

RISK ALERT

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RISK MANAGEMENT COLUMN

LPIIF SURVEY

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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.

You, the reader of the *Risk Alert Bulletin*, are an important stakeholder, and the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) wants to hear your views on the effectiveness and efficiency of the manner in which we communicate with you.

The LPIIF has launched a survey aimed at obtaining the views of stakeholders. The survey will run until 6 November 2020. The survey will only take a few minutes to complete and all legal practitioners (and everyone else involved in legal practice) are encouraged to participate. Participation on an anonymous basis is permitted.

In the event that you have any difficulty in accessing the link, please let us know.

The questions posed in the survey are aimed at:



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- Obtaining general corpographical information on the respondents - this will assist in providing a picture of the profession
- Testing the level of awareness of the company and its service offering
- The levels (and manner) of



Legal Practitioners' Indemnity Insurance Fund NPC

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engagements respondents have had with the LPIIF in the past 12 months

- What communication channels were used
- Feedback on the content of the communication
- Testing preferences for frequency and format of communication
- Suggestions for improvement, and
- Obtaining suggestions (if any)

for any additions to the LPIIF service offering

The survey results will be analysed and used by the LPIIF to assess the current channels of communication and its service offering to the profession. Gaps in the current communication will be identified and measures designed to close such gaps.

The current communication channels include the publication of the Risk Alert Bulletin, practice man-

agement articles published in *De Rebus* and alerts sent by the Prescription Alert unit. Some of the communication may not be reaching the intended audience.

The survey is open to all stakeholders and not just legal practitioners. As many responses as possible will give a representative sample and multiple responses from the same firm are permitted.

We look forward to obtaining your views.

Introduction

It has been noted that, unfortunately, many members of the legal profession may not have information regarding the:

- existence of the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF);
- services provided by the company;
- policy exclusions; and
- claim procedure.

In order to address these gaps, we will publish a series of articles giving information on the LPIIF. The articles will address some of the gaps in the understanding of the basis on which insurance cover is provided.

Background

The LPIIF is a short-term insurance company established by the Legal

WHO DOES THE LPIIF COVER AND FOR HOW MUCH?

Practitioners Fidelity Fund (the Fidelity Fund). The Fidelity Fund was empowered by sections 40A and 40B of the now repealed Attorneys Act 53 of 1979 to establish an insurance vehicle to provide professional indemnity insurance to practising attorneys (under the repealed statute). The LPIIF also provides bonds of security in favour of the Master of the High Court to practising attorneys appointed as executors of deceased estates. In addition, the LPIIF provides risk and practice support services for the legal profession. Section 77 of the Legal Practice Act 28 of 2014

(the Act) provides the statutory framework for the continued existence of the LPIIF.

The road travelled to the establishment of the company is set out in the judgement in *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC and Others* (16864/2013) [2017] ZAWCHC 71; [2017] 3 All SA 1005 (WCC) (30 June 2017).

The limit of indemnity (amount of cover)

One of the recurring queries posed to the LPIIF team by members of

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the profession relates to who the LPIIF covers and for what amount. In this article I will attempt to answer these two questions, in particular, and address some common misconceptions on the amount of cover afforded by the company.

The LPIIF provides professional indemnity insurance cover to all legal practitioners (attorneys, and advocates practising in terms of section 34(2)(b) of the Act) with a Fidelity Fund certificate on the date that the cause of action arose. The cover is automatic in the sense that practitioners falling within the definition of an insured are automatically covered. The terms under which the LPIIF cover is provided are set out in a Master Policy issued annually. One policy is issued for all insured legal practitioners – the LPIIF does not issue a separate policy for each insured practice. A copy of the current Master Policy can be accessed on the LPIIF website www.lpiif.co.za as can policies for previous insurance scheme years. The policy is also annually published in a special policy edition of the Risk Alert Bulletin in July. The LPIIF’s insurance scheme year runs from 1 July of each year to 30 June of the following year.

For purposes of the LPIIF policy, advocates practising with trust accounts are treated as sole practitioners (clause 5(d) of the policy). The annual amount of cover (limit of indemnity) is dependent on the number of partners in the practice

on the date that the cause of action arose (clauses II, 7, 8 and 9 read with Schedule A).

We will explain the application of the excess in a separate article.

The amount of cover is provided on a sliding scale as set out in the schedule below:

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

No of Principals	Annual Amount of Cover for Insurance Year
1	R1 562 500
2	R1 562 500
3	R1 562 500
4	R1 562 500
5	R1 562 500
6	R1 562 500
7	R1 640 625
8	R1 875 000
9	R2 109 375
10	R2 343 750
11	R2 578 125
12	R2 812 500
13	R3 046 875
14 and above	R3 125 000

The LPIIF does not sell cover in excess of the limits of indemnity listed in the schedule or provide a facility for practitioners to ‘opt in’ for a higher limit of indemnity. Cover in excess of the LPIIF limit of indemnity (called top-up insurance) can be purchased in the commercial insurance market.

Top-up insurance cover is purchased independently of the LPIIF. The company does not endorse or have a preferred relationship with any of the top-up insurers. Your insurance broker will be in a position to advise you in regard to top-up insurance and other appropriate cover available in the market.

It will be noted that the limit of indemnity is afforded on a sliding scale dependant on the number of partners/directors (jointly referred to as ‘Principals’ in the Master Policy (clause XXII)) in the firm on the date that the cause of action arose. The limit of indemnity is afforded to the practice as a whole and not per partner/director/practitioner (See the definition ‘Principal’ in the Master Policy (clause XXII).) For example, a firm with 9 partners is afforded an annual limit of R2 109 375 – it is not each partner who is individually afforded that limit. All staff in the firm (associates, candidate attorneys, administrative staff etc.) will be covered within the firm’s limit of indemnity (clause XII read with clause 6 (c)). In the event of a claim against the practice, an assessment will be conducted into the number of principals in the practice on the date that the cause of action (the circumstances giving rise to the claim) occurred. It does not matter that the composi-

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tion of the firm may have changed on the date that notification of the claim is made. The LPIIF team will investigate the matter and the applicable limit will be that for the firm on the date that the cause of action arose.

In the event of a claim against the firm, the limit of indemnity is the maximum amount to which the firm will be indemnified if it is found liable in respect of the claim. The amount of cover available for one year cannot be added onto the limit available in another year – limits of indemnity can thus not be accumulated.

Applicable policy conditions

In order to assist with an understanding of the extent of the cover afforded by the LPIIF, practitioners can also have regard to the following clauses of the Master Policy:

(The words in bold are as they appear in the Master Policy and are all defined in that document)

II Annual Amount of Cover:

*The total available amount of cover for the **Insurance Year** for the aggregate of payments made for all **Claims, Approved Costs and Claimants' Costs** in respect of any **Legal Practice** as set out in Schedule A;*

The annual limit of indemnity covers the aggregate of the practice's

liability for the payment of the claim (the award for damages/liability), approved costs (see below) and the claimant's costs (the party and party costs).

III Approved Costs:

*Legal and other costs incurred by the **Insured** with the **Insurer's** prior written permission (which will be in the **Insurer's** sole discretion) in attempting to prevent a **Claim** or limit the amount of a **Claim**.*

Approved Costs are, generally, authorised where an insured practitioner can, by taking an action such as an application for condonation, prevent a claim. It is important to note that the prior written consent of the LPIIF is required before such an action is embarked upon (or expense incurred). Be careful not to take any action (or incur any expense) that will prejudice the LPIIF as insurer.

VII Claimant's Costs:

*The legal costs the **Insured** is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the **Insurer**;*

These will, in the ordinary course, be the party and party costs of the party bringing the claim against the insured legal practitioner and for which the latter is liable. The payment of such costs erode the

limit of indemnity. In order to illustrate this: if a sole practitioner is, for example, faced with a claim of R1 400 000 and judgment is granted in that amount plus interest and costs, the LPIIF's liability will be for a maximum of R1 562 500 (see Schedule A, above). The practitioner will thus have an amount of R162 500 available to pay the party and party costs and the interest. If these exceed the balance of R162, 500 available, the practitioner will be liable for the remaining amount (in the event that there is no top-up insurance).

X Defence Costs

*The reasonable costs the **Insurer** or **Insured**, with the **Insurer's** written consent, incurs in investigating and defending a **Claim** against an **Insured**;*

Unlike many top-up policies where the costs of defending the claim are taken from the limit of indemnity, the LPIIF will pay such costs in addition to the limit of indemnity. In cases where the LPIIF successfully defends the claim on behalf on the insured practitioner, such costs are borne by the LPIIF and the insured's available limit will remain intact.

XII Employee:

*A person who is or was employed or engaged by the **Legal Practice** to*

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assist in providing *Legal Services*. (This includes in-house legal consultants, associates, professional assistants, candidate legal practitioners, paralegals and clerical staff but does not include an independent contractor who is not a **Practitioner**.);

The actions of employees of a practice are covered in terms of the limit of indemnity afforded to the practice.

XXII Principal:

An advocate referred in section 34(2)(b) of the Act, sole **Practitioner**, partner or director of a **Legal Practice** or any person who is publicly held out to be a partner or director of a **Legal Practice**;

As noted above, the annual limit of indemnity is determined by the number of partners/directors in the firm on the date that the course of action arose. Where a person is publicly held out as director, that person will be considered as a director purposes of assessing the applicable limit of indemnity and the excess. Firms holding out that certain persons are directors/partners in the practice when they are not (whether for BBBEE fronting purposes, bulking up numbers or any other reason) must take note of this risk. The LPIIF also does not distinguish between salaried and equity sharing partners - that is an internal arrangement in the firm.

Amount of cover

7. *The Annual Amount of Cover, as set out in Schedule A, is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**.*

*A change during the course of an insurance year in the composition of a **Legal Practice** which is a partnership will not constitute a new **Legal Practice** for purposes of this policy and would not entitle that **Legal Practice** to more than one limit of indemnity in respect of that **Insurance Year**.*

8. *Schedule A sets out the maximum **Annual Amount of Cover** that the **Insurer** provides per **Legal Practice**. This amount includes payment of compensation (capital and interest) as well as **Claimant's Costs** and **Approved Costs**.*

9. *Cover for **Approved Costs** is limited to 25% of the **Annual Amount of Cover** or such other amount that the **Insurer** may allow in its sole discretion.*

Some distinctions between the LPIIF and commercial insurers

Several commercial insurers sell professional indemnity insurance

cover to firms in excess of the LPIIF limit of indemnity. This is commonly referred to as 'top-up cover'. For example, considering the risks associated with the practice or as a prudent risk management measure, principals in a legal practice may be of the view that the practice requires professional indemnity insurance cover in addition to the annual limit of indemnity afforded under the LPIIF policy. The practice can then, through its professional indemnity insurance broker, purchase an appropriate amount of top-up cover in the commercial market. The appropriate level of the top-up cover required will vary depending on the needs of the firm. Some clients prescribe the minimum level of top-up cover that law firms listed on their service provider databases should have.

The judgment in the *Propell Specialised Finance (Pty) Ltd v AIF* case cited above included a detailed examination of the differences between the LPIIF and commercial insurers.

The table below highlights some differences between cover afforded in the top-up market and the LPIIF (as the primary insurer):

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LPIIF COVER	TOP-UP COVER
Cover is afforded on an <u>annual aggregate basis</u>	Cover is afforded on the basis of a maximum amount <u>per claim basis</u> (for example, a firm may purchase top-up cover of R1 million per claim. In such an instance the top-up insurer will indemnify the firm to a maximum of R1 million per claim)
The <u>costs</u> associated with defending a claim are carried by the LPIIF <u>in addition to the limit of indemnity</u> . Thus, in an instance where an assessment reveals that there is a valid defence against a claim, the LPIIF will appoint a specialist firm on its panel to conduct the defence on behalf of the insured and will bear the costs of defending the matter. In some instances, an advocate (or some other expert) may have to be briefed in the matter. All these defence costs are covered by the LPIIF <u>in addition to the limit of indemnity</u> . The LPIIF cover is thus afforded on a <u>costs in addition</u> basis. An insured is thus afforded the benefit of defence costs over and above the applicable limit of indemnity. The defence costs do not erode the limit of indemnity	Cover in the top-up market is generally afforded on a <u>costs inclusive</u> basis. This means that the costs of investigating the matter and of defending a claim will be deducted from the available limit of indemnity under the top-up policy. The defence costs will thus erode the available limit of indemnity for each claim indemnified by the top-up insurer.
As the <u>primary layer of insurance</u> , the LPIIF policy will be the first to respond to claims falling within the ambit of cover	Top-up policies will only respond to the extent that the claim exceeds the available limit of indemnity, the available cover under the LPIIF has been expunged (exhausted) or where the top-up policy wording covers a claim excluded from the LPIIF policy. In insurance parlance, it is said that top-up policies do not provide cover 'from the ground up' or the top-up policy is said to 'step down' to pick up an exclusion from the LPIIF policy. The policy wording of many top-up policies clarifies that the <u>cover is afforded in excess of the LPIIF cover</u>
Subject to the policy conditions, the LPIIF policy will respond to every claim as long as the insured had a valid Fidelity Fund certificate on the date that the course of action arose	The top-up policy will only respond to claims that fall within the period of coverage. Insureds must thus consider the dates for which the policy has been placed and other dates such as the inception or retroactive date, where applicable
If the cause of action arose when the practitioner fell within the definition of an insured, the policy will respond in respect of indemnified claims. The LPIIF policy thus responds to claims brought when the legal practitioner is no longer practising	So called run-off cover may need to be purchased to ensure that the top-up cover will respond to claims after the practitioner has left practice

It should be noted that the list of differences published above is not exhaustive.

Conclusion

We trust that the notes above clarify the position in respect of the limit of indemnity. The LPIIF team is available to provide any clarity required on the amount of cover afforded to insured practices.

GENERAL PRACTICE



A PROFESSIONAL PERSPECTIVE ON WHY LAW FIRMS FAIL

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Law firms, more so than other businesses, emphasise professionalism. Professional, ethical conduct in the execution of client mandates is not only required, but also expected and emphasised.

Professional conduct requires dedication and laser like focus on the matter at hand. Practically this means that vast amounts of professional skill and time are dedicated to a specific matter to achieve the desired outcome. A single-minded dedication to applying the law at hand is what achieves success.

Define this success? This is limited, professional mandate specific success driven by legal training, skill and ability. This is success strictly defined by the parameters of the mandate. Few experiences beat the ego trip of walking out of

court armed with an order granted in your favour or the admiration of colleagues after successfully pursuing a difficult matter. This is undoubtedly professional success and part of the thrill of legal practice.

But, this type of success clearly reveals fragmented professionalism. Professional success in legal practice emphasises the matter at hand and focuses on the success of the matter. Perfection in completion of the mandate dominates activities, thoughts and leads to micro-management at a matter level.

The defining management qualification is known as a *Master of Business Administration* (MBA). Note the absence of the words professional, or law. Business, of which a law firm is merely one manifestation, requires master-

ing of business *administration*. Where does this lead us? Quite simply, the law firm is a business, and each matter represents merely a small project in this much bigger business. The business has needs and requirements at a higher level than merely the sum of the professional mandates at hand. Additional management, and management skills, of human resources, risk and insurance, cash and compliance, to name a few, are required. This requires a very different skill and mindset to the typical matter-focused professionalism required to be a successful legal practitioner.

Many management activities are administrative by nature. The fallacy that software will manage our practice abounds. Management may be defined as the planning, control and application

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of resources to achieve business goals. From this it must be clear that software is merely another tool to be used by management and that software alone cannot manage any practice.

Administrative management requires a high-level holistic overview of the entire business. Simply managing individual matters successfully will not guarantee success of the business. It is not difficult to see that the problem originates with the formal education of lawyers. Law degrees are notoriously law focused and not management focused. After all, we need well training *law*-yers, not administrators. But bearing in mind that the vast majority of legal practitioners, this covers both advocates and attorneys, are single practitioners, without partners, it is clear that at least basic training in business management is essential. To this end both PLT and PMT training goes a long way, but it appears the nature of this training sadly emphasises professional conduct, as opposed to administrative management skills.

A small example will suffice. An attorney manages 300 active files. Work rotates on files as these are

presented by the diary. To determine the status of a specific matter, the paper file has to be opened and inspected for a last manual statement and the inside file cover inspected for a handwritten receipt. The question '*How am I supposed to know payment was received if there is no receipt in the file?*' is commonly heard. Several problems are revealed by such a statement. Fragmented matter management, the application of legal professional skills to administrative tasks, lack of summarised reports and reliance on archaic paper-based reports. This reveals a typical, professional one-matter-at-a-time mindset. This mindset is perfect, and required, for professional work, but when it comes to financial management and business administration, this presents a major risk. Software and systems cannot manage a practice but should present the tools required for effective management of core business areas. Accounts receivable represents the outstanding balances of work done by the firm. A simple age analysis, which instantly summarises all matters with outstanding balances provides the kind of high level, ho-

listic overview required to manage the *business* and not merely individual matters. From a compliance point of view, one could prepare lists of what reports are essential, but the following basics will go a long way to create a strong business-oriented management culture:

- Income and expense report, monthly, current clearly shows value of work done and where the money was spent
- Accounts receivable aged, listing matters and outstanding balances
- Cash books and bank reconciliation, it is not enough to know money has gone through the bank, it should be inspected frequently.

This is of course business focused, and trust compliance will require other, custom reports.

Law firms fail when they run out of cash. We believe that nobody works harder for their money than lawyers. By applying a bigger picture management mindset, a clear picture emerges of the health of *the law firm as a business*.