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# RISKALERT

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Legal Practitioners Indemnity Insurance Fund NPC
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LEGAL PRACTITIONERS FIDELITY FUND
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## RISK MANAGEMENT COLUMN

# COURT FINDS ATTORNEY LIABLE FOR CYBERCRIME LOSS

In the last decade, the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) has spent a considerable amount of its risk management resources alerting members of the legal profession to the increasing risks associated with cybercrime. The warnings have, unfortunately, either gone unheeded in many cases or reached the intended recipients too late as can be gleaned from the more than 137 cybercrime related claims notified to the insurance company since 1 July 2016 when the cybercrime exclusion (clause 16(o)) was implemented in the Master Policy. The value of repudiated cybercrime claims now exceeds R85 million. This figure only represents those claims that are reported to the LPIIF. The number and value of cybercrime claims reported by legal practitioners to the commercial market are not made publically available as is the data for such claims where members of the profession have to bear the losses as a result of not having appropriate risk transfer measurers (insurance or otherwise) for this risk. Ongoing attempts by the LPIIF over a number of years to get the law enforcement agencies (the police and the National Prosecuting Authority) to prioritise the investigation of these matters have, unfortunately, not met with any traction. We have even offered to make specialist resources available and have had discussions with a number of the other stakeholders (including some of the banks) who had undertaken to provide assistance to the law enforcement agencies investigating these crimes.

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At times, the lessons to be learned from certain risks are best taught by relating 'war stories' as will be demonstrated in an examination of a recent matter where the court found a practitioner liable for a loss suffered by her clients following on cybercrime.

The Eastern Cape Local Division of the High Court was recently called upon to adjudicate a matter where the plaintiffs suffered a loss following a cybercrime being perpetrated in a conveyancing transaction (See ***Ben Adrian***

# RISK MANAGEMENT COLUMN continued...

***Jurgens and Wendy Jurgens v Lynette Volschenk***, case no: 4067/18). The facts of this matter are similar to the *modus operandi* employed in the vast majority of cybercrime related matters reported to the LPIIF. The applicants, Mr and Mrs Jurgens, sought an order for the payment of an amount of R967,510.53 from the respondent, an attorney and conveyancer. During April 2017, the applicants had instructed the respondent to effect transfer of one of their properties. After the successful completion of the transfer, the proceeds of the sale were duly paid into the applicants' Standard Bank account, the details of which they had furnished to the respondent. Intending to relocate to the United States of America, the applicants instructed the respondent to act as their conveyancer in the sale of a second property in October 2017. They expected that the sale would be finalised before their departure. At all times, the first applicant (Mr Jurgens) corresponded with a secretary in the employ of the respondent and copied the conveyancer in the correspondence. The chronology of the relevant events can be summarised as follows:

- 13 December 2017- Mr Jurgens received an email from the respondent's secretary advising him that the transfer papers had been lodged with the Deeds Office the previous day. Mr Jurgens responded on the same day advising the secretary that the proceeds of the sale should be paid into the Standard Bank account which had been used for the previous transaction, assuming that the respondent would already have those account details on record having paid the proceeds of the previous transaction into that account;
- 14 December 2017- Mr Jurgens received an email purporting to be from the respondent's secretary requesting proof of the Standard Bank account number. He was not aware that this email was from a hacked email address and he responded with his account number. Noting the difference in email addresses, he responded to the hacked email address and as well as to the secretary's legitimate email address. The correspondence was also copied to the respondent;
- On Friday,15 December 2017- Mr Jurgens enquired, using both the hacked and the legitimate email addresses (as well as that of the respondent), when he could expect payment of the proceeds of the sale. The secretary received an email purporting to be from Mr Jurgens advising her that the proceeds should be deposited into an interest bearing account purporting to be that of Mr Jurgens held at ABSA Bank, the details of which would be furnished the following Monday;
- On Monday, 18 December 2017, the secretary received two emails purporting to be from Mr Jurgens. The emails purported to be a letter confirming that Mr Jurgens had an account with ABSA Bank and provided what purported to be a statement drawn from the account. Also on that date, the secretary, in response to Mr Jurgens' email enquiring on the progress regarding the proceeds of the sale, responded that the transaction had not yet come up for registration;
- 20 December 2017- the purchaser's bond attorneys paid the balance of the purchase price into the respondent's trust account;
- 21 December 2017- Mr Jurgens received an email from the secretary's hacked email address enclosing a registration letter, final account and proof of payment. The email also requested Mr Jurgens to direct all further correspondence to the hacked email address (the offices were closed for the holiday). The proof of payment reflected the purported transfer of the proceeds of the sale into the applicants' Standard Bank account. On the same day, the respondent went to the office to effect payment of the money to the applicants. Mr Jurgens' bank account details appeared to have been amended to reflect the ABSA bank account details. Payment was effected and forwarded to the hackers and the proof of payment sent to them at their spoof email address. The hackers, in turn, then amended the proof of payment into the legitimate Standard Bank account of Mr Jurgens and forwarded those details to him together with the legitimate registration letter and final statement of account;
- 26 December 2017- Mr Jurgens addressed an email to the respondent advising her that he had not received payment in accordance with the proof of payment dated 21 December 2017;
- 27 December 2017- Mr Jurgens sought clarification from the respondent's banker, Nedbank, copying both the respondent and her secretary. It was at that stage that the respondent advised Mr Jurgens that the emails exchanged between himself and her secretary had been hacked, with his hacked email address used to furnish the ABSA banking details to the secretary. The applicants did not have any bank account with ABSA Bank.

The applicants did not receive any of the proceeds of the sale. By the time the enquiries were made and the fraud discovered, only R65,584.21 of the amount of R967,510.53 paid was still in the ABSA account. The applicants argued that the respondent was liable for the loss in that she accepted the mandate to act on their behalf, owed them a duty of care and was negligent in paying the amount to the hackers, thus causing them the loss. The applicants, following on the reasoning in the test for liability espoused in ***Holtzhausen v Absa Bank Ltd*** 2008 (5) SA (SCA), contended that the respondent, being a conveyancer, had failed to exercise the necessary diligence, skill and care required of a reasonable attorney as contemplated in their agreement when the mandate was entered into.

The respondent denied that she was negligent in the matter. She alleged that she was not aware that Mr Jurgens' email address had been hacked. The respondent's contention was that, she had carried out the mandate with the due care, skill and diligence expected of a reasonable attorney and a conveyancer in the circumstances.

# RISK MANAGEMENT COLUMN continued...

Justice Tokota remarked that the

> "[a]ttorney's profession is an honourable profession which demands complete reliability and integrity from the members thereof. It is, therefore, the duty of an individual attorney to ensure, as far as she/he is able to do so, that he/she measures up to the high standards demanded of him/her. A client who entrusts his affairs to an attorney must be able to be rest assured that the attorney concerned is an honourable man who can be trusted to manage his affairs meticulously in the interests of the client. When money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be distributed for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is being held whenever it is required." (paragraph 16)

After considering a number of authorities including ***Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd*** 1985 (1) SA 475 (A), ***Margalit v Standard Bank of SA Ltd*** 2013 (2) SA 466 (SCA) and the other leading authorities on the question of liability, the court found that:

> [22] An attorney is liable to his/her client for damages suffered as a result of his negligence in the performance of his mandate. *(sic)* The liability is based on the breach of contract between the parties. It is a term of the mandate that the attorney concerned will execute the mandate by exercising his skill, adequate knowledge and diligence expected of an average practising attorney. He may be held liable even when he committed an error of judgment or matters of discretion if the attorney failed to exercise the skill, knowledge and diligence." (paragraph 22, footnotes omitted)

The court found that it was not necessary, in the circumstances of this case, for expert evidence to be led in order to prove what a conveyancer, in a position similar to the respondent, would have done if faced with the same circumstances in acting with the necessary care, skill and diligence which would ordinarily be expected from a reasonable attorney, which the respondent failed to do. The court's findings can be summarised as:

(i) the applicants had entrusted their affairs to the respondent and that she had been furnished with their Standard Bank account details in their previous dealings with her and in this matter;

(ii) It was therefore incumbent on the respondent to verify the sudden change in banking details. The purported change in banking details had taken place a day after Mr Jurgens had furnished his legitimate account details. The change in banking details within such a short space of time should have been a red flag for the respondent (the words used by the court are that it should have 'raised eyebrows');

(iii) An examination of the purported proof of the ABSA bank account should have alerted the respondent to the fact that something may be amiss in that, *inter alia*, the document purporting to be an ABSA bank statement did not have the names and addresses of the account holder, most of the transactions were in Gauteng, and the name listed for most of the transactions did not fit that of the applicants;

(iv) A diligent, reasonable attorney would have taken steps to verify the information with Mr Jurgens, which the respondent failed to do;

(v) It was no defence for the respondent to pass the buck to her secretary and to state that the account was dictated to her by her secretary;

(vi) The respondent owed a duty to her clients to act in their interests and to safeguard their money. A reasonable attorney in her position would have exercised more care in the circumstances, which the respondent failed to do resulting in the applicants suffering a loss as a result of her negligence; and

(vii) The respondent had a duty to ensure proper supervision of her secretary and control in order to safeguard the applicants' money. The court stated that "[w]hen a client instructs and an attorney accepts instructions to perform certain services for that client, there arises an implied term in the agreement between attorney and client that the attorney will perform the services required in a professional, non-negligent manner. This duty arises as a matter of law." (paragraph 27)

The application succeeded and the court ordered that the respondent was liable to the applicants for the amount of R967,510.53. The respondent was also ordered to pay interest on that amount from the date of the judgment to the date of final payment as well as the costs of the application.

There are a number of risk management lessons that can be learned from this case including:

1. When Mr Jurgens communicated with the hacked email address and copied the respondent and her secretary on their respective legitimate email accounts, this should have alerted them (and possibly Mr Jurgens as well) as early as the first hacked communication on 14 December 2017 that something was amiss. Seeing that the email is addressed to the secretary on two email addresses (the fraudulent and the legitimate), on reading the email received they should have discovered this and alerted Mr Jurgens that one of the email addresses he had used was incorrect;
2. The respondent, as the principal to whom the mandate was given, had been copied on all email communication and could have paid closer attention to the events that were unfolding in the matter;
3. The applicants were relocating from South Africa yet a new South African bank account was provided for them;
4. A reading of the judgment implies that the Standard Bank account was a joint account of the applicants

# RISK MANAGEMENT COLUMN continued...

used in the previous transaction. The applicants were the joint owners of the property in question (paragraph 3 of the judgment), yet the purported instruction from one of the owners (with no verification of such instruction with the joint owner) was accepted for the alleged change in banking details. The fraudulent account held with ABSA bank was, the respondent was led to believe, in the name of Mr Jurgens only (paragraph 10- '…the money should be deposited in **"his"** interest bearing account with Absa Bank….") (emphasis added) Was Mrs Jurgens ever contacted in order to verify and/or confirm the purported instruction to change the details of the bank account into which the proceeds of the sale of a property of which she was a joint owner?

5. In discussing the claim statistics in the next article in this edition of the *Bulletin*, a number of suggestions are made regarding appropriate steps practitioners can take in order to verify purported changes in banking details. These include phoning the client to verify any changes in the banking details or any other instruction initially given in the matter;
6. The respondent should have scrutinised the purported change in banking details and taken steps to verify the account before payment. As happened in this case, the purported "proof" of banking details attached to the emails sent to many of the other practitioners falling victim to this form of cybercrime also do not fit the profile of the parties to the transaction. In many cases an examination of the transactions listed will show that the activity on the account in a separate part of the country and that the transactions are mainly for small amounts, fast food, airtime and the like. It will also be noted that there will be no other large deposits visible on the documents. The perpetrators of the fraud have now also resorted to producing false letters purporting to be from the banks with fraudulent bank stamps thereon. The language and writing style of the hackers may differ to that of the client;
7. The lessons learned from other jurisdictions (the United Kingdom and Australia in particular) is that the *modus operandi* for this type of cybercrime is similar to that deployed in this case. The fact that this particular incident occurred just before the Christmas break may not be entirely a coincidence. In the United Kingdom it has been noted that such incidents generally increase in the lead up to weekends and long-weekends in particular. It is for this reason that such scams are referred to in some circles as 'the long-weekend' scams. The thinking is that the perpetrators of these crimes are of the view that legal practitioners are more likely to 'let their guards down' and not be as vigilant in scrutinising transactions as they prepare for time away from the office. In some firms, there may be less staff on duty in these periods and the regular checks and balances may thus not be in place; and
8. This type of fraud is perpetrated on all parties to a transaction, including estate agents and parties who make payments to law firms. One of the notifications received by the LPIIF related to the interception and alteration of a guarantee received from a major bank. It is thus imperative that practitioners alert all stakeholders and all the parties in the property sale and transfer value chain of the prominence of these scams and the common *modus operandi*.

# CLAIMS STATISTICS

*"I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be proficient in his calling, and if he does not bestow sufficient care and attention in the conduct of business entrusted to him, he is liable, and where this is proved the Court will give damages against him."* ***Van der Spuy v Pillans*** 1875 Buch 133 at 135

It is apposite to begin this article with the often quoted *dictum* enunciated by De Villiers CJ in a judgment delivered 144 years ago – the principles regarding the liability of a legal practitioner who fails to meet the required standard of care and skill in carrying out a mandate still apply today. Though the principle may have been expressed using different words in recent times, the core of that *dictum* still applies in the present day as will be gleaned from the authorities cited at the end of this article. The statistics for professional indemnity (PI) claims listed below suggest that many attorneys have (or are, at least, alleged to have) breached the standard of care expected of members of the profession.

As you read this edition of the *Bulletin*, the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) will be commencing the second month of the 2019/2020 insurance scheme year. This is an opportune time to assess where we are in terms of claims and the main areas of practice from which the claims arise. The outstanding reserve requirement for PI claims notified to the LPIIF was actuarially assessed at **R498,272,000** as at the end of March 2019. An exposure of just under half a billion Rands in outstanding PI claims against legal practitioners in South Africa is a serious cause for concern for the LPIIF, the legal profession as a whole and all other stakeholders. The underlying causes of claims must be addressed, and members of the profession need to pay urgent attention to developing and implementing appropriate risk management measures in their respective firms in order to avoid or mitigate the risk of

# RISK MANAGEMENT COLUMN continued...

PI claims (or even regulatory action) materialising. All stakeholders have a role to play in reducing the high number of claims.

Tables 1 and 2 on the right give a breakdown of the claims notified to the LPIIF in the last five years. It will be remembered that the LPIIF insurance year runs from 1 July of one year to 30 June of the following year. The figures in table 1 have been conveniently broken down into quarterly intervals. It will be noted from table 1 above that the number of outstanding claims continues to grow. PI claims are long tail in nature and take a number of years, in some instances, to be finalised. Many of the claims are the subject of litigation and this prolongs the finalisation of the matters. A lack of cooperation (and late notification) on the part of some insured practitioners also adds to the long tail. Clauses 25, 26 and 27 of the LPIIF Master Policy place a duty on the insured practitioners to provide the required cooperation to the LPIIF. Every claim must be thoroughly investigated. The investigation and assessment of the claim includes:

1. An assessment of whether or not the claim falls within the indemnity provided by the LPIIF;
2. If question 1 is answered in the affirmative, whether or not there is any liability on the part of the insured. The test for liability enunciated in the various authorities (including those listed at the end of this article) is used in assessing whether or not there is liability; and
3. If questions 1 and 2 are answered in the affirmative, then the extent of the liability (the quantum of the claim) must be assessed.

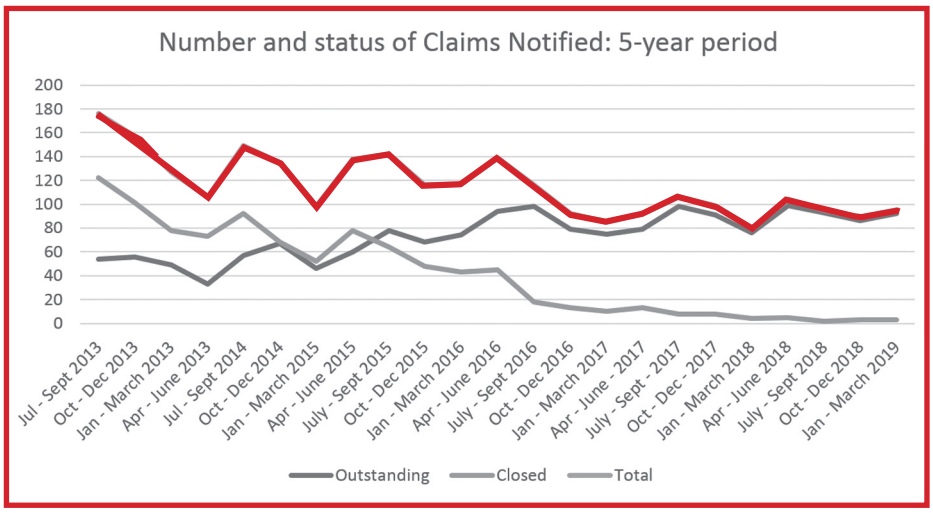
Table 2 shows the main claim categories. These have remained consistent in the last decade as has the overall claims development. We continue focusing our risk management initiatives on addressing the underlying risks, which lead to claims in these categories.

## Road Accident Fund (RAF) claims

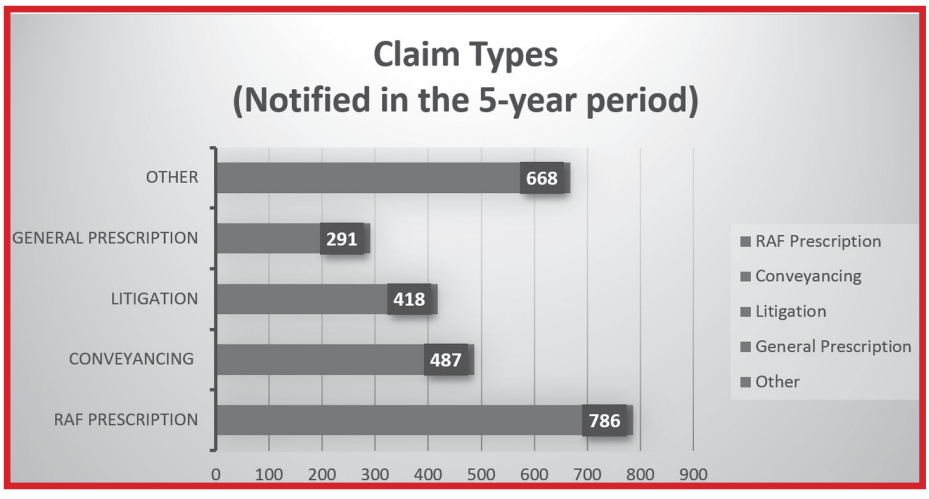
Notifications arising out of the prescription of RAF related matters (786 notifications) make up the highest number and value (approximately 68%) of the value of claims paid. The average quantum of this claim category is generally higher than the other categories and the investigation of prescribed RAF claims (prescribed and under settled) is also, in many instances, more expensive that other claim types – panel attorneys, medico-legal experts, actuaries, forensic investigators and other experts need to be instructed in order to investigate every aspect of the merits and quantum of these claims. Practitioners can mitigate the risk of prescribed RAF claims by implementing internal controls which can include:

- Conducting regular file audits, reviewing files and, where necessary

## Table 1- The number and status of PI claims notified quarterly in the last 5 scheme years




## Table 2: The main PI claim types notified in the last 5 scheme years



# RISK MANAGEMENT COLUMN continued...

and appropriate, closing problem files after taking and documenting instructions from clients and explaining the implications of the prescription date to the affected clients;
- Not accepting new instructions close to the prescription date;
- Taking full instructions and getting as much information and documents as early as possible after accepting the mandate so that the matter can be pursued timeously;
- Acting on instructions promptly and not procrastinating- in ***Mlenzana v Goodrick & Franklin Inc*** 2012 (2) SA 433 (FB) and ***Minister of Police v Masina*** (1082/17) [2019] ZASCA 24 (28 March 2018) the courts expressed their dissatisfaction with the procrastination of the attorneys involved which led to the prescription of the respective claims. In the ***Masina*** matter the court stated "[17] There was no explanation for the failure of [the respondent's] attorneys to pursue the matter expeditiously once he instructed them to do so in June 2014…The delay [was] also unexplained." Justice Rampai, in the ***Mlenzana*** case, wrote that "[89]…this was a chronicle of procrastination and neglect on the part of the defendant."
- Registering all time-barred matters with the LPIIF's Prescription Alert Unit and adhering to all reminders sent by that unit;
- Implementing a peer review system within the firm;
- Designing and implementing a dual diary system with support staff;
- Obtaining more than one contact number and an accurate address for clients in case further instructions are required before legal action is instituted (or as the litigation progresses);
- Ensuring that action is instituted in the correct court (having to withdraw an action instituted in the incorrect court in order to institute a new action in the court with jurisdiction exposes the firm to the risk of prescription);
- Assessing whether the practice has the capacity, appetite and resources to properly attend to the matter before accepting an instruction;
- Being wary of RAF tactics- do not accept the word of RAF claim handlers that a matter will be settled and requesting that summons should not be served to interrupt prescription; and
- Providing regular training within the firm and not assuming that a three year prescription period applies in all cases **[Important note: In the event that the practice is dealing with 'hit and run' cases (that is, claims where neither the driver nor the owner of the vehicle is identified), please contact us so that we can assist you in challenging the constitutionality of the two-year prescription period set out in the RAF Regulations, in the event that the RAF raises the prescription point];**

## Cybercrime

As will be noted from the article on page 1 of the *Bulletin*, it is also concerning to note that practitioners (particularly conveyancers) are still falling victim to cyber scams and phishing emails purporting to be instructions to change banking details of clients. The mitigation measures that we recommend practitioners adopt in order to mitigate cyber risks include:
- An awareness of the areas highlighted by the court in assessing whether or not there was negligence on the part of the legal practitioner in the case discussed on page 1;
- Using the account verification services offered by banks and some insurers;
- Getting payment instructions from clients in writing (with supporting documents) at the face-to-face initial instruction;
- Ensuring that adequate risk mitigation/ avoidance measures are in place in the firm to deal with cyber related risks;
- Educating staff on cyber risks;
- Purchasing appropriate cyber and commercial crime cover- this is a risk transfer measure that firms can use to protect themselves and their clients against losses;
- Properly supervising staff, and implementing checks and balances for all payments and the verification of beneficiary banking details before any payment is made as prescribed in Rule 54.13;
- An awareness of and alertness to spoof/ phishing scams;
- Carrying out a proper FICA verification process on all clients and the banking details supplied- insist on original documents (the fraudsters produce documents which look very similar to legitimate banking statements and confirmation letters);
- Contacting the client telephonically on the number provided at the initial consultation and in person to verify changes to banking details;
- Insisting that changes to banking details can only be made by clients in person physically attending the office with original bank stamped documents- Clause 16 (o) of the LPIIF Master Policy provides that: "*verify" means that **the Insured** must have a face to face meeting with the client and or other intended recipient of the funds. The client (or other intended recipient of the funds, as the case may be) must provide **the Insured** with an original signed and duly commissioned affidavit confirming the instruction to change their banking details and attaching an original stamped document from the bank confirming ownership of the account.";*
- Obtaining advice from Information and Communication Technology (ICT) risk experts on appropriate security measures that can be implemented in the firm- some insurers offer a cyber security assessment to their clients as part of the service offering;
- Keeping up to date with changes in the risk environment in which the firm operates;
- Adding a prominent note in all correspondence warning recipients that banking details will not be changed

# RISK MANAGEMENT COLUMN continued...

on the strength of an email; and
- Improving firewalls and other IT security and constantly assessing the susceptibility of the firm to hacking and other security and/or data breaches.

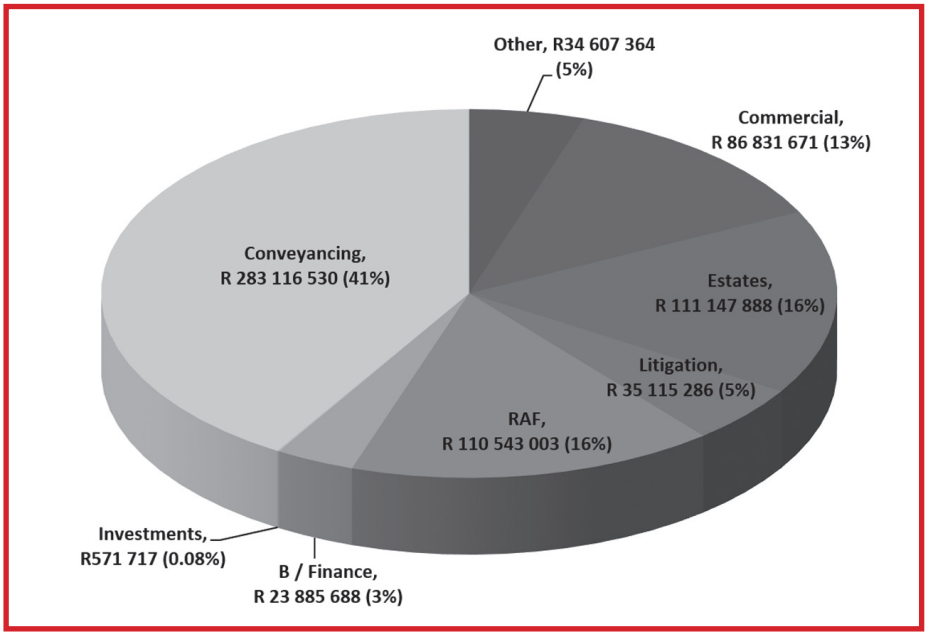
Many of the suggestions above were published in the August 2018 edition of the *Bulletin*. In the light of the continued scourge of cybercrime perpetrated against the legal profession, we thought that it would be prudent to re-publish and update the suggestions. The suggestions above must be communicated to the finance, risk and all other operational departments in the firm. Cyber risk must be listed as one of the main risks facing any practice and appropriate risk mitigation measures must then be designed and implemented as prescribed by Rule 54.14.7 for the trust accounting environment in particular and the firm in general.

## Legal Practitioners' Fidelity Fund (the Fidelity Fund) claim statistics

Table 3 on the right is a graphic illustration of the current claims against the Fidelity Fund. As at 31 May 2019, the Fidelity Fund had 1247 claims on record with a combined value of R685,819,000. The bulk of the contingent claims arise from the areas of conveyancing (41%), deceased estates (16%) and RAF work (16%).

There are similarities in the main risk areas faced by both the LPIIF and the Fidelity Fund. Conveyancing, RAF related matters, litigation and commercial related matters make up a significant portion of the claim categories notified to both entities. The claims brought by the Master of the High Court in enforcement of the bonds of security issued by the LPIIF to executors of deceased estates also mainly arise from misappropriation of estate funds by executors and/or their staff. Practitioners pursuing practice in these high risk areas of the law must be more vigilant in their awareness of the underlying risks both from a PI and theft of trust money perspective.

## Table 3: Contingent claims against the Fidelity Fund




Partners are jointly and severally liable for the debts of the practice. In so far as incorporated practices are concerned, it must be noted that section 34 (7)(c) of the Legal Practice Act 28 of 2014 provides that all present and past shareholders, partners or members are jointly and severally liable with the juristic entity: -

(i) for debts and liabilities of the entity contracted during their period of office; and

(ii) in respect of theft committed during their period of office.

Regard must be had to the judgments in ***Laniyan v Negota SSH (Gauteng) Incorporated and Others*** [2013] 2 All SA 309 (GSJ) and ***Fundtrust (Pty) Ltd (in liquidation) v Van Deventer*** 1997 (1) SA 710 (A) as well as section 19(3) of the Companies Act 71 of 2008 in this regard.

Practitioners are encouraged to study the underlying principles in respect of potential liability on their part and to ensure that they (and their staff) do not fall below the expected standard of conduct expressed in a number of cases over the years, including –

- ***Slomowitz v Kok*** 1983 (1) SA 130 (A);
- ***Honey & Blanckenberg v Law*** 1966 (2) SA 43 (R);
- ***Rampal (Pty) Ltd v Brett, Willis and Partners*** 1981 (4) SA 360 (D);
- ***Mazibuko v Singer*** 1979 (3) SA 258 (W);
- ***Mlenzana v Goodrick & Franklin Inc*** 2012 (2) SA 433 (FB);
- ***Margalit v Standard Bank of South Africa Ltd and another*** (883/2011) 2013 (2) SA 466 (SCA);
- ***Hirschowitz Flionis v Bartlett and Another*** [2006] (SCA 24 (RSA)3) SA 575 (SCA);
- ***Du Preez and Others v Zwiegers*** 2008 (4) SA 627 (SCA);
- ***Steyn v Ronald Bobroff & Partners*** (025/12) [2012] ZASCA 184 (29 November 2012);
- ***McCain v Mohamed and Associates*** [2013] 3 All SA 707 (C); and

# SETTLEMENT AGREEMENTS: SOME CAUTION FROM THE COURTS

The freedom to contract is a long-established principle of South African law. The courts will only interfere with this freedom in very limited circumstances where, for example, the contract is *contra bonos mores*, violates the Constitution, is against public policy or is unlawful.

Parties to disputes may, before or after the initiation of litigation, resolve (or narrow) the issues in dispute between them and enter into settlement agreements setting out the terms and conditions on which the resolution is reached. The parties may apply to court to have the terms of the settlement made an order of court, if they so agree. One of the advantages of making a settlement agreement an order of court is that the parties may find that it will then be (relatively) easily enforceable and, in appropriate circumstances, a judgement creditor could then enforce the terms of the agreement and court order by way of execution against the debtor – in this context, the terms 'judgment creditor' and 'debtor' are, respectively, used to refer to the party to whom performance is due and the party who is obliged to perform). The focus of this article is on settlement agreements sought to be made an order of court after litigation has commenced. For an examination of the position of pre-litigation settlement agreements see, for example, the article published by Vincent Manko, Johanna Lubuma and Camille Kafula titled 'The power of a court when a settlement agreement is not preceded by litigation' (accessible at https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2019/Dispute/downloads/Dispute-Resolution-Alert-19-June-2019.pdf )

Before dealing with the approach taken by the courts to settlement agreements, it is necessary to highlight some aspects of settlements which give rise to the risk of professional indemnity (PI) claims being brought against legal practitioners. It is always the legal practitioner's professional duty to act in the best interests of the client/s. Under settled Road Accident Fund (RAF) claims are one of the main claim categories dealt with by the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF). In reaching any settlement, it is important that practitioners take appropriate instructions from their clients and that those instructions are properly documented in contemporaneous file notes and confirmed in correspondence sent to the client. The terms of the settlement and how the amount is arrived at must be included in the discussion with the client and the recordal of the instruction. Reliance should never be placed on the authority in the power of attorney or a letter of engagement to conclude a settlement without taking proper instructions. If acting on a contingency basis, settlement should not be solely pursued in order to obtain 'an early payout of the investment in the matter'. It has been noted with concern that many matters (particularly personal injury matters) are settled at pre-trial conferences held close to the trial date or even at the trial Roll Call court on the date of trial without proper instructions being taken. Faced with the imminent trial, some practitioners may be tempted to even abandon certain heads of damages that they have not properly prepared on. The practice adopted by some opposing legal practitioners of simply 'meeting half-way' between the amounts being counter-proposed in settlement negotiations could lead to potential professional negligence claims where the settlement agreed has no bearing on the underlying claim, or the damages suffered by a party. In the same way that the plaintiff/ applicant's legal representatives run the risk of under settling a matter, the legal team on the other side runs the counter risk of over settling a matter. In line with the principles enunciated in ***Goldschmidt and Another v Folb and Another*** 1974 (3) SA 778 (T), all settlement offers must be put to the client even where the legal representative recommends that the offer be rejected outright or that a counter offer be made. The pressure that may be exerted by family members or other parties to accept an offer that the legal representative may not be in favour of is well known. If necessary, consideration should be given to applying for the appointment of a *curator ad litem*, especially in claims involving minor children or some other party not able to manage their own affairs adequately – a seasoned business person may understand the potential risks in a matter and adopt the attitude that it is best to 'snatch at a bargain' or 'a bird in the hand is better than two in the bush' but not every client will be able to appreciate the full implications of an offer. The once-and-for-all principle must also be explained to clients. No offer is without risks and this should be properly explained to clients.

Matters may be settled at any stage in the litigation process, with many settlements being reached after the close of pleadings or even on the doorsteps of the courts. The considerations taken into account by the parties in reaching settlement agreements will vary from matter to matter and may include, for example, considerations of the risks

# GENERAL PRACTICE continued...

involved in litigation, a desire to save resources, avoiding delays, curtailing legal costs, a concession of liability on the part of one of the litigants or an agreement to narrow the scope of the dispute. The practice directives applicable in the various divisions of the High Court include provisions relating to the settlement of matters and removals of settled matters from the roll. In those matters where the parties agree that the terms of their settlement agreements are to be made an order of the court, the lessons learned in a number of recent judgements show that the parties cannot assume that the terms of the their settlements will be accepted by the court and made an order of court as a mere formality. It should never be assumed that the courts will act as a mere rubber stamp of the settlement agreement. Though the South African courts adopt an adversarial model (and not the inquisitorial system), as can be seen from several recent judgments, the courts will exercise judicial oversight of the settlement agreements.

The approach adopted by the courts in considering settlement agreements will be now examined by looking at three recent judgements, beginning with the most recent. There are a number of other judgments where aspects of this topic have been considered.

## Case 1:

***Maswanganyi obo Machimane v Road Accident Fund*** (1175/2017) [2019] ZASCA 97 (18 June 2019)

Briefly put, the circumstances in this matter were that the appellant had instituted a dependent's action against the RAF on behalf of her minor child claiming a total amount of R 1 million. The allegations were that the child's father had been killed in a head-on collision, the sole cause of which the negligence of the insured driver. The collision had occurred when the deceased had attempted to overtake a vehicle that was in front of him. The RAF defended the matter. The matter was set down for hearing in the court *a quo* and after being rolled over for two consecutive days, the case was called for hearing on the third day and the parties requested that the matter stand down as they were attempting to reach a settlement. The presiding judge stood the matter down but informed the parties that she was ready to commence with the trial. The parties returned to court at 14:00 and requested that the court make their settlement agreement an order of court. The terms of the agreement were that the RAF conceded liability to pay 100% of the appellant's proven or agreed damages. The damages were agreed in the sum of R561 314.63.

The judge was not satisfied that the agreement should be made an order or court and noted that, from the pleadings and the witness statements, there was no indication that the insured driver was negligent at all or that she/he could have avoided the collision. On enquiring with counsel for the RAF whether she was satisfied with the agreement the latter (I paraphrase) indicated that:

(i) she was not satisfied;
(ii) she had only been briefed in the matter on the previous day;
(iii) she had tried to get hold of the insured driver who could not attend court on the day of the trial;
(iv) the RAF thus did not have any evidence to counter that of the plaintiff; and
(v) going through the statements, she could not find the required 1% negligence on the part of the insured driver.

Refusing to make the agreement an order of court, the judge requested that witnesses be called to testify as to how the collision had occurred. A passenger in the deceased's vehicle was called to testify and the matter could not be finalised and was, consequently, postponed to a later date. Five days before the agreed date for the resumption of the trial, the appellant, alleging that the *lis* between herself and the RAF had been settled and that there was no basis, in fact or law, for a hearing or a trial to take place, launched an application seeking –

1. the calling off the part-heard trial;
2. an annulment of the part-heard trial;
3. declaring that the *lis* between herself and the RAF to have been fully and finally settled in terms of the agreement and resultant draft order made and prepared by the parties on the date of the commencement of the trial; and
4. that the draft order referred to in paragraph 3 above be made an order of the court.

The RAF did not oppose the application and played no further part in the proceedings. The applicant's contention was, *inter alia*, that as an agreement had been concluded, the proceedings and the trial, as well as the presiding judge's direction that the trial should proceed, were fatally flawed and irregular and that the court no longer had the jurisdiction or power to continue to hear evidence and to further pronounce on the matter. The court a *quo* dismissed the application and an appeal to the full bench was also dismissed. The Supreme Court of Appeal (the SCA) granted special leave for an appeal to that court.

In the SCA, Weiner AJA (with Maya P and Wallis JA concurring) identified the following two issues for decision:

1. whether it was permissible to challenge the judge's decision in this way; and
2. if the question 1 was answered in the affirmative, whether the approach adopted by the judge to the settlement agreement was permissible.

The majority judgment in the SCA, after examining numerous authorities, found against the appellant and dismissed her appeal. The principles considered by the court included –

(i) once a matter is placed before it, in rendering a judgment, a court is obliged to adjudicate on all the

issues raised in the pleadings or affidavits and that it is not for the court to vary the defined issues. The parties can specifically withdraw all or some of the issues from judicial consideration by either abandoning a claim or defence or withdrawing the action or application in its entirety subject to certain limitations (paragraph [14]);

(ii) the position is that (paragraphs [15] and [16])

'[15] **When the parties arrive at a settlement, but wish that settlement to receive the *imprimatur* of the court in the form of a consent order, they do not withdraw the case from the judge but ask that it be resolved in a particular way**. The grant of the consent order will resolve the pleaded issues and possibly issues related "directly or indirectly to an issue or *lis* between the parties"…, **[T]he jurisdiction of the court to resolve the pleaded issues does not terminate when the parties arrive at a settlement of those issues. If it did, the court would have no power to grant an order in terms of the settlement agreement**.

[16] **The correct position is that the grant of an order making a settlement agreement an order of court necessarily involves an exercise of the court's jurisdiction to adjudicate upon the issues in the litigation. Its primary purpose is to make a final judicial determination of the issues litigated between the parties. Its order is *res judicata* between the parties and the issues raised by the parties may not be re-litigated**…' (footnotes omitted and emphasis added);

(iii) the premise that the settlement put an end to the *lis* and thus deprived the court of any further jurisdiction was shown to be incorrect. The court's jurisdiction was unaffected by the agreement (at paragraph [19]);

(iv) section 173 of the Constitution specifically empowers the court to prevent orders that amount to an abuse of process and the courts have a duty to ensure that they do not grant orders that are *contra bonos mores* (at paragraph [32]);

(v) **a court cannot act as a mere rubber stamp of the parties** (at paragraph [33]);

(vi) the court's duty extends further than considering whether the terms are illegal or immoral (at paragraph [33]);

(vii) the RAF, being an organ of state, is bound to adhere to the basic values and principles governing the public administration under the Constitution (at paragraph [34]) and that, in line with section 195(1) of the Constitution, '[a] high standard of professional ethics must be promoted and maintained'; and that '[e]fficient, economic and effective use of resources must be promoted' (at paragraph [34])

(viii) that in cases involving public funds, judicial scrutiny may be essential as judges are enjoined by section 173 of the Constitution to ensure that there is no abuse of process (paragraph 35); and

(ix) the agreement lacked adequate protection for the minor child (paragraph [37]).

The majority judgment noted that it is not every case that will require this form of judicial scrutiny (paragraph [36])

Zondi JA penned a dissenting judgment (with Mocumie JA concurring). The minority judgment:

(i) disagreed with the conclusion of the majority that the relief sought by the applicant in her notice of motion amounted to reviewing the court a *quo* or that the failure to provide safeguards for the management of the funds (which was never advanced as a ground of refusal) laid a sufficient basis for the court of first instance to refuse to make the settlement agreement an order of court;

(ii) disagreed with the identification of the issues for adjudication by the SCA and the manner in which the two questions posed were answered in the majority judgment;

(iii) stated that the agreement per the draft order put paid to any and all existing issues giving rise to the lis and litigation between the parties; and

(iv) stated that there must be a basis gleaned from the facts for a court to exercise its discretion against making a settlement an order or court.

## Case 2

***Mzwakhe v Road Accident Fund*** (24460/2015) [2017] ZAGPJHC 342 (26 October 2017)

This matter also arose out of a motor vehicle where applicant instituted action against the RAF for the damages he allegedly suffered following on injuries sustained in a motor vehicle collision. The plaintiff had suffered a fracture of the fibula. The RAF conceded liability but did not file a plea with regards to the quantum claimed. The applicant applied for default judgment. There was an appearance for the RAF at the hearing and the parties presented a draft order to the court in terms of which the RAF agreed to pay the applicant an amount of R250, 000 in settlement of his claim. The court stated that:

'[6] **In being requested to make [the settlement agreement] an order of court the court is not merely a rubberstamp**. The court has a duty to investigate the matter and ascertain

whether or not the agreement is one which should be made an order of court, This is even more essential when the respondent is a public institution whose finances and the administration thereof are in the public interest.' (emphasis added)

The court had postponed the matter in order to peruse the court file and the various expert summaries. The court noted several crucial inconsistencies and contradictions in the reports by the experts.

The court also noted that:

'[23] Our courts are inundated with matters relating to the RAF and the Minister of Law and Order (in re unlawful arrest claims). **The settlement agreements reached often bear no association to the damages actually suffered**. **The reasons for this are not apparent, although speculation is rife in regard to the motives behind such settlements. For these reasons, our courts have to be vigilant when dealing with State funds. The court can take judicial notice of the fact that the RAF claims that it is bankrupt. It is the court's duty to oversee the payment of public funds.** The applicant must prove its claim with reliable evidence. The claim is for a substantial sum. The RAF, for reasons known only to it, has agreed to pay out this sum without any investigation into its validity. A court cannot allow that, when, on the face of it, the claim is based upon contrary and flimsy evidence.

[24] **Our courts have a duty to ensure that it does not grant orders that are *contra bonos mores*. Thus, a court will not enforce a contract that is against public policy**.'

The court refused to make the draft order an order or court and ordered that –

(i) the matter would proceed as if no agreement had been concluded;
(ii) the applicant would be obliged to prove his claim;
(iii) the matter would be referred back to the Registrar for the purpose of pleadings to be filed;
(iv) the RAF was interdicted from paying to the applicant any amount in settlement of the entire claim without a court order first being obtained; and
(v) each party was to pay its own costs.

## Case 3

***Eke v Parsons*** [2015] ZACC 30

The matter before the Constitutional Court arose out of a commercial transaction between the parties wherein Mr Eke agreed to purchase the membership interest of Mr Parsons in a close corporation. Mr Eke defaulted in the payment terms of the agreement and Mr Parsons instituted proceedings in the High Court claiming the balance of the purchase price, the former entered an appearance to defend and the latter applied for summary judgment. A settlement agreement was entered into on the doorsteps of the court and that agreement was made an order of court (paragraph [3]).

Mr Eke again defaulted on the payment terms as agreement and then sought to challenge the court order which incorporated the settlement. He eventually launched proceedings in the Constitutional Court. One of the matters which the Constitutional Court was called upon to adjudicate was the status and effect of making a settlement agreement an order of court. On this point, Madlanga J (writing for the majority) made several points, including that:

' [19]… In certain circumstances, agreement- or lack of it- on certain terms may mean the difference between an end to litigation and a protracted trial. Negotiations with a view to settlement may be so wide-ranging as to deal with issues that, although not strictly at the issue in suit, are related to it- whether directly or indirectly- and are of importance to the litigants and require resolution….

[22] …, [A]n expedited end to litigation may not only be in the parties' interest, it may serve the interests of justice. This finds support at common law….

[24] Whilst ordinarily the purpose served by a settlement order is that, in the event of non-compliance, the party in whose favour it operates should be in a position to enforce it through execution or contempt proceedings the efficacy of the settlement orders cannot be limited to that. A court may choose to be innovative in ensuring adherence to the order… (footnotes omitted)

[25] **This is no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement**…. (footnotes omitted)

[26] Secondly, "the agreement must not be objectionable, that is its terms must be capable, both from a legal and practical point of view, of being included in a court order". That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must "hold some practical and legitimate advantage'. (footnotes omitted) (emphasis added)

The court also considered the provisions of section 173 of the Constitution and a wide range of authorities on the topic.

## Discussion

The judicial activism on the part of Justice Weiner in the ***Maswanganyi*** and the ***Mzwakhe*** matters is, with respect, applauded. The manner in which litigation is run against the RAF in some matters is a cause for concern for both the sustainability of the RAF, the interests of legitimate claimants, the protection of public funds and the reputation of the legal profession.

Litigants wishing to have their settlement agreements made orders of courts must consider the approach and principles applied by the courts and the warning that courts will not simply act as rubber stamps. A number of questions arise though, including circumstances where the parties agree on terms of a settlement and elect not to apply to make such settlement an order of court, agreements that are potentially *contra bonos mores* (against public policy) illegal or even unconstitutional could still be entered into and the courts will only have sight (and thus oversight) of these in the event of a dispute between the parties to the settlement which is taken through the litigation process.

While the emphasis on the protection of public funds in the ***Maswanganyi*** and ***Mzwakhe*** matters is, with respect, supported, the attitude and approach of the RAF to the litigation in these and many other cases must also be a cause for concern. Many destitute plaintiffs have to endure costly and lengthy litigation against the RAF while that statutory entity fails to deal with many legitimate claims expeditiously, in compliance with its legislative mandate or to litigate effectively and efficiently in certain matters on the court rolls. In the ***Maswanganyi*** matter, counsel was only briefed the day before trial. The attendance of the insured driver at the trial was not secured timeously and the RAF, represented by counsel at the trial, had elected to settle the matter. Similarly, in the ***Mzwakhe*** matter the RAF did not plead in respect of the quantum claimed and appears not to have done any investigation in respect thereof. Many plaintiffs (and their legal representatives) are frustrated by the RAF dragging its feet in terms of the investigation of matters and not providing proper instructions to its legal representatives. In many matters, even on the date of the trial, the RAF's legal representatives simply contend that they do not have instructions thus frustrating the legal process and possibly the constitutionality entrenched rights of the plaintiffs for a speedy resolution of disputes and access to justice. One wonders how many RAF claims are actually investigated to finality internally within the 120-day period after lodgement. The RAF is funded by the public purse whereas indigent plaintiffs, in many instances, have limited access to justice and must rely on legal practitioners who pursue their claims on a contingency basis. The scales of justice, I would respectfully submit, are heavily balanced against these plaintiffs.

Had the ***Maswangani*** and ***Mzwakhe*** matters not involved public funds, one wonders whether the courts would have taken a similar approach. In both matters the protection of public funds was one of the factors emphasised.

It is hoped that the interests of justice of all parties will be taken into account by courts called upon to make settlement agreements orders of court.

The (un)preparedness of the respective plaintiffs for trial in the ***Maswanganyi*** and ***Mzwakhe*** matters is also a cause for concern. In the ***Maswanganyi*** matter, the litigation proceeded to trial with no witnesses who available could testify on the circumstances under which the accident occurred. How, with respect, was it expected that the plaintiff would discharge the onus of proving that the accident was caused by the negligent driving of the insured driver? How well prepared or well advised was the plaintiff in taking the matter to trial in these circumstances? It is incumbent on attorneys acting for plaintiffs in RAF matters to investigate all aspects of the matter, including the circumstances under which the accident occurred. Presumably, the case as pleaded would have been formulated after there had been some consultation with witnesses. The plaintiff's legal representatives in the ***Mzwakhe*** matter should have been aware of the risks associated with contradictory reports by the experts and the effect this could have on proving the quantum of their client's claim.

Practitioners will be well advised to take heed to the warnings by the courts that settlement agreements will not, as a mere formality, be made orders of courts. Those acting for plaintiffs in RAF matters in circumstances similar to the ***Maswanganyi*** and ***Mzwakhe*** matters, will be similarly advised to consult with all the witnesses and obtain all the relevant information upfront, to investigate all matters thoroughly, analyse the pleadings and draw up an advice on evidence before proceeding to enroll matters for trial. A last minute concession by the RAF will not necessarily be rubber stamped by the court.

Do not bank on a concession and ultimate settlement agreed to by the RAF, negotiating with its proverbial back against the wall, at the doors of court being made an order of court in all cases. Where will the line be drawn for courts interfering with the parties' freedom to contract? Are the courts taking a more inquisitorial approach to matters involving public funds?