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RISKALERT

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RISK MANAGEMENT COLUMN

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Legal Practitioners Indemnity Insurance Fund NPC
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RISK MANAGEMENT COLUMN

Prescription

Prescription remains the greatest risk facing South African legal practitioners. Prescription related claims make up the highest number and value of claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) each year. In time we will see what the impact of emerging risks such as the increased use artificial intelligence will be.

The *Risk Alert Bulletin* is written by Thomas Harban, General Manager, LPIIF

Prescription mitigation measures have been covered extensively in our previous publications. Practitioners can also refer to the resources on the risk management page of the LPIIF's website (www.lpiif.co.za). The details for registering with the Prescription Alert service are also available on the website (see the Prescription Alert page). The Prescription Alert service is a backup diary service made available by the LPIIF to insured practitioners at no cost to the latter.

In *Stratton Oakmont (Pty) Ltd v Oosthuizen Du Plooy Attorneys* (2002/2019) [2025] ZANWHC 255 (2 December 2025) a firm of attorneys (the defendant/ ODP Attorneys) had been instructed by the plaintiff (Stratton) to institute action to recover monies owed to it (Stratton).

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The cause or action would be an acknowledgement of debt signed by the debtor, alternatively a claim based on unjustified enrichment. The plaintiff contended that in accepting the mandate to act on its behalf, fiduciary obligations were imposed on the defendant which, as such, ought to have exercised the necessary knowledge, skill, care and diligence expected of an average attorney and should have issued summons against the debtor (and served the summons timeously to interrupt prescription). Had the defendant done so, the plaintiff's claim would not have prescribed.

On the question of the defendant's negligence, Reddy J, referring to (and quoting from) some of the well known authorities on the point, made the following remarks:

"[32] …, I shift focus to the conduct of ODP Attorneys as Strattons erstwhile attorneys. To properly appreciate the duties of an attorney a few introductory remarks are necessary. The nature of an attorney's contractual duties encapsulates the implied obligation to devote attention to the client's business with the reasonable care and skill to be expected from a normally competent and careful practitioner. An attorney's liability arises out of contract and his or her exact duty towards his or her client depends on what he or she is employed to do. In the performance of his or her duty or mandate, an attorney holds himself or herself out to his or her clients as possessing the adequate skill, knowledge and learning for the purpose of conducting all business that he or she undertakes. If, therefore, he or she causes loss or damage to his or her client owing to a want of such knowledge as he or she ought to possess, or the want of such care he or she ought to exercise, he or she is guilty of negligence giving rise to an action for damages by his or her client against him or her.

[33] Given the expected reasonable conduct expected of an attorney, professional negligence, is extant where there:

"…is the failure by an attorney to act with the competence reasonably expected of ordinary members of the attorney's profession. An attorney must be meticulous, accountable, … He or she must serve his client faithfully and diligently and must not be guilty of any unnecessary delay. He or she must once he or she has undertaken the client's case, not abandon it without lawful reason or excuse. An attorney who fails to explain his or her precise instructions and lays possum, invites an adverse inference against him or herself. Where a client's claim prescribes under his or her watch, he or she is guilty of a breach of his or her mandate and duty to his or her client by his or her failure to present countervailing evidence that his or her mandate and instructions were circumscribed and not open ended.

…

An attorney is liable for the consequence of gross negligence if he or she displays a lack of reasonable skill and diligence in the performance of his or her duties in matters within his or her field of practise, expertise or knowledge."

[34] What is apparent is that ODP Attorneys has no defence to the claim of negligence given their litigating stance. No amount of legal acrobatics or sophistries can exonerate the negligent conduct of ODP Attorneys. It probably explains ODP Attorneys election not to tender any evidence and place much

store on technical defences." (footnotes omitted)

The defendant was ordered to pay the plaintiff the sum of R 1 928 771.50, interest thereon and the costs of suit on scale C. The defendant did not lead evidence and it is thus unclear why, having accepted the mandate, it did not pursue the plaintiff's claim timeously to interrupt prescription. The court dismissed the defendant's argument that the agreement between the plaintiff and the creditor did not comply with the National Credit Act 34 of 2005, was void and unenforceable. There was also the alternate claim based on unjustified enrichment.

Where a legal practitioner, after assessing a matter, is of the opinion that there are no prospects of success, it is best to advise the client as soon as possible and to record that advice in writing. If the client still wishes to pursue the matter, they can then approach another legal practitioner. It is the service, not the issuing, of the process claiming payment of the debt that interrupts prescription (section 15(1) of the Prescription Act 68 of 1969).

Cele v Road Accident Fund (357/2024) [2026] ZAMPMBHC 2 (21 January 2026) is another recent case dealing with prescription. The plaintiff was injured in a collision between two vehicles on 16 July 2017. The plaintiff lodged his claim directly with the Road Accident Fund (RAF) on 21 July 2017. The RAF did not finalise the claim and failed to inform the plaintiff that his claim would prescribe. The plaintiff terminated the RAF's mandate on 24 January 2022 and instructed attorneys to act on his behalf. On 25 January 2022, the plaintiff's attorneys served a notice of termination of the RAF's mandate and notice of appointment as attorneys of record. Summons was issued on 31 January 2024 and served on 24 January 2024.

The parties agreed that the court only deal with a special plea of prescription raised by the RAF. The special plea contended that the:

- plaintiff was required, in terms of section 23(3) of the Road Accident Fund Act 56 of 1996 (RAF Act) issue and serve summons on the RAF within five years from the date on which the cause of action arose;
- five-year period had lapsed on 15 July 2022; and
- plaintiff's claim had prescribed as summons had not been issued and served within the five-year period.

The plaintiff replicated to the special plea, admitting that he:

- was unrepresented when he lodged a claim and appointed the RAF to act on his behalf;
- could not be expected to issue summons in the period that he was represented by the RAF. The RAF could not issue summons against itself; and
- could only reasonably have been expected to issue summons against the RAF on 24 January 2022 when he terminated the RAF's mandate and appointed his attorneys of record.

In argument, the plaintiff relied on *Lottering v Chief Executive Officer of the Road Accident Fund N.O and Another* (1541/2018) [2021] ZANCHC 36 (13 August 2021), *Ralph v Road Accident Fund* (2014/03112) [2016] ZAGPJHC 94 (5 May 2016) and *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC). The point in the *Lottering* and *Ralph* cases is that "...where the RAF rep-

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resents to a claimant that it will assist in settling a claim without external legal advice, a greater duty of care rests on the RAF to take all reasonable steps to prevent claims prescribing in its hands – which steps would include responding to the claimant's enquiries, bringing the matter to finality, and informing the claimant about the rejection or prescription of the claim. In the absence of evidence by the RAF of the reasonable steps taken to contact the plaintiff or to properly process the claim, it would be unjust for the RAF to benefit from inaction on its part." (*Lottering* at paragraph 25).

In response, the RAF's argument was based on:

- section 23(3) of the RAF Act;
- *Van Zyl N.O. v Road Accident Fund* 2022 (3) SA 45 (CC); and
- *Mdeyide.*

The court:

- agreed with the RAF's contention that section 12(3) of the Prescription Act did not apply in this matter;
- gathered (at paragraph 16) that the RAF did not dispute that:

(i) it "assumed the plaintiff's legal representation before the plaintiff's current attorneys came on record";

(ii) it did not process the claim until it prescribed; and

(iii) the plaintiff terminated its mandate because it failed to process the claim.

In finding against the RAF (referred to in the judgment as 'the Fund'), Ngwenya AJ found that:

"[17] It is true that, through its internal claims system, the Fund acted as the Plaintiff's legal representative. Accordingly, it had a duty to ensure that the Plaintiff's claim was properly dealt with. I find that the Fund did not handle the Plaintiff's case with care.

[18] The Fund's argument that the mandate was terminated five months before expiry of the 5 years, and that it prescribed in the hands of the Plaintiff's current attorney, may seem valid at face value. However, I find that the Fund should not benefit from this, as stated in the cases referred to by the Plaintiff. Those cases do not address the situation in which the mandate is terminated before the prescription takes effect. Those cases deal with matters where prescription has already taken place. Therefore, the question in this matter is slightly different in that Plaintiff's attorneys came on record 5 months prior to the prescription. The question is: should they be blamed for not issuing summons within the 5-month period?

[19] I find that they should not be blamed, as the Plaintiff should have the full benefit of the 5-year period afforded to it by the statute. In this instance, the Fund wasted 4 years and 7 months, and no explanation has been offered for this. It would be unfair to expect the Plaintiff and the attorneys to work on the summons hastily within a shorter period, when the statute affords the Plaintiff 5 years to do so.

[20] In the premises, I find that the matter has not prescribed,…."

The RAF's special plea of prescription was thus dismissed with costs.

It will be interesting to see whether the *Cele* judgment will be taken on appeal and, if so, what the position of a court on appeal will be on the issues raised. Of particular interest is the view expressed

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in the judgment that a direct claimant should have the benefit of the full five-year period afforded by the RAF Act. Another point is clarification of what the RAF's obligations are towards direct claimants, and the nature of the relationship between that entity and such claimants.

Still on the prescription point, litigation against organs of state is also risky. The giving of timeous and adequate notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State (the Act) is a particular concern as many practitioners get it wrong. Which entities/ organs of state enjoy the protection of that section is not always straight forward. *Eskom Holdings SOC Ltd v Botha and Others* (A97/2023) [2024] ZAFSHC 204 (3 July 2024) was an appeal to the full-bench of the Free State High Court where Eskom contended that it enjoyed the notice protection afforded by section 3 of the Act. That appeal was dismissed with costs. Eskom has now approached the SCA. The SCA will hear the matter on 4 March 2026. The summary of the matter on the SCA Bulletin reads as follows:

"Eskom Holding SOC Ltd v Louis Johannes Botha, Hendrik Francois Naude, Wesdan Boerderye (Pty) LTD, Goueveld Boerdery (Pty) Ltd, Christoffel Petrus Scheepers (1332/2024)

Law of Contract – Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002(the Act) – interpretation whether the appellant falls within the ambit of s 1(1)(c) and/or s 1(1)(g) of the Act – whether the appellant is entitled to a notice in terms of s 3(1) of the Act."

Upcoming cases

The Supreme Court of Appeal (SCA) and the Constitutional Court (CC), respectively, will hear several matters that are important from a liability and risk management perspective.

Some of the cases to look out for in the coming weeks are (in the case of the SCA, the summaries are copied from the Bulletin issued by that court):

16 February 2026

The SCA will hear *Discovery Health (Pty) Ltd v Road Accident Fund and Chief Executive Officer of the Road Accident Fund: Collins Phutjhane Letsoalo.*

"Law of Delict – Law of Civil Procedure – Road Accident Fund Act 56 of 1996 – *res inter alios acta* principle – subrogation principle – whether the judgment dated [26 October 2022] by Judge Mbongwe (Mbongwe judgment) is *res judicata* – whether the Mbongwe judgment is correct – whether the RAF's new justification in the second and third directives are bad in law – whether the majority of the full court's approach to the *res inter alios acta* principle was mistake – whether the principle of subrogation applies to claims submitted against the RAF in the context of medical schemes and their payment of past medical expenses – whether the majority erred in dismissing the application on the basis that the second and third directives were not declared invalid by the Mbongwe judgment and are therefore not *res judicata* – whether the majority correctly found that the appellant had not made out a case for an interdict against the RAF for implementing subsequent directives – whether the majority correctly found that the appellant did not make out a case of unlawfulness of the second and third directives – whether the majority correctly found that the principles of res inter alios acta and subrogation ought not to apply to the first respondent and medical schemes – whether a personal cost issue can be granted against the second respondent – whether an order for the incarceration of the second respondent can be granted – whether the court *a quo* correctly held that the application to strike out raised by the second respondent, was justified and that the respondents are entitled to their costs in this regard."

On 16 February 2026, The SCA will also hear *The Road Accident Fund v Adam Mudawo, Wenile Simon Ndlovu, Bruce Mthokosizi Sibanda and Oyetunde Oneniyi Areo*. These cases relate to the rights of foreign nations to claim from the RAF.

"Constitutional Law – Road Accident Fund Act 56 of 1996 – Immigration Act 13 of 2002 – special leave to appeal – s 27 of the Constitution –interpretation – RAF Management Directive dated 21 June 2022 – injured foreigner claimants proof of identity – s 17(1) Road Accident Fund Act – the core issues on appeal are the proper interpretation of the application of s 4(1)(a) of the RAF Act and the Fund's powers in terms thereof; the interpretation of s 17(1) of the RAF Act and specifically the contextual interpretation of the phase 'any person'; the interpretation of the RAF Act read together with the Immigration Act 13 of 2002 – whether the RAF Act caters for and entitles illegal foreigners to the same benefit to which lawful citizens and permanent residents are entitled – whether the management directive and the RAF1 Form violate the rights promised in ss 10, 12, 27, 33 and 34 of the Constitution as far as illegal foreigners are concerned – whether the court *a quo* was correct in reviewing and setting aside the Fund's Management Directive, para 6.1 and 12.1, to the extent that it requires as part of the substantial compliance documents for a valid claim, proof of identity and documentary proof that the claimant was lawfully in the Republic of South Africa when the accident occurred – whether a foreign claimant must provide copies of his/her passport which may only be certified by the South African Police Service."

and

The Road Accident Fund v Lyton A, Takawira T, Gudza N, Lefatso GM, Chikwana T, Malefane L, Musekiwe I, Chitango B, Mufundisi T, Oladipupo OF, Hastings R, Oluwadare JA, Sucha C, The Sheriff Pretoria East, The Sheriff Centurion East (1468/2024)

"Law of Delict – Road Accident Fund Act 56 of 1996 – Immigration Act 13 of 2002 – whether the court a quo was correct in determining that the appellant did not place the causa in dispute – whether the court a quo was obliged to follow the decision of the full court in the *Mudawo* matter pertaining to the fact that the Immigration Act was potentially applicable to claims by the respondents against the appellant – whether the court *a quo* was correct in determining that substantial justice did not require the stay of the court orders and writ of execution – whether the court a quo exercised its discretion judicially."

17 February 2026

The Road Accident Fund, Chairperson of the Board, Road Accident Fund and Chief Executive Officer v Legal Practitioner's Indemnity Insurance Fund, NPC, We Emergency Response Team (Pty) Ltd, Tsholofelo Tlhajwang obo mi-

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nor, Rebecca Masabata Mohapi, Chrisjan Tolo, Johanna Susanna Visagie, Lucky Dumisani Sebatlelo, A Wolmarans Incorporated, Loubser Van Wyk Attorneys, Abongile Dumile Attorneys Incorporated, The Minister of Transport, The Legal Practice Council and Pretoria Attorneys Association

"Administrative Law – Promotion of Administrative Justice Act 3 of 2000 – Road Accident Fund Act 56 of 1996 – whether the court *a quo* erred in determining that the RAF1 form constituted an administrative action under the Promotion of Administrative Justice Act 3 of 2000 – whether the court a quo erred in finding that the Minister of Transport adopted the RAF1 form solely to resolve a dispute between the Minister and the Road Accident Fund regarding the authority to publish the form – whether the court a quo incorrectly found that the Minister had failed to observe her obligations under s 7(2) of the Constitution and whether this conclusion was contrary to the evidence and legal standards – whether the court *a quo's* reliance on principles from *Road Accident Fund v Busuku* was flawed, particularly in applying the principle of sufficiency to the RAF1 form's contents – whether the court *a quo* erred in in finding that the RAF's public consultation processes had no impact on the Minister's decision to conduct further consultations. Additionally, whether the court a quo incorrectly concluded that the publication of the Board Notice constituted making regulations and unlawfully encroached on the Minister's powers under s 24 of the Road Accident Fund Act – whether the court *a quo's* conclusion that the publication of the Board Notice fell outside the RAF's remit was incorrect – whether such directive could and should be reviewed and set aside in terms of PAJA."

On 17 February 2026, the CC will hear *Grancy Property Limited and Another v Dines Chandra Manilal Gihwala and Others*. That is an appeal against the SCA's judgment in *Grancy Property Limited and Another v Dines Chandra Manilal Gihwala and Others* 2025 (2) SA 76 (SCA).

23 February 2026

Johan Nicolaas Bouwer v The South African Legal Practice Council (1050/2024) "Law of Civil Procedure – Legal Practice Act 28 of 2014 – whether sufficient facts were placed before the court *a quo* to sustain the finding that the legal practitioner had misconducted himself, thus warranting an order suspending him from practicing as a legal practitioner for a period of 18 months – whether the respondent is wrongly before the court as all the resolutions and steps taken against the appellant were taken by the Gauteng Provincial Council – whether the Gauteng Provincial Council was empowered to bring a s 43 application as there was no theft of trust money – whether the relief sought in Part A for the appointment of a *curator bonis* to conduct an investigative purpose could have been handled by the disciplinary committee in terms of s 37(2)(a) of the LPA – whether there was a need to suspend the appellant from practice as the incident occurred some ten years ago – whether the court *a quo* erred in issuing a final order instead of the interim order sought."

24 February 2026

Road Accident Fund v Shireen Lynn Stoffels and Lizelle Herold obo Leeam Spalding (1182/2024)

"Law of Delict – Road Accident Fund – damages – declaratory order for payment of interest – Public Finance Management Act 1 of 1999 – Road Accident Fund Act 56 of 1996 – Section 2 of the Prescribed Rate of Interest Act 55 of 1975 (PRIA) – whether the Respondents are entitled to a declaratory order for payment of interest at an unspecified rate of interest in terms of s 2 of PRIA – whether the claims for interest are res judicata – whether the appellant can legally resist its liability to pay interest on judgment

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debts and costs awarded in favour of the respondents."

and **Road Accident Fund v Sheriff of the High Court (Pretoria East) & Others (268/2025)**

"Law of Civil Procedure – Declaratory Order – whether the appellant is entitled to a declaratory order against the Road Accident Fund for the payment of interest not provided for in court orders referred to in the writs execution – whether the appellant is entitled to a declaratory order that the writs of execution should be supported by calculation under oath of how such interest is calculated, with specific reference to the court order justifying the claim – whether the order of the court *a quo* should be overturned."

2 March 2026

Gorr Assist (Pty) Ltd v Bayport Securitisation (RF) Ltd (Successor in the title to Bayport Financial Services 2010 (Pty) Ltd) (788/2024)

"Law of Civil Procedure – special leave – Prescription – Condonation – s 165 of the Constitution – whether the applicant showed that there are special circumstances that warrants the granting of special leave to appeal – whether the court ruling dated 21 February 2024 is in conflict with s 165 of the Constitution and the principle of res judicata – whether the court of quo erred in dismissing the appeal as the appellant had no prospect of success – whether the court *a quo* erred in dismissing the appeal and upholding the special plea of prescription – whether the court erred in dismissing the condonation for the appeal."

Interesting judgments delivered recently

Limpopo Provincial South African Legal Practice Council v Moeng and Another (10977/2024) [2025] ZALMPPHC 240 (5 December 2025) – an attorney was struck of the roll. He had forged a court order and submitted a fake LPC letter of good standing to the Legal Aid Board of South Africa.

Road Accident Fund & Others v Mautla and Others (414/2024) [2025] ZASCA 200 (19 December 2025) – the SCA granted an application for reconsideration in the RAF's favour. The RAF was granted leave to appeal to the SCA. This matter concerns Board Notice 58 of 2021 and the RAF 1 form issued with it.

Magoda v Special Investigating Unit (WC01/2021) [2026] ZAST 2 (12 January 2026) – the applicant relied on legal advice that turned out to be poor. Finding that she had been ill-advised, the tribunal found that her reliance on her attorneys could not be interpreted as her being in wilful default.

Du Plessis and Others v Kruger and Partners Inc. and Another (A29/2024; 4186/2021) [2026] ZAMPMBHC 1 (13 January 2026) – Funds were deposited into a firm's trust account in anticipation of the conclusion of transactions. The firm transferred the funds without the consent of the depositor. The court found that the firm had breached its fiduciary duty, failed to uphold standard of *uberrima fides* expected of legal practitioners and that its conduct amounted to gross negligence. The court also considered the firm's obligations in terms of the Financial Intelligence Centre Act 38 of 2001 and the Legal Practice Act 28 of 2014.