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RISKALERT

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RISK MANAGER'S COLUMN

RAF 4 FORM: *VAN ZYL V RAF*, 2012 JDR 0972 (GSJ) – THE APPEAL

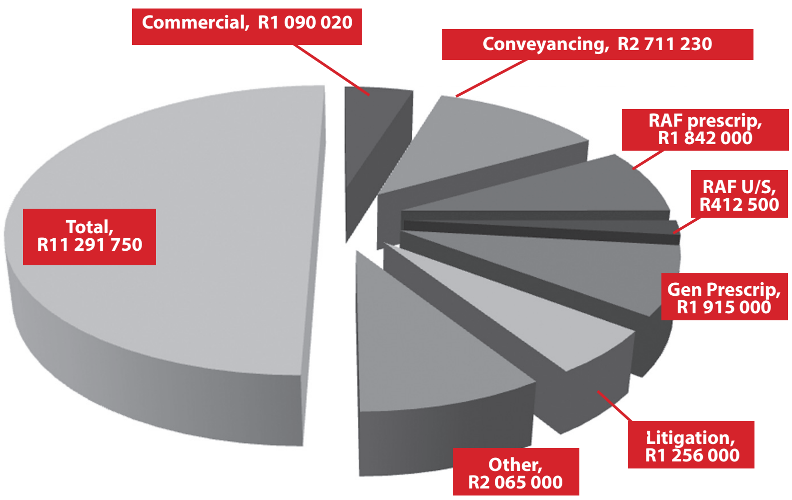
Ann Bertelsmann, Risk Manager

In the South Gauteng High Court, Judge Satchwell ruled that the **period for the submission of the RAF 4 form is five years** i.e. the time period provided for the service of summons - and not the two/three year period allowed for the submission of the claim form.

We previously reported that the Road Accident Fund (RAF) had lodged an appeal to the Supreme Court of Appeal against Judge Satchwell's ruling. The Attorneys Insurance Indemnity Fund (AIIF) and the Law Society of South Africa were both successfully joined as *amici curiae*. The hearing set down for 17 September 2013 was postponed. THE GOOD NEWS is that the **RAF thereafter withdrew the appeal.**

Our sincere thanks go to attorney Pravesh Diplall of Fathima Karodia Attorneys, who made the sensible suggestion that we intervene in the appeal and provide more of the profession's views on the issue.

CLAIMS TRENDS AS AT 30 SEPTEMBER 2013



TOTAL INCURRED VALUES* BY CLAIM TYPE FOR THE 2013 INSURANCE YEAR (AS AT 30.09.2013)

RISK MANAGER'S COLUMN continued...

Table 1: Comparative Analysis: Total incurred value* of claims notified as at 30 September – in the 2013 and 2012 years of insurance

YEAR	2013	% of Total	2012	% of Total
			R	
Conveyancing	2 711 230	24	2 680 205	25
RAF prescrip	1 842 000	16	3 184 000	30
RAF U/S	412 500	4	1 055 000	9
Litigation	1 256 000	11	715 000	7
Other	2 065 000	18	535 010	5
General presc	1 915 000	17	1 040 000	10
Commercial	1 090 020	10	1 575 000	14
TOTAL	11 291 750	100	10 784 215	100

**The total incurred value is the sum of any reserve held and payments made in respect of capital, interest, party and party and investigation costs.*

TOTAL INCURRED VALUES OF CLAIMS BY CLAIM TYPE

As seen in the graph on page 1, the value of claims arising out of *conveyancing* matters for the first quarter of the 2013 year was far higher than the values for all other claim types. This was followed by *general prescription* matters, which reached a staggering total value of R1 915 000 – even more than the value of *prescribed RAF* matters. Together, **both of these prescription types accounted for one third of the total incurred value of all claims.** (Please read our *Prescription Do's and Don'ts* on page 4)

As seen in Table 1:

- The total incurred value of claims notified in the first quarter of 2013, is **5%** higher than that for the same period in the 2012 scheme year.
- *General prescription* claims are a cause for concern during the current insurance year. They show an **increase of 90%** on the figures for the same period in 2012.
- *Litigation* claims show a year on year **increase of 46%** when compared with the same three-month period in 2012.
- However, the total-incurred value of *prescribed RAF* claims shows a **decrease of 42%** when compared with the same period in the 2012 insurance year.
- *The value of RAF under-settlements has* **decreased by 60%** year on year.

Table 2: Comparative Analysis: Number of claims notified as at 30 September – in the 2013, 2012 and 2011 insurance years

YEAR	2013	% of total	2012	% of total	2011	% of total
Conveyancing	38	33%	24	25%	42	34%
RAF prescrip	14	12%	28	29%	26	21%
RAF U/S	7	6%	6	6%	7	6%
Litigation	14	12%	12	13%	15	12%
General presc	8	7%	7	7%	12	10%
Commercial	11	9%	11	11%	11	9%
Other	24	21%	6	7%	10	8%
TOTAL	116	100%	94	100	123	100

NUMBER OF CLAIMS BY CLAIM TYPE (see Table 2)

- Year on year, there has been a **23% increase in the total number of claims** notified in the same three-month period in 2012.
- *Conveyancing* notification numbers have **increased** by 58% year on year for the same period in 2012 and have gone back to the 2011 level. **18 (47%)** of these 38 claims arose out of the ***unauthorised or premature payment of trust funds.***
- In the 2013 year as at 30 September, 14 *RAF prescriptions* had been reported. This is half the number of such claims notified in the same three-month period in 2012.

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GENERAL PRESCRIPTION MATTERS

For the past few years, claims arising out of the prescription of RAF and other general matters have escalated and are becoming a cause for concern. As discussed on page 2, they accounted for one third of the total incurred value of all claims in the past quarter.

Prescription can be a complicated topic. The general prescriptive period of three years may not apply to certain statutory or contractual matters, certain other types of debts set out in section 11 of the Prescription Act 68 of 1969 (the Act) or in the situation where prescription is delayed or interrupted by virtue of any of the circumstances set out in sections 13 and 14 of the Act.

It is essential that practitioners establish the **correct prescription date** for their client's matter as soon as possible and that they record this date prominently in the client's file. This check should of course, then be supplemented by a fail-proof, dual diary system.

Some of the most common causes of the prescription of claims are set out in the table on page 4.

SOME RECENT PRESCRIPTION CLAIMS

- A loss of support claim was lodged with the RAF, whereafter the responsible attorney at the insured firm's branch office became ill and died. The matter was referred to the insured's head office, because no-one else at the branch office had experience in RAF matters. However, because the client still needed to be consulted, the file was retained by the branch office. The client proved difficult to contact and the file contained insufficient file notes to assist the attorney now responsible for the matter. No summons was served within the five-year period. Only once the client contacted the insured enquiring after the progress of her claim, was the file discovered on an office windowsill (see 2, 8, 11 and 15 in the table on page 4 and 5).

- Attorney (A) drafted the summons and particulars of claim and sent it to his correspondent (B) for issue and service. A alerted B to the imminent prescription of the matter and the resultant urgency. B sent his messenger to have the summons issued, but there was some delay with the Clerk of the Court. Eventually, the file with the issued summons was put on B's cluttered desk and he did not notice it under the piles of other files and documents. The summons was not served and the claim became prescribed in B's hands (see 11, 12.1 and 12.2 in the table on page 5).

- Counsel was briefed to draft particulars of claim. The claim became prescribed while the papers were with counsel and the attorney failed to notice (see 6 and 9 in the table on page 4 and 5).

- Attorney A issued summons. When he died shortly thereafter, his file was taken over by attorney B, who failed to have the summons served, as there was a note on file stating that summons was issued and the sheriff's return of service was awaited (see 12.2 and 16 in the table on page 5).

- The attorney consulted with client in hospital. He opened a file the next day and mistakenly captured the wrong accident date, using the date of the consultation instead. Although the accident report and affidavit contained the correct date, he failed to pick up the error (see 1 in the table on page 4). This error might have been picked up if the firm had conducted routine peer file audits.

- The MMF1 was the only document outstanding, preventing lodgement of the client's claim. The hospital took 2 years to respond to the attorney's request. He then sent payment and received notification to collect three days before prescription. He asked the client to collect the form from the hospital but she failed to do so and the claim became prescribed (see 7.1 and 7.2 in the table on page 4).

- The attorney sent the summons to his Pretoria correspondent for service. On following up after the prescription date, he discovered that the correspondent had never received the documents (see 12.2 in the table on page 5 and the *Guthrie* case).

- When the candidate attorney assigned to a matter left the firm, a paralegal was given the file with the instructions to pursue settlement. No settlement was achieved and when a new candidate attorney was appointed, she discovered the file after the claim had already become prescribed (see 2, 13, 14 and 15 in the table on page 4 and 5).

RECENT CASE LAW

Macleod v Kweyiya [365/12] ZASCA 28 (27 March 2013)

On 30 January 1988, when she was approximately four years old, the respondent sustained injuries rendering her a paraplegic, in a motor vehicle accident between a Valiant, in which she was a passenger, and a Toyota. The appellant, her erstwhile attorney, had been instructed by the respondent's mother to institute a damages claim against the Road Accident Fund.

In March 1993 the claim was instituted for R25 000 in respect of the Valiant, and R870 220 in respect of the Toyota. On 18 March 1996 the claim was partially settled and the settlement agreement for R25 000 was made an order of court. On 3 February 1997, the particulars in respect of the unsettled portion were amended to increase the claim to R2.3 million. Three months later the claim was settled at R99 500. The respondent's mother accepted the settlement on her behalf.

On 19 April 2006, after the respondent had consulted with the appellant for a different issue, she was sent a copy of the documents relating to her earlier claim. On 8 April 2009, summons was issued against the appellant.

The respondent alleged that the appellant had acted negligently, in breach of contract and of his duty of care. She claimed that she was due R2.1 million at the time of settlement and quantified the monetary value of that amount (at the time she issued the summons) to be about R4.8 million. In her particulars of claim she anticipated a possible plea of prescription by stating that she only became aware of the terms of the settlement agreement when she received the documents in April 2006. She further alleged that she first consulted with her present attorneys in February 2009, and that it was only then that she became aware that the appellant had acted negligently. She contended that prescription only began to run from either of those dates.

In deciding when prescription began running, the Supreme Court of Appeal referred to sections 12(1) and 12(3) of the Prescription Act 68 of 1969.

Section 12(3) states that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a

GENERAL PRESCRIPTION MATTERS continued...

creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

In order to successfully invoke section 12(3), either **actual** or **constructive** knowledge must be proved. **Actual** knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the debtor. **Constructive** knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts from which the debt arises, by exercising reasonable care. A creditor cannot simply sit back and 'by supine inaction arbitrarily and at will postpone the commencement of prescription'.

In order for the debt to be due under section 12(1), it must be immediately claimable i.e. the various components of the cause of action must have fully accrued.

The appellant contended that the respondent should have been wary of her mother and should have demanded the details of the settlement. He argued that she had been in a position to sue the appellant within one year of attaining majority. Her response was that it was perfectly reasonable for her, at the age of twelve, to trust that her mother and her attorney had acted in her best interests. Once she reasonably formed that belief, there was no reason for her to think otherwise, without new evidence and therefore no reason for her to actively search for information implicating her mother or the appellant. When she, by chance, obtained information about the settlement on 19 April 2006, she sued the appellant within the three-year prescriptive period thereafter.

The Court held that it is negligence, and not an innocent inaction that section 12 (3) seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which plaintiffs find themselves.

The Court confirmed the finding of the court *a quo* and concluded that the respondent was entitled to sue her attorney 25 years after the event.

Seresha Mocktar
Candidate Attorney
Venn Nemeth and Hart
Pietermaritzburg

PRESCRIPTION DO'S AND DON'TS

DON'T:	DO:
1. Use **incorrect prescription date.**	**Make certain that you are using the correct date for prescription by ensuring that –** • you are familiar with any contractual or statutory prescriptive periods applicable to your client's matter (for example an insurance contract or claim against the State); • you are familiar with the Prescription Act 68 of 1969 *(especially section 11 - the periods of prescription of debts, section 12 – when prescription begins to run, section 13 – prescription delayed in certain circumstances and section 14 – interruption of prescription by acknowledgement of liability*); • you are fully conversant with all the facts pertaining to your client's matter and have taken them into account in calculating the prescription date; and • you have kept abreast of developments in the law (judgments and legislation).
2. Lose sight of the prescription date while attending to the matter/ make it difficult for someone attending to the file later to establish the date of prescription.	• Ensure that the **prescription date features prominently** at the front of the file and that important steps taken in the matter are recorded on the cover or in a prominently placed checklist. • Ensure that your firm and individual RAF matters are registered with PRESCRIPTION ALERT **(Contact Lucia Snyman at (021) 422 2830).**
3. Take on new matters that are close to prescription.	• Avoid this by refusing to take on such matters (making sure that you have explained the prescription problems to the prospective client). • Ensure, if you do take on the matter, that you explain the problems to client and obtain a proper written indemnity before accepting the mandate.
4. Discover after prescription date that proceedings were brought in the wrong forum **(no jurisdiction).**	• Ensure that the court/forum has **jurisdiction** in respect of the **parties, matter** and **quantum.**
5. Discover after prescription date that the wrong party/parties were cited **(no *locus standi*)**	• Establish who the true defendant (with the necessary *locus standi)* is by doing all the necessary checks *; and • ensure that plaintiff/s have *locus standi* ** (and that your instructions come from a source with the necessary authority***).
6. Allow prescription while particulars of claim are being settled by counsel.	• Ensure that counsel is briefed in good time and follow up/instruct another counsel if necessary.
7. 1 Leave it to the last minute to obtain important documents, reports and information. 7. 2 Leave it to your client to provide these!	• **Use a checklist** to ensure that all documents and information have been obtained. • If necessary go out and collect the information/documents/reports yourself. **{**see *Mlenzana v Goodrick & Franklin Inc* (2012) JOL29026(FSB)**}.**
8. At the last minute find yourself unable to contact client to obtain instructions.	• Make sure you have comprehensive contact details for client and his/her relatives.

GENERAL PRESCRIPTION MATTERS continued...

9. Forget to diarise the file to give yourself enough time to meet any time limits.	• Diarise ahead to leave yourself enough time to meet the time limits comfortably.
10. Fail to ensure that the file comes out on the due diary date.	• Ensure that you have effective and fail proof **diary and filing systems** in place and that all staff is properly trained to understand the importance of these systems.
11. Misplace files, especially when moving office.	• Have a fail proof diary system. • Have safe and efficient storage systems for both paper and electronic files. • If moving offices, be especially careful with planning and executing the move. Make sure all files are accounted for (This is the time when files most often get mislaid). • Ensure all files are properly signed out to the person removing them. • Where possible, avoid removing files from the office and be particularly vigilant where an employee leaves the practice (especially where this is not an amicable parting of the ways). • Do not keep piles of files in your office. • Ensure that the firm has a record of all files and to whom they have been assigned.
12. 1 Allow the firm's messenger or the sheriff of the court to issue/ deliver/ serve the documents after prescription. 12.2 Forget to follow up timeously to ensure that the issue/service/ delivery has been effected	• Ensure documents are prepared, issued and served well before prescription; or • if not possible, communicate the urgency to the messenger and/or sheriff. • Ensure address for service is correct and if necessary, go with the sheriff or give detailed instructions for finding the person on whom the documents must be served. • Diarise to follow up on whether the issue/service/delivery has been effected. **This is your responsibility!** (See the *Guthrie* case below.)
13. Take your eye off the ball by allowing a matter to prescribe during settlement negotiations.	• Rather institute action first and then hold over matters while attempting to reach settlement.
14. Allow unqualified/junior staff to take full responsibility for files.	• Introduce strict rules and procedures for file order, checklists, working plans, reporting to client and the making of comprehensive file notes. • Train and mentor staff properly. • Supervise staff regularly. • Conduct regular file audits.
15. Allow files to remain unattended to in the absence of the responsible attorney (whether due to illness, leave or resignation).	• Introduce strict office systems and contingency plans to avoid this. • Conduct regular file audits.
16. Fail to properly peruse a file taken over from a colleague.	• When taking over a colleague's matter, carefully go through file to check all is in order and there is no danger of time periods lapsing or matter prescribing.

*Aon SA (Pty Ltd (Aon) has been cited as defendant (insurer) in a number of summonses by plaintiff's attorneys, who have not done the necessary research. In the first place, Aon is not the insurer. Aon is the manager of the insurance company - the Attorneys Insurance Indemnity Fund. In the second place, the insurer should not have been cited as a party to the action, the firm of attorneys (as insured) should have been cited as defendant.

**In a matter where a mother instructed an attorney on behalf of her minor son, she was cited as plaintiff in a summons that was issued after the son had already become a major.

***A practitioner, instructed by a client M, in his capacity as a trustee of X Trust, drafted a summons citing M as plaintiff (and not in his representative capacity).

In *Guthrie v AA Mutual Insurance Association Ltd* 1986 (4) SA 979 (W) the applicant (G) sought leave from the Court, to permit it to serve summons in a matter that had already become prescribed.

The reason for the application was that, on the day prior to prescription, G's attorneys had dispatched the required documents via their messenger, who was to deliver them, by hand to the respondent. The messenger had failed to deliver the documents or return to the offices at all that day. G's attorneys only discovered on the following day that the documents had not been delivered and the claim had therefore become prescribed. G's attorneys had immediately arranged for delivery, but the respondent was not prepared to waive prescription.

The Court held that G's attorneys had a duty to satisfy themselves of the trustworthiness of the messenger, to draw the messenger's attention to the urgency of serving the documents and to follow up on whether the necessary attendance had been complied with. The Court further held that ***the attorney should have been increasingly vigilant as the critical time when prescription would occur approached*** and was negligent in failing to ascertain timeously whether or not the documents had been delivered according to instructions. The application for leave to serve the summons accordingly failed (see 12.1 and 12.2 on page 4).

RAF MATTERS

Future medical expenses (RAF about-face)

We sent out a newsflash to firms registered with Prescription Alert, after we had been informed that the RAF had decided not to provide undertakings for certain future medical expenses, but rather to pay for these in cash.

Our information is that they have now changed their minds about this and it will be business as usual!

Adjustment of statutory limit for loss of income and loss of support

In the *Gazette* of 25 October 2013 (GG 36951) (BN2090) the figure was adjusted to R213 675 with effect from 31 October 2013.

Warning!
PRESCRIPTION OF BILLS OF COST.

Michael de Broglio advises in his recent newsletter of 14 January 2014, that the RAF will not be paying costs where a writ has not been issued within three years of the taxation of the bill of costs – in line with the appeal court judgment in Santam Ltd v Ethwar 1999 (2) SA 244 (SCA).

THE TPA – LITERAL OR PURPOSIVE INTERPRETATION?

The Road Accident Fund (Transitional Provisions) Act 15 of 2012 (the TPA), was enacted on 13 February 2013. The TPA applies to motor vehicle collisions where the claimant/deceased was a passenger in a single vehicle collision, prior to 1 August 2013.

Section 2(1)(e)(ii) of the TPA reads as follows:

A third party who has, prior to this Act coming into operation –
(i)…
(ii) instituted an action against the Fund in a Magistrate's Court, may withdraw the action and, within 60 days of such withdrawal, institute action in a High Court with appropriate jurisdiction over the matter: ***Provided that no special plea in respect of prescription may be raised during that period.***

The proviso in section 2(1)(e)(ii), as highlighted hereinabove, could be interpreted using either the literal or the purposive approaches.

Application of the literal approach would mean that the plaintiff's claim could only be successfully withdrawn in the Magistrate's Court and reinstituted in the High Court if the five year period allowed for the issuing of summons, from the date of the cause of action, has not lapsed. In the event that the five year period has lapsed and summons in the Magistrate's Court is withdrawn, then the issuing of a fresh summons in the High Court, after the five year period, would give rise to a special plea of prescription.

The application of this literal interpretation could however have absurd consequences, which consequences are best described by means of example:

Joe Soap is a passenger in a single vehicle collision that occurred on 30 January 2008. His claim was lodged timeously, and action was instituted in the Magistrate's Court prior to the expiry of the five year period i.e. before 29 January 2013. The TPA came into effect on 13 February 2013. Joe can only proceed in terms of the old Act, because, if he were to withdraw the action in the Magistrate's Court in order to bring the action in the High Court, the RAF would be entitled to raise a special plea of prescription.

On the literal interpretation, the only passengers who would benefit from the TPA would be those whose claims arose sometime after 13 January 2008 and before 31 August 2008. All other passengers in single vehicle collisions would not enjoy the benefits that the TPA aims to provide, unless their attorneys had anticipated the provisions of the Act and instituted action in the High Court before the expiry of the five year period.

The TPA was established because the limitations on single vehicle passenger claims were found to be unconstitutional. The TPA thus strives to put these claimants on the same footing as other passenger claimants. From the above, it is apparent that the consequences of literal interpretation are not in line with the purpose of the TPA.

As a result it may be necessary to adopt a more purposive interpretation. In terms of this approach, the proviso is understood to mean that once summons has been withdrawn from the Magistrate's Court, the plaintiff has 60 days within which to issue summons out of the High Court, and **during that 60 day period, the RAF may not raise prescription of the claim as a defence**. This approach is certainly more consistent with the purpose for which the TPA was enacted.

It is however important to note that no legal precedent has been set, in favour of either the literal or the purposive approach.

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CONVEYANCING MATTERS

The following two recent Supreme Court of Appeal (SCA) decisions may be cause for some concern to conveyancers, banks and purchasers of immovable property. We summarise some of the issues below, but we recommend that all conveyancing practitioners read the full judgments carefully.

In essence, in both matters the court found that, if the owner has no intention to transfer ownership, registration does not effect a transfer of ownership; the person in whose name the property is registered accordingly does not become the owner.

Nedbank Limited v Mendelow NO (686/12) [2013] ZASCA 98 (5 September 2013)

The facts in brief:

The owner of an immovable property (Ms V) left her estate to her two sons in equal shares and also bequeathed some money to each of her grandchildren. One of her sons (R) forged her signature on a deed of sale in terms of which the property was sold to a company (in which Ms V held shares and of which she and her two sons were directors at the time). She died shortly thereafter. The brothers were initially appointed as executors. R also forged the signature of his brother (E) on a 'consent to sale' that was used to induce the Master of the High Court to sign a certificate that no objection to the sale was made by any beneficiary. R had also had E removed as a director of the company and obtained a mortgage bond over the property.

Subsequent executors of the deceased estate, alleging that the sale and transfer of the property to the company and the registration of the bond in favour of Nedbank (N), had been vitiated by fraud, successfully applied to the North Gauteng High Court (NGHC) for an order setting aside the transfer and the registration of a bond over the property and permitting them to reregister the property in the name of the deceased estate.

The Appeal:

An appeal by N was dismissed by the SCA. In essence, the Court held that where registration of transfer of an immovable property takes place pursuant to a fraud and there is no intention to pass transfer of ownership, the person in whose name the property has become registered is not the owner and cannot grant a valid mortgage bond over the property.

Lewis JA, referring to *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) explained that our system of deeds registration is negative and does not guarantee the title that appears on the deeds register. "Registration does not guarantee title." While a valid underlying agreement to pass ownership is not required, there must nonetheless be a genuine **intention to transfer ownership**.

In the NGHC, the cause of action was a review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The argument on behalf of the executors on the principles relating to transfer had only been raised once the SCA had brought them to their attention.

On behalf of the appellant N, the argument was raised that the executors were not entitled to rely on principles raised by the Court *mero motu*.

Referring to *Cuninghame v First Ready Development 249* 2010 (5) SA 325 SCA, Lewis JA said "The argument ignores the authorities in this court that state that where facts to which those principles apply are squarely raised in the papers before the court….a court should not allow the continuation of a wrong because the legal representatives of the parties did not appreciate the correct legal principles" (at paragraph 17).

She found that the elements of the *rei vindicatio* appeared in the papers and no more needed to have been pleaded.

Lewis JA did take issue with the finding of the Court *a quo* that the conduct of the Master and Registrar of Deeds amounted to administrative action and was reviewable under the PAJA, but she nevertheless dismissed the appeal with costs on the basis that the executors were entitled to vindicatory relief.

The decision in the *Nedbank* case was followed two months later in:

Quartermark Investments (Pty) Ltd v Mkhwanazi & another (768/2012) [2013] ZASCA 150 (01/11/2013)

The headnote reads as follows:
Contract – Sale of immovable property – induced by fraud – null and void – no intention on the part of the owner to transfer ownership – ownership does not pass despite registration – rei *vindicatio* available even if raised *mero motu* by the court if facts in support thereof appear in the papers – accords with the principle of legality

Facts in brief

The respondent had run into arrears on her mortgage bond and her property had been attached by her bank. She approached an agent of the Appellant for a loan and signed certain documents without being given an opportunity to read them. She was given to understand that these were loan documents, but they were in fact a sale of land agreement, an agreement of lease and a power of attorney authorising transfer of the property. She only discovered at a later stage, that the appellant had taken transfer of the property.

The Appeal

The two main issues on appeal were –

- whether the respondent had made out a case of fraudulent misrepresentation; and
- whether the High Court was correct in directing that the property be transferred to Ms Mkhwanazi despite her failure to tender restoration of the benefit she had received under the agreements.

Theron JA (Maya, Bosielo, Pillay and Petse JJA concurring) was satisfied that the respondent had been induced to sign the documents by fraudulent misrepresentations and was therefore entitled to rescind the contract.

He also found that a party that proceeds by way of the *rei vindicatio* need not tender restitution of what had been received pursuant to a contract sought to be set aside, because the cause of action is complete without such tender. Restoration of the benefit received may be the subject of a separate claim for unjust enrichment.

The appeal against the judgment of Spilg J in the South Gauteng High Court was accordingly dismissed with costs.

The following decision deals with the issue of whether the conveyancer was the agent of the seller or the purchaser, in receiving payment of the purchase consideration, from the purchaser of an immovable property.

Minister of Agriculture v C M De Klerk (747/2012) [2013] ZASCA 142 (30 September 2013)

Facts in brief

The first respondent, the owner of an immovable property (seller) entered into a written agreement of sale with the first appellant

CONVEYANCING MATTERS continued...

– the Minister of Agriculture and Land Affairs - (purchaser). The purchaser insisted on the appointment of its own conveyancer, Seshele Inc - the second respondent (conveyancing firm). The deposit was paid into the conveyancing firm's trust account. The necessary written undertaking for payment of the balance of the purchase price was provided by the Land Claims Commission and the property was transferred into the name of the beneficiary of the land claim.

The conveyancer had misappropriated a portion of the deposit (possibly prior to transfer) and the seller served summons for the outstanding balance of the deposit, citing the purchaser as first defendant, the Deputy Director: Finance in the Office of the Head of Land Claims Commission as second defendant (second appellant) and the conveyancing firm and conveyancer as third and fourth defendants.

The seller subsequently elected not to proceed with the action against the conveyancing firm and conveyancer. The Court *a quo* ordered the first and second appellants, jointly and severally, to pay the outstanding balance, interest and costs to the seller.

The Appeal

The Court disagreed with the purchaser's contention that the issue was not one of agency but rather one of performance (the purchaser had complied with the terms of the deed of sale as to how the purchase price was to be paid.)

In his majority judgment, Meyer AJA, (Cachalia JA and van der Merwe AJA concurring) held that the crux of the matter was whether or not the conveyancer was the agent of the seller for the purposes of receiving the purchase price from the purchaser. From the facts and in particular, the provisions in the Deed of Sale, the SCA concluded that he was the agent of the purchaser and not of the seller.

The SCA dismissed the purchaser's appeal (but upheld that of the second respondent). The purchaser was ordered to pay the outstanding balance, interest and costs to the seller.

Navsa ADP concurred with the minority dissenting judgment of Majiedt, JA, who disagreed with the majority's reasoning. He expressed the view that, on the seller's pleadings, the only issue appeared to have been that of the purchaser having to prove that the payments had been made. He held further that the parties are bound by their pleadings and that the question of agency was not specifically pleaded.

In any event he also found that there was no provision in the deed of sale that indicated the agency and referred to *Basson and Remini* 1992 (2) SA 322 (N) where Magid, J expressed the view that the conveyancer becomes the agent of both parties.

He noted that the seller had to prove that the money was misappropriated before registration, which on the facts, he opined had not been proven.

He expressed the view that the seller ought to have looked to the conveyancing firm for payment and noted that the seller would also have had a claim against the Attorneys Fidelity Fund.

We have been advised that this matter is on appeal to the Constitutional Court.

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LETTERS TO THE EDITOR

Hi Ann,

I should know the answer to this, but I don't!

We have professional indemnity top up cover in addition to the first layer of cover provided automatically by the Attorneys Insurance Indemnity Fund. My office manager would like to know if we need to take out additional cover for misappropriation of trust money or if we are automatically covered for this by the Fidelity Fund?

His concern is that the Fidelity Fund cover only indemnifies directors (who have a Fidelity Fund Certificate) but not "ordinary" employees. So if, say, a junior attorney misappropriates funds, are we covered?

(The name of the writer has been withheld.)

Hi S

I am so glad you asked me! Very few attorneys seem to know that the Fidelity Fund DOES NOT COVER ANY ATTORNEYS WHATSOEVER – directors or employees.

The Fund only provides protection to the public, where a director or an employee of the firm has misappropriated trust money…….but then only as a last resort. A member of the public whose trust money has been misappropriated, must first fully excuss the estates of the firm of attorneys and its directors. This puts all the directors' estates at risk.

It is therefore essential for a larger firm like yours to buy cover for misappropriation. It does not matter who in the firm has run off with the money – junior attorney, bookkeeper, director – there is no cover provided for the firm by the Fidelity Fund.

I hope this helps.