

RISKALERT

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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 Insurance Indemnity Fund (NPC)

Est. 1993 by the Attorneys Fidelity Fund



Attorneys Fidelity Fund
South Africa

Your Champion in the Legal Profession Since 1941

RISK MANAGER'S COLUMN

Brand new professional indemnity policy as from 1 July 2016

IMPORTANT NOTE

All practitioners please carefully read the comments below, together with the draft Master Policy for the coming insurance year (which runs from 1 July 2016 to 30 June 2017). The draft policy can be found on p 3. There are some changes in the new policy, which may affect the way in which you run your practice and/or that may necessitate your buying insurance cover for specific areas of your practice. (The 2015/2016 policy can be found on the AIIF website at www.aiif.co.za.)

In re-drafting the policy, the Attorneys Insurance Indemnity Fund NPC (AIIF) has been guided by three factors: the interests of the profession, the interests of the public and the sustainability of the company.

Our aim was to re-draft the policy in the plainest and clearest language possible, to make it more accessible to all. We have also changed the construction of the policy for the same reason.

The amount of cover and standard excesses/deductibles remain the same as in the previous year.

What are the noteworthy changes?

- Only legal services in respect of South African law will be indemnified. Work done in respect of the law of another jurisdiction will only be indemnified if the person doing such work has been admitted to practice in that jurisdiction. – see definition XX.
- The additional penalty excess/deductible, for failing to use or comply with Prescription Alert in Road Accident Fund matters, increases



Ann Bertelsmann,
Risk Manager

from 15% to 20% of the applicable excess/deductible. – see clause 12 a) and Schedule B, column A.

An additional penalty of 20% will also be applied to the excess/deductible in matters where documents are “witnessed” without the signature having actually been witnessed or where a false representation has been made in a certificate – see clauses 13 and 20 and Schedule B, columns A and B.

➤ The following have now been expressly excluded from cover:

- Liability arising out of cybercrime – clause 16 o) (also see definition IX);
- Liability arising out of the misappropriation or unauthorised borrowing of money or property belonging to client or a third party, whether held in trust or otherwise – see clause 16 b);
- Liability which should have been insured under another policy – see clause 16 c);
- Liability arising out of the intentional giving of an unqualified and

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binding undertaking, the fulfilment of which is dependent on the act of someone else – see clause 16 j);

- Liability arising out of a defamation claim between two practitioners – see clause 16 n);

- Claims by an entity in which the insured has a material interest – see clause 16 p);

- The Risk Management Questionnaire must now be completed annually – see

definition XXIV.

- If necessary, the insured must give the insurer reasonable access to its premises, staff and records in the conduct of the investigation of a claim – see clause 26.

- The insurer will be entitled to report an insured to the regulator, for failure to cooperate or assist the insurer in terms of the policy – see clause 27, and for material non-disclosure or misrepresentation relating

to an application for indemnity – see clause 35.

- Clause 40 contains a consolidated dispute resolution procedure.

- The definition of dishonesty in XI should also be noted.

Ann Bertelsmann

Legal Risk Manager, AIIF
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SCAM NEWS

Almost on a daily basis, we are being notified about one or other scam being attempted (and sometimes successfully effected) on members of the profession and their staff. Sadly, we all have to be doubly alert.

With the recent e-mail interception scam (see RAB 5/2014, p5) practitioners can protect themselves by following some of our suggested guidelines and, as far as securing e-mails is concerned, they need to make sure that

they make use of a reputable e-mail hosting service. Advice should be sought from IT specialists and technicians about encryption, internet security and e-mail hosting.

Unfortunately, clients are also getting scammed. This is more difficult to control. The scammer intercepts e-mail correspondence between the attorney and the client and then provides the client with incorrect banking details into which funds must be deposited. We suggest that practitioners warn anyone who needs to deposit funds into their trust accounts to telephonically confirm banking details which have been received by e-mail.

RAF MATTERS



Adjustment of the statutory limit for loss of income/loss of support as at 31 October 2015

BOARD NOTICE 234 OF 2015

In accordance with section 17(4A)(a) of the Road Accident Fund Act, Act No. 56 of 1996, as amended, the Road Accident Fund adjusted the amounts referred to in subsection 17(4)(c) to R237,850.00 with effect from 31 October 2015.



**Attorneys Insurance
Indemnity Fund (NPC)**

Est. 1993 by the Attorneys Fidelity Fund

THE ATTORNEYS FIDELITY FUND PROFESSIONAL INDEMNITY INSURANCE SCHEME 1 JULY 2016 TO 30 JUNE 2017

Preamble

The **Attorneys Fidelity Fund**, as permitted by the **Act**, has contracted with the **Insurer** to provide professional indemnity insurance to the **Insured**, in a sustainable manner and with due regard for the interests of the public by:

- a) protecting the integrity, esteem, status and assets of the **Insured** and the legal profession;
- b) protecting the public against indemnifiable and provable losses arising out of **Legal Services** provided by the **Insured**, on the basis set out in this policy.

Definitions:

I. **Act:**

The Attorneys Act 53 of 1979 (as amended or as replaced by the Legal Practice Act 28 of 2014);

II. **Annual Amount of Cover:**

The total available amount of cover for the **Insurance Year** for the aggregate of payments made for all **Claims**, **Approved Costs**, and **Claimants' Costs** in respect of any **Legal Practice** as set out in Schedule A;

III. **Approved Costs:**

Legal and other costs incurred by the **Insured** with the **Insurer's** prior written permission (which will be in the **Insurer's** sole discretion) in attempting to prevent a **Claim** or limit the amount of a **Claim**;

IV. **Attorneys Fidelity Fund:**

As referred to in Section 25 of the **Act**;

V. **Bridging Finance:**

The provision of short term finance to a party to a **Conveyancing Transaction** before it has been registered in the Deeds Registry;

VI. **Claim:**

A written demand or the institution of legal proceedings against the **Insured** for compensation or damages arising out of the **Insured's** provision of **Legal Services**; or

A notification by an **Insured** of circumstances that may in the future give rise to a legal liability to pay compensation or damages arising out of the **Insured's** provision of **Legal Services**;

(For the purposes of this definition, a written demand is any written communication that either makes a demand for or intimates or implies an intention to demand compensation or damages from an **Insured**);

VII. **Claimant's Costs:**

The legal costs the **Insured** is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the **Insurer**;

VIII. **Conveyancing Transaction:**

A transaction which:

- a) involves the transfer of legal title to or the registration of a real right in immovable property from one or more legal entities or natural persons to another; and/or
- b) involves the registration or cancellation of any mortgage bond over immovable property; and/or
- c) is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;

IX. **Cybercrime:**

Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the internet or any one or more of them. (The device may be the agent, the facilitator or the target of the crime or offence);

X. **Defence Costs:**

The reasonable costs the **Insurer** (or **Insured** - with the **Insurer's** consent) incurs in investigating and defending a **Claim** against an **Insured**;

XI. **Dishonest:**

Bears its ordinary meaning but includes conduct which may occur without an **Insured's** subjective purpose, motive or intent, but which a reasonable legal practitioner would consider to be deceptive or untruthful or lacking integrity or conduct which is generally not in keeping with the ethics of the legal profession;

XII. **Employee:**

A person who is or was employed or engaged by the **Legal Practice** to assist in providing **Legal Services**. (This includes in-house legal consultants, associates, professional assistants, candidate attorneys, paralegals and clerical staff but does not include an independent contractor who is not a **Practitioner**.);

XIII. **Excess:**

The first amount payable by the **Insured** (or deductible) in respect of each and every **Claim** (including **Claimant's Costs**) as set out in schedule B;

XIV. **Fidelity Fund Certificate:**

A certificate provided in terms of section 42 of the **Act**;

XV. **Innocent Principal:**

Each present or former **Principal** who:

- a) may be liable for the debts and liabilities of the **Legal Practice**;
- b) did not personally commit or participate in committing the **Dishonest**, fraudulent or other criminal act and had no knowledge or awareness of such act;

XVI. **Insured:**

The persons or entities referred to in clauses 5 and 6 of this policy;

XVII. **Insurer:**

The Attorneys Insurance Indemnity Fund NPC, Reg. No. 93/03588/08;

XVIII. **Insurance Year:**

The period covered by the policy, which runs from 1 July of the first year to 30 June of the following year;

XIX. **Legal Practice:**

The person or entity listed in clause 5 of this policy;

XX. **Legal Services:**

Work reasonably done or advice given in the ordinary course of carrying on the business of a **Legal Practice** in the Republic of South Africa. Work done or advice given on the law applicable in jurisdictions other than the Republic of South Africa are specifically excluded, unless provided by a person admitted to practise in the applicable jurisdiction;

XXI. **Practitioner:**

Any attorney, notary or conveyancer as defined in the **Act**;

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xxii. Prescription Alert:

The computerised diary system that the **Insurer** makes available to the **Insured**;

xxiii. Principal:

A sole **Practitioner**, partner or director of a **Legal Practice** or any person who is publicly held out to be a partner or director of a **Legal Practice**;

xxiv. Risk Management Questionnaire:

A self- assessment questionnaire which can be downloaded from or completed on the **Insurer's** website (www.aiif.co.za) and which must be completed annually by the senior partner or director or designated risk manager of the **Insured** as referred to in clause 5;

xxv. Road Accident Fund claim (RAF):

A claim for compensation for losses in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (as defined in the Road Accident Fund Act of 1996 or any predecessor or successor of that Act) in the Republic of South Africa;

xxvi. Senior Practitioner:

A **Practitioner** with no less than 15 years' standing in the legal profession;

xxvii. Trading Debt:

A debt incurred as a result of the undertaking of the **Insured's** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation.) This exclusion includes (but is not limited to) the following:

- a) a refund of any fee or disbursement charged by the **Insured** to a client;
- b) damages or compensation or payment calculated by reference to any fee or disbursement charged by the **Insured** to a client;
- c) payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client;
- d) any labour dispute or act of an administrative nature in the **Insured's** practice;

For the purposes of this policy, "disbursement" does not include any amount paid to counsel or an expert.

What cover is provided by this policy?

1. On the basis set out in this policy, the **Insurer** agrees to indemnify the **Insured** against professional legal liability to pay compensation to any third party:
 - a) that arises out of the provision of **Legal Services** by the **Insured**; and
 - b) where the **Claim** is first made against the **Insured** during the current **Insurance Year**.
2. The **Insurer** agrees to indemnify the **Insured** for **Claimants' Costs** and **Defence Costs** on the basis set out in this policy.
3. The **Insurer** agrees to indemnify the **Insured** for **Approved Costs** in connection with any **Claim** referred to in clause 1.
4. The **Insurer** will not indemnify the **Insured** in the current **Insurance Year**, if the circumstance giving rise to the **Claim** has previously been notified to the **Insurer** by the **Insured** and registered in an earlier **Insurance Year**.

Who is insured?

5. Provided that each **Principal** has, or is obliged to have, a current **Fidelity Fund Certificate** at the time the **Claim** is made, the **Insurer** insures all **Legal Practices** providing **Legal Services**, including:
 - a) a sole Practitioner;
 - b) a partnership of Practitioners;
 - c) an incorporated Legal Practice ;

6. The following are included in the cover, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:
 - a) a **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** has, or is obliged to have, a current **Fidelity Fund Certificate**;
 - b) a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** had, or was obliged to have, a current **Fidelity Fund Certificate** at the time of the circumstance giving rise to the **Claim**;
 - c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance giving rise to the **Claim**;
 - d) the estates or legal representatives of the people referred to in clauses 6(a) 6(b) and 6(c).

Amount of cover

7. The **Annual Amount of Cover**, as set out in Schedule A, is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance giving rise to the **Claim**.
8. Schedule A sets out the maximum **Annual Amount of Cover** that the **Insurer** provides per **Legal Practice**. This amount includes payment of compensation (capital and interest) as well as **Claimant's Costs** and **Approved Costs**.
9. Cover for **Approved Costs** is limited to 25% of the **Annual Amount of Cover** or such other amount that the **Insurer** may allow in its sole discretion.

Insured's excess payment

10. The **Insured** must pay the **Excess** in respect of each **Claim**, directly to the claimant or the claimant's legal representatives, immediately it becomes due and payable.
11. The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance giving rise to the **Claim**, and the type of matter giving rise to the **Claim**, as set out in Schedule B.
12. The **Excess** set out in column A of Schedule B applies:
 - a) in the case of a **Claim** arising out of the prescription of a **Road Accident Fund claim**. This **Excess** increases by an additional 20% if **Prescription Alert** has not been used or complied with by the **Insured**, by timeous lodgement or service of summons in accordance with the reminders sent by **Prescription Alert**;
 - b) in the case of a **Claim** arising from a **Conveyancing Transaction**.
13. In the case of a **Claim** where clause 20 applies, the **excess** increases by an additional 20%.
14. No **Excess** applies to **Approved costs** or **Defence costs**.
15. The **Excess** set out in column B of Schedule B applies to all other types of **Claim**.

What is excluded from cover

16. This policy does not cover any liability for compensation:
 - a) arising out of or in connection with the **Insured's** **Trading Debts** or those of any **Legal Practice** or business managed by or carried on by the **Insured**;
 - b) arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or of the **Insured's** predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in Section 26 of the Act;
 - c) which is insured or could more appropriately have been insured under any other valid and collectible insurance available to the **Insured**, covering a loss arising out of the normal course and conduct of the business. This includes but is not limited to Misappropriation

of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;

d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa;

e) arising from or in connection with the provision of investment advice, the administration of any funds or taking of any deposits as contemplated in:

- (i) the Banks Act 94 of 1990;
- ii) the Financial Advisory and Intermediary Services Act 37 of 2002;
- (iii) the Agricultural Credit Act 28 of 1996 as amended or replaced;
- (iv) any law administered by the Financial Services Board and or the South African Reserve Bank and any regulations issued thereunder;

f) arising where the **Insured** is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-bearing account in terms of section 78(2A) of the **Act**, and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made;

This exclusion does not apply to funds which the **Insured** is authorised to invest in his or her capacity as executor, trustee, curator or in any similar representative capacity;

g) arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the **Insured**, or from an order against the **Insured** to pay costs *de bonis propriis*;

h) arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act;

i) directly or indirectly arising from, or in connection with or as a consequence of the provision of **Bridging Finance** in respect of a **Conveyancing Transaction**. This exclusion does not apply where **Bridging Finance** has been provided for the payment of:

- (i) transfer duty and costs;
- (ii) municipal or other rates and taxes relating to the immovable property which is to be transferred;
- (iii) levies payable to the body corporate or homeowners association relating to the immovable property which is to be transferred;

j) arising from the **Insured's** having intentionally given an unqualified undertaking legally binding his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party;

k) arising out of or in connection with a breach of contract unless such breach is a breach of professional duty by the **Insured**;

l) arising where the **Insured** acts or acted as a liquidator or trustee in an insolvent estate, except in cases where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**;

m) arising out of or in connection with the receipt or payment of funds, whether into or from trust or otherwise, where that receipt or payment is unrelated to or unconnected with a particular matter or transaction which is already in existence or about to come into existence, at the time of the receipt or payment and in respect of which the **Insured** has received a mandate;

n) arising out of a defamation **Claim** brought by one

Insured against another;

o) arising out of **Cybercrime**;

p) arising out of a **Claim** against the **Insured** by an entity in which the **Insured** and/or related or interrelated persons* has/have a material interest and/or hold/s a position of influence or control**.

* as defined in section 2(1) of the Companies Act 71 of 2008

** as defined in section 2(2) of the Companies Act 71 of 2008

For the purposes of this paragraph, "material interest" means an interest of at least ten (10) percent in the entity;

q) arising out of or in connection with a **Claim** resulting from:

- (i) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war is declared or not) civil war, mutiny, insurrection, rebellion, revolution, military or usurped power;
- (ii) Any action taken in controlling, preventing, suppressing or in any way relating to the excluded situations in (i) above including, but not limited to, confiscation, nationalisation, damage to or destruction of property by or under the control of any Government or Public or Local Authority;
- (iii) Any act of terrorism regardless of any other cause contributing concurrently or in any other sequence to the loss;

For the purpose of this exclusion, terrorism includes an act of violence or any act dangerous to human life, tangible or intangible property or infrastructure with the intention or effect to influence any Government or to put the public or any section of the public in fear;

r) arising out of or in connection with any **Claim** resulting from:

- (i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;
- (ii) nuclear material, nuclear fission or fusion, nuclear radiation;
- (iii) nuclear explosives or any nuclear weapon;
- (iv) nuclear waste in whatever form;

regardless of any other cause or event contributing concurrently or in any other sequence to the loss. For the purpose of this exclusion only, combustion includes any self-sustaining process of nuclear fission or fusion;

s) arising out of or resulting from the hazardous nature of asbestos in whatever form or quantity.

Fraudulent applications for indemnity

17. The **Insurer** will reject a fraudulent application for indemnity.

Claims arising out of dishonesty or fraud

18. Any **Insured** will not be indemnified for a **Claim** that arises:

- a)** directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by that **Insured**;
- b)** directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by another party and that **Insured** was knowingly connected with, or colluded with or condoned or acquiesced or was party to that dishonesty, fraud or other criminal act or omission.

Subject to clauses 19 and 20 below, this exclusion does not apply to an **Innocent Principal**.

19. In the event of a **Claim** to which clause 18 applies, before the **Insurer** makes any payment, the **Innocent Principal** must take all reasonable action to:

- a)** institute criminal proceedings against the alleged

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Dishonest party and present proof thereof to the **Insurer**; and/or

b) sue for and obtain reimbursement from any such alleged **Dishonest** party or its or her or his estate or legal representatives;

Any benefits due to the alleged **Dishonest** party held by the **Legal Practice**, must, to the extent allowable by law, be deducted from the **Legal Practice's** loss.

20. Where the **Dishonest** conduct includes:

a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or

b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false;

The **Excess** payable by the **Innocent Insured** will be increased by an additional 20%.

21. If the **Insurer** makes a payment of any nature under the policy in connection with a **Claim** and it later emerges that it wholly or partly arose from a **Dishonest**, fraudulent or other criminal act or omission of the **Insured**, the **Insurer** will have the right to recover full repayment from that **Insured** and any party knowingly connected with that **Dishonest**, fraudulent or criminal act or omission.

The Insured's rights and duties

22. The **Insured** must notify the **Insurer** in writing as soon as practicable, of any **Claim** made against them, but by no later than one (1) week after receipt by the **Insured**, of a written demand or summons or application. In the case of a late notification of receipt of the written demand, summons or application by the **Insured**, the **Insurer** reserves the right not to indemnify the **Insured** for costs and ancillary charges incurred prior to or as a result of such late notification.

23. Once the **Insured** has notified the **Insurer**, the **Insurer** will require the **Insured** to provide a completed **Risk Management Questionnaire** and to complete a claim form providing all information reasonably required by the **Insurer** in respect of the **Claim**. The **Insured** will not be entitled to indemnity until the claim form and **Risk Management Questionnaire** have been completed by the **Insured**, to the **Insurer's** reasonable satisfaction and returned to the **Insurer**.

24. The **Insured** agrees not to, without the **Insurer's** prior written consent:

a) admit or deny liability for a **Claim**;

b) settle a **Claim**;

c) incur any costs or expenses in connection with a **Claim** unless the sum of the **Claim** and **Claimant's Costs** falls within the **Insured's Excess**;

failing which, the **Insurer** will be entitled to reject the **Claim**, but will have sole discretion to agree to provide indemnity, wholly or partly.

25. The **Insured** agrees to give the **Insurer** and any of its appointed agents all information, documents, assistance and cooperation that may be reasonably required, at the **Insured's** own expense.

26. The **Insured** also gives the **Insurer** the right of reasonable access to the **Insured's** premises, staff and records for purposes of inspecting or reviewing them in the conduct of an investigation of any **Claim** where the **Insurer** believes such review or inspection is necessary.

27. Notwithstanding anything else contained in this policy, should the **Insured** fail or refuse to provide assistance or cooperation in terms of this policy, to the **Insurer** or

its agents and remain in breach for a period of ten (10) working days after receipt of written notice to remedy such breach (from the **Insurer** or its agents) the **Insurer** has the right to:

a) withdraw indemnity; and/or

b) report the **Insured** to the regulator; and/or

c) recover all unnecessary payments and expenses incurred by it.

For the purposes of this paragraph, written notice will be sent to an address that appears on the original notification of the **Claim** to the **Insurer** and will be deemed to have been received five (5) working days after electronic transmission or sending by registered mail.

28. By complying with the obligation to disclose all documents and information required by the **Insurer** and its legal representatives, the **Insured** does not waive any claim of legal professional privilege or confidentiality.

29. Where a breach of, or non-compliance with any term of this policy by the **Insured** has resulted in material prejudice to the handling or settlement of any **Claim** against the **Insured**, the **Insured** will reimburse the **Insurer** the difference between the sum payable by the **Insurer** in respect of that **Claim** and the sum which would in the sole opinion of the **Insurer** have been payable in the absence of such prejudice. It is a condition precedent of the **Insurer's** right to obtain reimbursement, that the **Insurer** has fully indemnified the **Insured** in terms of this policy.

30. Written notice of any new **Claim** must be given to:

Attorneys Insurance Indemnity Fund NPC

1256 Heuwel Avenue|Centurion|0127

PO Box 12189|Die Hoewes|0163

Docex 24 | Centurion

Email: claims@aiif.co.za

Tel:+27(0)12 622 3900

The Insurer's rights and duties

31. The **Insured** agrees that:

a) the **Insurer** has full discretion in the conduct of the **Claim** against the **Insured** including, but not limited to, its investigation, defence, settlement or appeal in the name of the **Insured**;

b) the **Insurer** has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the **Claim**;

The exercise of the **Insurer's** discretion in terms of **a)** will not be unreasonable.

32. The **Insurer** agrees that it will not settle any **Claim** against any **Insured** without prior consultation with that **Insured**. However, if the **Insured** does not accept the **Insurer's** recommendation for settlement:

a) the **Insurer** will not cover further **Defence Costs** and **Claimant's Costs** beyond the date of the **Insurer's** recommendation to the **Insured**; and

b) the **Insurer's** obligation to indemnify the **Insured** will be limited to the amount of its recommendation for settlement or the **Insured's** available **Annual Amount of Cover** (whichever is the lesser amount).

33. If the amount of any **Claim** exceeds the **Insured's** available **Annual Amount of Cover** the **Insurer** may, in its sole discretion, hold or pay over such amount or any lesser amount for which the **Claim** can be settled. The **Insurer** will thereafter be under no further liability in respect of such a **Claim**, except for the payment of **Approved Costs** or **Defence Costs** incurred prior to the date on which the **Insurer** notifies the **Insured** of its decision.

34. Where the **Insurer** indemnifies the **Insured** in relation to

only part of any **Claim**, the **Insurer** will be responsible for only the portion of the **Defence Costs** that reflects an amount attributable to the matters so indemnified. The **Insurer** reserves the right to determine that proportion in its absolute discretion.

35. In the event of the **Insured's** material non-disclosure or misrepresentation in respect of the application for indemnity, the **Insurer** reserves the right to report the **Insured's** conduct to the regulator and to recover any amounts that it may have unnecessarily incurred as a result of the **Insured's** conduct.
36. If the **Insurer** makes payment under this policy, it will not require the **Insured's** consent to take over the **Insured's** right to recover (whether in the **Insurer's** name or the name of the **Insured**) any amounts paid by the **Insurer**. The **Insurer** will not, however, exercise its right to recover from the **Insured**, except in the case of that **Insured's Dishonest** or criminal act or omission in relation to the **Claim**.
37. All recoveries made in respect of any **Claim** under this policy will be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:
 - a) the **Insured** will first be reimbursed for the amount by which its liability in respect of such **Claim** exceeded the **Amount Of Cover** provided by this policy;
 - b) the **Insurer** will then be reimbursed for the amount of its liability under this policy in respect of such **Claim**;
 - c) any remaining amount will be applied toward the **Excess** paid by the **Insured** in respect of such **Claim**.
38. If the **Insured** gives notice of any circumstance which may give rise to a **Claim**, of which the **Insured** becomes aware during an **Insurance Year**, then any **Claim** in respect of that circumstance subsequently made against the **Insured** after the expiry of that **Insurance Year**, will for the purposes of this policy be treated as having been made during the **Insurance Year** first mentioned.
39. This policy does not give third parties any rights against the **Insurer**.

How the parties will resolve disputes

40. Subject to the provisions of this policy, any dispute or disagreement between the **Insured** and the **Insurer** as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, must be dealt with in the following order:
 - a) written submissions by the **Insured** must be referred to the **Insurer's** internal complaints/dispute team at complaints@aiif.co.za or to the address set out in clause 30 of this policy, within thirty(30) days of receipt of the written communication from the **Insurer** which has given rise to the dispute;
 - b) should the dispute not have been resolved within thirty (30) days from the date of receipt by the **Insurer** of the submission referred to in a) then the parties must agree on an independent **Senior Practitioner**, to which the dispute can be referred for a determination. Failing an agreement, the choice of such **Senior Practitioner** must be referred to the President of the Law Society (or his/her successor in title) having jurisdiction over the **Insured**;
 - c) the parties must make written submissions which will be referred for determination to the **Senior Practitioner** referred to in b). The costs incurred in so referring the matter will be borne by the unsuccessful party;
 - d) the unsuccessful party must notify the successful party in writing, within 30 days of the determination by the **Senior Practitioner**, if the determination is not accepted;
 The procedures in a) b) c) and d) above must be completed before any legal action is undertaken by the parties.

Complaints may be lodged with the:

Short Term Insurance Ombudsman

Tel: 011 726-8900

Fax: 011 726-5501

Share call: 0860 726 980

E-mail info@osti.co.za

Web: <http://osti.co.za>

Physical Address: Sunnyside Office Park, 5th Floor, Building D, 32 Princess of Wales, Terrace, Parktown

Postal Address: PO Box 32334, Braamfontein, 2017

SCHEDULE A

Period of Insurance: 1st July 2016 to 30th June 2017 (both days inclusive)

No of Principals	Annual Amount of Cover for Insurance Year
1	R1 562 500
2	R1 562 500
3	R1 562 500
4	R1 562 500
5	R1 562 500
6	R1 562 500
7	R1 640 625
8	R1 875 000
9	R2 109 375
10	R2 343 750
11	R2 578 125
12	R2 812 500
13	R3 046 875
14 and above	R3 125 000

SCHEDULE B

Period of Insurance: 1st July 2016 to 30th June 2017 (both days inclusive)

No of Principals	Column A Excess for prescribed RAF* and Conveyancing Claims**	Column B Excess for all other Claims**
1	R35 000	R20 000
2	R63 000	R36 000
3	R84 000	R48 000
4	R105 000	R60 000
5	R126 000	R72 000
6	R147 000	R84 000
7	R168 000	R96 000
8	R189 000	R108 000
9	R210 000	R120 000
10	R321 000	R132 000
11	R252 000	R144 000
12	R273 000	R156 000
13	R294 000	R168 000
14 and above	R315 000	R180 000

*The applicable **Excess** will be increased by an additional 20% if **Prescription Alert** is not used or complied with.

The applicable **Excess will be increased by an additional 20% if clause 20 of this policy applies.

LETTERS TO THE EDITOR



Dear Madam

I have recently opened my practice and would like some advice on a potential client, who has approached me to act on his behalf in transactions involving the sale of industrial diamonds.

The potential client, who was referred to me by a mutual acquaintance has sourced a seller for the diamonds in the Democratic Republic of the Congo and he has purchasers lined up in Hong Kong, that will buy the diamonds. Funding for the transaction has apparently also been secured through NAFCOC.

NAFCOC will pay the money to fund the entire deal into my trust banking account and I will then receive invoices to pay the seller, commissions and so forth. There will be no rush on the payments so I will be able to confirm with my banker that the money is indeed in my account before I make any payments and I have opened a separate trust account through which all this will be facilitated. I

have also obtained the necessary FICA documents.

I am concerned as I do not have a way of verifying where the diamonds come from and also cannot verify where the money comes from.

Please advise me whether there are any risk management problems with this instruction.

Kind regards
Name withheld.

Thank you for giving us the opportunity to give our risk management perspective on this matter. It is difficult to know where to start as there are many issues that could potentially cause you prejudice.

My colleagues and I all agree that this has many of the features of a **scam and/or a money laundering exercise**. It may be worthwhile for you to read the judgment in *Hirschowitz Flionis v Bartlett and Another*, 2006 (3) SA 575 SCA. The facts are similar.

As far as we are aware, NAFCOC does not give funding for this type of transaction. Have you contacted them to check? You would also probably have an obligation to notify the Financial Intelligence Centre of some of the transactions regardless of client confidentiality. It may also be worthwhile contacting the Central Selling Organisation (CSO) or Industrial Diamond Distributors Limited to find out if there are any specific procedures or

institutions that could assist you in the verification process.

Also, from your letter it would appear that you would essentially be acting as a paymaster. In our view this is not legitimate legal work and it exposes your firm to the many unnecessary risks in dealing with third parties' funds. In addition, please note that your professional indemnity insurance scheme policy through the AIIF (Attorneys Insurance Indemnity Fund) specifically excludes this type of instruction in the following clause:

5.1 Unless specifically stated to the contrary this policy does not cover any loss, destruction or damage whatsoever or any legal liability of whatever nature:

5.1.12 arising out of or in connection with the receipt or payment of funds, whether into or from trust or otherwise, where that receipt or payment is unrelated to or unconnected with a particular matter or transaction which is already in existence, or about to come into existence, at the time of the receipt or payment and in respect of which the insured has received a mandate."

You would need to approach your own broker to ensure that you are adequately covered for this sort of work.

NB: In the 2016/2017 policy, clause 5.1.12 is replaced by clause 16 m) which has the same wording.