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Legal Practitioners' Indemnity Insurance Fund: Thomas Harban, General Manager, 1256 Heuwel Avenue, Centurion 0127• PO Box 12189, Die Hoewes 0163 • Docex 24, Centurion • Tel: 012 622 3900 Website: www.lpiif.co.za • Twitter handle: @AIIFZA

Prescription Alert, 2nd Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 149 • Tel: (021) 422 2830 • Fax: (021) 422 2990 E-mail: alert@aiif.co.za • Website: www.lpiif.co.za

Legal Practitioners' Fidelity Fund, 5th Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 154 • Tel: (021) 424 5351 • Fax: (021) 423 4819 E-mail: attorneys@fidfund.co.za • Website: www.fidfund.co.za

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RISK MANAGEMENT COLUMN

AMENDMENTS TO THE LPIIF POLICIES

The annual renewal of the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) policies will take place on 1 July 2020. The new policies will be published on that date and will also be uploaded onto the LPIIF website (www.lpiif.co.za).

The LPIIF team has, once again, carefully considered the wording of both the professional indemnity Master Policy and the Executor Bond Policy. All insured legal practitioners must study the policy wording carefully.

Thomas Harban,
Editor
and General Manager
LPIIF, Centurion
Email: thomas.harban@lpiif.co.za
Telephone: (012) 622 3928

The Master Policy

The current Master Policy wording can be accessed at www.lpiif.co.za. The changes to the Master Policy do not introduce any new exclusions and are aimed at improving the articulation of the affected clauses and removing any potential ambiguity.

Changes have been made to the following clauses:

- XIII – clarification that this definition refers to the excess.
- XXIV – only legal practices conducted as a sole practitioner, a partnership of practitioners, an incorporated legal practice as referred to in section 37 (4) of the Legal Practice Act 28 of 2014 or by an advocate referred to in section 34 (2) (b) of the Act will, subject to the terms of the Master Policy, be covered.
- 6 – clarification of the existing position that indemnity is granted to the legal practice- that is, the firm –and not to the individual practitioners in the firm separately.
- 16 (e) – the definition of "Investment Advice" has been

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added in order to clarify the meaning of the existing exclusion. The change to this clause reads:

'*For purposes of this clause,* ***Investment Advice*** *means any recommendation, guidance or proposal of a financial nature furnished to any client or group of clients –*

(a) *in respect of the purchase of any financial product, or*

(b) *in respect of the investment in any financial product, or*

(c) *the engagement of any financial services provider.*'

- 16 (f) – the reference to section 78 (2A) of the repealed Attorneys Act 53 of 1979 has been removed.
- 16 (m) – the change in the wording clarifies the scenarios where the exclusion applies being (i) the insured acts purely as a conduit for the funds with no underlying mandate to provide legal services, and (ii) where, after the completion of the mandate, the insured takes further action which has no impact on the mandate to provide legal services, which action the client can perform successfully without the involvement of a legal practitioner, and such action amounts to the taking of further and unnecessary risks by the insured.
- 16 (o) – tidying up the wording in order to clarify that the exclusion applies to payments made by the insured into into an incorrect account(s).
- 30 – the word 'Notice' has been replaced with 'Notification'.

The annual limits of indemnity (amount of cover) and the applicable excesses remain unchanged.

Please direct any queries in respect of the Master Policy to the LPIIF's Claims Executive, Joseph Kunene, at sithembi.kunene@LPIIF.co.za or telephone (012) 622 3917.

The Executor Bond Policy

The changes to the Executor Bond Policy are as follows:

- References to 'attorney' have been replaced with 'legal practitioner'.
- References to the old law society provincial jurisdictions have been updated to refer to the Legal Practice Council (LPC).
- The policy clarifies the existing position that bonds of security will only be issued to executors. An applicant seeking appointment in other capacity, including as a Master's representative in terms of section 18 (3) of the Administration of Estates Act 66 of 1965, will not be granted a bond of security (clause 2.1).
- The day-to-day administration of the estate must be done by the legal practice in which the executor practices.
- The LPIIF has the right to refuse to issue a bond of security to an applicant who has breached any term of the policy, whether in respect of the current application or any previously granted bond of security (clause 2.10).
- Clauses 3.3.2.1 and 3.3.2.3 have been amended to give the LPIIF the rights (i) to refuse to issue further bonds to an applicant who fails to provide a copy of the letters of executorship within 30 days of such letters being issued, and (ii) giving the LPIIF the right to apply to the Master of the High Court for the removal of the executor for a failure to comply with the obligations in this clause.
- Clause 3.3.2.4 creates an obligation on the executor to apply to the Master for the closure of the bond within 30 days after the liquidation and distribution account has been approved and the executor has accounted to the Master.
- In terms of clause 3.9, the LPIIF will have the right to report the executor to the LPC at any stage where dishonesty is detected.
- Practitioners linked to more than one firm will have bonds issued to them in the name of only one firm (clause 4.2). This is a risk management measure aimed at ensuring (i) that the administration of the estates which are the subject of bonds issued to a particular executor are all administered in one firm, and (ii) preventing attempts by certain practitioners to breach the limit of R20 million per firm.

It will be appreciated that these amendments are aimed at improving the management of the risk associated with this line of business, addressing the long-tail nature of this business and also to align the obligations of the executors with the provisions of the Administration of Estates Act. The aim is also to encourage the prudent management of this area of practice. The value of active bonds issued by the LPIIF is currently approximately R5 billion with some bonds having been issued in as early as 2002 and the executors not properly reporting to the LPIIF on the progress made in the administration of the underlying estates. The risk cannot be left to exist in perpetuity. Claims in this area have also eminated mainly from dishonesty on the part of the executors or their staff.

Any queries in respect of the amendments to the Executor Bond Policy can be addressed to Zodwa Mbatha, the Executor Bond Executive, at zodwa.mbatha@lpiif.co.za or telephone number (012) 622 3925.

Keep a look out for the new policies in the next edition of the *Bulletin*.

GENERAL PRACTICE

KEEPING PROPER CONSULTATION NOTES SAVES THE DAY: THE DEFENCE TO A PROFESSIONAL NEGLIGENCE CLAIM TURNS ON THE ATTORNEY'S CONSULTATION NOTES

By: Khopotso Selepe (LLB)
Associate at Ditsela Incorporated Attorneys, Email: khopotso@ditsela.com

Introduction

The making and retention of proper consultation notes were crucial in the successful defence of a recent professional negligence claim brought against an attorney. The matter in question is that of ***PJ Nienaber vs Pierre Kitching Attorneys and Another*** (53906/2011) ZAGPPHC (21 May 2019) (unreported).

Background

His lordship Millar AJ delivered judgment in the matter. The plaintiff had sued the defendants (his erstwhile attorneys) for damages arising from alleged professional negligence, alleging that his claim against the Road Accident Fund (RAF) had been under settled.

On 26 April 2006, the plaintiff was involved in a motor vehicle accident (MVA). Pursuant to the MVA, the plaintiff was taken to Wilgers Hospital to be treated for his injuries. X-rays were taken and he was given a neck collar to wear and medication for pain. The plaintiff had only sustained neck injuries. On 29 June 2006, the plaintiff instructed the defendants to assist him with a claim against the RAF. His initial intention was to recover the medical expenses he had incurred.

During December 2007, the plaintiff was informed that a medico-legal examination had been arranged for him with an Orthopaedic Surgeon in Pretoria. The plaintiff attended the appointment on 23 January 2008 at the Orthopaedic Surgeon's rooms.

During the trial, the plaintiff testified that he received a telephone call in May 2009 from an attorney employed by the second defendant (Ms L) who informed him that she had received an offer of R40 000.00 in respect of his claim and that she had been unable to get hold of the instructing attorney to discuss the offer. He further testified that to the best of his recollection she had informed him that the offer was a good one in the circumstances and that the offer had been increased to R45 000.00. The plaintiff followed Ms L's recommendations and instructed her to accept the offer. He was unable to recall that, before taking his instructions, she had informed him of the 'once and for all rule' or that he had only instituted the claim so as to recover his past medical expenses.

During cross examination, it was put to the plaintiff that he had consulted with Ms L at the offices of the second defendant on 21 May 2009 and he was shown the contemporaneous note made by her in respect of that consultation. The plaintiff denied that the consultation had taken place. He was asked whether he regarded the notes of the discussions and, in particular, the note relating to the consultation on 21 May 2009 as being *ex post facto* fabrications. The plaintiff declined to characterise them as such. It was demonstrated that the contemporaneous notes made by Ms L were referred to in the bills of costs that had been prepared after the settlement of the matter during 2009 and before the present action had even been instituted. He was unable to offer any comment.

The plaintiff further testified that he subsequently learned that the case had become settled on the basis that the RAF would pay the sum of R47 235.73 and would furnish him with an undertaking in terms of section 17(4)(a) of the RAF Act to cover 80% of the cost of future medical treatment arising out of the injuries sustained in the MVA and would pay a contribution towards his medical costs.

After the settlement, so the plaintiff testified, he was advised by a parent of a boy who he coached rugby that he had a claim against his former attorneys for under settlement of his claim against the RAF.

Ms L had kept the following notes relating to the plaintiff's action against the RAF:

File Note Dated 21 May 2009

'Consultation – [DL] consults with client in order to discuss the offer

from the RAF. It was explained to client that there was a risk in finalizing the case in the Magistrate's Court in light of the fact that the jurisdiction possibly could be the cause that his undertaking would in the future be limited to the difference between R100 000.00 which is the jurisdiction and the amount that is offered for pain and suffering and medical expenses. I proposed further that we send him to an industrial psychologist in order to ascertain if he will possibly have to retire early or not. The client confirms to me that he currently does not have any problems at work and that he really wants to have the case settled and that he is not interested in going to an industrial psychologist. He instructs me to continue with written settlement negotiations with the other side and to give him written feedback on the result whereafter he will decide whether he is going to accept the offer.'

File Notes Dated 26 May 2009

'Attendance at court etc – matter must stand down because the other side still doesn't have instructions. B discussed general damages and settlement proposals – stand down – we receive offer – past medical expenses R2 235.73, future medicals – Section 17(4) limited to 80% and general damages R45 000.00. DL telephone client. He wants to accept the offer and to settle the matter. Risks are again explained regarding "once for all". He alleges that he only instituted a claim for past medicals and that he is happy. I telephone the instructing attorney. The attorney who is handling the case is not available and his cell phone if off. I left a massage yesterday afternoon with his secretary and speak to her. He apparently confirmed that he is busy with one or other amendment and that the case must be postponed. I confirmed to her that client wants us to accept the offer and that I don't know what to do because the attorney is avoiding me and we are dealing with the client directly because he asked us to because it is a client who requires a lot of feedback and is difficult. Client is happy with us and I cannot see what the problem is. She will urgently get someone to call me. [PK] calls me back. Explain the situation and he confirms that we must please immediately go ahead and settle the case and he will take the matter up with his PA. I call client again, he is happy and we accept.'

Telephone Notes Dated 19 June 2009

'[JN] – one of his friends told him on Saturday that he should have got much more for his case – can we ask for more? – no, final. Cannot just ask for more – must prove it – every case has its own facts. His settlement was based on the medical report. Remind him that he did not want to go to the industrial psychologist – if he now suddenly unhappy with the settlement then he must obtain a professional opinion and sue us. He must just remember that the settlement was on his instruction after I properly advised him. He won't – just wanted to know if he could get a little more.'

The plaintiff was unable to dispute the contents of the contemporaneous notes made by Ms L relating to either of his discussions with her, but stated that while he recalled the discussions, he did not recall the discussions as recorded in the notes. He was adamant that his memory was good notwithstanding his own failure to keep notes and the passage of 10 years and that the consultation on 21 May 2009 had never taken place.

The plaintiff refused to concede that after the elapse of 10 years it was possible that his memory was not as good as he believed.

Ms L testified that shortly before the trial and on 21 May 2009 she had consulted with the plaintiff wherein the plaintiff refused to consult with an Industrial Psychologist and instructed Ms L to continue with the settlement negotiations. The consultation was on the day immediately after an offer had been received from the RAF.

The defendant's expert attorney also testified that having regard, *inter alia*, to the discussion and consultations between the plaintiff and Ms L, a reasonable attorney in her position would not have done anything further in investigating a claim for loss of earning capacity and was entitled to accept and follow the plaintiff's instructions to settle the case for the amount that it was settled for.

Conclusion

The court noted that the plaintiff testified that the consultation on 21 May 2009 did not take place. He was adamant that he did not do so and went so far as to testify that he had never ever been to the second defendant's offices. Unlike Ms L who had kept notes of her interactions with the plaintiff, he had not done so.

Notwithstanding the passage of 10 years since the events in question, the plaintiff was dogmatic that his memory was accurate and disavowed any flaw or possibility of a flaw in it. Ms L, on the other hand, readily conceded that due to the passage of such a long time that her memory of what had transpired was vague and she was frank with the court when she testified that she could do little better than to confirm her notes.

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Besides being challenged factually whether the consultations of 21 May 2009 took place, it was not suggested that the notes which had formed part of the second defendant's file had been fabricated *ex post facto* – indeed the party and party bill of costs submitted to the RAF as well as the attorney client bill of costs of the second defendant, both of which had been drawn in 2009 referred to the consultation on 21 May 2009 as having taken place and was consistent with the contents of all the other relevant notes made by her.

The court held that the consultation of 21 May 2009 did in fact take place. It was during this consultation that Ms L had suggested to the plaintiff that he could go to an industrial psychologist to ascertain whether he would retire earlier than he would otherwise have done. The notes of the consultation specifically records that the plaintiff did not want to go for a further examination and wanted the case to be finalised and settled.

The court further held that having regard to the fact that the plaintiff on 21 May 2009, having been informed of the option of attending an Industrial Psychologist, refused this and instructed Ms L to proceed to negotiate for a higher offer and then on 26 May 2009, a higher offer having been negotiated proceeded to instruct her to accept it.

The court further held that it was unable to find that she did not discharge her obligations to either properly investigate the case or that she was negligent in advising the plaintiff that in her opinion the offer that had been received was a reasonable one.

On that basis, the plaintiff's case was dismissed with costs.

Lesson learned

In a nutshell, the important lesson to be drawn from this case is that attorneys should keep proper detailed notes when consulting with their clients. It is important to document every advice and instructions given by your client. This is more so in the current environment where some clients are inclined to want a second bite at the cherry after spending their settlement amounts. The attorney becomes an easy target. If steps taken by the attorney in settling the matter are not documented, the claimants' versions usually carry the day.

Practitioners are therefore advised to be smart and keep proper consultation notes to defend themselves against any future professional negligence claims.

INTEGRITY AS A LIFELONG COMMITMENT IN THE LEGAL PROFESSION

By: Mtho Maphumulo
Associate | Litigation Attorney at Adams & Adams
Email: mtho.maphumulo@adams.africa

'*Integrity: The indispensable element – the Fundamental Principles Leading to Trust, Reputation, Fair Play, Reliability, Adherence to Proper Conduct, Standards, Values.*' – James Thomas.

Integrity is integral everywhere and, in every space, however, in the legal profession, it is a non-negotiable trait – one that the court needs to be satisfied with before one becomes a legal practitioner. Upon admission, one becomes part of the noble profession and, naturally, is expected to uphold the law and have the utmost regard for it. It is thus justifiable to expect every lawyer to be a person of integrity.

Experience has, however, shown that this is not always the case – some lawyers do not maintain their integrity. Amongst other things, money, greed, influence and pressure push lawyers to partake in activities that usually prove detrimental to their hard-reached goal of becoming lawyers. Hereinunder, we will zoom into some of the conducts/behaviours which lawyers usually take 'lightly' yet may get them into trouble; demonstrate few measures/ways to deter such conduct whilst also reminding the practitioners of the gravity of maintaining integrity

both in their personal and professional spaces.

'Trivial misconducts' not so trivial for legal practitioners

Certain misconducts are generally perceived as trivial and easily pardonable for general members of the public and members of certain other professions. For legal practitioners, this does not hold true, as they are expected to uphold the law to the 't'. As explicated above, sometimes lawyers do get pushed by certain factors and end up 'doing favours'; 'helping friends/family/colleagues' – which requires them to transgress the perimeters of the law. A simple act of usage of the official stamp – certifying or commissioning a document – can have dire consequences if utilised inappropriately. Very often, a friend or a colleague will ask you to certify and/or commission a document without producing the original document or the identity document. This may, in the near or distant future, backfire. It often happens that a lawyer will ask for a 'favour' from his opponent – which, in a greater scheme of things, jeopardises the interests of the client of the lawyer doing the favour. This is prevalent in cases where the other party is the state/state organ or if the client is not so hands-on in the matter – thus leaving the practitioner 'to run the show'. Doing each other favours as colleagues is applaudable and advisable if it advances the interests of all parties involved/strengthens the legal position and contributes positively to the law. It then becomes imperative for legal practitioners to decide carefully on the favours they do for their colleagues.

Every legal practitioner is (or rather should) be aware of the statutory requirements one has to meet in order to appear in certain courts, for example, the High Court. It sometimes happens that a legal practitioner would appear without having the requisite right of appearance just because 'it will only take 5 minutes' or 'it is just to take the order'. This, if reported, followed and investigated, can have adverse ramifications for the concerned practitioner. The same applies to the signing of certain court documents, for example, the pleadings. Lastly, advocates sometimes double book themselves with the hope that one matter will settle, and s/he will deal with the other. This is a pure example of taking a chance which may greatly affect the rights and interests of one or both of your clients. As such, advocates must always avoid being double briefed.

Much more serious offences

If committing a trivial offence can have serious ramifications, one can only imagine how much harm can be caused by more serious offences-for example fraud, bribery and corruption. As demonstrated above, selfishness and greed have, on a number of occasions, been a downfall of some lawyers.

There is a trail of cases where lawyers have been struck-off the roll for offences one would not have imagined could be committed by members of the profession. For example, an attorney in the employ of a firm running his/her own matters on the side. There are no proper books; no necessary accounts in place and totally no compliance with the relevant law regulating the offering of legal services to the public. Others would brief certain advocates and get a share of the fee paid to counsel. This is a typical "*quid pro quo*" example where the attorney feeds a specific counsel with briefs and, in turn, gets to share the fees.

One may argue that although this is an unacceptable practice, some advocates may be prompted to resort to it due to lack of briefs. Be that as it may, it is unacceptable and cannot be condoned in our profession. Some lawyers have, in the past, been reported to the provincial law society (as it was then) for offences of bribery – bribing the court officials in order to 'get things done'. The offence of bribery is quite grave – be it in your personal or professional realm – offering or accepting a bribe is grave and, if reported and investigated, can have severe consequences.

In certain instances, prominent in cases against the RAF - lawyers mislead their clients (deliberately so) by not reporting properly or at all on the progress (or lack thereof) of the matter etc. Misleading of clients is unacceptable. Also, misleading your colleagues within your profession is unacceptable and is a breach of ethical duties.

These are but some of the prominent examples of trivial and serious offences that legal practitioners commit, and which has proved fatal to most hard-earned and promising careers. They speak to the core of one's integrity. Temptations, selfishness and greed is part of human nature but, as a person of integrity, you should be able to resist these for a greater good. For aspiring and current legal practitioners, it is pivotal to always remember that being a person of integrity does not cease upon admission, but it is a lifelong commitment.

Possible Measures

To curb the occurrence of the aforesaid offences, it is incumbent upon

the Legal Practice Council (LPC), courts and relevant role players to ensure that the integrity of the profession is restored and maintained. This is not only important for the judiciary but for the public at large – the public must have full confidence and belief in everyone associated with the judiciary in one way or the other. It is also imperative that each lawyer, as an officer of the court, reports those disobeying the law and breaching their ethical duties. Silence about such acts is a loud support of unethical behaviours.

When someone reports illegal/unethical behaviour, the LPC needs to protect that particular individual so as to encourage others to report such. Also, the LPC has to take robust decisions against perpetrators; courts' decisions relating to such offences need to be harsh and send a very strong message to everyone, so as to deter further misconducts.

Different national and provincial organisations, need to prioritise integrity amongst their members, continuously encourage/remind members of significance of upholding the law at all times. Further, these organisations are well positioned to transmit information further down to law students. If the right mentality is cultivated and implanted at the university level, then we will be right on course to eradicating unethical/illegal behaviour going forward. Most trivial offences can easily be obliterated through basic housekeeping, for example, lawyers producing their certificates of rights of appearance whenever they appear unless excused by a presiding officer specifically.

Conclusion

Every legal practitioner will agree that the journey to becoming a member of the profession is never easy. This, on its own, should be a sufficient reason for every practitioner to never want to risk losing everything they have worked so hard for. Our obligation, as officers of the court, is to safeguard and uphold the law and, in so doing, we instil confidence in the general public. As a person who has been declared fit and proper to safeguard the law and legal interests, you need to maintain integrity – be it in your personal or professional space and this must be your lifelong commitment.

This lifelong commitment births long-lasting fruits.

(This article was first published on 5 May 2020 at https://www.adams.africa/litigation/integrity-as-a-lifelong-commitment-in-the-legal-profession/ and is reproduced with the kind permission of the author)

ARGUMENTS IN SUPPORT OF A DELAY IN THE COMPLETION OF PRESCRIPTION AND EXPIRY PERIODS DURING THE LOCKDOWN PERIOD

By Thomas Harban

Introduction

At the time of writing, South Africa is in a state of national lockdown as part of the measures implemented by the government to combat the spread of the coronavirus (COVID 19) pandemic. Legal practitioners have, on various platforms, raised various concerns regarding the effect of the lockdown measures on their ability to conduct their practices. Similarly, various sectors of the general population have decried the effect of the lockdown on their ability to conduct their general affairs and to exercise their rights including their rights to pursue legal action. In this article I focus on the effect of the lockdown measures on matters that prescribe in the this period.

Many practitioners are concerned about the potential severe impact of prescription on themselves and their clients. The effect of the lockdown measures is that proceedings cannot be instituted and practitioners, by virtue of the measures in place, may not be able to attend to and have legal processes issued and timeously served on the defendants concerned in order to interrupt prescription. The circumstances under

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which proceedings can be instituted under the lockdown regulations are very limited. The courts are only providing limited services. Not all of the courts have electronic infrastructure such as CaseLines for the issue of new legal proceedings. Litigants who choose to pursue actions in person without the assistance of a legal practitioner do not have access to the electronic systems, where such systems are implemented.

The concerns raised by the practitioners in respect of prescription are well placed. Prescription of debts will, effectively, deny creditors their right to pursue claims against debtors concerned – I use the terms 'creditor', 'debt' and 'debtor' in the context that they are used in the Prescription Act 68 of 1969. Furthermore, the statistics for professional indemnity claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) reveal that prescription related claims are perennially the highest in terms of both the number and value of claims brought against legal practitioners. If this risk is not properly addressed, many legal practices will face the prospect of a flood of professional indemnity claims being brought against them by clients whose claims have allegedly prescribed in this period. Such claims arising out of the alleged prescription, individually or in aggregate, may exceed or substantially erode the firm's available limit of indemnity under the LPIIF Master Policy (a copy of which is available at www.lpiif.co.za). This will potentially leave such practitioners personally exposed in the event that they do not have sufficient top-up insurance or some other risk transfer measure in place. A flood of prescription related claims will also threaten the sustainability of the LPIIF as the primary insurer of all legal practitioners practising with Fidelity Fund certificates (section 77(1) of the Legal Practice Act 28 of 2014 and the clauses 5 and 6 of the Master Policy). The court rolls could also be further flooded with condonation applications and litigation launched in this regard. This is thus a potential catastrophic event that none of the stakeholders in the profession can risk facing.

There are a number of legal arguments that can be raised against a special plea of prescription where it is alleged that the debt prescribed during the lockdown period. This article focusses mainly on the delay in the completion of prescription stipulated in section 13 of the Prescription Act 68 of 1969. Though I have focussed on personal injury claims, the principles will apply to all litigation. Other grounds for the delay in the completion of prescription gleaned from the various authorities considered include the impossibility of performance and the related maxim of *lex non cogit ad impossibilia* and the *exceptio doli* concept.

It will be appreciated that it is not possible in the limited space available in this *Bulletin* to explore every possible legal argument *ad nauseum*. I will highlight the main principles of the arguments that can be raised in support of the argument that the completion of prescription is delayed in the current circumstances.

The uncharted nature of the lockdown regulations

The COVID 19 virus is novel and the measures implemented by government in response to the pandemic have taken plaintiffs and their legal representatives into uncharted territory. Both the plaintiffs and their legal representatives are subject to the restrictions. The pandemic is, itself, a superior force requiring an unprecedented response and so are the drastic and draconian measures implemented to curb it. The lockdown measurers are unforeseen, exceptional and extra-ordinary. The effects of the lockdown on the public in general and legal practitioners in particular are well documented. Some of the circumstances that are relevant for present purposes are outlined below.

The offices of the RAF are closed during the lockdown period. It is physically impossible for new claims to be legally hand delivered to the RAF offices. The Post Office is only providing limited services during the lockdown. Claims can thus not be submitted by registered mail. The effect of the closure of the RAF offices is also that plaintiffs cannot have summons served on that institution in respect of matters previously lodged with the RAF and in respect of which the 120 day period has expired. The RAF has not made any alternate facility available for plaintiffs to prosecute their claims during the lockdown period. In recent years the RAF has gone on a drive to encourage plaintiffs to lodge claims directly with it without the assistance of legal representatives. The direct claimants (as the RAF refers to them), being

laypersons without legal training, are in a particularly vulnerable position as they do not know the technicalities of pursuing claims, including the applicable time limits. It is not known whether the RAF will raise the prescription point in respect of the matters which were due to be lodged during the lockdown period. Should the RAF raise the prescription point, this may 'come back to bite it' (so to speak) as the 120 day period within which it has to consider claims will then also have to run during this time. The RAF cannot raise prescription against claimants, but expect that the time limit within which it must consider claims will not run in the lockdown period.

The instruction to pursue a RAF claim requires, in practical terms, a physical consultation between the plaintiff and the legal representative. The effect of the lockdown measures on the parties (the plaintiffs, potential witnesses and the legal representative(s)) is to introduce a number of significant challenges to the effective launching of proceedings). Legal practitioners are thus unable to have the essential documents such as a power of attorney, contingency fee agreement in accordance with Contingency Fees Act 66 of 1997 (where applicable), claim forms and affidavits by claimants and witnesses drawn up, and signed and commissioned.

Medical facilities are only providing limited services. The examination of potential claimants in order to complete the statutory RAF 4 claim forms is not permitted as it is not an essential service. It is also not possible for claimants to undergo the required medico-legal examinations for assessments to be made whether or not they have met the standard for the lodgement of claims and the proper assessment of the extent of the injuries (and any *sequelae*) and thus properly quantify their damages. Accident reports and other required documents such as hospital and clinical reports cannot be obtained. Practically, a party in the position of the plaintiff in ***Links v Member of the Executive Council, Department of Health, Northern Cape Province*** (CCT 29/15) [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) (30 March 2016) will not be able to have the required consultation at which the circumstances of his or her injury can be explored by medical professionals and explained to him or her giving rise to the knowledge that a cause of action exists.

The courts and the sheriffs are only providing limited services during the lockdown period. Service by the sheriff of a process in order to interrupt prescription is not legally possible in most instances or only possible under very restricted and difficult circumstances in others. Sheriffs in some jurisdictions have been worse affected than others. As noted above, electronic platforms (such as Caselines) or the issuing of summons are not available in all of the high, regional and lower courts.

In cases where the plaintiff is faced with some or other legal impediment preventing the taking of steps to interrupt the completion of prescription, such impediments are compounded by the lockdown measures. Judicial recognition (see the cases cited below) has been taken of those instances where impediments such as the fact that a curator *ad litem* or curator *bonis* has not been appointed for the plaintiff or a liquidator (or trustee) has not been appointed as yet for an insolvent as circumstances where the completion of the running of prescription is delayed until the impediment imposed by the superior force is removed.

The lockdown measures thus make it impossible for claimants to take the required steps to interrupt the running of prescription and expiry periods.

The applicable law

Various regulations and directives have been promulgated in terms of the Disaster Management Act 57 of 2002 aimed at regulating some or other aspect of the lockdown measures. The Office of the Chief Justice and the various heads of the high, regional and lower courts have issued a number of directives aimed at regulating the conduct of matters in their respective courts. It is trite that the regulations and directives do not repeal legislation. The various regulations and directives cannot be read as having the effect of denying a plaintiff the right to pursue an action against a defendant which such plaintiff would otherwise have in law, but for compliance with the lockdown conditions.

The Constitution

The Constitution (Constitution of the Republic of South Africa Act 108 of 1996) is the supreme law

of the Republic (section 2). A number of the fundamental rights enshrined in the Bill of Rights (Chapter 2) will be violated by extinctive prescription running under the lockdown conditions. These include the rights to equality (section 9), the rights of children in cases where a *curator ad litem* needs to appointed (section 28(1)(h), access to information (section 32), just administrative action (section 33) and, most importantly for current purposes, access to courts (section 34). The lockdown measures cannot be read as having the practical effect of permanently negating these rights. (see CM van der Bank, *The Constitutionality of Prescription Periods in the South African Law, Journal of Finance & Economics*, Volume 2, Issue 1 (2014), Published by Science and Education Centre of North America).

The Prescription Act

The enactment of the Prescription Act was aimed at consolidating and amending the laws relating to prescription. The prescription of debts is governed by chapter III of the Prescription Act. A creditor interrupts the running of prescription by the service on the debtor of a process whereby payment of the debt is claimed (section 15 (1)). In the normal course, this will be service of a summons. A common mistake made by practitioners is labouring under the view that issuing proceedings before the expiry of the prescription period is sufficient. Section 13 of the Prescription Act is relevant for present purposes, the applicable provisions which read as follows:

Completion of prescription delayed in certain circumstances

'(1) If—

(a) the creditor is a minor or is insane or is a person under curatorship ***or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1);*** *…*

(b) … ;

(c) … ;

(d) … ;

(e) … ;

(f) … ;

(g) … ;

(h) … ; and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).' (My emphasis)

(See MM Loubser *Extinctive Prescription* at 119.)

The lockdown regulations are a form of law (law is one of the impediments listed in section 13(1) (a)) which will prevent a creditor from instituting action in order to interrupt the running of prescription. In order to initiate litigation and have the process served on all the defendant(s), a plaintiff will need to breach the lockdown regulations in overcoming the practical disabilities referred to above in interrupting the running of prescription. It could not have been the intention of the legislative or the executive branches of government that members of the public and their legal representatives break the law in order to have actions instituted and served in order to interrupt prescription-consideration can be given by the judiciary to the application of the *exceptio doli* in these circumstances. The lockdown measures are temporary and with a specific intention-curbing the spread and impact of the pandemic. Such temporary measures with a specific purpose cannot have the effect of permanently denying a party a constitutionally enshrined right. The institution of legal proceedings to enforce a right and adjudication of the dispute by a court cannot be expunged as a collateral consequence of the fight against COVID 19.

Judicial consideration of superior force

The concept of a superior force in section 13 (1) (a) has received extensive judicial consideration. Many of the judgments that I have been able to access pre-date South Africa's constitutional democratic era where certain rights are now enshrined in the Bill of Rights. Be that as it may, the principles enunciated in the *ratio decidendi* (and the *obiter dicta*) of each of the cases can, in many instances, be applied as a test in assessing whether or not the lockdown measures can be said to be a superior force delaying the completion of the running of prescription.

GENERAL PRACTICE continued...

Some of the judgements considered the concept in the context of the Prescription Act, while others have considered the failure by plaintiffs to comply with the expiry period in statutes such as the now repealed section 32 of the Police Act 7 of 1958, the forerunner of Part 2 of the Institution of Legal Proceedings Against Organs of State Act 40 of 2002. The principles enunciated in the various judgements still apply today – perhaps even to a greater degree under the current constitutional order.

The plaintiff in ***Magubane v Minister of Police*** 1982 (3) SA 542 (N) had been detained in terms of section 6 of the Terrorism Act 83 of 1967 (described by the court at 545 as draconian both in intent and effect) from 13 September 1976 until 3 November 1977. She was assaulted by members of the Security Branch of the then South African Police on 13,14 and 15 September 1977. The plaintiff's notice of the action against the defendant was given on 17 January 1978 and the summons was served on 24 April 1978. The defendant raised a special plea that the plaintiff had failed to comply with the provisions of section 32 of the Police Act in that she had failed to commence her action within six months after her cause of action arose. It was common cause between the parties that the plaintiff was unable to obtain legal advice or to institute action by reason of her detention *per se*. Based on the agreed facts, the court was called upon to decide the following questions of law before any evidence was led:

(a) Whether section 32 of the Police Act applied to the proceedings and, if it did, whether or not the Prescription Act also applied?

(b) If section 32 applied and the Prescription Act did not, had the plaintiff complied with the provisions thereof?

(c) If the provisions of section 32 had not been complied with and the Prescription Act did apply, whether the defendant was debarred and/or precluded from relying on such non-compliance.

It had been agreed that in the event of the court finding that question (a) should be answered in the affirmative and questions (b) and (c) answered in the negative, then the plaintiff's claim should be dismissed with costs.

In finding in favour of the plaintiff, the comments of the court relevant for present purposes are summarised below.

Section 32 applied to the proceedings and that the cause of action had not commended within the prescribed six month period (at 549).

The provisions of the Terrorism Act operated to deny the plaintiff access to legal advice and 'she was clearly prevented by "superior force" [as postulated in section 13(1)(a) of the Prescription Act] from serving her summons'(at 549).

Unless otherwise indicated, the language of legislation must be given an interpretation which avoids harsh consequences (at 549-550 and 552).

The provisions of the Prescription Act applied to actions contemplated in section 32 of the Police Act (at 552-3). The obiter comments by the court on the *exceptio doli* are instructive.

The lockdown measures also, in my view, prevent some plaintiffs from obtaining legal advice and properly taking the required actions to interrupt prescription and/or expiry periods applicable to their matters. These measures cannot, to paraphrase the court, have been intended to have the draconian intention and effect of permanently denying plaintiffs their rights to institute actions.

The court in ***Hartman v Minister van Polisie*** 1983 (2) SA 498 (A) reached a different conclusion to that in ***Magubane***, finding that the Prescription Act did not apply to actions under section 32 of the Police Act.

In ***Montisi v Minister van Polisie*** 1984 (1) SA 619 (A) the court, in considering a special plea of prescription where the appellant had failed to comply with the time limits set out on section 32 (1) of the Police Act, held that the service of the required notice was prevented by the detention of the appellant in terms of section 6 of the Terrorism Act. The court held that the period in section 32 (1) does not run against a detainee for as long as the detention was in place (at 633). The appellant was unable to obtain legal advice or to institute action while so detained (page 631) – in other words, while the superior force preventing him from exercising his rights to bring

the action existed. Rabie CJ noted (at 631) that it was not suggested that the appellant was blameworthy for his detention and, therefore, he could not say that is was his fault that he could not comply with the prescripts of section 32 as a result thereof. (The same can be said of blameless plaintiffs unable to pursue actions as a result of the lockdown measures.) It would be unreasonable to expect that a person who was prevented by superior force (detention in that case) to comply with the time period in section 32 (1), to be unsuited because he did not comply with that provision. The legislature had not intended to deny a person who alleged that he had an action against the defendant, on the risk of prescription, within the relative short time of six months after the cause of action arose to bring the action (at 634). The court also held that the maxim *lex non cogit impossibilia* was applicable. The court in the ***Montisi*** matter thus reached a conclusion which differed to that in ***Hartman***.

The court in ***Knysna Hotel CC v Coetzee*** 1998 (2) SA 743 (SCA) stated that the provisions of sections 13 (1)(a) and 15 (1) of the Prescription Act contemplated circumstances where a party was prevented by a certain form of law or inability to act (*handelingsonbevoegdheid*) or superior force ('*oormag*') from serving a summons on the debtor, the completion of prescription was delayed. The superior force referred to, according to the court, must in the context of the section be seen as *eiudem generis* of the inability to act. The superior force must, objectively viewed, thus prevent the creditor from serving his summons. For example, where a company has been liquidated and a liquidator has not been appointed as yet or where a person is prevented by detention in terms of the Terrorism Act from obtaining legal advice in order to bring an action.

The approach taken in ***Gassner NO v Minister of Law and Order*** 1995 (1) SA 322 (C) is that the maxim *lex non cogit ad imposibilia* is applicable to the enforcement of such an expiry period.

Other judgements which can be considered in respect of section 13 (1)(a) of the Prescription Act include ***Mattioda Construction (SA) (Pty) Ltd v Everite Ltd*** 1980 (3) SA 157 (W) at 161 F-G, ***A Adams (Pty) Ltd v Vermaak NO and others*** 1993 (1) SA 107 (N), ***ABP 4X4 Motor Dealers (Pty) Ltd v IGI Insurance Company Ltd*** 1999 (3) SA 924 (SCA), ***Lombo v African National Congress*** (17/2001) [2002] ZASCA 61; [2002] 3 All SA 517 (A) (30 May 2002), ***Advocate Jan-Hendrik Roux SC NO v Road Accident Fund*** 2014 JDR 1235 (WCC), ***Skom v Minister Of Police and Others, In Re: Singatha v Minister Of Police and Another*** (285 & 284/2014) [2014] ZAECBHC 6 (27 May 2014), ***Minister of Law and Order v Maserumule*** 1993 (3) SA 688 (T), ***Mati v Minister of Justice, Police and Prisons*** 1988 (3) SA 750 (Ck), ***Brosens v Minister van Verdediging*** 1983 (3) SA 803 (T) and ***Pizani v Minister of Defence*** 1987 (4) SA 592 (A).

In so far as claims against the RAF are concerned, the approaches taken by the courts in the following matters create important precedents.

In ***Gabuza v Road Accident Fund*** (70524/16) [2018] ZAGPPHC 634; 2020 (2) SA 228 (GP) (29 August 2018), looking at the practical realities applicable in the plaintiff's claim which prescribed on a Saturday when the RAF offices are closed and the Post Office closing at 13:00, the court dismissed the RAF's special plea of prescription.

In ***Road Accident Fund v Masindi*** (586/2017) [2018] ZASCA 94 (1 June 2018) - where the last day before prescription fell on a public holiday, the court gave the plaintiff the benefit of that day.

In ***Msiza v RAF*** (Case No. 17335/2004) (a judgement delivered by Phatudi AJ (as he was then) in the then Transvaal Provincial Division on 23 June 2008) the plaintiff's claim was delivered to the RAF offices on the day before it prescribed. The delivery was made after the RAF offices had closed for the day. The court dismissed the RAF's special plea of prescription.

Conclusion

There is thus ample legal authority on which a special plea of prescription can be challenged in respect of a matter prescribing during the lockdown period. Where an argument based on any of the grounds of delay set out in section 13 (1)(a) of the Prescription Act is made, the plaintiff will be well advised to set the applicable grounds out in a replication to the special plea of prescription. Where an expiry period applies, the grounds can be set out in a condonation application.