A joint publication of the Legal Practitioners' Fidelity Fund and the Legal Practitioners Indemnity Insurance Fund NPC
(A Non Profit Company, Registration No. 93/03588/08)

RISKALERT

MAY 2023 NO 2/2023

IN THIS EDITION

RISK MANAGEMENT COLUMN

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: @LPIIFZA

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

Legal Practitioners Indemnity Insurance Fund NPC
Est. 1993 by the Legal Practitioners Fidelity Fund

LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

RISK MANAGEMENT COLUMN

Update on the LPIIF's review application against the RAF and Others

Thomas Harban,
Editor
and General Manager
LPIIF, Centurion
Email: thomas.harban@lpiif.co.za
Telephone: (012) 622 3928 or 010 501 0723

In November 2022 the LPIIF launched an application to review and set aside Board Notice 271 of 2022 introduced by the Road Accident Fund (RAF) for the acceptance and administration of claims. The respondents have indicated that they intend opposing the application. We have not received the respondents' answering affidavits yet. Only part of the record for the decision by the RAF and the Minister of Transport, respectively, has been received. The LPIIF has thus launched an application to compel the production of the full record.

Various interested parties have brought applications to intervene. At the time of writing, we have also recently received an urgent application from a firm of attorneys seeking an order –

(i) interdicting the RAF from rejecting claims based on the Board Notice; and
(iii) seeking to intervene in the review application.

To date, we have been notified of over 150 claims that have been rejected by the

RISK MANAGEMENT COLUMN continued...

RAF, purportedly relying on the impugned Board Notice. In some cases, the risk of prescription is imminent. We have sent updates on the status of the review application to those firms who have notified us of claims affected by the Board Notice. It will be appreciated that we do not have the capacity to receive, analyse and capture the thousands of affected claims lodged with the RAF or to provide guidance in respect of each individual claim. The LPIIF is not a firm of legal practitioners and thus cannot provide legal advice on every affected claim.

We have also been made aware of a practice adopted by some RAF offices where lodgements of claims are effectively "door stopped" and not accepted purportedly for non-compliance with the Board Notice. No rejection letters are issued in those instances.

Legal practitioners are urged to read the LPIIF's application, and all the annexures attached thereto. The grounds relied on in the review application will be gleaned from the documents. Unfortunately, some of the practitioners enquiring about the grounds of review refuse to read the papers, or the updates provided, and then repeatedly send the same queries even though the application and updates have been sent to them. This puts additional strain on our limited resources and does not assist in the important challenge we have taken on.

Over and above communicating directly with those firms who have notified us of affected claims, we have communicated with various structures in the profession giving updates on the review application. In addition, our communication has been sent to 8 639 email recipients in the profession. The LPIIF does not have the email addresses of every affected firm and individual legal practitioner in the country, but we have tried our best to communicate with a sizeable portion of the profession. The application was also distributed by the Legal Practice Council and is available on its website.

The Board Notice has been applied since 4 July 2022, yet some practitioners pursuing RAF claims on behalf of plaintiffs appear to be oblivious to it. That is a huge risk for those practitioners and their clients. Another area of concern is those practices who, in spite of the Board Notice, do not make any effort to meet the new requirements. We understand that the requirements are onerous and subject to various grounds of attack but practitioners must still act prudently in the interests of their clients. Unless or until the Board Notice is set aside (or the unlikely event that it is withdrawn), practitioners are urged to comply with it. Practitioners who have identified additional grounds to challenge the impugned Board Notice can either participate in one of the current tranches of litigation or launch challenges of their own.

Though the Supreme Court of Appeal was considering two different questions (see below) in *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* (1102/2021) [2023] ZASCA 50 (13 April 2023), what is stated about contingency fees agreements in paragraphs 27 to 31 of its judgment makes for interesting reading in the context of what the Board Notice prescribes regarding such agreements between attorneys and their clients. The LPIIF raised similar questions in paragraph 25 of its comments on Board Notice 58 of 2021 (the LPIIF's comments are annexed to its founding affidavit).

The related matter (*Mautla and Others v RAF and Others*) has been set down for hearing in the Gauteng Provincial Division on 9 May 2023.

Looking at how similar matters have played out, we anticipate that the LPIIF's review application will probably be heard late this year or even next year.

We will keep the profession apprised of developments in the various tranches of litigation relating to the Board Notice.

Short notes on some recent cases

Several decisions handed down in recent months will be of interest to legal practitioners from a risk and practice management perspective. The decisions have been grouped according to the risk and practice management topics we have identified in each. These cases also make for good training material for firms and provide guidance on the measures that firms must implement in order to mitigate the relevant risks.

Cyber risks

The judgments in *Hawarden v Edward Nathan Sonnenbergs Inc* (13849/2020) [2023] ZAGPJHC 14; [2023] 1 All SA 675 (GJ) (16 January 2023) and *Hartog v Daly and Others* (A5012/2022) [2023] ZAGPJHC 40 (24 January 2023) have received a lot of attention in the profession and the general media since they were handed down in January 2023. The two cases relate to litigation against law firms by parties who had suffered losses following on cyber breaches. In the *Hawarden* case the cause of action against the law firm was framed in delict, whereas the plaintiffs in *Hartog* framed their claims in contract. The perpetrators of the business email compromise (BEC) crime impersonated the law firm in *Hawarden*, while the sellers of the immovable property were impersonated in *Hartog*. A payment the law firm intended making to the sellers was thus targeted in *Hartog*, whereas a payment intended to be made to the law firm was targeted in *Hawarden*. We are informed that an appeal has been launched in the *Hawarden* matter.

Attorneys are not the only targets of cybercrime. In *Gerber v PSG Wealth Financial Planning (Pty) Ltd* (36447/2021) [2023] ZAGPJHC 270 (23 March 2023) the perpetrators of the BEC impersonated a financial service provider's (FSP's) clients. An investment managed by the FSP was thus the target. In *Mosselbaai Boeredienste (Pty) Ltd t/a Mosselbaai Toyota v OKB Motors CC t/a Bultfontein Toyota* (A43/2021) [2021] ZAFSHC 286 (18 November 2021) a transaction between two motor vehicle dealers was successfully targeted by the BEC scammers.

Cybercrime is universal. Attorneys and all parties that they transact with must thus be acutely aware of the ever-present risks and implement appropriate measures to mitigate the risks.

Contingency Fees Agreements

In *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* (1102/2021) [2023] ZASCA 50 (13 April 2023) the Supreme Court of Appeal (SCA) was called upon to adjudicate two questions:

(i) whether s 4 of the Contingency Fees Act 66 of 1997 imposes an obligation on the Road Accident Fund (RAF) to ensure that a legal practitioner obtains judicial approval before it enters into a settlement agreement with such a practitioner; and

(i) whether a settlement agreement concluded without such judicial approval is unlawful.

The background facts, in brief, were that a firm of attorneys was instructed to prosecute claims against the RAF in two separate matters. In the first matter, a curator *ad litem* had been appointed to represent the interests of the plaintiffs who were minors. The court order appointing the curator *ad litem* in the first matter stipulated that he was to obtain the court's approval before settling the matter. Such approval was not obtained when the settlement agreement was concluded. In the second matter, the minor children were represented by their mother. In both matters contingency fees agreements were entered into with the firm concerned. Summons was

RISK MANAGEMENT COLUMN continued...

issued in January 2019 and offers of settlement were made in November 2020 in the two matters. Section 4(3) of the Contingency Fees Act provides that: "(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before the court." Applications were brought before the High Court to make the settlement agreements orders of court and draft orders were prepared. The High Court answered the two questions paraphrased above in the affirmative and, accordingly, declared the settlement agreements to be unlawful as they were concluded without judicial approval.

The SCA considered the first question and concluded (at paragraph 31) that "there is no obligation on the RAF to ensure that the legal practitioner complies with s 4 before it concludes a settlement with him or her. It may well be salutary, where a contingency fees agreement is in place, for the RAF to enquire whether there has been compliance with s 4 of the Contingency Fees Act before it concludes a settlement agreement with a legal practitioner. But that does not equate to a statutory or legal obligation." The SCA also reached a different conclusion (at paragraph 41) to that of the High Court on both questions.

The SCA ordered that a copy of the judgment be brought to the attention of the Legal Practice Council regarding certain aspects of the conduct of the legal practitioners involved in the matter, including the curator *ad litem* in the first matter. The following finding by the SCA (at paragraph 65) should serve as a warning to legal practitioners:

"In seeking approval to have the draft orders made orders of court, the legal representatives gave the court the impression that the payments to the attorneys would be made once the orders were made. They failed to disclose to the court that in both matters: (a) [payment of the] capital had already been made; (b) the attorneys had already taken their fees without any taxation of such fees. Thus, the court was effectively misled. This conduct on the part of the legal practitioners should be brought to the attention of the Legal Practice Council. So should the conduct of the curator *ad litem* in failing to seek judicial [approval] conduct before accepting the offer of settlement."

Contingency fees agreements were also central in another matter decided in recent months. On 26 January 2023 Roelofse AJ, sitting in the Mpumalanga Provincial Division of the High Court (Mbombela) delivered a judgment in *Hendry v The Road Accident Fund and Eight Similar matters* (case no 856/2020). This judgment was handed down before the SCA judgment in *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* and the references by Roelofse AJ to that case are thus to the judgment of the court *a quo* (Fisher J sitting in the Gauteng Division of the High Court, Johannesburg).

The matters in the Mpumalanga Provincial Division all concerned applications to make settlement agreements orders of court and the plaintiffs' attorneys had concluded contingency fees agreements with their respective clients. Written settlement agreements had been entered into between the plaintiffs and the RAF and the plaintiffs' attorneys thus applied to have the settlement agreements be made orders of court. Draft orders had been prepared. The court raised concerns with the legal representative of the plaintiffs that the material placed before it was inadequate to consider making the settlement agreements orders of court. The court noted (at 22) that it appeared (and was conceded by the plaintiffs' legal representative) "that the affidavits were in the form of a template that was used in all the matters. It is clear that the only variables such as the plaintiffs' details, the settlement amounts were changed in accordance with the particulars of each matter and the settlement that was reached." The court found that:

- The information provided in

RISK MANAGEMENT COLUMN continued...

the affidavits deposed to by the plaintiffs' attorney did not adequately address the substance of what was required by s 4(1) and s 4(2) of the Contingency Fees Act and was a mere repetition (paragraph 24).

- It was unable, "in the mandatory exercise of [its] oversight function, … to consider the probity of the settlement agreements with the information that [was before it]" (paragraph 25).
- There was insufficient information to assess what amount the plaintiffs would have ultimately claimed at trial and what they were abandoning or compromising by settling rather than going to trial (paragraph 26).
- The plaintiffs' legal representatives had not provided information to enable an assessment the chances of success at trial (paragraph 27).
- The statement by the plaintiffs' attorney of an inability to give the chances of success at trial, in the face of what s 2 of the Contingency Fees Act prescribes before a legal practitioner enters into a contingency fees agreement, "perplexing". The court also considered the obligation placed on legal practitioners by paragraph 3.10 of the Code for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (paragraph 28).

The attorney's fees at the stage of the settlement were not disclosed. The court pointed out that a costs consultant could have been engaged earlier in the process so that the plaintiffs could become aware of the costs upon settlement. The belief by the attorney that the plaintiffs would not be able to obtain better relief if the matters proceeded to trial was inadequate (paragraph 30) and there was nothing said about the language used in explaining the settlements to the plaintiffs, whether an interpreter had been utilised or whether the plaintiffs understood the implications of settling or not settling (paragraph 33). The affidavits did not disclose what had been reduced to writing when the plaintiffs were informed of the offers and amounts of settlement. "The client must fully understand the financial implications too" (paragraph 32).

The plaintiffs' attorneys were ordered to file and deliver supplementary affidavits dealing in full with each of the requirements in terms of sub-sections 4(1)(a) to (e) of the Contingency Fees Act.

Conduct of legal practitioners

In *Goliath and Another v Chicory SA (Pty) Ltd* (3382/2018) [2023] ZAECMKHC 38 (7 February 2023) the inappropriate language used by the legal practitioners and the depth of the attack on the court and its findings were highlighted. The applicant in *Gaone Jack Siamisang Montshiwa (Ex Parte Application)* (Case no 672/2021) [2023] ZASCA 19 (3 March 2023) was found to have made disparaging allegations about judges.

The applicant's attorneys and counsel in *SASOL South Africa t/a SASOL Chemicals v Gavin J Penkin* (Case No: 06609/2020) [2023] ZAGPJHC 329 (14 April 2023) narrowly escaped a sanction of being precluded from recovering any costs from the applicant.

Egregious handling of a trial

In *T.B.M v Road Accident Fund* (21/50117) [2023] ZAGPJHC 299 (5 April 2023) the plaintiff's minor child suffered injuries in an accident involving multiple vehicles. The minor child, NSM, had been a passenger in one of the vehicles involved. The injuries sustained included a diffuse axonal injury. The court described a diffuse axonal injury as serious. Though the plaintiff, TBM, sued in her capacity as a representative of her minor child, the latter was erroneously described in the particulars of claim as an adult with full legal capacity. Counsel for the plaintiff filed his written submissions before any evidence was led, and thus prematurely. The court believed that the amount of more than R10 million in compensation sought had been inappropriately inflated. No justification was made on the papers for an award of gen-

eral damages or any award for future medical expenses. No evidence was placed before the court that the minor child had actually suffered a head injury, the experts called on her behalf assuming such an injury but none actually able to say that with certainty. The hospital records showed no indication of a head injury. None of the people who had treated the minor child were called to testify and no witnesses were called to explain how the accident occurred. No evidence was led of a decline in NSM's scholastic performance after the accident.

An order absolving the defendant, the RAF, from the instance was granted. The following extract from the judgment should serve as a warning to practitioners to act prudently in litigation of this nature:

"10. This outcome is in no small part due to inadequate preparation for trial on the part of both parties' legal representatives. At the outset of the trial, I was informed by counsel that the parties had settled what counsel described as 'the merits' of TBM's claim. But it emerged during the trial that this could not have been true. The RAF had clearly not conceded the nature and extent of NSM's injury, because the RAF had not accepted that NSM had suffered a head injury. Mr. Ngobeni cross-examined extensively on the absence of any evidence of a head injury. He argued at the close of the trial that a head injury had not been proved.

11. It ought to have occurred to the parties' legal representatives that this meant that the 'merits' of the trial – in the sense of the RAF's liability to compensate MSM for her proven losses – could not have been settled. A separation of issues between liability and quantum of damages is only possible if the nature of the injuries is conceded, but the amount to be awarded to compensate for the consequences of those injuries is not agreed. Here, a critical part of the 'merits' of the claim – the nature of the damage suffered – had not been conceded, and so it could not be said that the 'merits' had been settled.

12. For these reasons, I do not think any costs order is justified. The trial proceeded on a wholly mistaken shared assumption. Nor do I think that the plaintiff's legal representatives ought to be permitted recover their fees and disbursements from the plaintiff. TBM was entitled to expect a higher standard of representation than she received."

Termination of mandates

In *Chabeli Molatoli Attorneys Incorporated v Pitso N.O and Others* (25412/22) [2022] ZAGPPHC 744 (6 October 2022) the applicant (a firm of attorneys) sought an order removing the first respondent, the executrix of a deceased estate, from office. The executrix had entered into an agreement with the applicant appointing the latter as her agent but later terminated the applicant's mandate and appointed another firm of attorneys to act as her agents. The applicant also sought to have the termination of the mandate of agency declared invalid. The first respondent contended that, as principal, she was entitled to revoke the mandate of agency granted to the applicant. She also argued that it would be against public policy to force a principal to continue in a relationship with an agent where the latter no longer wished to continue in that relationship. The first respondent expressed dissatisfaction with, among other things, the legal fees which the applicant had charged. She alleged that the respondent's legal fees amounted to 60% of the value of the estate.

The court found that:

"[19] Bad relations between an executor and an heir cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result. But, …, even in such event, the respective actions of the heir and the executor must be considered, for an heir cannot be allowed to frustrate, through un-

RISK MANAGEMENT COLUMN continued...

reasonable and wrong conduct, the actions of an executor which is beyond reproach. A disgruntled heir cannot be allowed to circumvent the administration process by improperly pressurising the executor to accede to his demands. To remove an executor in such circumstances would not serve any purpose for the same lot would befall the next executor as well. It is not necessary to discuss this issue any further since in the present matter I hold the view that the relationship between the second to fourth respondents and the applicant is not such that it would prevent the administration of the estate."

The termination of the applicant's mandate was found to be unlawful.

Dissatisfied with the outcome, the unsuccessful respondents brought an application for leave to appeal. The applicant launched an application to cross appeal. Leave to appeal to the Supreme Court of Appeal was granted on 11 April 2023 and the application to cross appeal to the SCA was also granted (*Chabeli Molatoli Attorneys Incorporated v Pitso and Others* (25412/22) [2023] ZAGPPHC 223 (11 April 2023)).

It will be interesting to see how the various matters are ventilated in the SCA and how that court rules in respect thereof.

Macberth Attorneys Incorporated v South African Forestry Company SOC, Ltd and Others (29177/2020) [2022] ZAGPPHC 150 (2 March 2022) is another matter relating to the termination of the mandate of a firm of attorneys. The applicant served on the panel of attorneys of the first and second respondents, having been appointed after a tender process. The applicant was appointed to the panel of attorneys for a period of three years commencing from 2 May 2017, renewable for a further two years subject to an annual review of the services provided. During the term of the appointment, disputes arose between the first and second respondent, on the one hand, and the applicant, on the other. The disputes concerned allegations by the first and second respondents that the applicant overcharged for fees, concealed a settlement offer in order to generate more fees and charged for matters where it had not been mandated to act. Attempts to resolve the disputes between the parties were unsuccessful and the applicant's bills were referred to the Legal Practice Council for assessment. The first and second respondents wrote to the applicant on 5 January 2020 terminating its mandate. The court found that the decision to terminate the applicant's mandate was based on contract, was not administrative action taken pursuant to any legislative instrument and thus not subject to review in terms of the Promotion of Administrative Justice Act 3 of 2020. The application was thus dismissed. The court also stated that the application was moot as it had been launched in July 2020, two months after the contract ended. The applicant launched an application for leave to appeal which was dismissed on 22 March 2023 (*Macberth Attorneys Incorporated v South African Forestry Company SOC, Ltd and Others* (29177/2020) [2023] ZAGPPHC 187 (22 March 2023)) for failure to prosecute the appeal timeously (an application for condonation was unsuccessful) and because the appeal would have no practical effect.

Claims against the Legal Practitioners' Fidelity Fund

Smith v Legal Practitioners' Fidelity Fund Board (26539/2016) [2023] ZAGPPHC 66 (1 February 2023) arose out of an interesting set of facts. The plaintiff's four claims arose out of four transactions he had entered into with a Mr Stephens, described as the Financial Officer of a law firm. In all four transactions the plaintiff paid the required funds into the law firm's trust account. The owner of the firm had emigrated to Australia. Each transaction involved a scheme that Mr Stephens convinced the plaintiff to invest in and attractive returns were promised. Mr Stephens later disappeared, only to be traced to the USA, and the plaintiff lost his money. It subsequently emerged that he (Mr Stephens) had used a fictitious name. The plaintiff's ac-

tion against the Legal Practitioners' Fidelity Fund (Fidelity Fund) was unsuccessful. The claims were found to fall within the statutory exception in s 47(1)(g) read with s 47(5)(b) of the Attorneys Act 53 of 1979. (The Legal Practice Act 28 of 2014 repealed the Attorneys Act. See ss 56 (1)(e), (5) and (6) for the corresponding investment exclusions in the current statute.)

In *Rabalao v Trustees for the time being of the Legal Practitioner's Fidelity Fund: South Africa and Another* (63838/2021) [2023] ZAGPPHC 218 (3 April 2023) the applicant intended purchasing immovable property and paid the purchase price, transfer and registration fees into the trust account of an advocate practising in terms of s 34(2)(b) of the Legal Practice Act (a "trust account advocate"). A person who identified herself as a lawyer working with the trust account advocate informed the applicant that the transfer of the property into the applicant's name would be made after the applicant paid the purchase price, transfer fees and registration costs. The transfer and registration of the property into the name of the applicant never took place and she lost her money. The question before the court was whether the legal practitioner, in receiving the funds into his trust account, acted in the course of his practice as a trust account advocate. The applicant had lodged a claim with the Fidelity Fund, which rejected it on the basis that the money was not "*given in trust to a trust account practice in the course of the practice of the … advocate referred to in section 34(2)(b).*" The court, after considering the provisions of the Legal Practice Act and previous cases on the test for entrustment, reviewed and set the Fidelity Fund's decision to reject the applicant's claim and ordered that the decision be reconsidered.

Delictual claims for medical malpractice

- *Mashinini v The Member of the Executive Council for Health and Social Development, Gauteng Provincial Government* (335/2021) [2023] ZASCA 53 (18 April 2023)
- *NSS obo AS v MEC for Health, Eastern Cape Province* (Case no 017/22) [2023] ZASCA 41 (31 March 2023)
- *TN obo BN v Member of the Executive Council for Health, Eastern Cape* (36/2017) [2023] ZAECBHC 3 (7 February 2023)

Prescription

- *Minister of Justice and Constitutional Development and Others v Pennington and Another* (162/2022) [2023] ZASCA 51 (14 April 2023)
- *Shoprite Checkers (Pty) Ltd v Mafate* (903/2021) [2023] ZASCA 14 (17 February 2023)

Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA)

- *Giftwrap Trading (Pty) Ltd v Vodacom (Pty) Ltd and Others* (1009/2020) [2023] ZASCA 47 (4 April 2023)

Road Accident Fund

- *Hlatshwayo and Another v Road Accident Fund* (3242/2019) [2023] ZAMPMBHC 2 (24 January 2023)
- *Discovery Health (Pty) Limited v Road Accident Fund and Another* (2022/016179) [2022] ZAGPPHC 768 (26 October 2022)

Other interesting cases

Legal practitioners should also read *Ruth Eunice Sechoaro v Patience Kgwadi* (896/2021) [2023] ZASCA 46 (4 April 2023) and *Krügel Heinsen Incorporated v Thompson and Another* (Case no 41/2022) [2023] ZASCA 38 (31 March 2023) which have a direct bearing on their execution of their duties in matrimonial matters post-divorce and conveyancing, respectively. The judgment in *Krügel Heinsen Incorporated* and that in *Cutlers Holdings Ltd & Anor v Shepherd and Wedderburn LLP* [2023] EWHC 720 (Ch) demonstrate that courts will not hold legal practitioners liable where there is no legal basis for liability.