

RISKALERT

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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
Twitter handle: @AIIFZA

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.

RISK MANAGER'S COLUMN



Ann Bertelsmann,
Risk Manager

REMINDER: RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

Please remember to complete this important risk management tool that you can download from our website (www.aiif.co.za) and e-mail it to me at ann.bertelsmann@aon.co.za. Better still, you can complete it **online**. The questionnaire must be completed at least once every two years by your risk manager or senior partner.

We will not process practitioner's claims unless we have received your properly completed form less than two years prior to the claim being submitted.

AIIF STAFF NEWS

Regrettably, we have had to say goodbye to both Siphephelo Mbuli (claims legal adviser) and Julia Cebekulu (court bonds) in the past few months, but it is with great pleasure that I introduce our two newest legal advisers who both joined the AIIF on 9 December 2013:

Mavundla Mhlambi matriculated at St Andrews College, Grahamstown, thereafter obtaining his B.Com LL.B from Rhodes University. He did articles of clerkship with Honey Attorneys in Bloemfontein and Podbielski Mhlambi Attorneys in Welkom. After being admitted to practise as an attorney in 2011, he worked at Oberholzer Attorneys and Mhlambi Attorneys in Welkom.



Nomphumelelo Tshabalala matriculated at Nelspruit Private College and obtained her LL.B degree at Wits University. After having served her articles of clerkship at Malherbe Rigg & Ranwell Incorporated, she worked as an associate at both Nkosi Nkosana Incorporated and Mokonyane Incorporated.



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RISK MANAGER'S COLUMN continued...

PRESCRIPTION ALERT (PA)

What is it?

PA is a computerised diary system that records the particulars of all **statutorily time-barred matters** (such as RAF claims and claims against the State) that have been registered by practitioners. This is done in order to provide practitioners with timely notifications of the impending approach of prescription dates.

What will it cost us?

It is important to note that this service is provided to the profession **at no cost whatsoever** and so we urge you to make use of this system as a **back-up to your own diary systems**.

Why is it important for us to register?

It will help to mitigate the risk of such claims prescribing in your offices – and a resultant professional indemnity claim against your practice. *In this regard, please see the AIIF's claims statistics below.* Please also note that, in the event of a claim arising out of the prescription of an RAF matter, a **15% penalty loading will be applied to your deductible**, should the services of PA not have been utilised and reasonably complied with.

What do we need to do?

We invite all RAF practitioners to register their firms and individual matters with PA. For this purpose, we have included a firm registration form in this Bulletin.

Also, to make it simpler for everyone, practitioners are now able to **register their firms and matters online**. A "Helpline" is available to assist you with this process, or with any queries about the statutory provisions relating to time-barred claims.

CONTACT DETAILS FOR PRESCRIPTION ALERT:

Lucia Snyman (Systems Manager)

Tel (021) 422 2830 • Fax 086 575 6803

Docex 149 Cape Town • E-mail info@aiif.co.za

Can I register other types of matters on the system?

We have had several queries from the profession, expressing the wish to register their other matters on the system. We are looking into the feasibility of broadening the scope of this service.

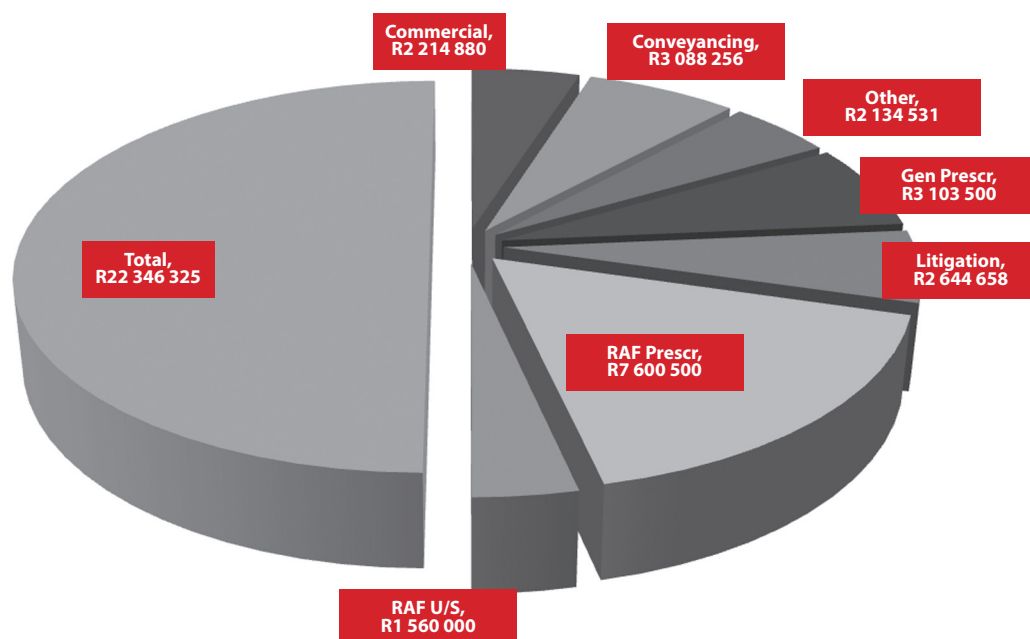
Please e-mail me to let us know whether or not your firm would wish to make use of this proposed additional service. (ann.bertelsmann@aon.co.za).

CLAIMS TRENDS AS AT 31 DECEMBER 2013

**GRAPH: TOTAL – INCURRED VALUES BY CLAIM TYPE FOR THE 2013 INSURANCE YEAR
(AS AT 31 DECEMBER 2013 [Q1 AND Q 2] = 6 months)**

For the first six months of the 2013 insurance year, there were 262 claims (valued at R22 346 325) notified to the AIIF by practitioners. Some of these are only potential claims, but the majority are matters in which a letter of demand or summons has already been received by the insured firm. See the table below for a breakdown of claims according to area of practice.

The total-incurred value includes actual payments and reserves for future payments of capital and costs.



RISK MANAGER'S COLUMN continued...

**TABLE: COMPARATIVE ANALYSIS : NUMBER OF CLAIMS NOTIFIED
2011 TO 2013 AS AT 31 DECEMBER**

YEAR	2013	2012	2011
Conveyancing	56	52	103
RAF prescription	51	56	61
Gen prescription	24	23	24
Litigation	31	28	41
RAF u/s	10	16	17
Commercial	18	27	19
Other	72	20	20
TOTAL	262	222	285

As you will see from the graph on page 2 and the table on the left, claims arising out of *conveyancing* and *RAF prescription* matters lead the field in their numbers, but *RAF prescription* matters make up the largest percentage of the value of all claims registered in the 2013 year so far (34%).

At present, our major concern is the number and value of claims that arise from the **PRESCRIPTION** of claims against the RAF and in various other areas of law. In our experience, prescription occurs most often because of **lack of proper supervision of junior staff**. Please read our *Prescription Column* on page 4.

FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001, AS AMENDED (FICA)

As your professional indemnity insurer, our main concern is the manner in which you open your firm up to professional indemnity claims arising out of your failure to ensure compliance with FICA.

Our emphasis is on your knowing who your client really is and how and where to get hold of your client, when necessary.

We have numerous claims arising from practitioners' failure to "FICA" clients properly. For example, we have conveyancers who do not insist on seeing the sellers' original identity document. In a few cases, the "wife" married in community of property, attending at the conveyancer's offices to sign the necessary transfer documents, subsequently turned out to have been the mistress of the errant husband!

However there are other aspects of FICA that have serious implications for your practice. Please ensure that you and your staff are well aware of all the obligations created by this Act including registration and reporting.

Registration Obligation of Attorneys in Terms of FICA

All attorneys are obliged to register with the Financial Intelligence Centre in terms of section 43B of FICA.

The period for accountable and reporting institutions to register with the Centre ended on 01 March 2011. If you have not registered, please do so as soon as possible as there will be sanctions imposed for late registration.

You are reminded that each branch of your firm will be regarded as a separate accountable institution and separate secure login credentials are needed for each branch.

For the necessary documentation for registration with the Centre, please consult their website at www.fic.gov.za.

For more information specific to attorneys, please consult the Law Society of South Africa's website, www.lssa.org.za.

Ann Bertelsmann, Risk Manager AIIF
Ann.bertelsmann@aon.co.za

GENERAL PRESCRIPTION MATTERS

Prescription is one of those problems in practice that is generally easily avoidable, if the correct practices and procedures are followed in your offices. Please see articles written on the topic of prescription, in previous *Risk Alert Bulletins* (4/2012, 5/2012, 3/2013, 2/2014) Back copies of these *Bulletins* can be found on our website www.aiif.co.za.

We strongly recommend that you incorporate the necessary checks and balances to avoid prescription, into your practice manual/minimum operating standards manual and ensure that they are strictly enforced.

Recent Case Law

In a previous *Bulletin* (No 5/2013) we published a discussion of the judgment in *Apdol v Road Accident Fund*, 2013(2) SA 287 (GNP).

Recently the Supreme Court of Appeal handed down judgment, also dismissing a similar special plea of prescription brought (in this case by the Premier of the Western Cape) on the basis of the new age of majority of 18 years – in terms of s 17 of the Children's Act 38 of 2005.

Malcolm v Premier, Western Cape (207/2013) [2014] ZASCA 9 (14 March 2014)

Facts

Cameron Malcolm "CM" (born 21 June 1987) brought an action against the Premier of the Western Cape "PWC", arising out of his having contracted Hepatitis B at the Red Cross Children's Hospital in 1993, when he was six year's old. The action was brought within one year from the date on which he had attained the age of 21.

PWC raised a special plea of prescription, which was successful in the Western Cape High Court, but was subsequently dismissed on appeal to the Supreme Court of Appeal (SCA) by Wallis JA (Navsa, Shongwe and Theron JJA and Legodi AJA concurring).

Prescription issues

CM was a minor at the time of the expiry of the three-year prescriptive period, referred to in s 11(d) of the Prescription Act 68 of 1969 (the Prescription Act). However, in terms of ss 13(1)(a) and (i) of the Prescription Act, completion of prescription was delayed:

'If –

(a) the creditor is a **minor** ...;

and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a) ... has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

The issue in this case was the meaning that was to be given to "minor" in view of the change in the law relating to the age of majority that had occurred after CM had become infected with Hepatitis B, and which altered the age of majority from 21 years in terms of s 1 of the Age of Majority Act 57 of 1972 to 18 years in terms of s 17 of the Children's Act 38 of 2005.

Until the Children's Act came into operation on 1 July 2007, prescription would only have been completed, in CM's case, one year after he had turned 21 i.e. at midnight on 19 June 2009.

However, on 1 July 2007, by operation of the new law, CM had attained majority.

The respondent's representatives argued in support of the special plea, that the impediment of minority (referred to in s 13(1)(a) of the Prescription Act had ceased to exist on the date on which the Children's Act came into operation (1 July 2007). They argued that the effect of the operation of the Children's Act left CM (who had turned 20 years old shortly before the Act came into force and was now considered to be a major) with one year in which to institute action i.e. on or before 30 June 2008.

The appellant's representatives argued that, because at the time the claim arose, he had had until one year after he turned 21 to institute action, that right had not been affected by the change in the age of majority. This argument was based on;

- the presumption that statutory changes are presumed not to prejudice acquired rights; and
- the provisions of ss 12(2)(b) and (c) of the Interpretation Act 33 of 1957.

Wallis JA noted that the arguments on both sides "*proceeded on the footing that the reference to a 'minor' in s 13(1)(a) of the Act is a reference to a person who has not yet achieved the legal status of majority*". He examined the meaning of the word 'minor' at some length, referring to various sources including *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) and the Constitution of South Africa.

The learned judge pointed out that the argument on behalf of CM was misplaced for the following reason: In the case of a law having been repealed, s 12(2) of the Interpretation Act provided for the consequences of the repeal. In this particular case, the change in the legal position was triggered by an amendment to the legal age of majority and did not involve either the repeal or amendment of s 13(1)(a) of the Prescription Act.

Wallis JA held that the new meaning of s 13(1)(a) of the Prescription Act did not automatically operate in relation to all unexpired periods of prescription that were already running when the change in meaning occurred and that "*whenever there is a change to existing law the question arises whether the change applies in relation to matters that have their origin in past events*".

He quoted as follows from Corbett CJ's judgment in *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 483H-I:

'There is at common law a prima facie rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past.'

He opined that Corbett CJ's statement, made in relation to a change in the law brought about by statute, could be equally ap-

GENERAL PRESCRIPTION MATTERS continued...

plicable to a change in the law resulting from a changed interpretation of a statute, where that altered interpretation is triggered by a change to another statute. *“So adapted there is a presumption against the change in the law operating retrospectively so as to create a new obligation or impose a new duty or attach a new disability in regard to events already past”.*

He speculated about various possible situations where minor claimants would, if the altered meaning were to be applied to them, suffer a disability in relation to past events, in that their claims could be extinguished by prescription as a result of the change in the legal position. *‘As long as there is a potential disability for claimants affected by the change they are entitled to the benefit of the presumption that the change in the law does not apply to their situations.’*

In support of his contentions, he referred to *Apdol v Road Accident Fund* 2013 (2) SA 287 (GNP) – persons over the age of 18 on 1 July 2007 attained majority on that date and not on an earlier day when they had turned 18, and s 24 of the Marriage Act 25 of 1961 – a marriage entered into by a 19 year old prior to that date but without the requisite consent would not become valid.

He also found that there was no such prejudice to potential defendants if the effect of the change in the law is that it applies only to claims arising after 1 July 2007 and that the altered interpretation of s 13(1)(a) of the Prescription Act was applicable only to claims arising after 1 July 2007.

Ann Bertelsmann
Risk Manager AIIF, Editor
Ann.bertelsmann@aon.co.za

A PRESCRIPTION CLAIM

Facts

A Attorneys, represented by one of their professional assistants, acted for the plaintiffs, B and his co-worker, C – who were allegedly unfairly dismissed by their employer, D. Actions were brought in the Labour Court by A Attorneys on behalf of B and C and were subsequently settled out of court with D, during 2005.

In terms of the settlement, once B and C had withdrawn their court actions, D was to pay B an amount of R100 000.00 and C an amount of R50 000.00. At that stage B had some unresolved issues with the SARS and D stipulated that the money was to be held in trust by A Attorneys and not be paid out to B before his affairs with the SARS were in order.

The professional assistant, after settlement had been reached, proceeded to serve and file the notices of withdrawal but **failed to have the settlement agreement made an order of court**. Soon afterwards she resigned and left the employ of A attorneys.

A partner of A Attorneys, who subsequently took over the file, acknowledged that there were no relevant file notes on file and that he did not have the time to study the file in detail. He was at that stage aware that there had been a settlement on that file and that payment of **an amount** had been made into A Attorneys’ trust account. He was also aware that B was to revert once his problems with the SARS had been resolved and was waiting for B to revert. He was however not aware of the fact that D had only paid the amount of R50 000.00 in respect of C’s claim and had made no payment in respect of B’s claim.

In August 2008, B informed A Attorneys that his SARS problems were now resolved and requested payment of his R100 000.00 and C’s R50 000.00. It was only at this stage that the partner at A Attorneys, who had taken over the file, discovered that D had failed to pay over the amount of R100 000.00 in respect of B’s damages. He immediately paid over the R50 000.00 to B, undertaking to collect the further payment from D.



Although A Attorneys followed up with D, they were advised that the new managers knew nothing about the matter. D refused to make any further payment. Naturally, by this stage more than three years had elapsed since the agreement had been made between the parties and the action had been withdrawn. Any claim against D, based on the settlement agreement, had become prescribed.

Discussion

What were the problems that you have identified in the conduct of this matter? Where did A Attorneys go wrong? How would you

GENERAL PRESCRIPTION MATTERS continued...

have dealt with this file, to ensure that you protected your clients' rights?

Some suggestions that come to mind are:

- A Attorneys' professional assistant should have insisted on making the settlement agreement an order of court. This would have had the effect of a judgment, which would not have prescribed for 30 years and which the new managers would have been obliged to honour, failing which, a writ of execution could have been obtained.
- In the absence of a court order, the professional assistant should not have proceeded to serve and file the notices of withdrawal of the actions, before A Attorneys had received payment of both amounts, in full. (It seems that there was no supervision or proper training of the professional assistant by A Attorneys).
- Since neither of the above had been done, then A Attorneys should have ensured that the full amounts had been collected before the claim in terms of the settlement agreement became prescribed. *What went wrong in this regard?*
 - It seems clear that A Attorneys do not have rules re-

lating to the procedures for the hand-over of files from one practitioner to another. Or if they do, then this particular partner did not follow the correct procedures. Had the partner studied the file properly, he would have been in a position to follow up, and if necessary institute a new action against D on the basis of the agreement, before prescription.

➤ Had the professional assistant included detailed file notes in the file, it would have made it quicker and easier for the partner to come to grips with the matter.

➤ Once the partner had become aware of the non-payment of B's damages, he still had approximately 1 month within which to institute an action based on the Agreement. He wasted time attempting to negotiate with D – and not taking cognisance of the threat of prescription.

Another potential problem that arises from the facts of this claim, is the partner's unauthorised payment of C's damages over to B, without the express written permission to do so, from C.

Ann Bertelsmann

CONVEYANCING MATTERS

A CONVEYANCING CLAIM

The claimant entered into a sale agreement with an estate duly represented by the then executor AB. Material terms of the sale agreement were *inter alia*:

- The purchase price was R250 000.00, payable as follows:
 - A cash deposit of R220 000.00 on signature of the sale agreement which was to be held in trust in an interest-bearing account by the transferring attorney pending registration of transfer;
 - R30 000.00 on registration of transfer to be provided by a financial institution and secured by way of a guarantee;
- The sale agreement was subject to a suspensive condition which stated as follows:

Master and beneficiaries' consent

Insofar as may be required in law this sale and the terms and conditions hereof are subject to all necessary consents being

obtained from the Master of the High Court or the beneficiaries in the estate referred to in the introduction to this agreement, or both, as the case may be. Should such consent not be obtained, or should the Master of the Supreme Court decline for any reason to furnish a certificate in terms of section 42(2) of the Administration of Estates Act 66 of 1964, then this agreement shall lapse and be null and void. In such event, the seller shall be obliged to repay to the purchaser all amounts which have been paid by him by virtue of this agreement against payment by the purchaser to the seller of reasonable compensation for all benefits which the purchaser has had as a result of this agreement in particular but not limited to occupational interest as calculated in terms of 2 above, but the parties shall otherwise have no further claims against each other.

The claimant duly complied with her obligations in terms of the sale agreement and paid R220 000.00 to the conveyancers.

The conveyancers paid X Bank a total amount of R117 839.47 in full and final settlement of the estate's mortgage bond obligations

CONVEYANCING MATTERS continued...

in respect of the property. As a result of this payment the mortgage bond was settled in full, thus discharging the estate's obligations and liability towards X Bank.

A Power of Attorney to Transfer was prepared and forwarded to the Master of the High Court for endorsement in terms of Section 42(2) of the Administration of Estates Act. The Master refused to do so, as he required written consent to transfer from the guardian of the minor child of the deceased. Such consent was refused.

The claimant accordingly invoked the provisions of the suspensive condition in the sale agreement, declaring the sale null and void. The claimant claimed repayment of the deposit of R220 000.00. As this amount had already been paid to X Bank, the conveyancer was not in a position to repay the deposit to the purchaser.

This could have been an open-and-shut case where the conveyancer might have been held responsible for the claimant's

loss, but the situation is further complicated by the following:

- The claimant signed the sale agreement in respect of the property in question, which X bank was threatening to foreclose on because of the unpaid mortgage bond. It was expressly agreed between the executor and the claimant that the money deposited was to be used to save the property, by paying it over to X bank. The executor contends that the full implications of this course of action were explained to the claimant.
- The claimant failed to pay the occupational rental of R1 000.00 per month for a period of almost four years.
- The claimant had also left the property in a dilapidated, inhabitable and damaged state of repair. The damage to the property amounts to an estimated R300 000.00 (i.e. more than the purchase price).

Ann Bertelsmann

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. The statutory limit has increased to R215 320.00 (Two Hundred and Fifteen Thousand Three Hundred and Twenty Rand) effective 31 January 2014 (per GG37262 p53 BN8 of 2014)



Important Recent Case Law

In *Venessa Da Silva v the Road Accident Fund and another*, Free State High Court, Case No 1349/2008. 23 January 2014, the Court declared S19 (b) (ii) of the Road Accident Fund Act 56 of 1996 to be inconsistent with the Constitution and invalid. (This

applies only to matters that have not been finalised by settlement, judgment or prescription before the date of the judgment.)

A copy of this judgment may be obtained on our website www.aiif.co.za, on the RAF Matters page. We hope to publish a more detailed article on this judgment in the next *Bulletin*.

LETTERS TO THE EDITOR

Dear Editor
NO 1/2014

In the February 2014 issue of Risk Alert (No 1/2014) you provide an answer to a query relating to the misappropriation of monies by an ordinary employee (Page 8 under the heading Letters to the Editor).

Your reply mentions that to obtain payment from the Fund the estates of the directors, amongst others, must first be excused.

You mention directors and not partners implying that the employer is an incorporated company and not a partnership.

Surely it is incorrect that the directors, unaware of the misdemeanour and not reckless, can personally, and financially be held liable for such behaviour. This would surely also apply to negligence by a co-director.

Please enlighten.

Yours faithfully
Practitioner's Name withheld

Dear Sir

Thank you for your letter in response to the letter that was published in the recent Risk Alert Bulletin.

You may wish to look at the Attorneys Fidelity Fund website (www.fidfund.co.za), where all the issues are discussed in detail.

What I say in my response applies equally to directors and partners. You are responsible for ensuring (through effective risk management of your trust account) that none of your employees or co-partners/directors misappropriate client's trust money. In the event that a theft of trust money occurs, you and your co-partners or co-directors will be liable. That is why it is so important to ensure that your firm buys cover for this. Clearly any insurance would not cover you for your own fraud/theft, but as an innocent party, the cover would protect you. I would suggest that you contact your broker in this regard.

Kind regards

Editor's note:

With regard to paragraph 4 of the letter from a practitioner, I make mention of the following provisions in the Attorneys Act 53 of 1979 (as amended) "Attorneys Act" and Draft 8 of the Legal Practice Bill "LPB":

Attorneys Act s23 (1)

"A private company may ... conduct a practice if -

*(a) Such company is incorporated and registered as a private company under the Companies Act, 1973 (Act 61 of 1973) ...and its memorandum of association provides that **all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their period of office.**"*

LPB s34 (7)

"A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents—

(a) its shareholding, partnership or membership as the case may be, is comprised exclusively of attorneys;

(b) provision is made for legal services to be rendered only by or under the supervision of admitted and enrolled attorneys; and

(c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for —

(i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and

(ii) in respect of any theft committed during their period of office.