



COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE PROPOSED AMENDMENTS TO SECTION 55(1) OF THE LEGAL PRACTICE ACT

Brief historical overview:

Provision is made in section 55(1) of the Legal Practice Act (the LPA) for the Minister of Justice and Correctional Service (the Minister) to determine the limit of any claim, as defined. The provision empowering the Minister to limit claims is new, having been introduced in the LPA. No similar provision existed in Attorneys Act, 1979.

The Attorneys Fidelity Fund, as it was then called, motivated during February 2013 in their comments on the Legal Practice Bill [b12-2012] for the introduction of a capping mechanism for certain claims. It was stated that the Fund's liability is open-ended. Based upon an actuarial report, the Fund recommended '*that it would be appropriate to cap claims at a level of 5 million rand per claim*'.

At the time, the Fund stated that:

"99.9 of claims paid by the Fund over the past few years would have been unaffected by such a cap and as such a statutory capping of 5 million rand per claim is recommended in order to protect the sustainability of the Fund going forwarding the event of a disaster sized claim and or series claims hitting the Fund. It is further submitted that the Minister be empowered through regulations to review the capping limits going forward on recommendation of the Board of the Fund based on an actuarial report which assess the sustainability of the Fund. In short, the Fund seeks an enabling section within the LPP which will make this possible. It would not in any event be an innovation

within the profession with this being standard in most jurisdictions to avoid the collapse of Fidelity Funds resulting in non-protection for the public against malfeasance by practitioners.”

The purpose of the Legal Practitioners’ Fidelity Fund

The purpose of the Legal Practitioners’ Fidelity Fund (the Fund) must be consistent with the purpose of the LPA, which is located under section 5 of the LPA. We submit that the Fund’s central mandate is to protect and promote the public interest, as envisaged under section 5 (d) of the LPA. Section 55

Consequently, the first purpose of the Fund, as listed under section 57 of the LPA, is to meet the liability of the Fund referred to in section 55, being; to reimburse persons who suffer pecuniary loss, as permitted under the LPA. In its Annual Integrated Report 2021 (the 2021 Report), the Fund specifically states: “The Legal Practitioners’ Fidelity Fund (LPFF) is a fidelity guarantee fund which exists in terms of the Legal Practice Act to protect the public against loss, resulting from theft of money or property entrusted to attorneys in the course of their practices.”

The 2021 Report further states: “The primary purpose of the Fund is to reimburse clients of legal practitioners who may suffer pecuniary loss due to the theft of money or property entrusted to an attorney in the course of his/her practice as such or when an attorney acts as executor or administrator in a deceased estate, or as a trustee in an insolvent estate.”

The sustainability of the Legal Practitioners’ Fidelity Fund

Historically, the Fund’s Board has been concerned about the possibility of an extraordinary claim that could effectively terminate the Fund and, by implication, negate the above legislative mandate. No doubt, the Board of the Fund should be alert to this possibility and ensure that appropriate controls are introduced to address this possibility.

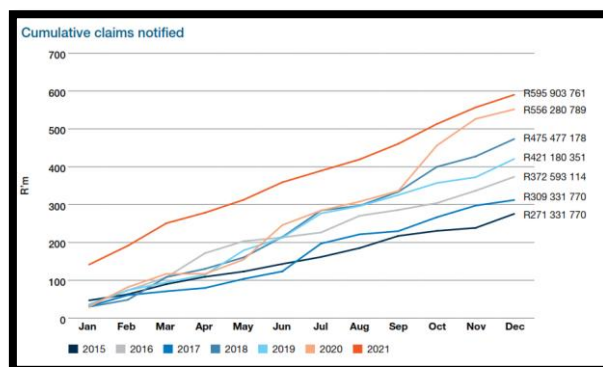
The 2021 Report further states that: “In 2021, the independent actuarial report confirmed that the Fund was sustainable BUT it had to manage competing interests to its resources more carefully to remain sustainable in the long term.”

The LSSA is of the view that the determination of the limit of any claim must, centrally, also take into account the Fund’s legislative mandate, i.e.: protection of the public. The amount of R5m was [proposed](#)

[as a cap during 2013](#). After almost ten years, the Minister proposes that the same amount be introduced as a cap.

In reality, the Fund has reported that the cumulative value of claims has increased. The 2021 Report states:

Cumulative value of claims notified
The graph below represents a comparison of the cumulative value of claims notified for the past five years at the end of the months below. For the year under review, the Fund saw a sharp increase in the value of theft claims registered with the Fund. In 2021, claims to the value of R595 903 761 were filed with the Fund, an increase of 6% from 2020.



It is unclear to what extent the average value of claims has changed. It appears evident that the Fund's contention during 2013 that 99.9% of claims paid by the Fund over the past few years would have been unaffected by such a (R5m) cap is no longer valid.

Ministerial discretion:

Although the Minister has a wide discretion, it is trite that such discretion constitutes administrative action, and, within a constitutional dispensation, it does not amount to an unfettered discretion. The Minister's decision in this regard must therefore be rationally related to the purpose for which the power was given, i.e.: protection of the public. [Maxrae Estates (Pty) Ltd v The Minister of Agriculture, Forestry and Fisheries & Another (case no 407/2020) [2021] ZASCA 73]

It is not evident from the invitation to comment which relevant factors the Minister took into account to determine the proposed limit. A cursory review of the historic context suggests that the Minister has merely polished off the proposed 2013-cap. If so, this is not acceptable.

LSSA's proposal:

In summary, the proposed limit appears to be arbitrary of nature and requires, in our view, a comprehensive reconsideration. In doing so, the Minister must apply his mind to the matter at hand and provide substantive motivation for the proposed decision. The proposed R5 million cap is no longer an appropriate amount and a lot of innocent members of the public will unduly suffer. Also, the sustainability of the Fund can be improved, by amongst other:

1. Obtaining additional insurance to cover massive claims;
2. Avoiding a limit, but, if inescapable, determining an appropriate and non-random limit taking into account all relevant factors. The LSSA anticipates such limit will not be less than R25m;
3. Section 74(1)(a)(ii) of the Legal Practice Act authorises the Fund to levy contributions when Fidelity Fund Certificates are issued, and these can be set at a rate which will provide additional income for the Fund, as a last resort, this could also be investigated as a sustainability measure.