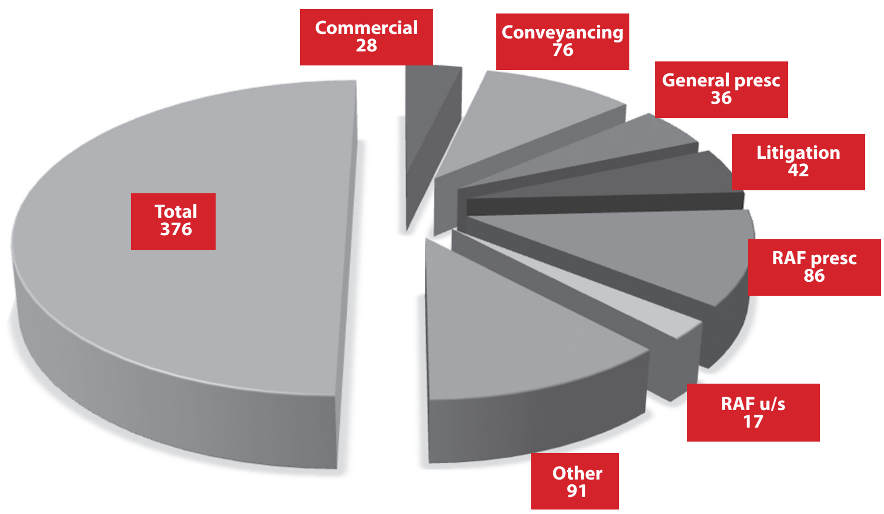
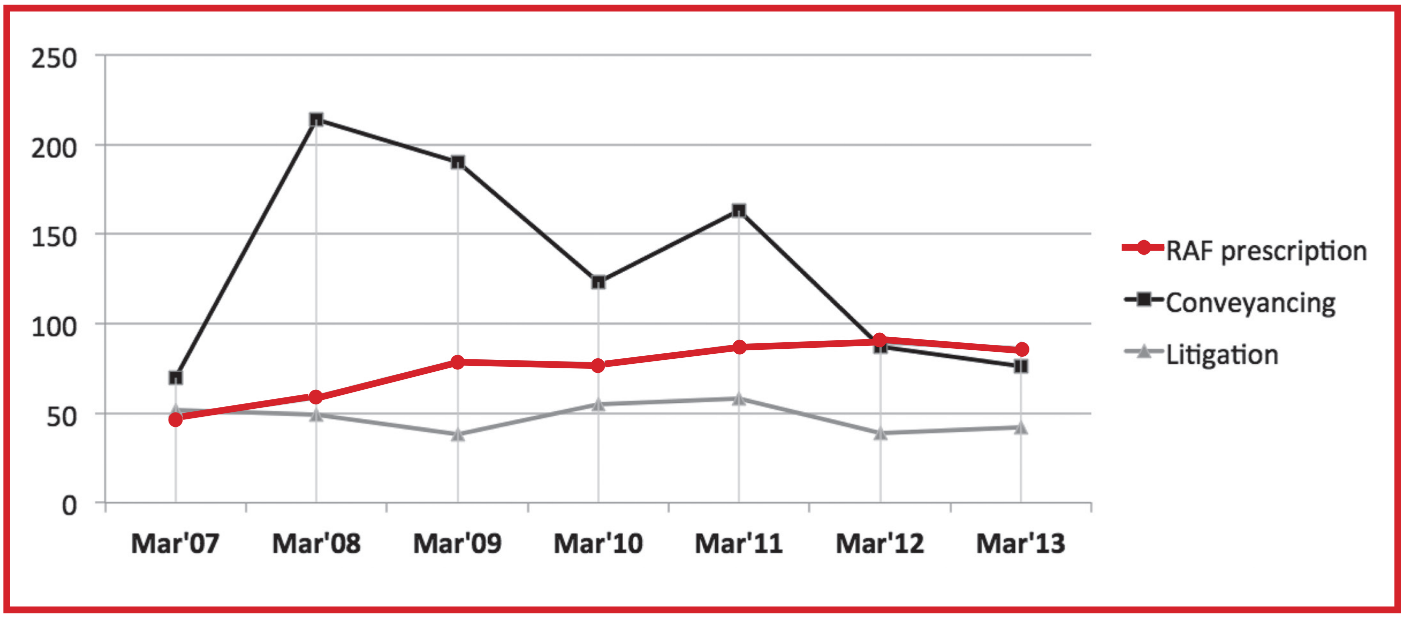


TABLE 2: COMPARATIVE ANALYSIS: NUMBER OF CLAIMS NOTIFIED 2013, 2012, 2011, 2010, 2009, 2008 AND 2007 AS AT 31 MARCH (9 MONTHS)

YEAR	2013	2012	2011	2010	2009	2008	2007
Conveyancing	76	87	163	123	190	214	70
RAF prescription	86	90	87	77	79	59	48
RAF U/S	17	23	30	23	25	15	11
Litigation	42	39	58	55	38	49	52
General prescription	36	39	27	15	29	15	19
Other	119*	66	73	59	58	35	26
TOTAL	376	344	438	352	419	387	226

RISK MANAGER'S COLUMN continued...

GRAPH 4: DEVELOPMENT OVER 7 INSURANCE YEARS:
NO OF CLAIMS PER CLAIM TYPE(AT Q3)



From **Table 2** and ***Graph 4*** (*above)* it can be seen that over a seven-year period, ***RAF prescription*** claims numbers have risen and *litigation* claims numbers have remained fairly stable. ***Conveyancing*** claims **numbers rose sharply in 2008** but have **reduced to 2007 levels in the current year.**

PRESCRIPTION CLAIMS

Together, prescription of RAF and general litigation matters accounts for 32% of all claims notified to the insurer.

According to the Road Accident Fund (RAF) the number of claims lodged continues to reduce year on year, because of the amendment Act having come into operation. Conversely, RAF prescription claims against attorneys notified to the AIIF continue to increase steadily.

The causes of these claims are many and varied, but some of the most common causes are:

- Lack of supervision and training of junior staff;
- No effective diary system;
- Files being kept in the attorney's office instead of being diarised and filed away;
- Files or clients that disappear;
- Matters being handled by a succession of different attorneys (either in the same or a different practice);
- Leaving drafting and service of summons to the last minute;
- Failure to record the date of prescription in the file accurately or at all;
- Discovery after prescription that the incorrect parties have been cited or action brought in the wrong jurisdiction;
- Lack of checks and balances;
- Taking one's "eye off the ball" during settlement negotiations.

Please see our chart of 'prescription do's and don'ts' in the February *Risk Alert Bulletin* (1/2014). Also see our General Prescription article on page 4

GENERAL PRESCRIPTION MATTERS

LET THE PARTNER BEWARE!

An important case study

We were notified of several general litigation prescription claims against a young two-person partnership, over a short period of time.

History

Partner A specialised in commercial work and partner B attended to general litigation matters. They worked in partnership for a few years, neither one interfering in the practice of the other.

It transpires that, while partner A was diligently attending to his commercial matters, partner B's practice at some stage and for reasons unknown, became completely chaotic.

Partner B took on numerous instructions, but failed to carry out his mandate. Instead of competently pursuing litigation on behalf of his clients, he began deceiving them about the status of their matters. He went so far as to draft documents and cut and paste court stamps on them to satisfy his clients of the progress of their matters. He advised some of them that default judgments had been obtained. Many of these matters became prescribed, without his having served summons. (This scenario may sound far-fetched, but it is by no means an unusual situation. It is, however, usually the type of behaviour we see from poorly supervised candidate attorneys and other employees.)

Partner A was blissfully unaware of what was happening in his partner's practice until the first summons was served on him. By then the partnership had dissolved and partner B had taken all of his files with him. He was subsequently struck off the roll and has now absconded, leaving Partner A to sort out the mess.

Problems

The total value of the claims against the practice by far exceeds the limit of indemnity of R1 562 500 for a two person practice. Once this full limit of indemnity has been expunged, the damages are payable by both partners (jointly and severally) from assets of their practice and from their personal estates. Since it seems that partner B is now a man of straw, the full burden will fall upon partner A.

To make matters worse, the partnership did have so called top-up cover for an additional amount above the limit of indemnity, but this was cancelled at some stage before the claims were notified. Professional indemnity policies are issued on a claims-made basis. This means that the cover must be in place when a claim is made and not when the cause of action arose. As the practice did not buy run-off cover, it is no longer protected (only insofar as top-up is concerned – the primary layer through the AIIF provides run-off cover up to the limit of R1 562 500).

Lessons learned

1. Regardless of the size of your practice, make sure that there is proper reciprocal oversight of ALL partners'/directors' work, regardless of the measure of trust between them. File audits are a good idea. Had this been done, Partner A would have become aware of any problems at an earlier stage when the damage could have been controlled.

2. You need to hold regular staff meetings and discussions of matters, especially problematic ones.

3. You need to take advice from a reputable legal insurance broker to ensure that situations similar to this one are covered, for example by the purchase of top-up and run-off cover.

NB: It was also subsequently discovered that partner B had been getting some of clients' fees paid into his own business account. Partner A suffered that loss as well. Adequate cross checks should be in place with regard to billing and receipt of payments.

Ann Bertelsmann
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RAF MATTERS

VALIDITY AND RELEVANCE OF REPEALED SECTION 19(b)(ii) OF THE ROAD ACCIDENT FUND ACT OF 1996

Introduction

Sections 19(a) – (f) of the Road Accident Fund Act 56 of 1996 contain provisions which exclude the liability of the Road Accident Fund in circumstances where:

- There is no common law liability on the part of the wrong-doing driver (s 19(a);
- Where the claimant is a motorcycle passenger (s19(b)(i));
- The claimant is a social/gratuitous passenger and is injured or killed by the exclusive negligence of the driver of the vehicle concerned and the passenger is a member of the household of the driver and the driver is the head of that household (s19(b(ii));
- The claimant is a social/gratuitous passenger responsible in law for the maintenance of the driver of the motor vehicle concerned and such driver is exclusively negligent (s19(b)(ii));
- The claim is handled by a person who is not an admitted and practising attorney (s19(d(i));
- The claimant shares the proceeds of his claim for services rendered with a person who is not an admitted and practising attorney (s19(d(ii));
- The claimant fails or refuses to submit medical records or to a medical examination at the request of the Road Accident Fund or allow the Road Accident Fund to inspect medical records (s19(e)(i) – (iii));
- The claimant fails to submit an affidavit or documents relating to the accident (s19(f)(i) and (ii)).

All these provisions, barring s19(b), are still law. s19(b) was repealed by s8(a) of the RAF Amendment Act 19 of 2005 (RAFAA) which took effect in 1 August 2008. This act at the same time abolished s18(1) which limited the liability of the RAF for certain classes of passengers and/or their dependants (see s7(b) of the RAFAA) where these passengers were injured or killed. s18(1) (restricting the number of claims against the RAF by certain passengers) and 19(b)(ii) (excluding the claims of certain passengers against the RAF) were linked inasmuch as the repealed s19(b)(ii) contained a reference to the repealed s18(1)(b) by stating that only passengers who are s18(1)(b) passengers (i.e. passengers socially or gratuitously conveyed) are subject to the exclusion created by s19(b)(ii).

In *Mvumvu and Others v Minister of Transport and Another* (CCT 67/10) [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) it was held that the restriction on passengers of recoverable damages was unconstitutional in respect of claims which arose before the repeal of s18(1) on 1 August 2008. This resulted in the enactment of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 (Published in *Government Gazette* 35979 of 10 December 2012) essentially enabling passenger claimants who were subject to s18(1), whose claims arose before 1 August 2008 and whose claims had not prescribed or were not finalised, to elect to be subject to the pre- or post-amended RAF Act (as amended by the RAFAA) and making provision for procedural requirements in this regard. The *Mvumvu* judgment raised the question regarding the status of claimants who were not passengers in terms of s18(1) (claims restricted) but who were subject to s19(b)(ii) (claims excluded) and whose claims had not been finalised or prescribed. There is commonality in these provisions as they all apply to passengers prejudiced by the exclusive negligence of the driver of the vehicle in or upon which such passengers were conveyed. In order to properly evaluate the validity and relevance of s19(b)(ii) a brief outline of the requirements of s19)b)(ii) is called for.

Section 19(b)(ii) requirements

s19(b)(ii) applies to passengers. This means that the claimant must have been conveyed within the legal meaning of the word (see Klopper *Law of Third Party Compensation* LexisNexis (2008) 131.) and the injury and loss must have been caused by the exclusive negligence of the driver of the vehicle in or upon which the claimant was conveyed. The section calls for a special (i.e. a social or gratuitous) class of passenger and divides this special class into two categories of passengers: Passengers who are members of a household and passengers who are legally responsible for the maintenance of the driver of the vehicle concerned.

A household exists where:

- Persons cohabit in the same dwelling;
- Such cohabitation is continuous or permanent; and
- There is some kind of relationship between the persons in such a household. (See Klopper *ibid.* 127-129)

Apart from the existence of a household, case law requires the driver to be the head of the household and the passenger to be a member of the driver's household before the exclusion can take effect (see *Masombuka v Constantia Versekeringsmaatskappy* 1987 (1) SA 525 (T)).

In the case where the claimant is legally responsible for the maintenance of the driver, it is not required that the claimant must actually maintain the driver (See Klopper *ibid.* 130).

Typically the exclusion could apply to a family injured while on holiday where the driver is the head of the household and is exclusively negligent or where a husband is the driver and through his exclusive negligence injures his passenger wife who owes him a reciprocal duty of maintenance.

Interestingly the exclusion is often found in short term indemnity insurance and the reason for the exclusion seems to be to ensure that a wrongdoer's legal duties of maintenance are not taken over by the RAF (insurer) and to prevent collusion (see Klopper *ibid.* 133). In passing, it is strange that both the parties and the courts in *Mvumvu* could not find any reason for the existence of s18(1). s18(1)

RAF MATTERS continued...

was introduced to limit the exposure of the RAF (previously authorised insurer) because of affordability issues and to prevent collusion (see Suzman, Gordon & Hodes *Law of Compulsory Motor Vehicle Insurance in South Africa* Juta (1982) 191.) It is therefore ironic that the partial constructive abolition of the rights of the main body of road accident victims by the RAFAA was partially justified by the increased exposure created by the abolition of s18(1) (see *Law Society of South Africa and Others v Minister of Transport and Another* (10654/09) [2010] ZAGPPHC 26, 2010 (11) BCLR 1140 (GNP); (CCT 38/10) [2010] ZACC 25, 2011 (1) SA 400 (CC)). s18(1) affects only 16% of all road accident victims (See RAF Commission Report Volume 1 p 173).

Validity and relevance: *Mvumvu and Others v Minister of Transport and Another* and *Vanessa da Silva v Road Accident Fund and Minister of Transport*

Based on the same argument raised in *Mvumvu*'s case, s19(b)(ii) may also be invalid. More so, if it is considered that in the case of *Mvumvu* the *restriction* of recoverable damages (s18(1)) was held to be invalid. s19(b)(ii) deals with the same category of claimants (passengers) as *Mvumvu* and in addition does not restrict but *entirely excludes* the claims of this class of claimant (see Klopper *ibid.* 125). Viewed from this perspective, s19(b)(ii) is more onerous than s18(1). The constitutionality of s19(1)(b)(ii) was raised in *Vanessa da Silva v Road Accident Fund and Minister of Transport* ZAFSHC 1349/2008 (Heard 21 November 2013, judgment on 24 January 2014) and found to be unconstitutional. This judgment has been confirmed by the Constitutional Court in *Da Silva v Road Accident Fund and Another* [2014] ZACC21. It follows that s19(b)(ii) has, because of the *Da Silva* judgment now once more become relevant despite its repeal on 1 August 2008 by the RAFAA .

Conclusion

The finding of unconstitutionality of s19(b)(ii) the RAF Act has made s19(b)(ii) relevant and applicable in relation to claims which arose before 1 August 2008. Claimants whose claims arose before 1 August 2008 and were subject to s19(b)(ii) can, as a consequence of *Mvumvu* and especially *Da Silva,* now fully recover their damages from the RAF provided their claims have not been finalised and have not become prescribed. The affected claimants are bound to be mainly minors injured or who suffered loss prior to 1 August 2008 or other claimants whose claims have not prescribed as a result of the suspension of prescription in terms of s23(2) of the RAF Act of 1996.

Professor Hennie Kloppers
Practising attorney and Emeritus Professor,
University of Pretoria.

CONVEYANCING MATTERS

Further discussion of *Royal Anthem Investments 129 (Pty) Ltd v Yuen Fan Lau and Shun Cheng Liang* (941/2012 [2014] ZASCA 19 (26 March 2014) (see the Special Policy Edition of the *Risk Alert Bulletin No 3/2014*)

As a result of the *Royal Anthem Investments'* judgment conveyancers are placed in a very precarious position where there is a dispute between a seller and a purchaser regarding the validity/interpretation of a sale agreement. When faced with a claim like this, consideration should be given to section 1 of the *Prescribed Rate of Interest Act* (PRIA) which reads as follows:

> *"If a debt bears interest and the rate at which the interest is to be calculated* ***is not governed by any other law or by an agreement or a trade custom or in any other manner,*** *such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to the debt, orders otherwise."*

The Royal Anthem sale agreement clearly stipulated that the deposits had to be invested in terms of section 78(2A) of the Attorneys Act and therefore the interest was governed by an agreement. It could also be argued that it is a trade custom that funds paid to a conveyancer and held by a conveyancer in trust will be invested by the conveyancer in an interest bearing account and the interest thus earned is for the benefit of the person entitled to the capital at the time when the interest was earned. Unfortunately no reasoning was given by the Court as to why the purchaser would be entitled to *mora* interest. Perhaps there is a general assumption that debts normally bear interest at the *mora* rate (15.5%) calculated from due date to date of payment.

<u>It might also be prudent for a conveyancer, faced with a similar claim, to institute interpleader proceedings in terms of High Court Rule 58 and Section 69 read with rule 44 in the Magistrate's Court. In terms of these interpleader proceedings any funds held in trust by the conveyancer will then be paid to the Registrar, taking the risk away from the conveyancer.</u>

Ken Mustard
McCLUNG - MUSTARD
Attorneys, Conveyancers, Notaries

CONVEYANCING MATTERS continued...

LAWYERS CUTTING CORNERS IN HOUSING RUSH, SAYS OMBUDSMAN

"In my opinion the standard of both residential and commercial conveyancing of 75% of law firms is appalling. This is partly due to firms being unable to offer experienced, quality solicitors salaries comparable to say, GP's, because conveyancing charges still remain far too low for the specialist knowledge involved etc. Look at estate agent charges. We have always bemoaned the fact they get paid over four times more than us." UK Law Society Gazette, Friday 10 May 2014

In an article dated 8 May 2014, John Hyde reports that United Kingdom complaints about residential conveyancing have surged 25% in the last year and one in five complaints to the Legal Ombudsman service now relates to conveyancing, making it the most complained about area of law.

The view that "the housing bubble may be forcing lawyers to rush through purchases and leave themselves open to more complaints" is supported by the fact that London and the south-east (where there has recently been a housing boom) have yielded the most legal complaints in England and Wales.

How does this relate to the situation in South Africa?

If we look back at the period of the South African property boom from around 2003 to 2007, our statistics show that there was a similar increase in claims against conveyancers during the latter part of this period. Since the slump in our property market, conveyancing-related claims have reduced significantly.

This is something for conveyancers to bear in mind when the property market picks up. No matter how much pressure there is, we cannot afford to relax our attention to detail and stringent supervision of conveyancing staff.

GENERAL PRACTICE

EFT BANKING – A FABULOUS TECHNOLOGICAL INNOVATION

Convenient, quick and certain - in the sense that the transaction cannot proceed unless the required amount of money is in the transferring account. At the press of a button and in a matter of seconds, money is transferred from one bank account to another.

So much better for the payer than having to write out a cheque and so much better for the payee than having to present the cheque for payment and waiting for the funds to clear.

But, how secure is the transaction and at what risk is the transaction performed?

You punch in the account name and the account number and as long as the account number is a valid number, the bank concerned accepts the information and instruction and pays the sum entered into that account, regardless of the name you punch in. There is no verification between the name and the number. The IT banking structure does not check the number against the name.

This is dangerous and places the payer at enormous risk.

Your simple mistake of transposing one number could result in the money going into the wrong person's account. You would be none the wiser, as the account may well be a valid bank account number but it is not verified against the name you punched in.

Depending on the bank you are transferring from and the bank into which you are paying, you may only find out two or three days later that your intended payee has not received the funds. You are then at the mercy of the integrity, honesty and good faith of the actual payee to get the funds back – IF you are able to extract information from the bank about the details of the person you actually paid.

Meanwhile, the intended correct payee is jumping up and down threatening to report you to the Law Society and to sue you for the money plus interest – not to mention allegations of theft and fraud being hurled against you. An honest unintentional mistake turns into a nightmare.

The problem lies in some banking IT systems being currently unable to link and verify an account number with a name.

GENERAL PRACTICE continued...

The problem is exacerbated by the prevalence of fraud endemic in society – a person may furnish you in writing – email, letter, fax from an institution to deposit funds into a valid account but which is not in the name of the correct payee.

The following procedure is therefore recommended:

1. Instructions to pay into a bank account should always be in writing.

2. Instructions to pay into a bank account should never be accepted telephonically or in any oral form nor by e-mail.

3. The payee should be requested to furnish the following details in writing in his/her instructions to make payment, namely, the full name of the account holder, the name of the bank, branch name and code and account number and should confirm the correctness of these details by affixing his/her signature thereto.

AND

4. The payee must present an original or certified copy of a bank statement reflecting the name of the account holder and the account number.

OR

The payee must present written confirmation on a letterhead from the payee bank of the full names of the account holder, identity/registration number of the account holder, the account number, the type of account and the branch code. This confirmation must be signed by a bank official and duly stamped by the bank.

AND

5. A procedure should be implemented in the attorneys' offices whereby the person who loads or captures the payment and the person who confirms or authorises the release of the funds are independent of each other. In certain instances it may be appropriate that more than one person should be required to authorise or confirm the payment that was captured. The person who loads the payment and the person/s who authorises the release of the funds should both check the correctness of the banking details against the source documents provided.

These steps will ensure that:

(a) You have confirmation in writing that the account number links up to the account name; and

(b) That a double-check system is in place to minimise fraud and to avoid or reduce human errors.

Ceris Field – Field's Attorneys, Cape Town
Hussan Goga – Hussan Goga & Company, Durban

(This article was compiled by the authors at the request of the Deceased Estates, Trusts and Planning Committee of the Law Society of South Africa.)

For more on this topic, see Simthandile Myemane's article in 2014 (June) *De Rebus* 18.

LETTERS TO THE EDITOR

RE: RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

The above matter refers.

Please advise whether and when we are supposed to submit the above questionnaire and when this ruling was introduced.

(Attorney's name withheld.)

All practices are asked to complete the questionnaire every two years. The ruling was introduced in clause 6.1.2 of the 2012-2013 policy and was discussed in the Risk Alert Bulletin and on our website.

It is designed to encourage practitioners to re-assess the level of risk management in their own practices. There is no form of "policing" for this except that we cannot process any professional indemnity claims against your firm until the questionnaire has been satisfactorily completed, less than two years before the claim is notified to us.