

# RISK ALERT

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## RISK MANAGEMENT COLUMN

### A NEW YEAR – TIME TO RETHINK AND REASSESS THE APPROACH TO RISK MANAGEMENT

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#### DISCLAIMER

Please note that the Risk Alert Bulletin is intended to provide general information to legal practitioners and its contents are not intended as legal advice.

By the time this edition of the Bulletin is published, many practices will be well into the implementation of their strategic plans for the year. As part of the strategic planning, an assessment must be done on the risks that may affect the achievement by the practice of its strategic goals. Improving the way risks are managed must be one of the goals for every practice in 2020.

In the unfortunate event that risk management was not given the appropriate priority in the past, the beginning of the new year is an opportune time to rethink your approach. A prudent approach is to constantly evaluate the efficacy and efficiency of the risk management practices and policies in place in the firm.

A number of organisations have published what are predicted to be the main risk focus areas in 2020. Some these surveys have focussed on certain aspects of legal practice in other jurisdictions. I am not aware of a survey conducted in South Africa which looks into the proverbial crystal



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ball on what 2020 holds in store for legal practitioners in this country. While these surveys are based on the mandate and area of focus of the respective organisations, several general observations can be gleaned from the publications. These include:

- (i) The importance of constantly scanning the operating environment holistically (internally and ex-



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- ternally) in order to identify the risks faced by an enterprise;
- (ii) A risk management plan must assess the potential impact of a risk materialising and the development and implementation of a risk management plan appropriate for the identified risks;
  - (iii) The increase in various forms of cyber related risks;
  - (iv) The numerous risks arising from the changing regulatory and economic environment;
  - (v) Embedding the risk management plan within the enterprise; and
  - (vi) Concerns regarding the sustainability of legal practices and how certain areas of practice are affected by the identified risks.

Management of risks requires constant action on the part of practitioners. It cannot be assumed that risks will 'auto-correct'. Practitioners must make a concerted effort to identify the risks applying to their respective environments and then develop measures to deal with the risks. Practical measures must be taken to manage risk. Such measures will include the risk treatment options (accept, avoid, mitigate or transfer). The risk management plan must address the unique circumstances of the practice concerned. No legal practice is totally immune from risk. The obligation to have a risk management plan has its genesis in the regulatory and governance requirements applicable to law firms. The legislation, rules and professional duties of a legal practi-

tioner impose certain risk management obligations on practitioners. Risk management over all aspects of the practice is an absolute necessity and cannot be seen merely as a tick-box exercise, applicable only to some areas. The benefits to the practice and all other stakeholders of the risk management will depend on the attitude taken by the senior members of the practice and the amount of effort put into the exercise. When addressing younger practitioners, I often suggest that in an increasingly competitive market, the manner in which risk is managed in the firm may be the distinguishing factor that sets one practice apart from the competition.

The Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF) provides risk management assistance to insured legal practitioners at no cost to the practice. Please contact either Henri van Rooyen (our Practitioner Support Executive) or me should you require any assistance with risk management. We can be contacted on (012) 622 3900 or email us at [Risk.Queries@LPIIF.co.za](mailto:Risk.Queries@LPIIF.co.za).

The annual completion of completion of the risk management self-assessment questionnaire is prescribed by the rules and the LPIIF policy. For your convenience, we have included a copy of the questionnaire in this edition of the Bulletin. A copy can also be downloaded from the LPIIF website. The rationale behind the completion of the questionnaire is set out in the note accompanying it. We must add that the information required is important in order to give the LPIIF, being the primary

professional indemnity insurer of all practitioners with Fidelity Fund certificates (see section 77 of the Legal Practice Act 28 of 2014), the underwriting information required in order to assess the risk pool.

We look forward to ongoing engagement with the profession with regards to risk. The LPIIF, the Legal Practitioners' Fidelity Fund, the Legal Practice Council (as the regulator), every member of the profession and all other stakeholders have a common interest to ensure that risk is properly managed by all practitioners. In this regard, we encourage members of the profession to inform us of any risk related topic they wish us to address and to bring any new developments to our attention. To this end, we are also going through a process of assessing our various publications in order to ensure an improved offering to readers. We look forward to your input. Keep a look out for further communication from the LPIIF in this regard.

Our publications this year will cover topical risk matters and we will, as far as possible, attempt to provide members of the profession with practical suggestions on how to avoid or mitigate risks.

Embed risk management in every aspect of your firm, make it part of the DNA of the practice and we trust that you will have a claim-free 2020. All stakeholders in the firm will reap the benefits of a properly developed and implemented risk management plan.

## GENERAL PRACTICE

## AN ATTORNEY'S LACK OF CARE AND DILIGENCE CAN HAVE ADVERSE COSTS CONSEQUENCES

"...There comes a time when a diligent attorney has to leave the comfort zone of his or her air-conditioned office and venture out to do some fieldwork in order to safeguard the interests of a client..." (per Rampai J in *Mlenzana v Goodrick & Franklin Inc* 2012 (2) SA 433 (FB) at paragraph [99]).

It is trite that an expert witness is required to assist, and not to usurp, the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and their opinions must be underpinned by proper reasoning in order to enable the court to assess the cogency of the opinion proffered and the conclusions reached. The court must be able to satisfy itself as to the correctness of the expert's reasoning. Absent any reasoning, the opinion is inadmissible. An expert opinion which lacks proper reasoning is not helpful to the court.

In *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ), the court held that in order for a comprehensive medico-legal report to continue being accepted as complying with the rules pertaining to expert evidence in modern practice, and for the plaintiff not to be potentially prejudiced by a failure to distinguish assumptions from fact and opinion, the following is pertinent:

- A clear distinction must be made between the primary source data relied upon, secondary sources and the plaintiff's say-so. The primary source would inevitably be the treating hospital's records from the time of the accident until discharge.
- The medico-legal report should also clearly indicate whether the plaintiff's assertions are accepted or merely assumed.



Authors (from left): Ayanda Nondwana, Director at Lawtons Africa and Zinhle Mokoena, Candidate Attorney at Lawtons Africa

Accordingly, the court ruled that much will depend on how the experts distinguish between objective originating data on the one hand and the plaintiff's say-so or unsubstantiated hearsay on the other. In this way a clear line can be drawn between expert opinion evidence on the one hand and the acceptance of the plaintiff's mere say-so on the other.

In a matter wherein the writers were involved\*, and judgement handed down in November 2019, the apt advice given by the court in *Mlenzana* was not heeded by one of the parties, with dire consequences to the attorney who was representing the plaintiff.

Briefly, the facts were: the defendant, an incorporated firm of attorneys, had acted on behalf of the plaintiff in a claim against the Road Accident Fund (RAF) for damages arising out of a motor vehicle accident. The claim became prescribed in the hands of the defendant and, as a result, the plaintiff instituted a claim against the firm for professional negligence.

The parties reached a settlement save for the costs of three experts engaged

by the plaintiff. The defendant contended that it was not necessary or reasonable for the plaintiff to have engaged their services and as a result, their reports were not opinions as prescribed by the law and therefore the defendant was not liable for these costs. On the other hand, the plaintiff's attorney contended that it was necessary for him to investigate the head injury based on the version of the plaintiff that he had lost consciousness at the scene of the accident. In short, the plaintiff's attorney accepted the say-so of the plaintiff without demur in deciding to brief the said experts. Similarly, the said experts, relying on the say-so of the plaintiff and in absence of objective evidence or data to support their conclusion, opined that there was a head injury.

In granting judgement in favour of the defendant, the court, reminiscent of *Mlenzana*, profoundly remarked as follows:

"However, faced with the plaintiff who alleges to have been knocked unconscious at the time of the accident and hospital records which do not show anything or a complaint relating to a

## GENERAL PRACTICE continued...

head injury, not even showing the recording of the Glasgow Coma Scale on admission or any MRI scan results, I am unable to comprehend why the clinical notes of the first treating doctor were not obtained.

Further, it is incomprehensible why a statement was not obtained from the plaintiff's employer as to the state in which he found the plaintiff when he took him to the private doctor on that day. I am of the respectful view that a diligent attorney would have obtained this information to ascertain whether the plaintiff was in fact knocked unconscious on the day of the accident before embarking on a costly exercise to engage the services of experts. The ineluctable conclusion is therefore that the referral

of the plaintiff to the experts as part of the investigation of the head injury was unreasonable and unnecessary in the circumstances of this case." (At paragraph 8 of the judgement, emphasis added)

As a result of the court disallowing these costs, the plaintiff's attorney absorbed the costs as his expense.

The above judgement is a welcome reminder to all attorneys who specialise in personal injury matters that care and diligence are required prior to the engagement of medical experts. The reliance on the say-so of the client does not meet the basic standard of reasonableness. The attorney is required to do some leg-work for a change, otherwise the consequences will be costly.

(This article was originally published in the Lawtons Africa *Insurance Law Newsletter* on 17 December 2019 and is reproduced with the kind permission of the authors.)

\*Note by the editor: Mr Nondwana and Ms Mokoena acted on the instructions of the Legal Practitioners' indemnity Insurance Fund NPC (the LPIIF), the professional indemnity insurer of the defendant, in this matter. The judgement by Twala J in the matter of *Miquessewe Isaias Ndlovu v Nozuko Nxusani Incorporated* (Gauteng Local Division, Johannesburg Case No: 5803/2017) was delivered on 15 November 2019.

## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE



**Legal Practitioners' Indemnity Insurance Fund NPC**

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The annual completion of this questionnaire will assist legal practitioners in:

- Assessing the state of the risk management measures employed in their practices;
- Focusing their attention on the appropriate risk management measures to be implemented;
- Providing a means of conducting a gap analysis of the controls the firm needs to have in place; and
- Collating the information that may be required in the completion of the proposal form for top-up insurers and the application for a Fidelity Fund certificate.

### IMPORTANT NOTES AND FREQUENTLY ASKED QUESTIONS

#### A. How often must the questionnaire be completed?

Clauses XXIV and 23 of the Legal Practitioners Indemnity

Insurance Fund NPC (the LPIIF) Master Policy read with the South African Legal Practice Council rules (the rules) prescribe that every insured legal practitioner must complete this questionnaire annually. The LPIIF will not provide indemnity in respect of a claim where the insured has not completed this questionnaire in the applicable insurance scheme year. Attorneys must have regard to point 15 of the application for a Fidelity Fund certificate form (schedule 7A of the rules) which provides that this form must be completed. Advocates with trust accounts rendering legal services in terms of section 34(2)(b) of the Legal Practice Act 28 of 2014 (the Act) must also complete this questionnaire annually (see point 13 of the application for a Fidelity Fund certificate form for advocates (schedule 7B of the rules)). A Fidelity Fund certificate will not be issued to a legal practitioner who has not complied with this requirement. Any reference to a firm in this form includes advocates practicing in terms of section 34(2)(b) of the Act.





## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE



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| Are of practice   | Percentage | Are of practice              | Percentage |
|---|------------|------------------------------|------------|
| Conveyancing  |            | Commercial                   |            |
| Criminal  |            | Debt collection              |            |
| Estates - trustees/executors/administrators   |            | Insurance                    |            |
| Investments   |            | Liquidations                 |            |
| Marine  |            | Matrimonial                  |            |
| Patents & Trademarks  |            | Personal injury (RAF claims) |            |
| Medical malpractice   |            | General litigation           |            |
| Other (please specify any type of work that makes up a significant percentage of your fees) |            |                              |            |

## 2. SECTION 2

### 2.1. Risk Management Information

| Risk Question |  | Yes | No |
|---------------|--|-----|----|
| 2.1.1         | Do you have a dedicated risk management resource/ a person responsible for risk management and/or quality control?                     |     |    |
| 2.1.2         | Are all instructions recorded in a letter of engagement?   |     |    |
| 2.1.3         | Does your practice screen prospective clients?   |     |    |
| 2.1.4         | Do you assess whether or not you have the appetite, the resources and the expertise to carry out the mandate within the required time? |     |    |
| 2.1.5         | Has your firm registered all time barred matters with the LPIIF's Prescription Alert unit?   |     |    |



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## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

| Risk Question |  | Yes | No |
|---------------|--|-----|----|
| 2.1.6         | Are regular file audits conducted?   |     |    |
| 2.1.7         | Is the proximity the prescription date taken into account when accepting new instructions and explained to clients?                  |     |    |
| 2.1.8         | Is a peer review system implemented in the firm?   |     |    |
| 2.1.9         | Is advice to clients always signed off by a partner/ director?   |     |    |
| 2.1.10        | Do you have a dual diary system in place for professionals and support staff?  |     |    |
| 2.1.11        | Do you have a formal handover process when a file is transferred from one person to another within the firm?                         |     |    |
| 2.1.12        | Is more than one contact number obtained for clients?  |     |    |
| 2.1.13        | Are instructions, consultations and telephone discussions confirmed in writing?  |     |    |
| 2.1.14        | Does your firm have documented minimum operating standards/ standard operating procedures?   |     |    |
| 2.1.15        | Does your practice have effective policies on uniform file order?  |     |    |
| 2.1.16        | Is there a formal structure and process for supervision of staff and delegation of duties?   |     |    |
| 2.1.17        | Do you have a formal training program in place?  |     |    |
| 2.1.18        | Does the training program include risk management training?  |     |    |
| 2.1.19        | Do you have any executor bonds of security issued by the LPIIF?  |     |    |
| 2.1.20        | If yes, have the estate funds been audited as part of your annual regulatory audit? Please provide a copy of the annual audit report |     |    |
| 2.1.21        | Are background checks (including criminal records and professional history) conducted on new employees?                              |     |    |

## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE



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| Risk Question |  | Yes | No |
|---------------|--|-----|----|
| 2.1.22        | In respect of the financial functions, has an adequate system been implemented which addresses:    |     |    |
| 2.1.22.1      | Segregation of duties?   |     |    |
| 2.1.22.2      | Checks and balances?   |     |    |
| 2.1.22.3      | The internal controls prescribed by Rule 54.14.7 with regards to the safeguarding of trust funds?  |     |    |
| 2.1.22.4      | Compliance with FICA and the investment rules?   |     |    |
| 2.1.22.5      | The verification of the payee banking details and any purported changes as required by Rule 54.13? |     |    |

2.2. What other insurance policies does your firm have in place? (for example - cyber risk, misappropriation of trust funds, top-up professional indemnity, fidelity guarantee, commercial crime, public liability etc)

2.3. Are you aware of the risks associated with cybercrime in general and risks associated with phishing/cyber scams and the scams involving fraudulent instructions relating to the purported change of beneficiary banking details?

Yes  No

2.4. Does your practice have appropriate insurance in place to cover cyber related claims (Cybercrime related claims are excluded from the Master Policy- see clause 16(o))?

Yes  No

2.5. Does your practice have regular meetings of professional staff to discuss problem matters?

Yes  No

2.6. Does your practice have formal policies on file storage and retrieval? (Procedures to ensure that files are not lost or misplaced or overlooked)

Yes  No

2.7. Have you read the Master Policy and are you (and all others in your practice) aware of the exclusions

(including the cybercrime exclusion)?

Yes  No

2.8. Have you and your staff had regard to the risk management information published on the LPIIF website (<https://lpiif.co.za/risk-management-2/risk-management-tips/>)?

Yes  No

2.9. Would your firm like to receive risk management training?

Yes  No

2.10. Should you require a risk management training session for the professional and/or support staff in your firm, please contact either:

- **Henri Van Rooyen (Practitioner Support Executive)**  
Email: [henri.vanrooyen@LPIIF.co.za](mailto:henri.vanrooyen@LPIIF.co.za)
- **Thomas Harban (General Manager)**  
Email: [thomas.harban@LPIIF.co.za](mailto:thomas.harban@LPIIF.co.za)

NAME

CAPACITY:

SIGNATURE:

DATE OF COMPLETION: