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RISK MANAGEMENT COLUMN

Sans satis scientia lex, legalis praxis est periculosum: Insufficient legal knowledge is risky for practitioners

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In the practice of law, the core is about providing specialised knowledge and services to clients. This article aims to examine some of the risks flowing from incompetence in the law. The structure of the article is to first give a broad outline of the risk. The second section looks at what the Legal Practice Act 28 of 2014 (the LPA) and the Code of Conduct issued in terms of that legislation prescribe in relation to competence. The third section examines how competence has been dealt with in some decided cases. Lastly, I make some risk management suggestions for practitioners to consider.

The risk outlined

A lack of knowledge of the law is a significant risk for legal practitioners. A legal practitioner with inadequate knowledge of the law in the field in which their firm practises will not meet the required standard of care, skill and diligence expected of legal practitioners. A rudimentary knowledge of the law is fertile ground for errors or omissions to materialise. Legal practitioners will be well advised to keep abreast of developments in all areas of law in which they practise and to implement regular training sessions for all staff in their firms. If a firm fails to constantly update its knowledge of the law, it runs the risk of not being able to provide contemporary expertise and that does not ensure value for its clients.

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Most legal practitioners in South Africa are competent in their respective areas of practise and provide a high standard of service to their clients. Such firms are lauded for the manner in which they conduct their practices and for the time and effort spent honing their expertise in the areas of law in which they practise. This is evident, *inter alia*, from an analysis of the underlying reasons for the breaches that ultimately result in claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF). On an annual basis, a relatively small number of claims arise from a lack of adequate legal knowledge. This is, however, a risk that requires ongoing attention. Not all professional indemnity claims arise from a lack of legal knowledge. This article is aimed at raising awareness of the risks for those legal practitioners who have not yet discovered the value of investing in measures to ensure that they have the requisite knowledge of the law in their respective areas of practice.

Remember the maxim *ignorantia juris non excusat*? (I stretch that maxim from criminal law to civil law of liability merely to illustrate a point.) Fortunately for those suffering damages because of incorrect legal advice, the legal practitioners concerned will not be able to argue an ignorance of the law to escape liability, and the ignorance of the law on the part of such legal practitioners will be the *causa* for liability, rather than an *excusatio* to avoid it. Also consider the embarrassment, and consequent damage to your reputation, of having been found to be incompetent or lacking adequate knowledge about the law in the area in which you have accepted a mandate and held yourself out as an expert. An opponent who realises that their legal knowledge on a subject is superior to yours may have the propensity to gloat, at your expense (justifiably, perhaps).

While this articles focuses on the risk of professional indemnity claims flowing from incompetence of legal practitioners, the topic has wider implications, including compliance and operational risks. Consider, for example, the consequences of not knowing and applying the law in the conduct of your legal practice as an entity. Do you know what your obligations are in respect of legislation such as the LPA, the Protection of Personal Information Act 4 of 2013, the Cybercrimes Act 19 of 2020, the Financial Intelligence Centre Act 38 of 2001 or even the Contingency Fees Act 66 of 1997? Are you aware of the consequences that flow from non-compliance with any of these statutes? Have you, and everyone else in your firm, undergone training on all the laws applicable to your practice? Do you have a training program in place for updates on the law or professional ethics? Competence and compliance must be at the root of every function carried out in a law firm.

Over the years, the LPIIF has made substantial resources available to the legal profession aimed at educating members of the profession on how to avoid the common errors that result in claims. A wide range of topics have been covered in the education initiatives, ranging from partnership agreements, agreeing/accepting and documenting the mandate, risks to look out for in clients, prescription, cyber risks, under-settlement of matters, personal stressors and how to close-off a mandate when the instruction has been carried out. The underlying reasons for claims have also been examined by looking at the common errors made in legal practices that ultimately result in those claims. All these risk management suggestions will be ineffective if there is a dearth of technical legal skills in the firm.

A particular concern was raised for me this year while conducting risk management training sessions when it became apparent that some candidates did not know what the ethical duties of attorneys are. Participants struggled with basic concepts such as the doctrine of *stare decisis*, knowledge of substantive and procedural law in some cases. Some participants admitted that they were unable to conduct legal research or to write legal opinions. Unfortunately, for some people, reading the law is something that was last done while at university. This stems partly from an inability to undertake quality legal research as is evi-

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dent in the reliance on general search engines such as Google or Wikipedia to purportedly find technical legal information on questions of law. The internet can potentially be as dangerous as it may be useful. There are no guarantees that the information that pops up after your Google search will be accurate, current material or even have been written by someone with formal legal training in South African law. It is evident that not all firms have formal training programs in place. The likelihood of the practitioners concerned facing claims or disciplinary action in future is very high, while the probability of such practitioners conducting successful, sustainable practices is low. Some of these challenges may be addressed with the implementation of the "high standards of legal education and training, and compulsory post-qualification professional development" referred to in section 5 (h) of the LPA. Many other professions already have a system of compulsory post-qualification professional development in place which they refer to as continuous professional development (CPD).

It will be noted from the claim statistics published by the LPIIF that incorrect application of the law and the rendering of incorrect legal advice, respectively, are some of the common errors made by legal practitioners. Many of the other errors and omissions that ultimately result in claims can also be linked to a lack of competence.

While some claims result from *bona fide* mistakes made in legal practices, many claims result from circumstances where the practitioners concerned took on mandates that they did not have the necessary competence to execute or simply got the applicable legal principles wrong.

The sausage factory mentality that has creeped into some firms exacerbates this problem. For example, it can be noted from the information provided to the LPIIF by firms dealing with Road Accident Fund (RAF) claims that a tick-box approach is applied in some practices to deciding on the documents to be submitted, sometimes irrelevant precedents are used repeatedly and there is no regard for updates in legislation or the applicable legislation or any other applicable legal principles. Poorly drafted documents are a common occurrence and what is pleaded may have no relevance at all to the facts (or the applicable law) pertaining to the matter at hand. The fact that the matters result in professional indemnity claims against the practices concerned is thus unsurprising. The LPIIF often also sees poorly drafted pleadings from the legal representatives acting for plaintiffs in professional indemnity claims. An inability to frame a sustainable cause of action or inadequate knowledge on the legal principles in respect of professional indemnity claims is commonplace. This is one of the reasons that professional indemnity claims take a long time to be finalised and also why some of the firms initially instructed by a plaintiff to pursue a claim against another firm subsequently face claims themselves from their erstwhile clients. Considering the poor quality of some of the work produced by certain legal practitioners, it is unsurprising that they may be unflatteringly referred to with by expressions such as "a claim waiting to happen" or even as "walking claims".

There are numerous reported cases where non-compliance with, or an incorrect application of, the Contingency Fees Act has been highlighted. There are also many applications to strike-off or suspend legal practitioners where it can be gleaned from the underlying circumstances that there was a lack of knowledge and that the root of the problem lies in a lack of competence.

Prescription remains one of the main risks faced by the legal practitioners. This is evident from the consistently high number and value of prescription related claims notified to the LPIIF. This is the case despite the considerable amount of time spent focusing on this risk and suggesting measures that firms can implement to mitigate the likelihood of it occurring. Applying this to the present topic, it is concerning that many of the practices which have had prescription related claims display inadequate knowledge on the law relating to prescription. Adequate knowledge of the legal principles (the law and

how it applies to the facts before them) which determine when prescription commences running, is suspended or interrupted is often lacking on the part of some of the practitioners concerned. The lack of adequate knowledge on this important legal principle results in these firms not being armed with the legal arguments to overcome a special plea of prescription in circumstances where such a special plea could be successfully challenged. Such firms also run the risk of blissfully trotting along oblivious of the imminent risks that they face. The proverb "where ignorance is bliss, 'tis folly to be wise" springs to mind.

Cybercrime related claims can similarly be avoided if the legal prescripts relating to payments (see rule 54.13) are applied consistently.

For more information see:

- The information on prescription available under the risk management section of the LPIIF website (www.lpiif.co.za) and in the Practice Management column of *De Rebus* (www.derebus.org.za)
- DC Harms SC, *Procedural Timetables and Prescription Periods* (LexisNexis, 2017)
- MM Loubser, *Extinctive Prescription* (Second Edition) (Juta, 2019)
- "The importance of the in-house compliance function in a law firm", *De Rebus*, September 2019, and
- "Written records of instructions: meeting the regulatory requirements" in the August 2021 edition of the *Bulletin*
- "Until a claim do us part: Does your partnership agreement address the event of a claim against the firm?", *De Rebus*, October 2017

The LPA

The purpose of the LPA is to, *inter alia*, promote the public's interest (s 3(d)) and to create a framework for the "development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners" (s 3 (g) (i)).

The Code of Conduct for all legal practitioners, candidate legal practitioners and juristic entities issued in the terms of the LPA (the Code) prescribes that:

"3. Legal practitioners, candidate legal practitioners and juristic entities shall-

3.1 maintain the highest standards of honesty and integrity;

…

3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;

…

3.13 remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the field in which they practice;

18. Specific provisions relating to the conduct of attorneys

An attorney shall-

…

18.14 perform professional work or work of a kind commonly performed by an attorney with such degree of skill, care and attention, or of such quality or standard, as may reasonably be expected of an attorney;"

The provisions that I have quoted are aligned with the principles of liability of attorneys developed by the courts (see below). Time will tell whether an enterprising litigant will also plead a breach of the LPA, the rules and the Code as a basis for liability on the part of a legal practitioner.

A failure by a legal practitioner to either:

- carry out work in a competent and timely manner;
- remain abreast of legal developments, and the various legal principles applicable to their area of practice; or
- perform work at the standard and quality and with the degree of care, skill and attention reasonably expected of an attorney

exposes that practitioner to regulatory action by the Legal Practice Council and may simultaneously serve as the basis for a profes-

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sional indemnity claim against such practitioner.

It is particularly concerning that a substantial number of legal practitioners with whom I have interacted on some of the training platforms have not even read the LPA. Several legal practitioners persisted, in 2022, in referring to the repealed Attorneys Act 53 of 1979, though four years have already elapsed since the LPA came into effect on 1 November 2018. This is exacerbated by the failure by the legal practitioners concerned to read the LPA which is the primary legislation regulating the profession. This can only be described as egregious. Remember that claims arising from legal services carried out in violation of the LPA or the rules issued in terms of that Act are excluded from the LPIIF Master Policy (clause 16 (t)).

Practitioners can have regard to:

- Bernard Wessels, *The Legal Profession in South Africa: History, Liability and Regulation* (Juta, 2021), and
- P Ellis, AT Lamey and L Kilbourn, *The South African Legal Practitioner: A commentary on the Legal Practice Act* (LexisNexis, 2021)

Lessons learned from decided cases

Chapter 4 of the book by Bernard Wessels sets out an in-depth analysis of the contractual liability of legal practitioners and the delictual liability of legal practitioners is covered in chapter 5 of that instructive and scholarly work. That book is highly recommended for all legal practitioners.

For current purposes, I will restrict the focus to a selection of cases where the competence of the legal practitioners concerned was raised. It is not practically possible in an article of this nature to give a detailed analysis of all decided cases on this subject. I also do not conduct a detailed analysis of incompetence as a form of negligence or the duty of care (if the cause of action is based in delict) or a breach of the mandate (in the event that the case is pleaded in contract). It is hoped that the general principles gleaned from the highlighted cases will become apparent for the reader. Readers are also urged to have regard to the various cases referred to as they provide important lessons on what is expected of legal practitioners. These can be used in internal training sessions in firms and for the development of internal measurers to prevent claims. The facts of many of the cases are interesting and the "war stories" documented in the cases can make for instructive case studies in your training material.

In the often-cited passage from *Van Der Spuy v Pillans* 1875 Buch 133, De Villiers CJ stated the following:

"I do not dispute that an attorney is liable for negligence and want of skill. Every attorney is supposed to be reasonably proficient in his [or her] calling, and if he [or she] does not bestow sufficient care and attention in the conduct of business entrusted to him [or her], he [or she] is liable; and where this is proved the court will give damages against him [or her]." (at 135)

Knowledge of the law will enhance proficiency, while significantly mitigating the risk of liability for negligence and the lack of skill referred to by De Villiers CJ.

Mlenzana v Goodrick and Franklin 2012 (2) SA 433 (FB) is a case arising from circumstances where the plaintiff had instructed to the defendant to pursue a loss of support claim against the RAF. The plaintiff's husband had been killed in a motor vehicle accident. The defendant did not pursue the claim timeously resulting in the prescription of the plaintiff's claim against the RAF. The plaintiff then instituted a professional indemnity claim against the defendant. The following findings by Rampai J are relevant for present purposes:

- a failure by the defendant to, "as knowledgeable practitioners often do", perform a rough calculation of the quantum of the compensation in order to lodge the claim timeously [at 71];
- the "clear misconception of the law" by the attorney, Ms Smith, dealing with the matter in the defendant's office [at 72];

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- the failure by Ms Smith to apply for copies of the full birth certificates of the plaintiff's minor children herself as a "knowledgeable, skillful and diligent attorney" would have done in the circumstances and that "on account of poor knowledge, skill and care, Ms Smith made such onerous demands on her client that would probably have discouraged and frustrated even a very prudent and cooperative client." [at 79];
- the considerable time taken by Ms Smith to realise that she had the necessary information in her possession to pursue the matter timeously, but she repeatedly wrote to her client asking for [at 81];
- that an "ordinary competent attorney, with a proper perception of the importance of the claim to her client" would have written to the police (before the end of the month in which she was initially instructed) requesting copies of the accident report, accident plan and witness statement [at 79];
- the defendant "did not take reasonable steps, not only to obtain the information [Ms Smith] believed she required, but this is very important, also to exercise the skill, knowledge and diligence expected of an average attorney. As a result of such disturbingly shocking lack of skill, knowledge, diligence and care she failed to appreciate the value of information her client had supplied almost three years before the expiry date of the prescription period." [at 92]
- "I have to say, and it is not pleasant saying it at all, that the plain truth about this whole problem was not Ms Smith's own making. She was admitted as an attorney in 2003 and on 2 October 2003 she was given a huge responsibility to run not only the MVA department of the defendant but also the conveyancing department. She was a virtual novice in the legal profession at the time. She was put in the deep end and left all by herself to navigate the stormy waters of the deep ocean. She was not at all equipped to do such intricate work. Her legal knowledge was still very limited. Since then she hardly ever attended a MVA seminar. Yet she regarded herself as an expert in the field. Her evidence was that a two-day practical training course she was compelled to attend as a candidate attorney was the only meaningful training she ever received. That, in brief, explained why the plaintiff's claim prescribed" [at 93]; and
- "Since Ms Smith failed to exercise the skill, knowledge and diligence expected of an average attorney, she acted negligently and her negligence made the defendant liable to the plaintiff. In my view the defendant neglected to lodge the plaintiff's claim. Its omission was due to the fact that its representative did not have the requisite degree of knowledge, skill and diligence which, as an attorney, she was supposed to have" [at 101].

The *Mlenzana* judgment is essential reading material for all firms conducting personal injury claims. The numerous lessons to be learnt from that judgment include the need to know the law applicable to your mandate, meaningfully engaging with information provided by a client, the dangers of procrastination, lack of adequate training for staff, the need for effective supervision supervision of all staff (professional and support staff), managing workloads and the dangers of throwing staff into the proverbial deep end, without support. Expecting staff in the firm to simply "get on with it" when these lessons have not been applied is fertile ground for errors to occur that will result in liability on the part of the firm.

Judgments on this subject are replete with unflattering comments about the competence (or lack thereof) of the legal practitioners concerned. Some rather interesting cases that readers can have regard to are:

- *Law Society of the Cape of Good Hope v C* 1985 (1) SA 754 (C) where the evidence in an application to have the at-

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torney's name struck from the roll for misconduct disclosed a "fairly brief career of blundering incompetence in bookkeeping" rather than a "systematic course of rascality";

- *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) where the state employees were held personally responsible for a portion of the costs due to their degree of incompetence and indifference. An appeal against that order was successful in *MEC for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC);
- *Viljoen v Schumann VD Heever & Slabbert Attorneys* 2015 JDR 0123 (GP) where the court stated that "[in] order to succeed with his claim for breach of mandate the plaintiff was required to prove the mandate and its terms, a breach of the mandate, usually in the form of a negligent failure on the part of the attorney to exercise the skill, adequate knowledge and diligence expected of a legal practitioner, a reasonable likelihood of success in the proceedings to have been instituted and damages within the contemplation of parties when the mandate was concluded' [at 5]. The court went on to state that "[it] is inconceivable that an attorney could expect to adduce evidence that he did not contemplate harm arising from his incompetence in the present circumstances' [at 12];
- *Ramonyai v LP Molope Attorneys* 2014 JDR 0772 (GSJ)
- *Fourie v Van der Spuy and De Jongh Inc. and Others* 2020 (1) SA 560 (GP) (30 August 2019)
- *Jurgens and Another v Volschenk* (4067/18) [2019] ZAECPEHC 41 (27 June 2019) (unreported)
- *Slomowitz v Kok* 1983 (1) SA 130 (AD)
- *Mazibuko v Singer* 1979 (3) SA 258 (W)
- *Margalit v Standard Bank of South Africa Ltd and Another* 2013 (2) SA 466 (SCA)
- *Hirschowitz Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) ; and
- *Du Preez and Others v Zwiegers* 2008 (4) SA 627 (SCA).

The following resources also contain useful information for internal staff training materials:

- The risk management documents available on the LPIIF website
- The articles published in the Practice Management column of *De Rebus*
- Marius van Staden, "The Conveyancer's Mandate", in the May 2015 edition of the *Bulletin* and
- Michelle van Eck, "A framework for professional duties and the liability of legal practitioners in the payment of trust monies", 2020 *TSAR* 846
- Chapter 8 of the book by Bernard Wessels dealing with personal cost orders against legal practitioners
- IH Hoffman, *Lewis and Kyrou's Handy Hints on Legal Practice: Second South African Edition* (LexisNexis, 2011), and
- Kevin William Gibson, *Legal Malpractice Avoidance Guide* (2014)

The competence of legal representatives has also been raised in several criminal cases. The subject is commonly raised in an appeal where the accused asserts that his or her fundamental right to a fair trial was compromised due to the inadequate handling of the matter by the legal representative. Regard can be had, for example, to the following cases where this was considered by the courts:

- *S v Tshepo Mbungi* 2011 JDR 0811 (GNP)
- *Ramonyathi v S* (A470/2014) [2014] ZAGPPHC 915 (23 October 2014), and
- *Odhiambo v Regional Court Magistrate, Stellenbosch and Another* (11054/2019) [2019] ZAWCHC 109; 2020 (1) SACR 266 (WCC) (27 August 2019)

Readers can also have regard to the following publications:

- Peet M Bekker, "The right to legal representation, including effective assistance, for an accused in the criminal jus-

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tice system of South Africa", XXXVII CILSA 2004, p173

- WH Hulburt, "Incompetent Service and Professional Responsibility", Alberta Law Review (1980), Vol XVIII, No. 2, p 145;

Risk management suggestions

- Invest in training for yourself and everyone else in your firm. Many institutions offer informative training sessions that provide real value to legal practitioners. Having said that, not everyone who holds themselves out as an expert on a particular subject in fact has the claimed expertise. Beware of marketing gimmicks clothed as expert training sessions. Do some research and only use accredited institutions and those with a verifiable training history. If you go into a training session having done some background reading on a topic you will extract more value and are more likely to spot imposters.
- Training is particularly important for new members of your team, irrespective of their level of experience. Even a seasoned practitioner can benefit from a refresher course where new skills can be learnt and the benefits of the years of experience, in turn, shared with less experienced staff. Senior practitioners participating in the training sessions will also go a long way to getting buy-in from less experienced staff members.
- Only accept instructions in matters where you are confident that the matter falls within your knowledge and capacity. If not, refer the client to another legal practitioner who has specialist knowledge and experience in that area of legal practice.
- Do not follow advise from counsel or any other expert blindly. Do not serve as a mere postbox between counsel and the client. Give meaningful, knowledgeable input on the matter at all times. Apply a degree of professional skepticism where necessary.
- Do not simply "wing it" hoping that by some stroke of luck you will succeed in legal practice with a rudimentary knowledge of the law.
- Remember the Proverb "A little knowledge is dangerous" and abide by it.
- The internet can be your friend, but also your enemy.
- Subscribe to legal research websites and platforms run by experts and only use those to conduct legal research.
- Information and Technology systems are useful for enhancing efficiency but are not a substitute for diligence and competence.
- Develop a tradition of reading law and legal developments. Publications such as *De Rebus* and the *Bulletin* are a useful starting point. Get into the habit of reading judgments and legislative updates. Subscribe to the various products and platforms that provide legal updates.
- The implementation of the compulsory post-qualification professional development system provided for in the LPA will go a long way to address the risks highlighted in this article.
- All stakeholders have a responsibility to address the risks highlighted above, failing which other entities and professions will continue making inroads into the domain of legal practitioners.
- The LPIIF provides risk management training for practices at no cost. Email Risk.Queries@lpiif.co.za to arrange a training session for your firm. The training will address the specific areas of practice conducted by your firm. If there is a specific area of law on which you require training, indicate that in your email and the training will be tailored to suit your needs.
- Take heed of the maxim *ignorantia iuris nocet*: not knowing the law is harmful