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RISKALERT

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RISK MANAGEMENT COLUMN

GENERAL MATTERS

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RISK MANAGEMENT COLUMN

CYBERCRIME CLAIMS – GROSS NEGLIGENCE OR A RECKLESS FAILURE TO HEED THE WARNINGS?

It is widely lamented that, unfortunately, some members of the legal profession do not read the documents that they are meant to. Regrettably, this also appears to be true of risk management information published for the benefit of the profession. This has a damaging effect on the reputation of the practitioners concerned and the legal profession as a whole. Those members of the profession who take time to read risk management information and heed the warnings published are lauded for their conduct.

Thomas Harban,
Editor

Since 2010, the AIIF has regularly published warnings to the profession on the risks associated with cybercrime and cyber scams. These warnings have, *inter alia*, been published in the following editions of the *Bulletin*:

- August 2010 (pages 1 and 8)
- May 2012 (page 3)
- August 2012 (page 1)
- February 2013 (page 1)
- May 2013 (page 3)
- November 2014 (page 5)
- July 2015 (page 1)
- August 2015 (page 1)
- November 2015 (page 1)
- February 2016 (pages 1 and 2)
- May 2016 (page 2)
- July 2016 (page 1)
- August 2016 (page 7)
- November 2016 (page 4)
- February 2017 (page 2)
- July 2017 (page 1)

The only topic which has received comparable coverage in the last eight years has been prescription of Road Accident Fund (RAF) claims. Previous editions of the *Bulletin* can be accessed

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on the AIIF website at http://www.aiif.co.za/risk-management-2/risk-management/

Despite the extensive coverage of cyber risk in the *Bulletin* and the general coverage of the risks associated with phishing scams and cybercrime in the wider press, a large number of practitioners are, unfortunately, still falling victim to this risk. In some instances, the same firm has fallen victim to the same scam on more than one occasion.

The frequency with which practitioners are falling victim to cybercrime (and the extent thereof) raise the question whether the underlying problem is one of gross negligence when it comes to the management of cyber risks and funds entrusted to them or simply recklessness on the part of the practitioners concerned. The possibility of collusion between parties involved in the transaction and the perpetrators of the fraud in some instances has also been raised.

The cybercrime exclusion in clause 16(o) of the AIIF policy (the policy) came into effect on 1 July 2016. Since that date, we have been notified of over 110 cybercrime related claims with a total value in excess of R70 million. The AIIF policy will not respond to these claims as they fall within the exclusion. The firms concerned will have to bear the associated losses themselves if they do not have alternate appropriate insurance cover in place.

Cybercrime is defined in clause IX of the policy as:
"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 of them. (The device may be the agent, the facilitator or the target of the crime or offence)."

This definition of cybercrime was arrived at after extensive consultation with, *inter alia*, the profession and the wider insurance market. Cover for cybercrime is available in the open insurance market and this risk would more appropriately be insured under such a policy – clause 16 (c) of the AIIF policy would thus also apply to cybercrime claims. Cyber risks do not, in the ordinary course, fall within the ambit of professional indemnity policies.

The exclusion of cybercrime in the policy has been upheld after it was disputed by an insured attorney. It will be noted that the wording of clause IX is wide and it will not matter whether the cyber breach occurred in the environment of the legal practice, the estate agent, the beneficiary of the funds or some other party involved in the transaction – the test is whether or not:

(i) there was a criminal or other offence facilitated by the use of electronic communication or information systems;

(ii) any device or the internet (or any one thereof) was involved;

(iii) the device was the agent, the facilitator or the target of the crime or offence.

There does not have to be evidence of hacking for the exclusion to apply. Some practitioners have sought to argue that the cause of the loss was not cybercrime (as they believe that their email system was not hacked) but, on their own submission, was caused by negligence, gross negligence or even recklessness of a member of their staff in being duped by the electronic communication to make the payment. Their argument is thus that clause 16(o) should not apply. Our response to this argument is that as long as the circumstances fall within the definition in clause IX, the exclusion in clause 16(o) will apply. Hacking is not a prerequisite for the exclusion to apply. Furthermore, even if it is argued (wrongly in our view) that the liability to pay compensation arises out of any purported negligence, gross negligence or even recklessness, the AIIF policy will not respond as the policy does not cover any claim for compensation that falls within the exclusions (see clauses IX, 1 and 16) and the fraudulent misrepresentation in the email purporting to change the banking details is:

(i) a criminal or other offence;

(ii) the misrepresentation that caused (facilitated) the payment into the fraudulent incorrect account;

(iii) conveyed by electronic communication (the email system); and

(iv) conveyed via a device and/or the internet.

It will be noted from our previous publications that many of the cybercrime related claims arise out of circumstances where practitioners and their staff have fallen victim to phishing scams, the most common of which is a fraudulent instruction to a conveyancer to pay funds due to a beneficiary into a different bank account to that on record. The phishing email will emanate from an email address which looks similar to that of the person to whom the funds are due. Hovering with the cursor over the email address will display the real underlying fraudulent email address. The AIIF has been notified of at least one instance where the target of the phishing scam was the proceeds of a RAF claim. In another recently notified claim, the guarantee issued by a bank was intercepted and the banking details thereon were changed.

In the February 2017 edition of the *Bulletin*, we suggested some risk mitigation measures that practitioners

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could consider implementing in their firms in order to guard against this risk. We republish this list with additional comments. Practitioners can:

(i) **Ensure that adequate risk mitigation/avoidance measures are in place to deal with cyber related risks**;

(ii) **Make staff aware of the various scams** – this is a matter for training of staff;

(iii) **Place appropriate insurance cover in place to deal with this risk – cybercrime policies and commercial crime policies for example;**

(iv) **Properly supervise staff and have a proper system of delegation and checks and balances where changes in banking details can only be authorised by a senior practitioner after having verified all aspects of the instruction to effect the change**;

(v) **Be aware of spoof/phishing emails – do not click on links to unsecure emails. Do not enter your passwords on any unverified email attachment;**

(vi) **Ensure that proper FICA verification processes are in place and that the identity and bank account details of all clients are properly verified;**

(vii) **Contact the clients (using the telephonic details on record) in order to verify any purported change in banking details;**

(viii) **Insist that changes to payee details can only be done after verification with the party to whom the funds are due and in person at the attorney's office with original documents being provided** – it is preferable to have a client complain of the inconvenience of a fastidious attorney rather than have a client make a claim against the firm for a loss suffered as a result of cybercrime;

(ix) **Obtain advice from IT experts on the appropriate security measures to be implemented in order to avoid falling victim to cybercrime**; and

(x) **Keep up to date with the constantly changing risk environment in the general commercial world.**

It is pleasing to note that a number of firms have taken risk prevention steps such as adding a prominent notification close to their email signatures stating that their banking details have not changed and that any change in their banking details will not be communicated via email.

The payment of funds to incorrect parties also demonstrates a failure to ensure that adequate internal controls are implemented to ensure that trust funds are safeguarded as prescribed by the rules applicable to practitioners. The rules prescribe that practitioners must ensure:

(i) That the design of the internal controls is adequate to address the identified risks;

(ii) That the internal controls have been implemented as designed;

(iii) That the internal controls which have been implemented operate effectively at all times; and

(iv) That the effective operation of the internal controls is monitored regularly by designated persons in the firm having the appropriate authority.

There are a number of products available in the commercial market which can be used by practitioners to verify the authenticity of bank accounts before making payment. A staff member at one of commercial banks has indicated that a simple exercise conducted at an automatic teller machine (ATM) can also be used to check the details of the account holder: using a note of a small denomination (say R10), the account details on the email communication are entered as if trying to deposit the R10 through the ATM into that account. Before the completion of the transaction, the ATM will display the name of the account holder and, in this way, the name compared to that of the legitimate beneficiary. The transaction can then be cancelled/abandoned once the details of the account holder have been viewed on the ATM screen and the ATM will return the R10 note. This may seem to be a tedious process, but could save a firm the losses following on the payment of a large amount of funds into an incorrect bank account.

The sale of a property is a significant transaction in the life of any person. The fact that the banking details of a party to whom funds are due would purport, without prior notice, to change close to the date on which the funds are to be paid should, in the ordinary course, itself raise a red flag for any person dealing with the matter. The perpetrators of the scam often attach fraudulent documents purporting to be bank statements to their emails. An examination of these 'bank statements' will show that the 'transactions' listed thereon often do not fit the profile or the geographical location of the beneficiary.

It is hoped that practitioners will heed the warning and take steps to avoid falling victims to cybercrime.

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RISK MANAGEMENT COLUMN continued...

THE IMPORTANT ROLE PLAYED BY SUPPORT STAFF IN MANAGING RISKS

Many professional indemnity claims faced by legal practitioners arise from a failure to develop, implement and adhere to appropriate internal office procedures. Administration is an integral part of every legal practice. Typically, the legal practitioner deals with the matters concerned with the rendering of legal services and the carrying out of clients' mandates and the administration aspects (the so called back-office functions) of the firm are left to administrative or support staff. The legal practitioner may, in addition to dealing with matters on behalf of clients, have other responsibilities such as marketing the firm to existing and potential clients. Administrative functions are, generally, carried out by staff who do not have qualifications in law. There may be those people who find administration to be laborious and tedious and do not see any value therein. Administration, on the face of it, may not be seen as a potential income generating work-stream.

Administration is an important part of the law firm. In some practices the operations of the entity may be headed by a Chief Operations Officer (COO), a Chief Administrative Officer (COA) or even the practice manager. These are senior positions and the key performance areas of the incumbents should include components of risk management. Smaller firms or those who do not have such positions within their structures can still take measures to ensure that the administrative and support staff play an active role in risk management.

Support staff must be trained on their responsibilities in so far as risk management in the firm is concerned. The management of risk is an enterprise wide responsibility and not just a concern for the senior professionals or management in the firm. A successful practice may be threatened as a result of a breach of an administrative procedure in the firm. The administrative staff in the firm will often be the persons responsible for carrying out the internal controls for the financial functions referred to in previous article.

Have you, for example, considered the risks to your firm in the event that a member of your support staff makes an error? Such potential errors could include:

- A messenger serving or filing a document out of time
- A failure by a member of the secretarial staff to accurately diarise a prescription or some other important date on in respect of a matter
- An error in the payment of trust funds
- The misfiling of important documents
- An error in the typing of a document that is only discovered after signature and an application for rectification is then necessary (at the cost of the firm)

Encourage and empower your support staff to play an active role in risk management and ensure that they are properly trained. Many educational institutions (including LEAD) offer courses aimed at introducing support staff to risk management.

Some of the suggestions for getting support staff into a risk management regime are:

- Encouraging staff to 'manage up'- ensure that support staff are empowered to raise risk management concerns they observe in the work of their seniors and to raise these in a professional manner with the party/parties concerned
- Having a peer review system between a secretary and the practitioner where each is encouraged to review and audit the work of the other
- Implementing a dual diary system between professional and support staff to ensure that nothing 'slips through the cracks'
- Including risk management measures in the minimum operating standards/standard operating procedures of the various administrative functions/processes in the firm and encouraging staff to give their input thereon
- Incentivising the development of innovative risk management measures
- Conducting regular file audits and giving constructive feedback where necessary
- Developing a structured training regime within the firm
- Encouraging the implementation of personal development programmes for support staff
- Implementing a proper segregation of duties in respect of all finance related functions
- Encouraging support staff to attend the various risk management seminars held on various topics related to their functions

It is sometimes said that support staff are the backbone of any legal practice and it is thus crucial that this important function of a firm is adequately empowered to deal with the risks faced by the practice. The risks associated with cybercrime, for example, can be mitigated and even avoided if support staff are properly trained thereon.

Practitioners must thus not under estimate the role support staff can play in managing risks in the firm.

GENERAL MATTERS

*DRAKE: A REDEFINING JUDGEMENT ON BREACH OF MANDATE AND CONTRACTUAL DAMAGES

By Ayanda Nondwana, partner, and Palesa Letsaba, associate, at Hogan Lovells (South Africa)

In a precedent setting judgment, the Supreme Court of Appeal in ***Drake Flemmer & Orsmond Inc & Another v Gajjar NO*** *[2017] ZASCA 169 (1 December 2017)* pronounced on the principles applicable in respect of the assessment of contractual damages arising from the breach of mandate by an attorney.

In this matter, the court had to determine the date damages against the attorneys for professional negligence should be assessed.

The facts of the case

On 2 July 1997, Mr Sutherland (the claimant), later substituted by the *curator ad litem*, was involved in a motor vehicle accident. He sustained a brain injury (not investigated by the firm initially instructed) and fractures of the pelvis and right *femur*.

The claimant instructed Drake Flemmer & Orsmond Inc (DFO) to institute his Road Accident Fund (RAF) claim in order recover the damages he suffered as a result of the injuries he sustained in the accident. DFO had only referred the claimant to an orthopaedic surgeon.

On 21 December 1999, on the instruction of the claimant, DFO accepted the RAF's offer of settlement in the sum of R98, 334 (inclusive of general damages and medical expenses) and an undertaking for future medical expenses. No claim for loss of income was pursued by DFO against the RAF.

On 19 September 2000, the claimant addressed a letter to DFO seeking to review the settlement of his claim with the RAF. DFO advised him that it was not possible to do so. At the time, the claimant's complications resulting from the head injury had worsened and he had struggled to retain jobs and attempts to pursue a business venture had failed dismally. Effectively, the claimant was unemployable in the open labour market due to the consequences of the head injury he had sustained.

In July 2001, the claimant terminated the mandate of DFO and instructed Le Roux Inc (LRI) to pursue a claim against DFO for under-settling his RAF claim. On 25 April 2002, LRI assessed that the claimant's claim with the RAF had been under-settled.

On 21 April 2005, LRI, on behalf of the claimant, served summons in an action against DFO for the recovery of damages flowing from the under-settlement of the RAF claim. However, at the time of institution of the legal proceedings against DFO by LRI, the claim had prescribed due to the incorrect computation of the commencement date of prescription by LRI.

On 18 November 2011, LRI informed the claimant that on the advice of new counsel, as his claim against DFO for professional negligence had prescribed in their hands, they would withdraw as attorneys of record.

From April 2005 to November 2011 LRI had represented the claimant inadequately until its realisation that the claim against DFO had prescribed, despite having knowledge of this allegation in DFO's plea in June 2005.

The matter went on trial in November 2015 and both DFO and LRI conceded liability. The only remaining issue to be decided by the court *a quo* was the damages the claimant would have been entitled to, had his claim against the RAF been properly prosecuted. For that purpose, the claimant's claim was actuarially valued as at 1 December 2015. The court *a quo* substantially accepted the claimant's quantification of his damages but reduced it by 43,69 % because of a supposed delay of about seven years by the claimant in suing LRI. This effectively resulted in a valuation date of September 2009. The court of first instance, in awarding compensation to the claimant, deducted from the reduced sum the actual settlement, grossed up to its September 2009 value, and awarded the claimant the difference.

On appeal, DFO and LRI contended that the claimant's claim should have been valued at the date of settlement (1999) or at the date of a notional trial against the RAF, and that for this reason, his claim should have been dismissed.

At the outset and having regard to the circumstances of the matter, the court observed that the underlying issues for determination were (i) applicable law; (ii) the permissible evidence; and (iii) the time-value of money.

Having considered the applicable issues at length, the SCA summarised its findings as follows (paragraph 88 of the judgement):

"…[W]*here an attorney's negligence results in the loss by a client of a claim which, but for such negligence, would have been contested, the court trying the claim against the attorney must assess the amount the client would probably have recovered at the time of the notional trial against the original debtor. Where the original claim is one for personal injuries, the evidence available and the law applicable at the notional trial date would determine*

the recoverable amount. The nominal amount in rands which the client would have recovered against the original debtor represents the client's capital damages against the negligent attorney. If justice requires that the client be compensated for the decrease in the buying power of money in the period between the notional trial date and the date of demand or summons against the attorney, the remedy lies in s 2A(5) of the Interest Act. If s 2A(5) were invoked, the court would not necessarily apply the prescribed rate but might choose instead to adopt a rate which would neutralise the effect of inflation. A similar approach applies where, as in the present case, a second attorney has allowed the claim against the first attorney to prescribe."

This judgment has far-reaching implications for attorneys in general and for practitioners specialising in the pursuit of professional indemnity claims, in particular, following the mishandling of personal injury matters.

The court closed by sounding the warning bells and remarked that the circumstances of this matter were exceptional and that this case should not be used as a licence by claimants in future cases to approach matters as the plaintiff did. The writers hold a different view, with respect. The circumstances of this matter are not unique at all but are quite prevalent. Invariably, in trying to accommodate the claimant in this matter, the court has, effectively, redefined the law in terms of assessment of contractual damages arising from personal injury claims.

Attorneys, you are forewarned and it definitively cannot be business as usual.

*This article was first published in the Hogan Lovells Insurance Newsflash on 19 April 2018 https://www.hoganlovells.com/en/publications/drake-a-redefining-judgment-on-breach-of-mandate-and-contractual-damages (accessed on 22 June 2018)

'HIT AND RUN' RAF CLAIMS: IS THE TWO YEAR PRESCRIPTION PERIOD CONSTITUTIONAL?

The February 2017 edition of the *Bulletin* included an article by Jonathan Kaiser analysing some conflicting decisions in respect of the prescription of RAF claims. RAF related claims continue to make up the largest claim type both in terms of the number and the value of claims notified to the AIIF. An analysis of the claims notified indicates that a large number arise from circumstances where the RAF has relied on the two-year prescription period in claims arising out of circumstances where neither the driver nor the owner of the vehicle is identified (so called 'hit and run' cases). We encourage practitioners to challenge the two-year prescription period raised by the RAF in this respect and to report such matters to the AIIF as soon as possible so that we can, where necessary and appropriate, assist the practitioners with such a challenge.

In these matters, the RAF relies on Regulation 2(1)(b) of the regulations promulgated under the Road Accident Fund Act 56 of 1996. Regulation 2 (1) (b) provides that:

"A right to claim compensation from the Fund under section 17(1)(b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity if neither the owner nor the driver thereof has been established, shall become prescribed upon the expiry of a period of two years from the date upon which the cause of action arose, unless a claim has been lodged in terms of paragraph (a)"

Regulation 2(2) prescribes a two-year prescription period irrespective of any legal disability to which the claimant concerned may be subject.

The AIIF's contention is this regard is that:

(i) Regulation 2(1)(b) read with Regulation 2(2), in imposing the two-year prescription period, unfairly discriminates between plaintiffs with legal disability injured in accidents where neither the driver nor the owner is identified as opposed to those in claims where the driver and/or the owner is identified;

(ii) In cases where the driver or the owner is identified, in a claim for compensation in terms of section 23(1) of the RAF Act, prescription will not run against a claimant with some or other legal disability;

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(iii) The distinction between the two classes of claimant may be arbitrary and injudicious;
(iv) This discrimination is unconstitutional and infringes the rights of the claimants concerned to equality as enshrined on section 9 of the Constitution;
(v) The regulations also infringe on the rights of the claimants concerned to approach a court of law as enshrined in section 34 of the Constitution;
(vi) The powers of the Minister of Transport in terms of section 17(1)(b) and section 26 of the RAF Act to make regulations do not expressly provide the power to impose prescriptive periods where the owner or the driver is not identified;
(vii) Section 16 of the Prescription Act 68 of 1969 provides that the provisions of that Act shall apply to all debts, unless ousted by the provisions of an Act of Parliament which is inconsistent therewith and only to the extent of such inconsistency. The offending Regulations do not have the status of an Act of Parliament and thus do not meet the requirements of the exception in section 16 of the Prescription Act; and
(viii) The offending Regulations may be *ultra vires* the Minister's powers in terms of the RAF Act.

We have studied a number of judgements where the courts have considered the prescription issue, including:

- ***Moloi and Others v RAF*** 2001 (3) SA 546 (C)
- ***Geldenhuys & Joubert v Van Wyk and Others: Van Wyk v Geldenhuys & Joubert & Another*** 2005 (2) SA 512 (SCA)
- ***Engelbrecht v RAF*** 2007 (6) SA 96 (CC)

The article by Jonathan Kaiser analyses the relevant cases in-depth.

It is important that practitioners notify us of appropriate cases as soon as possible. In this way, the AIIF will be in a position to timeously assist practitioners with the drafting of a replication to the special plea of prescription raised by the RAF on the basis of the offending Regulations.

This is a matter that has important implications for all stakeholders, including the claimants concerned, their attorneys and the AIIF. We look to the profession to assist us in curtailing the resultant hardship faced by the claimants who have been deprived of their rights of action by the RAF in raising prescription in these matters.

PROFESSIONAL INDEMNITY CLAIMS AGAINST ATTORNEYS: DO NOT CITE THE AIIF

In bringing a professional indemnity claim against an attorney the cause of action is usually framed in contract in that the attorney concerned is alleged to have breached a material term of the mandate granted by the plaintiff, resulting in the latter suffering a loss. The parties to the agreement (mandate) will be the plaintiff and the attorney concerned. The plaintiff will contend that as a result of such breach, damages have been suffered and the attorney is then called upon to compensate the plaintiff for such damages allegedly suffered. In some cases the claim is framed in delict in the alternative. It thus seems clear that the plaintiff's claim, whether framed in contract or delict, is against the practitioner/firm concerned who/which should be cited as a defendant in the matter. However, some attorneys acting for plaintiffs in professional indemnity claims appear not to understand the applicable legal principles.

In recent times, there have been an increasing number of claims where the AIIF as an entity is cited as a defendant in the professional indemnity claims brought against practitioners though, in all the cases concerned, no cause of action is made out against the company. In many of these cases the prayer in the papers does not indicate against which of the parties (the AIIF or the firm being sued) damages are claimed.

Practitioners acting for plaintiffs should ask themselves: is there any basis in law in terms of which it can be alleged that the AIIF as entity, with no *nexus* (legal or otherwise) to the plaintiff, is liable to the latter for the alleged damages suffered? On what basis can the action be instituted against the AIIF when there is no allegation that the entity (by act or omission) caused the damages allegedly suffered by the plaintiff?

GENERAL MATTERS continued...

One of the considerations practitioners need to apply their minds to in taking an instruction to act in any litigation on behalf of a plaintiff is who the parties to the litigation are and what the cause of action is. When suing a legal practitioner for an alleged breach of contract, the action will be against the legal practitioner concerned. The AIIF is not a party to that contract (mandate) and thus cannot, in law, be a defendant in any action brought against the practitioner. The AIIF cannot breach a contract to which it was not a party and thus had no obligations.

The contractual relationship (mandate) between the client and the attorney must be distinguished from that between the AIIF and insured attorneys. The two contractual relationships are separate and independent of each other.

The AIIF policy regulates the insurance relationship between the company (as insurer) and the legal practitioner against whom the claim is made (as insured). The third party (the plaintiff) is not a party to this insurance relationship and cannot seek to enforce any rights in terms of the AIIF policy. The *res acta inter alios* maxim will apply as the plaintiff is not a party to the insurance relationship. Practitioners acting for plaintiffs should ask themselves whether, in a case involving a claim for damages to a vehicle in an accident (a so-called crash and bash claim), the driver and/or owner of the vehicle alleged to have caused the damage is sued or the insurer? The same would apply in a claim pursued for damages arising out of any breach of contract claim- action would be instituted against the party alleged to be in breach and not against the insurer of the party concerned. Similarly, a professional indemnity claim must be instituted against the legal practitioner concerned and not against the AIIF. The only circumstances where action can be pursued against an insurer directly are those where section 156 of the Insolvency Act 24 of 1936 is applicable.

The AIIF policy does not give any rights to a third party (such as a plaintiff). Clause 39 of the policy makes this clear. The only right which can be claimed in terms of the AIIF policy is the right to indemnity provided thereunder and only an insured practitioner (as defined in the policy) can claim such indemnity.

This matter has been communicated to practitioners on numerous occasions, yet there are those attorneys acting for plaintiffs who persist in citing the AIIF as a party in circumstances where it is clear on the facts and the law that the claim lies against a practitioner and not against the insurance company. Such matters result in a waste of resources in that the AIIF has to expend time and funds in defending the matters. The AIIF will seek punitive costs orders against all plaintiff's attorneys who cite the company as a defendant in circumstances where it should not be cited. Some of the reasons given by the plaintiff's attorneys for citing the AIIF in these cases are:

(i) **A lack of knowledge of what the AIIF is and how it works**- attorneys should not be acting in matters where they have no knowledge of the law applicable and who the defendant(s) should be. It is dangerous to pursue a defendant when you do not know who/what the defendant is, the basis on which it provides indemnity and to whom such indemnity is provided. The attorneys concerned are thus pursuing matters where they do not have the relevant basic knowledge to pursue the mandate from their clients and thus placing themselves and their clients' interests at risk;

(ii) **Rather than pursue a colleague (the attorney alleged to have been negligent) a decision is taken to pursue the insurer as that is the more likely line of recovery** – in addition to there being no basis in law for such causes of action, they smack of underlying collusion and will be reported to the law society having jurisdiction. The AIIF will not entertain claims where cover is not triggered under the policy by an insured against whom a claim is made by reporting a matter and complying with the policy conditions. We have noted those matters where, after the AIIF has disputed or repudiated a claim, the underlying litigation is then not pursued against the law firm allegedly liable to the plaintiff;

(iii) **With claims against the Attorneys Fidelity Fund, that entity is cited** – the Attorneys Fidelity Fund and the AIIF deal with different and separate risks. The attorneys who raise this argument, with respect, fail to understand the basis of the liability of the respective entities and the indemnity each provides. **The Attorneys Fidelity Fund (in terms of section 26 of the Attorneys Act 53 of 1979) indemnifies members of the public for losses arising out of the theft of trust funds. The member of the public will thus be the claimant and pursue the claim against the Attorneys Fidelity Fund directly. The AIIF on the other hand, affords professional indemnity cover under the policy (and in terms of sections 40A and 40B of the Attorneys Act) to an insured legal practitioner as defined in the policy. Only the legal practitioner concerned as the counter party to the insurance relationship can thus bring an application for indemnity in terms of the policy in respect of a claim brought by a third party (the plaintiff) against the practitioner.**

We trust that practitioners will desist from citing the AIIF as a party in litigation where there is no basis in law for doing so. Remember that you also run the risk of an adverse costs order being made against you, your client's claim being delayed (and possibly prescribing) while you pursue the litigation against the AIIF as the incorrect party.