A joint publication of the Attorneys Fidelity Fund and the Attorneys Insurance Indemnity Fund NPC
(A Non Profit Company, Registration No. 93/03588/08)

RISKALERT

AUGUST 2013 NO 4/2013

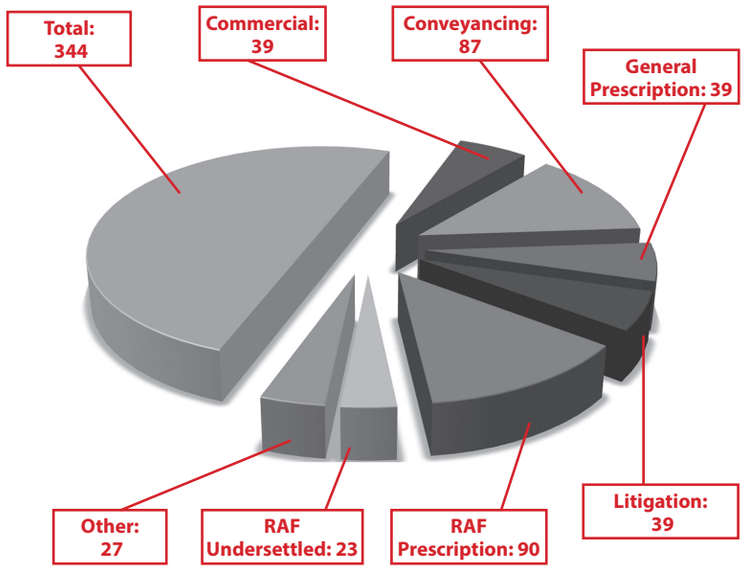
IN THIS EDITION

RISK MANAGER'S COLUMN

Ann Bertelsmann, Risk Manager

Under the auspices of the Legal Education and Development arm of the Law Society of South Africa (LEAD), the Attorneys Insurance Indemnity Fund (AIIF) and the Attorneys Fidelity Fund (AFF) have been facilitating half-day seminars on *Effective Risk Management* in various parts of the country. There has been such a positive response to these **free seminars**, that LEAD is considering arranging more of the same later this year. Please look out for the dates for your area and sign up!

CLAIMS TRENDS (as at 31 March 2013)



NUMBER OF CLAIMS BY CLAIM TYPE FOR THE 2012 INSURANCE YEAR AS AT 31 MARCH 2013 (Q1, 2 AND 3)

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RISK MANAGER'S COLUMN continued...

As will be seen from the Graph, on page 1 conveyancing notification numbers represent an unacceptably large slice of the claims pie. Claims arising out of the ***unauthorised or premature payment of trust funds*** continue to be a major problem and **36 (41%)** of the **87** conveyancing claims (valued at **R8.6 million)** fall into this category. This represents approximately **66%** of the value of all *conveyancing* matters for the period.

Practitioners continue to pay out money held in trust without the express permission of the depositor or without there being adequate security in place. These payments are usually made as a result of either –

- fraud on the part of the payee ;*or*
- fraud on the part of the person instructing the conveyancer to pay a third party; *or*
- the mistaken belief that a conveyancer only has a duty of care towards his own client and should only take instructions regarding payment from his own client – regardless of who the depositor is, or the depositor's instructions; *or*
- failure to advise a depositor of the dangers of paying money over without adequate security; *or*
- failure to ensure that adequate security is in place in accordance with the depositor's instructions; *or*
- payment instructions from a person who does not have the necessary authority to act on behalf of an entity or other party; *or*
- payment instructions of only one of the spouses/ co-owners of a property; *or*
- failure to note that certain suspensive conditions in an agreement have not been fulfilled; *or*
- failure to note the interests of another party (eg the South African Revenue Service).

Please take note that the deductibles for claims arising out of conveyancing matters **have now been increased in line with those for prescribed RAF/ MVA matters.** (*see the policy on our website or in the July edition of the Bulletin 3/2013).*

General Prescription claims are still a cause for concern, with an increase of 45% in the number of claims year on year.

(Please read the *Risk Alert Bulletin* 4/2012 and 5/2012 (August and November) in which you will find a Prescription Table and tips on avoiding prescription. Back copies of the *Bulletin* can be found on our website www.aiif.co.za.)

In the first nine months of the 2012 year, ***RAF/ MVA prescriptions*** are ahead of all the other claim types including *conveyancing* both in number (**90**) and total incurred value (**R13.1 million).**

Claims arising out of conveyancing and prescribed RAF/ MVA matters represent the bulk of the total number and value of claims for the 2012 year so far.

RAF MATTERS

RAF 4 PRESCRIPTION PERIOD

The appeal against Satchwell J's judgment on this issue in the matter of ***van Zyl MM v Road Accident Fund,*** **case number 34299/2009, SGHC** is to be heard in September 2013. (See Letters to the Editor on page 8).

RECENT CASE LAW

Restitutio in integrum
Minors may go back to the Road Accident Fund for fair compensation if it has under-settled their claims

1. *Road Accident Fund v Myhill NO* (505/2012) [2013] ZASCA 73 (29 May 2013)

The Supreme Court of Appeal (SCA) dismissed with costs, an appeal by the Road Accident Fund (RAF) against the judgment of Strydom AJ in the South Gauteng High Court. (**Please see the discussion of the High Court judgment in the February *Bulletin* 1/2013).**

FACTS IN BRIEF:

The mother, in her capacity as the guardian of two minors (Philippine and Lufuno Swalibe) and represented by an attorney, settled her two minor children's claims against the RAF. Subsequently the respondent, a practising advocate, was appointed as *curator ad litem* to represent these minors in civil proceedings against the RAF. In this action, the respondent sought an order setting aside the settlements and claiming substantial damages for the minors arising out of their injuries.

(Pre-trial the parties had agreed that the issue of liability should be determined at the outset as a separate issue).

In the court *a quo*, the respondent had relied on the following alternative causes of action in seeking to set aside the settlement agreements:

i.The agreements were void or voidable due to mistake.

ii.The agreements were prejudicial to the interests of the minors.

iii.In making the offers, the appellant had breached its statutory duty to investigate the nature, extent and consequences of the injuries suffered by the minors and to offer them reasonable compensation.

The court *a quo* found in favour of the respondent on the second cause of action and this finding was the only issue to be considered on appeal.

JUDGMENT:

The SCA confirmed that a contract may be set aside under the *restitutio in integrum* if it is shown that:

- it was **prejudicial** to the minor at the time it was concluded and
- the prejudice suffered was **serious or substantial.**

(Although this is established law, it seems that it has recently been debated whether or not legal certainty should trump this principle).

The Court acknowledged that, in considering the issue of prejudice, it had to guard against being wise after the event and taking into account factors unknown at the time the claims were settled.

In this regard, the Court examined the history of the RAF's handling of the claim, noting that the RAF had assessed both minors' damages at R10 000 each and had authorised the claims handler to start negotiating at R 8 000 for Philippine and R 7 000 for Lufuno. However, as the merits of the claim had been assessed on the basis that the mother had been partially to blame for the collision, they applied a set-off and the minors' damages were further reduced by 30% because of the mother's alleged contributory negligence.

Philippine's claim was settled for R5 600 (R 8000 less a 30% apportionment of R2 400) and Lufuno's claim for R4 900 (R7 000 less a 30% apportionment of R2 100).

The Court took cognisance of the fact that, at the time the claims were settled, the statutory medical report and the minors' hospital records were the only available sources of medical information regarding

RAF MATTERS continued...

the nature, severity and *sequelae* of the minors' injuries. The Court noted that these documents indicated that the minors had both sustained head injuries that were "*by no means insubstantial and had required hospitalization of some duration*".

Epilepsy had not been positively diagnosed at the time, but the Court opined that the following factors should reasonably have been taken into account by the RAF in their assessment:

- After the minors had been released from hospital and before settlement with the RAF, the mother had alleged that both minors had suffered seizures.
- Lufuno had suffered an infarct in the brain, putting her at higher risk of developing post-traumatic epilepsy.
- Post-traumatic epilepsy is a complication wholly consistent with the minors' head injuries.

Taking these factors into account, the Court found:

- That the assessment of general damages in respect of both minors was wholly inadequate.
- Allowance should have been made for possible future medical expenses, which could easily have been covered by a certificate in terms of s 17(4)*(a)* of the RAF Act 56 of 1996.
- (After having expressed its difficulty with the 30% apportionment of blame for the collision against the mother, based on her version of events) that the passage from Voet 16:2:8, relied upon by the RAF, had been based on an acceptance that no prejudice would be caused to the minors if set-off was to operate. It held that "*the time has now come for this court to put the matter beyond doubt and to rule that a debtor liable to a minor child, when sued by the child's custodian parent, may not set off against its liability to the child any amount that it may personally be owed by the custodian parent".*

The Court acknowledged the following important potential benefits of settling a claim for less than anticipated: the uncertainty of litigation, the impossibility of predicting the outcome of claims for bodily injuries, the limitation of litigation costs and early payment of damages.

"Of course the mere fact that the claims were settled in amounts less than what they were worth does not in itself lead to the inexorable conclusion that the settlement agreements should be rescinded. Weighed in the scale must also be the inherent advantages of compromising a claim. The old adage that a bird in the hand is worth two in the bush is all too frequently true in respect of litigation which is, by its very nature, fraught with unforeseen difficulties. All too often the anticipated strength of a case wilts during the progression of a trial. Not only do witnesses both err and make unmerited concessions, but the assessment of general damages and future losses are matters of discretion upon which opinions may validly differ. All in all, the prediction of the outcome of a claim for damages for bodily injuries is not a matter for the fainthearted and is incapable of accurate determination. A value judgment has to be made and, bearing in mind that a settlement not only does away with the inherent uncertainties of litigation but also limits the escalation of costs and brings about an immediate payment rather than one forthcoming at some future, uncertain stage, it is often best to settle even if the amount offered is less than what is hoped would be finally awarded".

However, despite any possible benefits that the early settlement of the minors' claims may have had, the Court found that the "*relatively trifling amounts*" for which the minors' claims had been settled were unrealistic given the nature and severity of their injuries and the very real prospect that they could experience epilepsy in the future. It found, therefore, that the settlements were **substantially prejudicial to the minors** and could not be allowed to stand. The judgment of the Court *a quo* was accordingly upheld.

NOTE:

It appears from this judgment that an agreement which is shown to be substantially prejudicial to a

RAF MATTERS continued...

minor at the time it was concluded – based on the information available at the time – may be set aside despite the parent or guardian who enters into such an agreement on the minor's behalf having been represented by an attorney.

2. *Motswai v Road Accident Fund, South Gauteng High Court* (case 2010/17220, 02/05/2013)

This is the judgment of Satchwell J, on the issue of costs only.

(Please see the May *Bulletin* (2/2013) for a discussion of the earlier judgment, which was handed down in December 2012 on all issues except costs. Judgment on the issue of costs and the question of a possible order of costs *de bonis propriis* was postponed for further evidence and argument and was heard on 15 March 2013.)

JURISDICTION OF THE COURT TO CHANGE PARTIES' AGREEMENT ON COSTS

Satchwell J confirmed that there had been an agreement of settlement between the parties which, *inter alia,* had dealt with the issue of costs to be paid to the plaintiff by the defendant.

She pointed out that, in this instance, the Court was not concerned with any substantive contract between the parties and that the award of costs was a matter within the discretion of the Court.

Mindful of the fact that money spent by the defendant was public money, she expressed the view that a court should "*carefully scrutinise costs arrangements between parties where it is clear on the papers that neither legal representative has been alert to ensure cost-effective litigation*".

THE MERITS

Satchwell J dealt in some detail, with the plaintiff's attorney's explanation as to why the incorrect averment (that the plaintiff had suffered a fractured right ankle) appeared in the particulars of claim. (*I discuss this explanation further below on page 6)*

The plaintiff

She discussed and dismissed the plaintiff's arguments as to why this incorrect averment was justified. One of these she understood to be that the candidate attorney was responsible for the content of the pleadings and that the principal could not be held responsible for the accuracy thereof.

The defendant

Satchwell J also considered the conduct of the defendant's attorneys and their failure to evaluate the merits at an early stage and stated:

"*It was argued that the claim for loss of income remained alive to the day of trial. There is nothing before me to suggest that anyone cast a professional legal eye over this claim and evaluated the merits of incurring the costs of an occupational therapist, an industrial psychologist, an attorney and an advocate when the claim had reduced to approximately fifteen hundred rand (R 1500) in respect of time off from part time work to obtain physiotherapy*".

She opined that only the radiologist's fees should have been incurred by the defendant, as his report would have made it clear that no further medical reports were required.

THE ORDER

The Court ordered that:

- **The plaintiff's attorneys may not recover fees and disbursements from the defendant.**
- **The defendant's attorneys may only recover their own fees and the radiologist's and counsel's fees from the defendant and must bear the costs of other medical reports *de bonis propriis*.**

What can we, as practitioners, learn from this judgment?

The Court took issue with the patently **incorrect averment in the particulars of claim** that the plaintiff had suffered a fractured right ankle. It seems that the plaintiff had advised the candidate attorney that he had a broken right ankle and that there was some reference to the possibility of fractures to the right ankle and right foot in the medical records. However the records also reflected that, after x-rays had been taken the diagnosis was one of a soft-tissue injury.

RAF MATTERS continued...

In attempting to show the Court that this error was not a deliberate attempt on his part to mislead, the plaintiff's attorney stated that "*probabilities dictate that I did not personally deal with this matter at its inception as it is normally dealt with by the more junior members of my firm.*"

His firm's usual *modus operandi* for dealing with RAF matters was explained. The candidate attorney is responsible for consultations, investigations, perusal of documentation, and preparation of particulars of claim.

"*The procedure followed in our firm when summons is issued is that a candidate attorney or professional assistant would draw the particulars of claim and I would then check the format thereof. I do not refer back to the hospital records as this is too time-consuming. … I signed the particulars of claim after I satisfied myself that the correct format was used.*" The attorney does not take responsibility for the accuracy of pleadings.

Clearly the practice's usual *modus operandi* holds many inherent dangers and the practice opens itself up to *inter alia* the following consequences:

- Claims resulting from prescription of a claim
- Claims resulting from the under-settlement of a claim
- Costs orders against the firm
- Law Society disciplinary proceedings
- Dissatisfied clients

Practitioners are reminded of the findings in the recent judgment of the Free State High Court in *Mlenzana v Goodrick & Franklin Inc* (2012) JOL29026 (FSB) where the Court took issue with the way in which the RAF claim had been dealt with by the practice. One of these issues was the delegation of duties to and absence of **supervision** of the newly admitted attorney who had dealt with the matter.

I also refer practitioners to the article on our website (www.aiif.co.za) entitled "***Risk Management Tips".***

Below are some extracts from the article, which I believe are pertinent in the context of this virtual "textbook"case.

"If I were, off the top of my head, to choose three major causes of claims, I would say they were;

i) Failure to obtain proper instructions from client and manage client's expectations;

ii) Inadequate supervision of staff coupled with a lack of checks and balances to pick up problems; and

iii) Failure to consider the attorney's ethical and other duties to the court, client and third parties."

3.1.2 Facts from the documents

It is the attorney's duty to carefully consider documents relevant to his mandate. Too often we encounter claims where this just does not happen and an essential aspect of the matter is overlooked. .. It could also be the result of the delegation of the matter or aspects thereof to an employee.

1.1.3 Facts that emerge from further investigation

There will of course always be additional facts that emerge as a matter progresses, such as those from documents obtained at discovery, or those obtained from other sources such as medical records.

All new facts need to be considered very carefully as they could seriously affect a client's case or strategy.

6.3 Delegation

- The task delegated must be matched to the delegate's capabilities and capacity.
- Remember that you remain accountable to client in spite of the delegation.

7 Supervision

- Delegation certainly does not remove a

RAF MATTERS continued...

practitioner's responsibility to client. The buck still stops with you! When there is delegation, it is essential that controls are in place to ensure quality service to client. Where appropriate, there must be effective **supervision** of delegates.

Failure to properly supervise staff is unprofessional conduct!

- The LSNP Rule 89.16 states that it is unprofessional or dishonourable or unworthy conduct to fail to adequately supervise staff.
- The KZNLS Rule 14 (vii) states that it is misconduct to carry on practice "at an office which is not under the direct and personal supervision of – (aa) the member, or (bb) a partner of the member, or (cc) a practitioner who is employed by the member."
- The FSLS has a similar rule (17(13) requiring that the practice be continuously under the direct and personal supervision of a practising attorney.

Ineffective supervision can lead to:

- Claims against your practice for professional negligence/breach of mandate;
- Claims against your practice for misappropriation of trust money or fraud;
- Loss of dissatisfied clients;
- Disciplinary action by your professional body…;
- Orders against you for costs *de bonis propriis* (which are excluded from cover in the scheme policy);
- Unhappy, unmotivated staff;
- Lack of teamwork and a stressful working environment;
- Damage to your practice's reputation; and
- Decreased profitability.

CONVEYANCING

The facts of a claim involving an unauthorised payment from trust:

The conveyancer attended to a transfer. The purchase price was R470 000 and the purchaser was given a bond of R550 000. The conveyancer's secretary mistakenly believed that the surplus of R80 000 was due to the seller and paid it over to the latter with the balance of the proceeds of the sale.

TAKE-OUT TIPS:

Conveyancers need to ensure that –

- **their conveyancing secretaries are properly supervised;**
- **there are checks and balances in place to avoid such errors; and**
- **all relevant documents on file are thoroughly scrutinised and calculations checked, before payments are made from trust.**

GENERAL PRESCRIPTION

An extract from a recent claim notification:

"I wish to notify you of a potential claim that may be lodged against our firm by one of our clients, who instructed us to issue summons against the driver of a motor vehicle.

We were instructed to enter into settlement negotiations with the driver's insurers first and if unsuccessful we were to proceed with summons.

The matter was diarised to prescribe on the 14th of June 2013 instead of the 4th of June 2013 and the claim subsequently prescribed while negotiations were taking place."

TAKE-OUT TIPS:

- **Make sure that you have the correct prescription date and record it prominently.**
- **Make sure that you have an effective diary system with the necessary checks and balances.**
- **Do not be lulled into a false sense of security (or "take your eye of the ball") during settlement negotiations with the other side.**

LETTERS TO THE EDITOR

Dear Ann

I note that the RAF is going ahead with the appeal of Satchwell J's RAF 4 van Zyl judgment.

I enquire having regard to the widespread effect an upholding of an appeal may constitute should not any one of the Attorneys Fidelity Fund / Law Society of South Africa (LSSA)/ Indemnity Fund join the proceedings as amici.

With respect to the attorneys involved in the matter, they may not have the resources to deal fully with a matter which has such dire consequences.

I am of the view that the court may not have enough of the profession's views on the matter even though I understand that it has a lot to do with interpretation of the Regulations and Act.

It is well known that the submission of the RAF4 within the lodgement periods is very constraining for a number of reasons.

A claimant for example may be involved in a hit and run and suffer a fracture tibia/fibula. Initially the injury may be doubtful as qualifying as serious – however after about a year, claimant may undergo amputation and due to lack of mobility may not be able to attend an attorney's office or assessment by a doctor.

Another problem for example is that there are so few doctors trained to do the assessments scheduling appointments 6 to 8 months away.

Kind regards

(Name withheld at the attorney's request).

Editor's note: In response to this letter, we have instructed one of our panel attorneys to look into the possibility of joining the action. We are informed that the LSSA is also considering this issue.

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