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RISKALERT

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RISK MANAGEMENT COLUMN

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LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

RISK MANAGEMENT COLUMN

Challenging the RAF Board Notices

The previous edition of the Bulletin included an overview of the litigation challenging the measures sought to be introduced by the Road Accident Fund (RAF) for the acceptance and administration of claims.

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Practitioners pursuing claims against the RAF are urged to read all the relevant judgments. The LPIIF does not have the capacity or a mandate to provide legal advice to practitioners on individual claims that they are dealing with. We request that members of the profession thus desist from submitting queries to us on the steps that must be taken in individual matters that they are dealing with. Several practitioners have been sending us copies of their lodgement bundles or copying us on all correspondence exchanged with the RAF. This takes up a lot of our time and detracts attention from the execution of our mandate. The onus is on the practitioners concerned to consider the legal position in each matter where they have accepted a mandate and to act prudently in the circumstances. One option is to act as the practitioner did in the matter covered in a media report at https://www.moneyweb.co.za/news/south-africa/raf-and-its-chair-and-ceo-avoid-being-declared-in-contempt-of-court/

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We are monitoring RAF litigation as best we can and will provide general risk management suggestions – not legal advice – where appropriate.

Board Notice 271 of 2022

On 22 March 2024 a full bench of the Gauteng Division handed down judgment in favour of the LPIIF and other applicants (*Legal Practitioners Indemnity Insurance Fund NPC and Others v Road Accident Fund and Others* (046038/2022) [2024] ZAGPPHC 294 (20 March 2024)).

In terms of the court order:

(i) Board Notice 271 of 2022 is declared unlawful, reviewed and set aside;

(ii) The RAF 1 form published by the Minister of Transport in the Government Gazette on 4 July 2022 (the 2022 RAF 1 form) is declared unlawful, reviewed and set aside;

(iii) The RAF must continue to investigate and process claims lodged in accordance with Board Notice 271 of 2022 and/or the 2022 RAF 1 form and accepted as such. Those claims are deemed to have been lodged in terms of the RAF Act;

(iv) From 6 May 2022 the prescribed form will be the 2008 RAF 1 form until the Minister of Transport prescribes an amendment to that form in terms of section 26 of the RAF Act;

(v) Those claimants who sought to lodge claims in terms of Board Notice 271 of 2022 or the 2022 RAF 1 form, but the lodgement was either declined or not acknowledged by the RAF, are afforded until 30 September 2024 to resubmit their claims in terms of the 2008 RAF 1 form. The claimants in this category enjoy the benefits of lodgement from date on which they originally sought to lodge;

(vi) The RAF must take all reasonable measures to inform claimants referred to in (iii) and (v) above of the contents of the order. The measures are to include the publication of the order in at least three national newspapers and taking reasonable measures to inform the public of the order;

(vii) The Minister of Transport must adopt and publish a revised RAF 1 form within 6 months from the date of the order;

(viii) The RAF is to pay the costs of the applicants, including the costs of two counsel where so employed; and

(ix) The Minister is ordered to pay the costs of the applicants on an unopposed basis.

The RAF notified the parties on 9 April 2024 that it intends applying for leave to appeal the judgment. At the time of writing, the application for leave to appeal has not been argued yet. The profession will be informed of developments in the matter.

We have received numerous reports that, despite the judgment, RAF officials are still refusing to accept claims, purportedly still relying on Board Notice 271 of 2022. That will be dealt with as part of the ongoing litigation. As stated above, we cannot assist members of the profession with their individual claims. In *Mlamli v Johnstone and Another* (955/2024) [2024] ZAECMKHC 40 (9 April 2024), dissatisfied with the RAF's refusal to accept his lodgement documents, the applicant launched an urgent application for an order compelling the RAF to accept them. The RAF had purportedly relied on Board Notice 271 of 2022 in its refusal to accept the documents. The Court ordered that:

- the RAF's decision and conduct, purportedly relying on Board Notice 271 of 2022, in refusing to accept the lodgement documents were declared unlawful;
- within 5 days of the order, the RAF is to accept delivery of the applicant's claim documents sent by hand/ email/ post; and
- the RAF immediately cease relying on Board Notice 271 of

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2022 to refuse the lodgement of claims.

Other judgments relevant to Board Notice 271 of 2022 include *Radebe v Road Accident Fund* (053998/2023; 074803/2023) [2024] ZAGPPHC 25 (1 January 2024), *Road Accident Fund v Zilwa Attorney Incorporated and Others* (Eastern Cape Division, Mthatha Case no: 4112/2023) (6 November 2023) and *Road Accident Fund v Sogoni and Another* (EL660/2023) [2023] ZAECELLC 18 (21 July 2023).

Foreign claimants

In *Mudawo and Others v Minister of Transport and Another* (011795/2022) [2024] ZAGPPHC 258 (26 March 2024) a full bench made an order which is another significant victory for claims. The order is quoted verbatim below:

1. "The provisions of the substituted RAF 1 claim form prescribed by Government Notice R2235 published in Government Gazette 46661 dated 4 July 2022 issued by the Minister of Transport (first respondent) in terms of section 26 of the Road Accident Fund Act, 56 of 1996, is reviewed and set aside to the extent that both part 6.1 (substantial compliance injury claims) and part 12.1 (substantial compliance death claims) thereof require that, if a claimant is a foreigner, proof of identity must be accompanied by documentary proof that the claimant was legally in South Africa at the time of the accident.
2. The provisions of the RAF Management Directive dated 21 June 2022 titled Critical Validations to Confirm the Identity of South African Citizens and Claims Lodged by Foreigners, is reviewed and set aside to the extent that:
   - 2.1 In respect of foreign claimants, it requires that proof of identity must be accompanied by documentary proof that the claimant was legally in South African at the time of the accident;
   - 2.2 In respect of foreign claimants, they are required to provide copies of their passports with an entry stamp and where they have left South Africa, the passport must have an exit stamp and should the foreign claimant still be in the country, that proof of an approved visa must be submitted before the RAF is prepared to register such claimants' claims;
   - 2.3 It is required that copies of the passports of foreign claimants may only be certified by the South African Police Service;
3. The first and second respondents are jointly and severally ordered to pay the applicants' costs of the application, including the costs of two counsel and senior counsel, where utilized, the one paying the other to be absolved."

Board Notice 58 of 2021

As reported in previous editions of the Bulletin, Board Notice 58 of 2021 was reviewed and set aside in *Mautla and Others v Road Accident Fund and Others* (29459/2021) [2023] ZAGPPHC 1843 (6 November 2023). The RAF's application for special leave to appeal was dismissed by the Supreme Court of Appeal with costs on 15 March 2024 as the requirements for special leave to appeal were not satisfied.

Any developments in the *Mautla* matter will also be communicated to the profession as and when they occur.

Notice regarding the LPIIF policies

The 2024/2025 insurance scheme year will commence on 1 July 2024. No changes will made to the LPIIF policies for the new scheme year. The policies will be published in the Bulletin on 1 June 2024 and uploaded onto the LPIIF website on 1 July 2024.

The RAF litigation model

The measures taken by the RAF in recent years have had a significant impact on claimants, their attorneys, the RAF panel and the courts. It is no exaggeration to describe the developments at the RAF as one of the major disruptors to the profession, claimants, the courts and all other stakeholders in recent years. In 2020 the RAF terminated its panel. More than 100 firms were affected by this development (*Road Accident Fund and Others v Mabunda Incorporated and Others; Minister of Transport v Road Accident Fund and Others* (1147/2020; 1082/2020) [2022] ZASCA 169; [2023] 1 All SA 595 (SCA) (1 December 2022)). The litigation strategy adopted by the RAF in the wake of the termination of its panel has caused much consternation for all interested parties. The current situation is, respectfully, summed up in the following passage of the notice to the legal profession issued by the Office of the Deputy Judge President of the Gauteng Local Division, Johannesburg, on 26 March 2024 about the future of the Road Accident Fund default judgment (RAF DJ) roll:

"4. An aspect, …, is the behaviour of the Road Accident Fund in the RAF DJ court. It is has reported to me that, increasingly a practice has evolved in which a RAF 'representative' (sic) turns up at the last minute, totally ignorant of the case and incapable of engaging even in settlement discussions, and thereupon files a belated notice of opposition. This provokes a postponement albeit with punitive costs. One acting judge recently informed me that his entire roll had been sabotaged by this ruse. I need not belabour the unethical nature of this conduct. It makes a mockery of the court process."

Litigation inherently takes a long time to be finalised. After waiting for many years to get a trial date, practitioners must now also factor in the possibility (a probability in many cases) that the RAF will adopt the practice described above and the matter will not be heard on that day. This has a significant impact on practitioners and their clients alike. Disgruntled clients, not *au fait* with these challenges, may unfairly blame their legal representatives for the delays. This is compounded by the current backlog in obtaining trial dates in many courts and the public relations exercise the RAF has embarked in the media insinuating, unfairly to the profession, that legal practitioners acting in their own interests are primarily to blame for the current calamitous situation.

The RAF's failure to play a meaningful role in litigation has been lamented in several judgments (see, for example, *Sayed NO v Road Accident Fund* 2021 (3) SA 538 (GP), *Hlatshwayo and Another v Road Accident Fund* (3242/2019) [2023] ZAMPMBHC 2 (24 January 2023) and *LN and Another v Road Accident Fund* [2023] ZAGPPHC 274; 43687/2020 (20 April 2023)). See also Professor Hennie Klopper's article, "Is the Road Accident Fund an *inheritas damnosa*?" (*De Rebus*, July 2023).

In a recent case (*Muir v Road Accident Fund* (28025/2019) [2024] ZAGPJHC 288 (18 March 2024)) conduct of the RAF's legal representative provoked the ire of the judge.

The plaintiff in *Muir* had been injured in a motor vehicle collision that occurred on 15 December 2017. He instituted a claim against the RAF. The two

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special pleas raised by the RAF were both dismissed by the court. The RAF did not commission any expert reports and did not call any witnesses to testify on its behalf at the trial. Makhambeni AJ commented that:

"[8] It needs to be pointed out that in view of the defendant's election to neither call any witness, nor file any expert reports, it was going to be difficult for the defendant to mount a credible defence, if any, to the plaintiff's meticulously presented case, and [the RAF's attorney] Mr Ngomana was accordingly warned of this as he, on more than one occasion, ventured into the realms of testifying from the Bar instead of merely cross-examining the plaintiff which I found to be quite regrettable, to say the least.

[9] Thus, it came as no surprise that the defence lawyer could not make any impression on the case, the plaintiff's counsel, Mr Smit presented, as well as, on the plaintiff himself."

The trial had commenced on 18 October 2023 and ran over two days. Rather peculiarly, on the morning of 19 October 2023 the RAF, in an attempt to stop the adjudication of the plaintiff's general damages claim, uploaded a formal rejection letter onto Caselines in respect of the serious injury assessment report. This occurred after the second special plea, on that ground, had been dismissed by the court the previous afternoon. On this point, the court stated that:

"[53] In my view, it is regrettable inasmuch as Mr Ngomama's duty to his client has to be acknowledged, the more disturbing feature about this mode of behaviour is the fact that it is indicative of a lawyer, who has forgotten that he was and still remains an officer of the Court, and as such, he owed a higher duty to the Court than he would ever have to his client, hence it is not only inappropriate for him to refuse to answer questions, but rather improper to the point where it starts raising questions about whether, or not, he still remains fit and proper to practice law."

Makhambeni AJ's comments about the conduct of the RAF's legal representative should serve as a lesson to all practitioners. It is thus worth quoting the learned judge's comment regarding the attorneys conduct in full:

"The unethical conduct of Mr T Ngomana on behalf of the defendant

[68] The conduct of Mr Ngomana, during the course of the trial, has been rather woefully shameful and unbecoming of a legal practitioner, if one is to put it mildly.

[69] Mr Ngomana struggles to answer questions honestly and with the requisite measure of sincerity to the point where it cannot be said that his inability to answer with the requisite measure of honesty and sincerity can be attributed to him making errors with regard to the English language, since these are conscious errors that he purposely made with a view to deflecting attention from the fact that he did not have valid answers to the questions asked. It is expected that if a legal representative in proceedings before Court does not know the answer to the question asked of him/her, he/she will have the good sense and sense of duty to appraise the Court of the fact that he/she does not know, instead of giving an answer that misleads the Court as Mr Ngomana did, when he was asked whether he knew and understood the difference between substantive and formal compliance during the course of arguing the first special plea in terms of Section 24(4) of the RAF Act. Getting something fundamental as this wrong, and then attempting to cover it up with an apology that is contrived and insincere can never be good enough.

[70] After the second special plea was dismissed, Mr Ngomana was asked about his readiness, with regard to the merits of the case, and in one of our interactions, instead of answering my question, he

then said to me he had no instructions whatsoever on that aspect. I then pressed him further, and asked him whether he was saying to me that he had no instructions to proceed on the merits. He then responded by saying that he was ready to proceed on the merits. I then asked him again now why did he earlier say that he had no instructions on the issue of the merits, when in fact, he had a general instruction to proceed in the first place. It was during the course of that interaction that he ultimately said to me that he was refusing to answer my questions, something which I found rather strange for a legal representative that is supposed to have a duty to appraise the Court of where he stood on a certain issue when asked about it. Hence it is my considered view that Mr Ngomana does not seem to have a proper understanding of the overriding duty that he has to Court, and as a result thereof, would benefit greatly from remedial action by the Legal Practice Council, whereby two or three senior members of the profession would have to sit down and administer the necessary rebuke towards in (*sic*) a safe environment and in such a way that he is helped to understand the danger he is putting his career in with his mode of behaviour, which is rather undesirable to say the least, to put it very mildly.

[71] When the hearing resumed on 19 October 2023, Mr Ngomana apologised for his regrettable and odiously repugnant behaviour on 18 October 2023, which apology was accepted, but then again, it was not long before he was at it again, because on that day he sought to conduct his cross-examination in a manner that resembled giving testimony from the bar, and when this was brought to his attention by me, he refused to listen and instead adopted the same attitude that he had adopted the day before, which left me wondering whether there was any sincerity in the apology that he had offered earlier that morning. Upon realising the error in his ways after he had again refused to answer questions, he apologised and this time around he was told in no uncertain terms that an insincere and contrived apology was one that the Court was not prepared to accept. At the end of the proceedings, I did take the time to admonish Mr Ngomana, however it remains my considered view that from a Restorative and Therapeutic Justice point of view, Mr Ngomana needs to be referred to the Legal Practice Council in Gauteng, under the supervision of the provincial chairperson of the Council, and such a referral envisages a state of affairs wherein two Senior Advocates would have to sit down with Mr Ngomana, and explain to him his duties to the Court as expounded upon in the matter of *Rondell v Worsley* [1966] 3 All ER 657, by Lord Denning, which view and judgment was confirmed on appeal to the House Of Lords (in *Rondell v Worsely* [1969] AC 19 1) by Lord Reid MR, in the House of Lords when he was writing on behalf the Lords. Once the remedial action has been administered by the two Senior Advocates, the provincial chairperson of the Legal Practice Council in Gauteng will then have to file an affidavit to the effect that she has satisfied herself that Mr Ngomana now understands his duties to the Court, and such an affidavit would have to be filed within a period of three (3) months after the order of this Court is handed down."

Legal practitioners must always be conscious of their ethical duties to the court. Pursuing an unsustainable defence, whether on the instructions of a client or otherwise, is just as risky as pursuing a meritless case for plaintiffs- the latter being a lesson that can be learned from another recent case, *Nkosi and Another v Minister of Police and Others* (164072/022) [2024] ZAGPJHC 320 (28 March 2024), where the plaintiffs' pursuit of a hopeless case resulted in punitive costs order being imposed.

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LPIIF claim statistics

The claim patterns remain constant from previous reporting periods. The aggregate for prescription related claim payments is 56% (R190 million). This is concerning in view of the amount of coverage prescription mitigation measures have received in LPIIF materials, the emphasis on that risk in the training that we provide, and the company having made the Prescription Alert system available to the profession at no cost. Practitioners are urged to have regard to the materials on our website and to also make use of the training afforded by the company at not cost to the profession. Risk management training for practitioners and their staff can be arranged by sending a request to Risk.Queries@lpiif.co.za

It is apposite at this point to discuss another recent judgment (*Tsotetsi v Mkhabela and Another* (2022/8508) [2024] ZAGPJHC 337 (8 April 2024)) where a legal practitioner and his firm were held liable for the loss suffered by a plaintiff whose RAF claim had prescribed in their hands. The plaintiff was injured in motor vehicle accident that occurred on 20 August 2019. The plaintiff alleged that he suffered damages of R1 million as result of the injuries sustained in the accident. The plaintiff's case as pleaded was that:

- the first defendant, an attorney practising as the sole director of the second defendant (an incorporated law firm), approached him, on behalf of the second defendant;
- a "representative" of the second defendant, Albert Mofokeng, had approached him at his home after he (the plaintiff) was discharged from hospital following the accident and explained to him that second defendant could assist him in pursuing a claim against the RAF. He had not approached the second defendant, but it was the second defendant that had sought him;
- an oral agreement was concluded between them in terms of which the second defendant would investigate the circumstances leading to the accident in which he was injured, lodge a claim timeously with the RAF and pursue a damages claim on his behalf;
- the first and second defendants breached the agreement and/or failed to execute their obligations by failing and/or neglecting to timeously act in the matter, resulting in the prescription of his RAF claim;
- but for the defendants' failure to timeously execute their mandate as agreed, he would have successfully pursued his claim against the RAF, and it would have been finalised in his favour had they exercised reasonable care expected of a reasonable and professional attorney; and
- because of the defendants' breach, they should be held liable, jointly and severally, for the damages he will be able to prove.

On receipt of the plaintiff's summons, the defendants filed an appearance to defend and, subsequently, their plea (a bald denial) and discovery affidavits in due course. The defendants attended virtual pre-trail conferences approximately a week before the trial. However, neither defendant nor their legal representatives were present at court on the day of the trial. Attempts to contact them or their legal representatives telephonically on the trial date were unsuccessful.

The plaintiff's evidence was that the "representative" of the second defendant had brought documents with him to the first (and only) meeting which the plaintiff filled in and signed. Mofokeng did not provide the plaintiff with copies of documents or a business card but gave the latter a phone number on which he could be contacted. After giving the instruction in August 2019, the plaintiff did not hear from the second defendant until January 2021 when he phoned Mofokeng to enquire about progress in his claim. Mofokeng informed him that the claim was not progressing due to the COVID 19 pandemic. When he did not hear from the second defendants or any of its representatives again, the plaintiff instructed his current attorney. The current attorney contacted the RAF in the plaintiff's presence and was told that no claim had ever been lodged in the plaintiff's name and any claim he would have had was extinguished by prescription.

Having accepted the version advanced on behalf of the plaintiff, and in the absence of anything to the contrary proffered by the absent defendants, the court was satisfied that an agreement of the type contemplated was concluded between the plaintiff and the second defendant represented by Mofokeng. The defendants were held jointly and severally liable to the plaintiff for 100% of the damages that he would prove at a later stage at a trail on the quantum.

Liability related matters on SCA roll this month

The latest Supreme Court of Appeal (SCA) Bulletin lists several liability related matters to be heard in May 2024 that may be of interest to legal practitioners. The names of the parties and summaries below are extracted from the Bulletin available on the SCA's website. The matters include:

- ***Michelle Jacqueline Scholtz, Michelle Jacqueline Scholz NO v Leon De Kock NO, The Master of the High Court and Legal Practice Council*** to be heard on 2 May 2024. This case involves the fiduciary duty of an executor to render an account to principal beneficiaries and whether the first appellant in her personal capacity was subject to the accounting sought.
- ***Sanoj Jeewan ("Mark") v Transnet SOC Ltd and Ernest & Young (EY)*** – prescription is one of the questions in this matter to be heard on 3 May 2024.
- ***Edward Nathan Sonnenberg Inc v Judith Mary Hawarden*** – on 8 May 2024 the SCA will hear the appeal against the much-publicised judgment regarding liability of a law firm for a cybercrime related loss suffered by a client. The court will consider whether the appellant is liable to the respondent for pure economic loss caused by omission, whether the firm was negligent and, if wrongful and negligent, the firm's conduct caused the respondent's loss. Contributory negligence on the part of the respondent will also be considered.
- ***AIG South Africa Limited v 43 Air School Holdings (Pty) Ltd, 43 Air School (Pty) Ltd, PTC Aviation (Pty) Ltd and JET Orientation Centre*** – this case concerning insurance indemnity for a COVID 19 related business interruption loss is scheduled to be heard on 9 May 2024.
- ***Marelize Botha v Ruark Botha*** – this family law matter involving a common mistake in a divorce settlement is scheduled to be heard on 10 May 2024.
- ***Estelle Le Roux and Marthinus Van Der Spuy Le Roux v Dielemaar Holdings (Cape) (Pty) Ltd Limited and IPIC Properties (Pty) Limited*** – prescription and *res judicata* are some of the matters for consideration listed in the summary of this matter scheduled to be heard on 13 May 2024.
- ***Ubisi MK and Nel, Van De Merwe & Smalman Inc v Road Accident Fund*** – the summary of this matter scheduled to be heard on 13 May 2024 reads as follows: "Civil Procedure- effect of unchallenged settlement agreement powers of court in awarding and disallowing damages in a claim – effect of settlement agreement on the existence of a *lis* and jurisdiction – whether the high court was justified in making adverse findings and an order referring the professionals affected without hearing them – whether the High Court had the power to find that the first respondent was not entitled to be compensated for general damages – whether the high court had the authority to dismiss the first appellant's claim for loss of earnings and past hospital and medical expenses costs."
- ***Ian Julian Smith v The Legal Practitioners' Fidelity Fund Board*** – the test for entrustment in terms of section 26 (a) of the repealed Attorneys Act 53 of 1979 will be considered in this matter to be heard on 15 May 2024.
- ***Collins Letsoalo and Road Accident Fund v Mothusi Lukhele*** – this matter scheduled to be heard on 21 May 2024 involves the *audi alterem partem* principle and a party's right to be properly and timeously served in a matter where relief is sought against such person.
- ***The MEC for Health, Gauteng Provincial Government v Shongwe*** – this medical negligence case to be heard on 23 May 2024 will consider "whether the minor was unaware of his loss of amenities of life and/or pain and suffering and whether he experienced a 'twilight zone' and the amount of damages that should be awarded to him".