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RISKALERT

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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.

Legal Practitioners' Indemnity Insurance Fund NPC
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LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

RISK MANAGEMENT COLUMN

SCAM ALERT

The increase in cybercrime incidents in 2020 is well documented. Locally and abroad, legal practitioners and their staff working remotely as a result of the COVID-19 lockdown measures have been identified as one of the the economic sectors targeted by the cyber scammers. People working from home, it has been said, may have lower alertness to cyber risks. In some instances, the required information technology (IT) security and other risk management measures implemented in the office environment may not have been deployed in the homes of staff working remotely. Some legal practices had to make hasty arrangements to ensure that their operations could continue remotely, and IT security considerations may not have received the appropriate attention. The result is that cyber security vulnerabilities have been aggravated in some instances.

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Cybercrime related claims make up the highest number of excluded claims reported to the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF). Since the beginning of 2020, the LPIIF has been notified of 194 cybercrime related claims with a total value of R130 128 918.

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The constant flow of cybercrime related notifications is a serious cause for concern as it shows the extent to which South African legal practitioners continue falling victim to cybercrime.

It will be remembered that cybercrime related claims are excluded from the LPIIF Master Policy (see clause 16(o)).

The extent of cyberattacks against law firms, globally, is highlighted in the article entitled '*Law Firms' Reported Cyberattacks Are 'Tip Of The Iceberg*' by Xiumei Dong (accessible at https://www.law360.com/cybersecurity-privacy/articles/1326001/law-firms-reported-cyberattacks-are-tip-of-the-iceberg-?nl_pk=83d7c2b1-2452-4854-9241-be7d92c6812d&utm_source=newsletter&utm_medium=email&utm_campaign=cybersecurity-privacy). As noted by the author, many of the cyberattacks go unreported. The article highlights the cybersecurity vulnerabilities in remote working and the fact that the full extent of the attacks may be more severe than currently reported.

As we approach the end of 2020, cybercrime may increase as cybercriminals seek ill-gotten windfalls ahead of the festive season. The cybercriminals, primarily, seek access to the finances and data held by legal practitioners. Several legal practices have also been targets of other forms of cyberattacks such as ransomware attacks.

Everyone in the legal practice must have a heightened alertness to cyber related scams and other scams. Cybercriminals succeed when the guard is lowered – do not let your guard down!

A lot can be written on scams, but, for present purposes, I will highlight just three of the many variations of scams targeting South African legal practitioners.

Scam 1 – The fraudulent change of banking details

This is the most common of the scams targeting legal practitioners and is sometimes called business email compromise (BEC) scam. Put briefly, the legal practice will receive an email purporting to be from a person to whom a payment is due. The email will provide details of a fraudulent bank account and give an instruction that the funds must be paid into that account. Conveyancers, in particular, have been the target of these scams. In some instances, one character in the email address of the intended recipient of the funds is changed and, unless special attention is paid to the communication, the recipient will be induced into believing that the fraudulent email constitutes a legitimate payment instruction. There have also been instances where an email purporting to be from the law firm is sent to a third party giving fraudulent bank details purporting to be those of the firm. In this instance, funds due to be paid to the practice are paid to the fraudsters.

No payments should be made without a verification of the banking details of the recipient.

Further information on this scam can be obtained from the following sources:

- The Bulletins published in November 2019, August 2019 and August 2018. Copies of these Bulletins can be accessed at https://lpiif.co.za/risk-management-2/risk-management/. Those editions of the Bulletin also provide suggestions of measures that legal practices can implement in their practices to mitigate the risks arising from this scam.
- The judgements delivered in ***Fourie v Van der Spuy and De Jongh Inc. and Others*** (65609/2019) [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP) (30 August 2019), ***Jurgens and Another v Volschenk*** (4067/18) [2019] ZAECPEHC 41 (27 June 2019), ***Galactic Auto (Pty) Ltd v Venter*** (4052/2017) [2019] ZALMPPHC 27 (14 June 2019) and ***Lochner v Schaefer Incorporated and Others*** (3518/16) [2017] ZAECPEHC 4 (24 January 2017); and
- Michele van Eck, '*A framework for professional duties and liability of legal practitioners in the payment of trust monies*', 2020 TSAR 846

Scam 2 – The Fidelity Fund overpayment of audit fee refunds

The *modus operandi* of this scam is that a fraudulent cheque is deposited into the legal practice's bank account. The deposit is followed by a phone call from a fraudster purporting to be from the Legal

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Practitioners' Fidelity Fund (the Fidelity Fund).The fraudster alleges that the Fidelity Fund has made an overpayment of the firm's trust audit fees and demands a refund of a substantial portion thereof. As a "sweetner", the fraudster may "authorise" the firm to retain part of the purported payment as fees, though the firm would not have rendered any legal services to earn such a fee. A fraudulent document purporting to be a deposit slip or other form of proof of payment will be sent to the firm on a fake Fidelity Fund letterhead. The perpetrators of the scam will put pressure on the firm to make the 'refund' as soon as possible. This is an attempt to get the firm to make the payment of the 'refund' into the fraudsters bank account before the firm receives a notification from the bank that a fraudulent cheque has been paid into the firm's bank account.

The Fidelity Fund will never make payments in this way and neither will it make such a demand for repayment. Practitioners must not make any payment to the fraudsters in these circumstances.

For more information on this scam see:

- The November 2019 edition of the Bulletin; and
- The warning from the Legal Practice Council (the LPC) and the Law Society of South Africa (LSSA) published at https:// lpc.org.za/warning-against-fraud-statement/

Neither the Fidelity Fund nor the LPIIF will indemnify practices for losses suffered in this scam.

Scam 3 – The 'cat fishing' scam

The most common *modus operandi* of this scam involves the legal practitioner being approached by a party purporting to be either a so-called 'middleman' or some other participant in a purportedly lucrative commercial transaction. The practitioner will be lured into the scam with a promise that a large amount of money will be paid into the firm's trust account. The idea is usually that the trust account will be used as a conduit through which the funds will be passed for onward payment to third parties. Lucrative commissions will then purportedly be earned by the 'middleman' and the practice. Some versions of this scam include a narrative involving the sale of some or other precious metal, foreign exchange or some other offshore transactions. In the face of the COVID-19 pandemic, the transactions involving large amounts of personal protective equipment (PPE) have also been touted.

The narratives to the legal practitioners may vary. At the end of the day, the legal practitioner's trust account will be used as a conduit. Parties who have participated in these schemes and suffer losses, may later turn to the legal practitioners involved in an attempt to recover their losses. Such transactions also expose the practitioners to regulatory action in terms of the Financial Intelligence Centre Act 38 of 2001 or even criminal prosecution in terms of Prevention of Organised Crime Act 121 of 1998. The risk of regulatory action by the LPC also exists. The precautions relating to anti-money laundering are well documented in a variety of freely available literature.

Taking things with the proverbial pinch of salt, applying professional scepticism, being street wise, that old adage that if something sounds too good to be true then it probably is and all the other related words of warning will be well applied by legal practitioners faced with scams.

Though it has been adapted over the years, this scam is not new as will be noted from the facts of ***Hirschowitz Flionis v Bartlett and Another*** (546/04) [2006] ZASCA 23; 2006 (3) SA 575 (SCA) ; [2006] 3 All SA 95 (SCA) (22 March 2006)

Practitioners facing claims arising out of this scam will not be indemnified by the LPIIF as no legal services would have been rendered by the firm. Regard must also be held to clauses XX, 1, 16 (e), (f), (j), (k) and (m) of the LPIIF policy, each of which may apply to a claim arising out of the scam.

Educate all members of staff on the common scams, implement the appropriate internal controls to mitigate the risks associated with scams and constantly monitor that the measures are being implemented.

GENERAL PRACTICE

CLEAR VISION BEYOND THE CLOUD

By: Simthandile Kholelwa Myemane
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The world finds itself in a cloud that has been caused by the coronavirus, commonly referred to as COVID-19. The future looked even more blurry when the pandemic hit and killed a high number of people before the spread could be contained. While certain countries have seen a second wave of the pandemic, South Africa is currently experiencing relatively stable infection rates from the first wave, with the second wave currently uncertain.

Though the virus was not foreseen, it impacted our lives and businesses. We are still living with the pandemic and expected to do so for an unknown period into the future. As we all know, at the time that the virus was first detected in South Africa, we had already seen the damage it was causing in other parts of the world and could therefore put responses in place to deal with it in order to mitigate its potential catastrophic effect. These responses included declaration of a state of national disaster and a hard lockdown that our government introduced to curtail the spread of the virus. This gave time for government to prepare and improve the conditions at our health care facilities in order to deal with the expected numbers of infections.

Legal practices, as businesses, have also been hit hard by this pandemic and have had to respond appropriately. A number of legal practitioners have lost their lives due to the virus. In certain instances, due to being infected with the virus, some legal practices have not been able to reopen even after the economy opened for business. There are legal practices that have had to seek emergency funding following the hard lockdown that was imposed by the government. The question then arises: if we were to experience a second wave that may necessitate some form of stricter lockdown regulations, would the legal profession be prepared? How will legal practices ensure that they are resilient? In this article I attempt to explore various ways in which legal practices can prepare themselves for the event that the second wave materialises, with an anticipated emergence of stricter regulations.

One of the ways to prepare for an eventuality and ensure that one stays afloat is by assessing and, where necessary, changing one's attitude towards technology. We have seen numerous articles around technology and the benefits as well as risks of invest-

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ing in technology. COVID-19 has proven the importance of investing in technology. Since March 2020, businesses that were able to trade virtually have survived the storm. However, enterprises that required their operations to be physically carried out from their usually business premises have struggled, with only some surviving. While closure of legal practice for economic reasons has always taken place, this pandemic has exacerbated the situation as some could not have a clear vision beyond the cloud.

This takes me to the point of business resilience, and I challenge legal practices to develop appropriate resilience. Resilience of a business goes beyond just using technology, but technology is central to whatever mechanisms one explores, especially now. One of the definitions that the Merriam Webster dictionary gives for resilience is that it is 'an ability to recover from or adjust easily to misfortune or change'. Simply put, it is the ability of the organisation to quickly adapt to all situations and be able to push through. Resilience therefore requires that legal practitioners be agile, both in mindset and methodology.

The legal profession still heavily relies on face-to-face consultations with clients and manual processes for storing client information. Legal practices need to invest in technology that allows virtual consultation with their clients, such as Microsoft Teams, Zoom or other similar technological solutions. These capabilities can also be accessed via various electronic devices, thus enabling the clients to meaningfully participate. In respect of client files, legal practitioners still open physical files for their clients, make notes on the files etc. This often requires of a legal practitioner to have access to the physical file to ascertain the status of a matter and to be able to do further work on the file. We have been hearing of the technological future that is coming and that future has arrived now. Legal practices can still open and maintain files for each client, but this can take place in a digital space instead of a physical file.

One of the advantages of digitisation and automation is that if a mandate, for instance, is concluded and payments relating to that mandate become due, these should not wait for one to go to the office to make the payments. The workflow that would have occurred at the office should still occur away from the office. The person assigned to sign-off a file should be able to do so off-site. A notification can be sent to the person responsible to initiate payment, who will follow the internal payment processes and payment can be affected without compromising any of the internal controls. Should the second wave materialise, legal practitioners should be well positioned to continue servicing their clients as if they are at their operating premises, and in that way the client remains happy. This also ensures that the legal practice and legal practitioners remain relevant.

Investing in and using technology should not be seen to suggest that people stop applying logic to situations. There are risks that come with technology, and legal practices and practitioners should ensure that they employ the necessary security measures to protect themselves from attempts to defraud them.

CONCLUSION

Legal practitioners need to ensure that their practices are resilient and can stand the test of time.

THE EXCESS PAYABLE IN TERMS OF THE LPIIF POLICY EXPLAINED

By: Thomas Harban,
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LPIIF

The limits of indemnity afforded to insured legal practitioners under the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) Master Policy were explained in the November 2020 edition of the Bulletin. As indicated in that edition, various aspects of the LPIIF cover will be explained in a series of articles published in the Bulletin. In this edition, the focus is on the excess payable (also called the deductible).

The payment of an excess is a common requirement in short-term insurance policies when a claim is paid. The LPIIF Master Policy is no exception in this regard.

When is the excess payable under the LPIIF policy?

The excess becomes payable where indemnity has been afforded to the insured legal practitioner and the latter is found liable to compensate the claimant. The amount of the liability could be set out in the terms of a judgement handed down by a court or in the terms of a settlement agreement. In the latter instance, the settlement agreement will set out the amount of the liability and specify that the insured is liable to pay the excess (and the amount thereof).

The excess will then become payable at the point the LPIIF needs to make payment of the claim.

The excess is the first amount payable in respect of the claim. The insured practitioner will be required to pay the excess directly to the claimant or the latter's legal representative. The LPIIF will require proof that the excess has been paid (if already paid) or a pledge signed by the insured undertaking to pay the excess.

No excess is payable where:

- The claim is successfully defended
- The LPIIF makes a payment of approved costs
- The LPIIF only pays the defence costs in respect of a claim

Who is liable to pay the excess?

Remember that the indemnity is afforded to the legal practice and the legal practice is thus liable to pay the excess. With single practitioners it will be clear that the sole practitioner will be liable for the excess. In practices with more than one principal (see the definition of principal in clause XXIII of the policy) a dispute sometimes arises between the partners/directors in the firm with regards to whether the partner/ director who dealt with the underlying matter and thus exposed the firm to the liability is solely responsible for the payment of the excess or whether the all the partners/directors are liable to pay. The partners/directors are jointly and severally liable for the liabilities of the practice and the excess is one example of such liability. The LPIIF, to the extent provided in the policy, indemnifies the practice as a whole in respect of the liability for the claim. How the excess is split between the partners/directors is an internal matter that does not involve the LPIIF or the claimant.

The liability to pay the claim may arise at a time when the constitution of the firm has changed or even where the firm no longer exists. It not uncommon that the relationship between the former partners/ directors may, in the interim, have deteriorated to the extent that there is little, if any, civil

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communication between them and they may have become belligerent and uncooperative towards each other and thus dispute who is liable to pay the excess. Such a dispute may delay the finalisation of the claim while the squabble drags on. Interest on the claim could be running and thus the liability of the practitioners will be increasing. The claimant and the LPIIF cannot be prejudiced in perpetuity by such an internal dispute.

One measure of mitigating this risk is to address liability for the excess in the partnership agreement. This will also provide certainty to the principals in the practice. In this regard, see the suggestions in the article "Until a claim do us part: Does your partnership agreement address the event of a claim against the firm?" published in the October 2017 edition of De Rebus (http://www.derebus.org.za/claim-us-part-partnership-agreement-address-event-claim-firm/ accessed on 30 October 2020). In that article it was noted that:

'A partnership of practitioners (as with any other partnership) is based, inter alia, on good faith between the participants in that relationship to the achievements of the objects of the partnership. In addressing attorneys in various forums, I have often likened the partnership agreement entered into by practitioners to an antenuptial contract (ANC) entered into by parties about to enter a marital relationship. All the terms of the relationship should be carefully set out so that, in the unfortunate event of a dissolution, the rights and obligations of the respective parties to the 'fruits and the spoils of the union' are clearly recorded. I surmise that for so long as the partnership relationship peacefully persists and all the parties thereto are deriving the associated benefits, it would be improbable that any of the participants would feel the need to regularly have regard to the contents of the underlying agreement. (I suppose that, similarly, a married couple would hardly find a need to refer to their ANC contract while their union is a happy one.) However, when the relationship ends, or faces the threat of termination (whether, for example, in the unfortunate event of the demise of one of the partners or the threat of a claim against the partnership), the parties may suddenly then find a need to have careful regard to the contents of the agreement. At that stage it may be too late to seek to address any gaps in the agreement.

…[A] Number of questions [arise], which practitioners should consider addressing.

What if, for example –

- *a claim against the partnership arises only after the partnership has been dissolved;*
- *a claim is made against the partnership, but the underlying circumstances of the claim arose when the practitioner concerned was part of a previous entity; or*
- *one partner, facing a claim, either joins the other(s) or institutes action against them for a contribution?*

A response that "we simply did not consider these questions" may not assist when the partnership is faced with a claim.

My suggestion to practitioners is that it would be prudent to address issues relating to professional indemnity (PI) claims and other forms of potential liability in the partnership agreement. A claim for PI, misappropriation of funds or some other liability may arise after the partnership has been dissolved. In many instances, practitioners moving between firms may take the files they have worked on (or are currently working on) with them. What will happen in the event that there was breach of mandate, while the practitioner was still with the previous firm? Against which firm will the claim lie? In many partnership agreements, substantial emphasis is placed on how the financial rewards will be shared between the partners/directors but little (if any) attention is paid to how liabilities will be addressed.

The [LPIIF] is often notified of claims against firms, which no longer exist in the form they had existed, when the circumstances giv-

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ing rise to the claim arose. In some instances, the relationship between the former partners has degenerated to the extent that they are belligerent towards each other.'

Simply put, the liability of the partners/directors for the deductible in the event of a claim should be addressed in the partnership agreement by prudent practitioners. The agreement should also deal with circumstances where the liability arises from the conduct of an associate, candidate attorney or other member of staff working under the supervision of one or more of the principals. Setting out the terms in relation to the payment of the deductible will create certainty and protect the principals against each other.

What is the amount payable?

As with the amount of cover, the applicable excess is determined by the number of partners in the practice on the date that the cause of action arose (see the previous edition of the Bulletin). Remember that:

(i) advocates practising with Fidelity Fund certificates are regarded as sole practitioners and will thus have to pay the amount applicable practices with one partner; and

(ii) Any person publicly held out as a partner/director by the firm will be considered as such for purposes of calculating the excess.

(See clauses XXIII and 10-15 of the policy.)

The schedule for the applicable excesses is set out in the Master Policy and is as follows:

SCHEDULE B: Period of Insurance: 1st July 2020 to 30th June 2021 (both days inclusive)

No of Principals	Column A Excess for prescribed RAF* and Conveyancing Claims**	Column B Excess for all other Claims**
1	R35 000	R20 000
2	R63 000	R36 000
3	R84 000	R48 000
4	R105 000	R60 000
5	R126 000	R72 000
6	R147 000	R84 000
7	R168 000	R96 000
8	R189 000	R108 000
9	R210 000	R120 000
10	R231 000	R132 000
11	R252 000	R144 000
12	R273 000	R156 000
13	R294 000	R168 000
14 and above	R315 000	R180 000

The applicable **Excess will be increased by an additional 20% if **Prescription Alert** is not used and complied with.*

***The applicable **Excess** will be increased by an additional 20% if clause 20 of this policy applies.*

It will this be noted that:

- A higher excess is payable for prescribed Road Accident Fund (RAF) and conveyancing claims (see Column A);
- A 20% loading will be added to the applicable access where the claim arises out of circumstances where dishonesty conduct is involved, including:

(a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or

(b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false. (in this regard see the definitions of dishonest and innocent insured in clauses XI and XV, respectively.)

- A 20% loading will be added in the event of a prescribed RAF claim where the underlying claim was (a) not registered with the Prescription Alert Unit, or (b) alerts from that unit have not been complied with.

The Prescription Alert system is a backup diary system on which practitioners can register all time-barred matters. Practitioners are encouraged to register all litigious matters with the Prescription Alert unit. That unit sends alerts and reminders to practitioners of the looming prescription date. Queries relating to the Prescription Alert unit can be addressed to alert@LPIIF.co.za

Queries in respect of the LPIIF policy in general can be addressed to info@LPIIF.co.za