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# RISKALERT

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Legal Practitioners Indemnity Insurance Fund NPC
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## RISK MANAGEMENT COLUMN

## A NOTE FROM THE EDITOR

Thomas Harban, Editor

Welcome to the first edition of the *Bulletin* in 2019.

Five months have elapsed since many provisions of the Legal Practice Act 28 of 2014 (the Act) came into effect on 1 November 2018. It is hoped that all those affected by the Act (within the profession and the consumers of legal services) have now read this seminal piece of legislation and the corresponding regulations. Some of the changes brought about by the Act are the changes to the names of the Attorneys Fidelity Fund (now the Legal Practitioners' Fidelity Fund (LPFF)) and the Attorneys Insurance Indemnity Fund NPC (now the Legal Practitioners' Indemnity Insurance Fund NPC(LPIIF)).

With the move by *De Rebus* to an electronic format rather than printed form, the *Bulletin* will also only be available in printed format for those readers who opt for the printed version. The publication is available in electronic format on the LPIIF website (https://lpiif.co.za/risk-management-2/risk-management/). Should you prefer to receive a printed version of the *Bulletin*, please inform us and we will add you to our mailing list.

For the benefit of those practitioners who have not had prior interaction with the two entities (the LPFF and the LPIIF), in this and upcoming editions of the *Bulletin*, we will republish some information on the procedure to be followed in lodging a claim against each of the entities. We will also publish a series of articles explaining the indemnity provided by the two entities.

The teams at the respective entities are always available to assist practitioners and members of the public with any queries. We also welcome contributions of articles from readers and suggestions of topics that you may want us to cover.

Please do not hesitate to contact us.

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### Erratum

On page 1 of the December 2018 edition of the *Bulletin*, we erroneously referred to section 94(8) of the Act in the dealing with the consequences of contravening section 84(1) of the Act. The correct reference is section 93 (8) of the Act and not section 94(8) as stated in the article.

We apologise for the error.

# RISK MANAGEMENT COLUMN continued...

## THE NAMES OF THE AIIF AND AFF HAVE CHANGED

The name of the Attorneys Fidelity Fund (the AFF) changed on 1 November 2018 to the Legal Practitioners' Fidelity Fund. Section 53(1) of the Act provides that the Fund will continue to exist under the name the Legal Practitioners' Fidelity Fund (the LPFF).

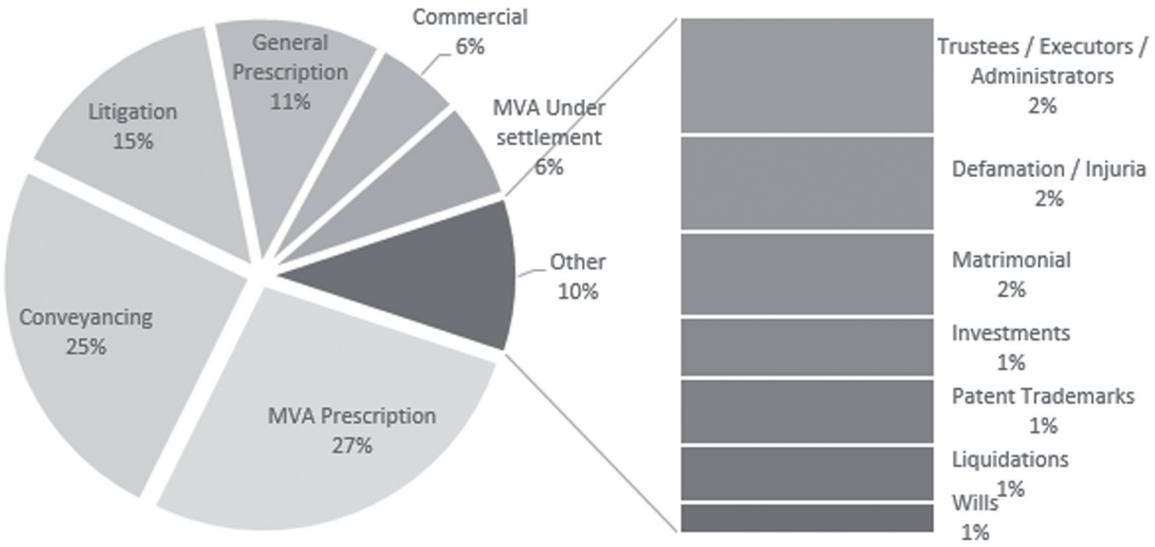
The Attorneys Insurance Indemnity Fund NPC (the AIIF) has also changed its name and is now called the Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF). Historically, the LPIIF provided the primary layer of professional indemnity insurance to firms of practising attorneys in accordance with the provisions of sections 40A and 40B of the Attorneys Act 53 of 1979. Section 77(1) of the Act provides the statutory framework for the continued existence of the company as the vehicle through which professional indemnity insurance is provided for practising attorneys and advocates who practice with Fidelity Fund certificates (FFCs) in terms of section 34 (2) (b) of the Act. Advocates practising with FFCs are a new class of insureds for the LPIIF on the professional indemnity insurance line of business.

It must, however, be noted that the LPIIF will only issue bonds of security to attorneys (not advocates) who are appointed as executors of deceased estates. Section 77(3) of the Act empowers the Board of the Fund to enter into deeds of security to the satisfaction of the Master of the High Court on behalf of an attorney in respect of work done by that attorney as, *inter alia*, the executor of deceased estates. The LPIIF is also the insurance vehicle through which the bonds of security are granted. As the empowering section refers only to attorneys, advocates appointed as executors of deceased estates will not be granted bonds of security by the LPIIF. There are a number of companies in the commercial insurance market which provide bonds of security to practitioners appointed as executors of deceased estates.

Advocates who wish to apply for bonds of security can approach the commercial market for assistance.

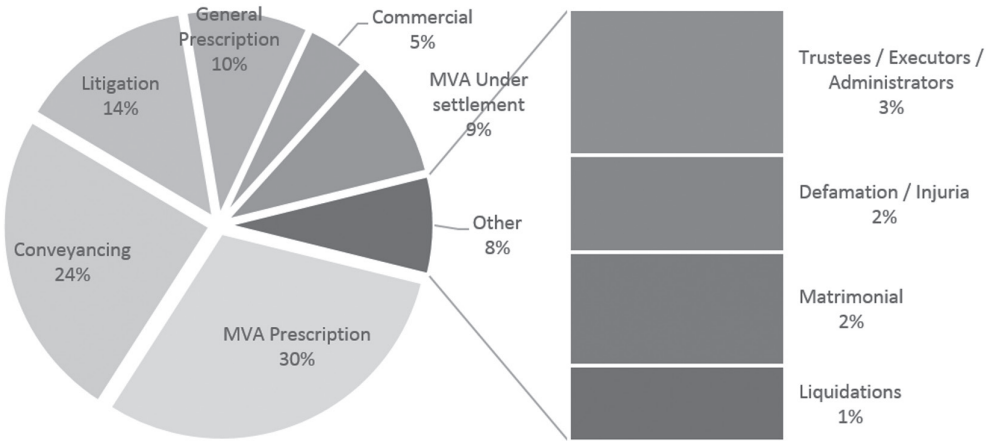
## LPIIF CLAIMS STATISTICS (2011 TO 2017)

### Number of claims notified

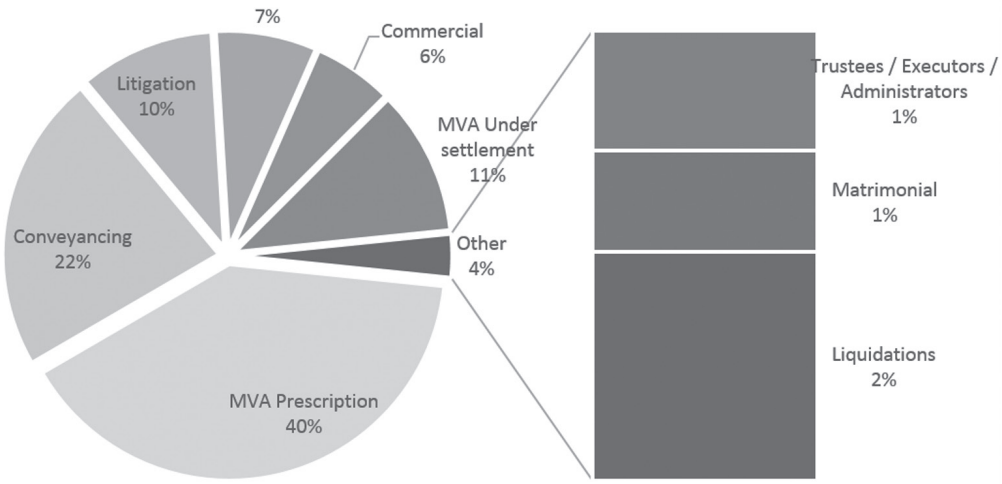


# RISK MANAGEMENT COLUMN continued...

## Breakdown by number of claims paid




## Breakdown by value of claims paid




It will be noted from the statistics above that in the seven year period covered, conveyancing and RAF prescription related claims make up the highest number and value. Some of the underlying problems leading to the high number of conveyancing claims in the period covered are:

- a hangover from the property boom
- the bridging finance phenomenon
- cybercrime targeting conveyancing firms
- a lack of adequate internal controls
- a failure to adequately supervise staff

Over the years we have published extensively on the measures firms can implement to mitigate the risk associated with the prescription of RAF claims. There are a number of documents available on our website (www.lpiif.co.za) to which practitioners can have regard. Practitioners are also urged to register all time barred matters with the Prescription Alert unit and to adhere to the notices and reminders issued by that unit. A 20% loading will be applied to the deductible (excess) payable in the event of a RAF prescription related claim where the matter was not registered with the Prescription Alert unit or where the alerts from that unit have not been complied with.

It must be remembered that the Prescription Alert system is a back-up diary system and that firms must still implement their own reliable internal diary systems.

# RISK MANAGEMENT COLUMN continued...

## WHAT TO DO IN THE EVENT OF A CLAIM OR INTIMATION OF A CLAIM

The points below are also published on our website.

- Refer your client to another practitioner of their choice in a different firm. You cannot assist your client with their claim against you as there will be a conflict of interest.
- You may provide your client with a copy of his/her file, but you must retain at least one complete copy to submit to the LPIIF. It is important to provide the LPIIF with the entire file content: this includes all correspondence, pleadings and all notes made thereon, including file, consultation, telephone, research as well as notes on "post it" stickers (if available).
- Do not admit or deny liability, negotiate, settle a claim or incur any costs or expenses in connection with a claim, without the prior written consent of the LPIIF, as you will be in breach of the LPIIF policy. Your right to indemnity under the LPIIF policy cannot be ceded, assigned or encumbered in some other way for the benefit of a third party.
- On receipt of your notification, the LPIIF will determine whether or not the claim falls within the indemnity afforded under the policy. (Please consult the LPIIF policy regarding the exclusions).
- If the claim is not covered under the LPIIF policy, the claim will be formally rejected.
- If the claim is covered under the LPIIF policy, the claim will be allocated to one of the legal advisors within our team (who are all admitted attorneys).

- The claim will be registered on the system in the appropriate insurance year and the standard first letter, together with additional requirements will be forwarded to you.
- Indemnity is conditional upon the practitioner complying with all the requirements set out in the policy as well as any additional requirements from the legal advisor.
- If an actual claim has been made against your firm (either by letter of demand, summons or application), the legal advisor may request the claimant's attorney to hold over further proceedings to allow the LPIIF to investigate the claim. You may also be requested to file a notice of intention to defend or notice of intention to oppose.
- If the claimant's attorney is not willing to hold over further proceedings, the legal advisor may request you to assist him or her with the filing of further notices and/or pleadings to provide them with more time to investigate the claim.
- You are obliged to co-operate with the LPIIF at all times. A failure to co-operate or provide assistance may lead to the withdrawal of indemnity.
- After a thorough investigation by the claims team, the LPIIF may, after consultation with you, either settle the claim with the claimant or defend the action on your behalf.
- In the event that, after assessing the claim, the decision is that the matter must be defended, a firm on the LPIIF panel will be appointed to conduct your defence.

GENERAL PRACTICE

# THE LEGAL PRACTICE ACT: SOME POINTS FOR THE FINANCIAL SERVICES INDUSTRY TO CONSIDER

In our interaction with representatives of the financial services industry, we have been informed that a significant number of firms (approximately 2000 in total) serve on the panels of the various organisations in the financial services industry. We have also had a request to publish a broad overview of the Legal Practice Act (the Act) for the benefit of this significant block of the consumers of legal services.

There has been a lot of focus on the changes in the financial services industry with the introduction of the Twin Peaks model of regulation and the full implementation of the Solvency Assessment and Management (SAM) regime in 2018. The regulation of the South African legal profession has also undergone a substantial change with the implementation of many provisions of the Act from 1 November 2018. Similarly with the long legislative road travelled by the financial services industry to the implementation of the Twin Peaks and SAM regime, the journey travelled by the legal profession to the full implementation of the Act has taken several years. As with all other industries, financial services require various legal services from time to time (and *vice versa*) and has several touch points with the legal profession. The provisions of the Act also affect lawyers who are not in private practice (including those employed inhouse by corporate entities) and will have to be complied with over and above the regulatory standards applied in the financial services industry. It is thus important that the financial services market is aware of the changes brought about by the Act.

It goes without saying that there are a number of significant changes introduced by the Act. For the first time in South Africa, the office of a Legal Services Ombud will be established when Chapter 5 of the Act comes into effect. (Chapter 5 did not come into effect on 1 November 2018). There are already a number of Ombud offices with jurisdiction over different aspects of the financial services market. The Legal Services Ombud will be a retired judge. Legal practitioners conducting investment practices must register as Financial Service Providers (FSPs) in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act). Compliance with the Financial Intelligence Centre Act 38 of 2001 (the FIC Act) is also compulsory.

Due to space limitations in the *Bulletin*, a comprehensive examination of all the provisions of the Act will not be possible in this article and the focus will thus be on selected matters which, in my opinion, the financial services industry must be aware of. For present purposes, the focus will be on the change in the regulatory structure, the authority to render legal services, the handling of trust money and the draft Code of conduct for legal practitioners (the Code) and how these three topics affect the financial services market in particular. This is not to say that these changes only affect the financial services market.

## The introduction of a single regulatory body for the legal profession

The South African Legal Practice Council (the LPC) is now the single regulatory body exercising jurisdiction over all legal practitioners (and candidate legal practitioners). The LPC regulates both attorneys and advocates. The LPC replaces the four statutory law societies (the law societies of the Cape, KwaZulu Natal, Free State and the Northern Provinces) which regulated the attorneys' profession in the past and the bar councils which regulated the conduct of advocates. Historically, the law societies (in respect of attorneys) and the General Council of the Bar (the GCB) (for advocates) played a dual role as regulators as well as pursuing the professional interests (the so-called trade union function) of their respective members. This has now changed in that the LPC will act only as the regulator of the profession as set out in the LPC and not as a professional interest body. Various structures in the legal profession will now have to form voluntary associations to pursue their various interests as this cannot be done through the LPC. The objects of the LPC (as set out in section 5 of the Act) include:

(a) facilitating the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;

(b) ensuring that fees charged for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice- the application of the section dealing with fees for legal services (section 35) has been postponed. The South African Law Reform Commission (SALRC) must investigate several areas relating to legal fees and report back to the Minister of Justice within two years of the implementation of the Act. In conducting its investigation, the SALRC must consider international best practices, the public interest,

the interests of the legal profession and the use of contingency fee agreements;

(c) promoting and protecting the public interest;

(d) preserving and upholding the independence of the legal profession;

(e) enhancing and maintaining the integrity and status of the legal profession and of appropriate standards of professional conduct of all legal practitioners and candidate legal practitioners; and

(f) upholding and advancing the rule of law, the administration of justice and the Constitution.

## Authority to render legal services and the duties in respect of trust money

Only a legal practitioner admitted and enrolled to practise in terms of the Act may render legal services. Every legal practitioner practising for his or her own account (either as a sole practitioner, partner in a firm or a director in an incorporated practice) must be in possession of a valid Fidelity Fund certificate. The consequences of a failure to comply with this requirement are set out in section 93(8) of the Act. The Fidelity Fund certificate is issued annually to a legal practitioner who has met the prescribed requirements, including the outcome of the annual audit of the trust account of the practice, the payment of the prescribed fee to the LPC and whether or not there is any regulatory action taken against the practitioner concerned. The Act also introduces a new category of legal practitioner, being advocates with Fidelity Fund certificates- this category of advocate will be able to accept instructions directly from clients. Historically, the South African legal profession was split into a dual profession. Attorneys took instructions directly from the public and then, in turn, gave an advocate an instruction (referred to as a 'brief') where required. Advocates were thus referred to as a referral profession. The advocates who elect not to apply for Fidelity Fund certificates will not have trust accounts and will continue operating as a referral profession, only accepting instructions from attorneys. The respective definitions of 'conveyancer' and 'notary' in the Act refer only to attorneys- an advocate can thus not be a conveyancer or a notary. It is important that consumers of legal services (and other stakeholders in the profession) insist on having sight of the current Fidelity Fund certificate of every attorney (or advocate taking instructions directly from the public). Providing legal services when not in possession of a valid Fund Certificate is an offence and the consequences thereof include the possible imposition a fine, imprisonment (or both), the striking-off the Roll of legal practitioners and the person concerned is not entitled to a fee for the services rendered (section 93(8)).

The possession of a valid Fidelity Fund certificate gives members of the public the assurance that the legal practitioner being engaged has met the prescribed requirements and that there will be appropriate protection if the legal practitioner defaults in any way in their duties. The actions of a practitioner practising without a Fidelity Fund certificate will not be covered by the LPIIF. The LPIIF provides the primary (base) layer of professional indemnity insurance to all legal practitioners who are in possession of a valid Fidelity Fund certificate. Members of the public must be aware of this risk. In the same way that a financial services provider or credit provider must be registered with and issued with a licence by the appropriate regulator, the Fidelity Fund certificate is such a licence issued to legal practitioners to provide legal services. The LPFF will also not be liable in the event of the theft of money or property purportedly entrusted to a legal practitioner who practises without a Fidelity Fund certificate. Where necessary, members of the public must contact the LPC in order to verify whether a legal practitioner is admitted as such, on the Roll of practitioners, in possession of a valid Fidelity Fund certificate and also whether or not any regulatory action has or is being taken against the practitioner concerned.

The duties of legal practitioners in respect of the handling of trust money and property as set out in the Act and the Rules include specific requirements in respect of:

- trust money being kept separate from other money
- designation and management of trust investments
- appropriate internal controls being designed, implemented and monitored by legal practitioners over their trust accounts
- implementation of acceptable financial reporting frameworks
- retention of accounting records and files for a minimum of seven years
- conduct of investment practices
- prohibition of the pooling of investments
- firms conducting investment practices being obliged to comply with the FAIS Act
- prohibition against of the investment on behalf of a client in shares or debentures in a company that is not listed on a licenced securities exchange or in unsecured loans

## The Code

A draft professional code of conduct has been published. The code addresses several matters, including:

- approaches and publicity, specialisation and expertise- these provisions relate to marketing by practitioners of their services and touting
- the sharing of fees and offices and the payment of commission
- the naming of the partners and the practice

# GENERAL PRACTICE continued...

- replying to communication
- conflicts of interest

Part IV of the Code deals specifically with the conduct of legal practitioners not in private practice. Many organisations (including those in the financial services industry) employ legal practitioners inhouse in roles such as legal advisors and corporate counsel. The incumbents in these roles (which, for present purposes will be referred to as 'corporate counsel') must be aware of the provisions of Part IV of the Code which include the duty to act in an ethical manner and adhere to the following standards of conduct:

(i) act in a fair, honest, transparent manner and with dignity and integrity;

(ii) remain impartial and objective and avoid subordination or undue influence of their judgment by others;

(iii) give effect to legal and ethical values and requirements and treat any gap or deficiency in a law, regulation, standard or code in an ethical and responsible manner;

(iv) not engage in any act of dishonesty, corruption or bribery;

(v) disclose to any relevant party any personal, business or financial interest in his or her employer or its business or in any stakeholder to avoid any perceived, real or potential conflict of interest;

(vi) not knowingly misrepresent or permit misrepresentation of any fact;

(vii) provide opinions, decisions, advice, legal services or recommendations that are honest and objective;

(viii) when providing legal services or advice to his or her employer, corporate counsel must be free from any conflict of interest, financial interest or self interest in discharging his or her duty to the employer. A corporate counsel must -

(a) be and appear to be free of any undue influence or self-interest, direct or indirect, which may be regarded as being incompatible with his or her integrity or objectivity;
(b) assess every situation for possible conflict of interest or financial interest, and be alert to the possibility of conflicts of interest;
(c) immediately declare any conflict of interest or financial interest in a matter, and must recuse himself or herself from any involvement in the matter;
(d) be aware of and discourage potential relationships which could give rise to the possibility or appearance of a conflict of interest;
(e) not accept any gift, benefit, consideration or compensation that may compromise or may be perceived as compromising his or her independence or judgment.

(ix) corporate counsel must at all times act in a professional manner and must: -

(a) act with such a degree of skill, care, attention and diligence as may reasonably be expected from a corporate counsel;
(b) communicate in an open and transparent manner with his or her employer and with third parties, and not intentionally mislead his or her employer or any third party;
(c) make objective and impartial decisions based on thorough research and on an assessment of the facts and the context of the matter;
(d) exercise independent and professional judgment in all dealings with his or her employer and with third parties;
(e) remain reasonably abreast of legal developments, applicable laws, regulations, legal theory and the common law, particularly where they apply to his or her employer and the industry within which he or she operates;
(f) comply with and observe the letter and the spirit of the law, and in particular those relevant to his or her employer or to the industry in which he or she operates, including internal binding and non-binding codes, principles and standards of conduct;
(g) observe and protect confidentiality and privacy of all information made available to him or her and received in the performance of his or her duties, unless there is a legal obligation to disclose that information; and
(h) generally act in a manner consistent with the good reputation of legal practitioners and of the legal profession, and refrain from conduct which may harm the public, the legal profession or legal practitioners or which may bring the legal profession or legal practitioners into disrepute.

Financial service providers and others who utilise the services of legal practitioners must thus be aware of the provisions of the Act and hold the legal resources they utilise, internally and externally, to the provisions of the Act, the Rules and the Code. How any potential conflicts and overlaps between the Code and similar codes applicable in other industries (for example, the FAIS Code) will be managed is a matter that the respective regulators across the industries will need to engage on.

# THEFT BY ANOTHER NAME: UNAUTHORISED 'LOANS' FROM TRUST ACCOUNTS

Clause 16(b) of the LPIIF Master Policy excludes liability for compensation:

'*arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or 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 [Attorneys] Act*;'

Section 55 of the Legal Practice Act contains the provisions relating to the liability of the LPFF and replaces section 26 of the Attorneys Act.

We often receive queries regarding the meaning of the phrase 'unauthorised borrowing' of trust money. This is theft by another name. The term was included in the policy wording on the suggestion of representatives of the broader insurance market who, when dealing with theft claims against law firms, had noted an increase in the number of practitioners who provided an explanation that (in the view of the practitioner) they had not stolen the funds but rather made what was purportedly a loan from their trust creditor, without the knowledge and or consent of the latter.

The facts of a recent Supreme Court of Appeal (SCA) judgment (*The Law Society of the Northern Provinces v Morobadi* (1151/2017) [2018] ZASCA 185 (11 December 2018)) provide an example of what can be considered to be "unauthorised borrowing". The relevant facts for present purposes are the complaints against the practitioner that he:

1. Purported to conclude a contingency fee agreement with an executrix in respect of an instruction to attend to the administration of a deceased estate and charged 15% of the gross value of the assets in the estate;
2. Without the knowledge and authority of his client, had taken his fee prematurely and expressed his apology for 'borrowing' the client's money; and
3. Alleged that part of a payout received from a client in respect of a Road Accident Fund (RAF) claim had been paid to him over and above his fee as a gesture of gratitude by the client.

Section 51 (1) (b) of the Administration of Estates Act 66 of 1965 prescribes the tariff for administration of an estate at 3.5% of the gross value of the assets in the estate. The purported contingency fee agreement thus violated the Administration of Estates Act. It is clear from the judgment that the court was rather skeptical of the explanation in respect of the "unauthorised borrowing" of the trust funds. The funds were taken from the trust account without the knowledge and or consent of the client and there was thus no agreement between the parties in respect of a loan- there could thus not have been a loan. The judgment also indicates that the practitioner had used the funds in question in order to make up a cash shortfall that he had in his practice.

These purported loans from clients are also put up as explanations by attorneys faced with misappropriation claims that are reported to the LPFF or as an explanation for a delay in paying client funds when due.

It must be remembered that Rule 55.12 prescribes that:

- The firm must account to a client in writing within a reasonable time after the performance or earlier termination of any mandate and retain a copy of such account for at least five years. Each account must specify:
  - (a) All amounts received in connection with the matter concerned, appropriately explained;
  - (b) All disbursements and other payments made in connection with the matter;
  - (c) All fees and other charges charged to or raised against the client and, in the case of an agreed fee, a statement that such was agreed and the agreed amount; and
  - (d) The amount owing to or by the client.

The firm must pay any amount due to a client within a reasonable time, unless instructed otherwise. Steps must be taken to verify the banking details (and any subsequent changes to the banking details) before any payment is made (Rule 54.13).

Theft of trust funds, whether cloaked as a loan or otherwise, is unlawful and will have serious consequences for the practitioner/s concerned. Moving (rolling) trust funds around in an attempt to hide a trust shortfall will be discovered and action will be taken against the practice.