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RISK MANAGEMENT COLUMN

Review of RAF board notices

The *Risk Alert Bulletin* is written by Thomas Harban, General Manager, LPIIF

The litigation in respect of Road Accident Fund (RAF) Board Notice 58 of 2021 and Board 271 of 2022, respectively, is ongoing. The matters are now before the Supreme Court of Appeal (SCA). We will inform the profession and other interested parties when dates for the hearings have been allocated. We, once again, implore practitioners to desist from contacting us seeking separate updates on the matters. Please have regard to the November 2024 edition of the Risk Alert Bulletin available on risk management page of the LPIIF website (www.lpiif.co.za) for more information in this regard. All updates will be published in the Bulletin.

Since our last update, the following judgments have been handed down in respect of the Board Notices:

Moeketsi v Road Accident Fund (959/2023) [2024] ZAFSHC 411 (24 December 2024)

In April 2021, the plaintiff was injured in a motor vehicle accident. She instituted action against the RAF for damages arising from her injuries. Her damages were claimed under several heads (past and future loss of earnings, general damages, past and future medical expenses). The RAF had, in terms of section 24(5) of the Road Accident Fund Act 56 of 1996 (RAF Act), objected to the validity of her claim. The objections were based on allegations that:

1. the medical section of the RAF 1 form had not been

completed by the treating doctor in terms of section 24(2)(a) and the SMR was not stamped;
2. the claim had not been entirely completed in compliance with section 24 (4)(a) and (b) as page 4, paragraph 15, was missing;
3. a copy of her identity document or passport certified in the previous 6 months was required;
4. a RAF 4 form completed in line with AMA guidelines was required; and
5. several documents relating to the quantification of the claim were required.

The RAF filed three special pleas, raising substantial compliance, premature summons and prescription. In the alternative, the RAF proposed that the matter be postponed to a pre-trial date in 2025 pending an outcome of the SCA judgments in *Legal Practitioners Indemnity Insurance Fund NPC and Others v Road Accident Fund and Others* 2024 (4) SA 594 (GP) (the *LPIIF* matter) and *Road Accident Fund and Others v Mautla and Others* (29459/2021) [2023] ZAGPPHC 2001 (1 December 2023) (*Mautla*). The court pointed out that, contrary to the contention in the RAF's heads of argument, in the *LPIIF* matter leave to appeal had only been granted in respect of the order declaring Board Notice 271 of 2022 unlawful, reviewing and setting it aside. The RAF also contended that the decisions in *Rasenyalo*, *Jeje* and *Ranosi* did not take the pending SCA litigation into account. The court, however, pointed out that in *Ranosi*, reference was made to the *LPIIF* matter. (The *Rasenyalo* and *Ranosi* decisions are covered in the November 2024 edition of the Bulletin and the *Jeje* judgment is discussed below.)

The court found that the plaintiff had substantially complied with the provisions of the RAF Act. The documents listed in the letter of objection related to the quantum of the claim and were not required to investigate the merits. The plaintiff had thus lodged a valid claim, not issued summons prematurely and her claim had not prescribed. The court also pointed out that the issues in *casu* differed materially from those in the two matters (*LPIIF* and *Mautla* cases, respectively) before the SCA. It was also pointed out that all the Free State High Court cases referred to emphasised that substantial compliance with the requirements was sufficient. The court noted that the test for substantial compliance is an objective one. Having considered the order granted by the SCA on the questions to be considered in the *Mautla* case, the limited grounds of appeal in the *LPIIF* matter, and the authorities dealing with the standard of compliance required by section 24, the court opined that the matters pending before the SCA would not have a bearing on the crisp points raised in the RAF's three special pleas in this matter. All three special pleas were thus dismissed.

Tsham v Road Accident Fund (622/2023) [2024] ZAECQBHC 76 (10 December 2024)

The plaintiff was severely injured in a motor vehicle accident that occurred on 9 December 2020. His attorneys submitted an RAF 1 form and supporting documents to the RAF by registered mail on 29 September 2022. There was no suggestion that the RAF form was not complete in every material respect. On 19 June 2024, almost 21 months after receiving the claim, and 15 months after having been served with the summons, the RAF wrote a letter to the plaintiff objecting to the validity of his claim. The objection came by way of a standard letter issued by the RAF:

1. referring to Board Notice 271 of 2022 which purportedly prescribes the documents to be submitted with a claim for compensation;
2. claiming that substantial compliance with section 24 and Board Notice 271 of 2022 for a valid claim had not been met because the following documents were allegedly not submitted:
   2.1. medico legal reports establishing or substantiating the plaintiff's temporary/ permanent disability and earnings claimed;
   2.2. an itemised tax invoice from a registered medical provider or hospital for past medical expenses; and
   2.3. proof of medical expenses.
3. purportedly relying on the reasons in 2 above for objecting to the validity of the claim. (It is noteworthy that the objection letter quoted in the judgment refers to section 25(4) of the RAF Act and not to section 24 (5)); and
4. not accepting the documents it

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received for purposes of lodgement, and returned them to the plaintiff's attorney.

The plaintiff's summons was served on the RAF on 17 March 2023 alleging, *inter alia*, that he had complied with all the requirements of the RAF Act. The RAF entered an appearance to defend on 25 April 2023 and filed its initial plea on 17 May 2023. The initial plea alleged that the RAF had no knowledge of the plaintiff's compliance with the provisions of the RAF Act. More than a year later, in October 2024, the RAF filed an amended plea denying that the plaintiff had complied with the RAF Act. The letter dated 19 June 2024 was annexed to the amended plea. The denial that the plaintiff had complied with the RAF Act was based solely on that letter.

The plaintiff replicated to the amended plea. The replication contended that it was not open to the RAF to rely on Board Notice 271 of 2022 which had been declared unlawful and set aside by a full court in the *LPIIF* matter. The replication also contended that the RAF was precluded from objecting to the validity of claim lodgement more than sixty days after the receiving the claim. However, the RAF persisted with its denial that the plaintiff had complied with the RAF Act.

The court pointed out that, as a consequence of the full court's decision in the *LPIIF* matter declaring Board Notice 271 of 2022 unlawful, the RAF 1 form prescribed by the Minister of Transport pursuant to the impugned Board Notice was also declared unlawful. Both the Board Notice and the RAF 1 form had been reviewed and set aside. Curiously, counsel for the RAF advised the court that the judgment in the *LPIIF* matter was not appealed. The *Tsham* matter was heard on 2 December 2024, many months after the RAF had launched its application for leave to appeal, the matter had been argued on 8 August 2024 and judgment in the leave to appeal was handed down on 26 August 2024.

The court in *Tsham* agreed with the reasons advanced, and conclusions reached, in the *LPIIF* matter and noted that the RAF's counsel was unable to advance any contrary submissions. The RAF's reliance on the impugned Board Notice was thus considered to be ill-founded and, consequently, dismissed.

Turning to section 24 (5), the court found that, as the objections to the validity of the claim had been raised outside of the prescribed sixty day period, they could not be sustained.

The RAF's defence of non-compliance with the RAF Act by the plaintiff was dismissed with costs. The RAF was found liable for 100% of the damages the plaintiff is able to prove arising out of the injuries he sustained in the accident on 9 November 2020.

Masilo v Road Accident Fund (5599/2023) [2024] ZAFSHC 372 (22 November 2024)

On 11 November 2021, the plaintiff was injured in a motor vehicle collision. His claim for compensation was lodged with the RAF on 17 May 2023. On 23 June 2023 the RAF objected to the plaintiff's claim alleging that all the requirements for a valid claim in terms of section 24 (1) of the RAF Act had not been met. Rather than address the complaint in the objection letter, the plaintiff issued summons against the RAF.

The RAF raised three special pleas, being:

1. the plaintiff's alleged failure to lodge a claim substantially in compliance with section 24 of the RAF Act read with Board Notice 271 of 2022;
2. the alleged premature service of summons before the plaintiff complied with section 24;
3. a special plea of prescription raised in an amended plea.

The main contention was whether the plaintiff had complied with section 24. If the court found in his favour on that point, the two other special pleas would fall away.

The argument for the plaintiff centred around substantial compliance with section 24 and the plethora of authorities dealing with that question dismissing similar special pleas by the RAF. The decisions in *Jeje*, *Ranosi* and *Rasenyalo* were also referred to.

It was argued on behalf of the RAF that the plaintiff's claim did not comply with the provisions of section 24 and should thus be dismissed. The argument on behalf of the RAF was also that, despite its written objections, the plaintiff had not complied with the prescripts. On the prescrip-

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tion point, the RAF's argument was that because the plaintiff failed to lodge a valid claim within two years, his claim had prescribed. The court noted that the RAF's counsel had conceded that she was aware of decisions by the Free State Division of the High Court dismissing the special pleas. She, nevertheless, had instructions from the RAF to pursue the special pleas.

The court listed the documents that must accompany the RAF 1 form. It held that:

"[9] A perusal of the plaintiff's RAF 1 revealed that the plaintiff is identified as the injured person and the accident details have been substantially disclosed. The accident report, s 19*(f)* affidavit and the hospital records are also attached. However, what is lacking are the plaintiff's employment details.

[10] The purpose of RAF1 is to assist the defendant to investigate the accident so as to reach a decision on whether the claim should be defended or not. My view is that the RAF1 form, together with the submitted hospital records and the accident report provided sufficient information to enable the defendant to investigate the claim. I am satisfied that there was substantial compliance with the provisions of s 24(1) of the Act and a valid claim was lodged by the plaintiff …."

The RAF's three special pleas were thus dismissed.

Previous editions of the Bulletin cover other judgments dealing with the impugned Board Notices. If, after considering the judgments covered in this edition and previous publications, you became aware of any relevant case that we have missed in our summaries, please send us a copy.

Substantial compliance with the RAF Act

Jeje v Road Accident Fund (4628/2023) [2024] ZAFSHC 265 (27 August 2024)

The primary question considered by the court in this matter is whether the plaintiff's claim lodged with the RAF substantially complied with the provisions of the RAF Act.

The plaintiff suffered serious injuries when he was hit by a motor vehicle on 20 May 2021. The plaintiff was a pedestrian at the time of the collision. His claim for compensation was lodged with the RAF on 16 March 2023. The prescribed RAF 1 form was lodged, together with the plaintiff's identification document, a consent form, a special power of attorney, section 19 affidavit setting out the particulars of how the accident occurred, medical records, a hospital record and an accident report. The RAF had filed an objection in terms of section 24 (5) to the plaintiff's claim. The letter of objection, *inter alia*, alleged that the amounts claimed under the different headings were not indicated on the form, the plaintiff's tax records or bank statements had not been included, all hospital and medical records were not submitted, and all itemised tax invoices from medical service providers or hospitals relating to past medical expenses had not been provided.

He instituted action against the RAF for compensation. The RAF defended the action, filing a plea and, subsequently, a special plea. The special plea alleged that the plaintiff had failed to lodge a claim in substantial compliance with sec-

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tion 24 of the RAF Act. The special plea referred to section 24 (1) (a) which provides that a claim for compensation and the accompanying medical report referred to in section 17 (1) shall be set out in the prescribed form and completed in all its particulars. Section 24 (4)(a) providing that "any form referred to in this section which is not completed in all its particulars shall not be acceptable as a claim under this Act" was also referred to. The third ground relied on in the special plea was section 24 (4) (d). That subsection provides that precise details must be given in respect of each item of compensation claimed and shall, where applicable, be accompanied by supporting vouchers. The RAF then pleaded that the amounts claimed for general damages, loss of earnings and future medical expenses were not accompanied by supporting vouchers or documents and no employer's certificate and proof of earnings were attached.

The court:

1. observed that recent decisions dealing with the RAF claim form and its compliance with section 24 showed that while the requirement relating to the submission of the claim form is peremptory, the prescribed requirements concerning the completeness of the form are directory. This means that substantial compliance with the requirements was sufficient and the test for substantial compliance is an objective one;
2. referred to *Road Accident Fund v Busuku* 2023 (4) SA 507 (SCA) where it was stated that the RAF Act constitutes social legislation primarily concerned with providing the greatest possible protection to persons who have suffered loss caused by the negligence or unlawful acts of the driver or owner of a motor vehicle. The provisions of the RAF Act must thus be interpreted as extensively as possible in favour of third parties in order to afford them the widest possible protection;
3. followed the approach in *Busuku* where it was held that the RAF 1 form did not call for detailed information. It was not intended, of itself, to enable the RAF to assess the quantum of the plaintiff's claim, but seeks to enable the RAF to investigate the impact of the injuries sustained. To this end, the RAF 1 form requires the disclosure of information to guide and facilitate the investigation, enabling the RAF to investigate the merits of a plaintiff's claim in order to consider its approach to pending litigation before costs are incurred; and
4. referred to *Pretorius v Road Accident Fund* (35303/2018) [2019] ZAGPJHC 293 (26 August 2019) where it was held that a court of first instance is required to enquire whether, as a fact, the omission of information in the RAF 1 form prejudiced the RAF in any manner in the sense that it was denied requisite information to assess whether there was a risk of liability.

Considering these principles and the documents before it, the court opined that the documentation accompanying the RAF 1 form "was adequate to fulfil the needs of an enquiry into the merits of the plaintiff's claim, so that it could consider its approach to the pending litigation before costs are incurred. The medical and hospital records, the section 19 affidavit and the accident report submitted together with the RAF1 form, constituted sufficient information for the assessment of the plaintiff's claim on the merits thereof." (at [15])

The RAF's special plea was thus dismissed.

A suspended attorney representing an accused in a criminal trial is a fundamental irregularity

S v Mkhize (Special Review) (RC552/2024; 15/2024) [2024] ZAKZPHC 123 (23 December 2024)

Mr Mkhize had been convicted in the Regional Court in Pietermaritzburg on a count of unlawfully possessing a firearm, and another of unlawfully possessing ammunition for the firearm in question. Mr Mkhize's prosecution commenced on 25 November 2022 and ran until 27 June 2023 when he was convicted and sentenced. On the count of unlawfully possessing the firearm, he was sentenced to 10 years' imprisonment, and on the count of unlawfully possessing ammunition he was sentenced to 3 years' imprisonment. The two sentences were to run concurrently. Mr Mkhize had already served 18 months of his sentence when the matter was reviewed by the High Court. Mr Mkhize had been represented by a Mr Lizwi Joshua Kwela from the firm Kwela and Company throughout the proceedings in the Regional Court. Mr Kwela, at all times, purported to be an admitted attorney with a right of appearance in the Regional Court.

The matter came before the High Court on special review at the instance of the magistrate. The request for a special review included a covering letter by the magistrate stating that Mr Mkhize had been defended by Mr Kwela who, according to a letter from the Legal Practice Council (LPC) dated 12 November 2024, had been suspended from practising. The letter from the LPC was attached and stated that Mr Kwela was suspended from practising as a legal practitioner on 22 July 2020 and the KwaZulu Natal Provincial Director of the LPC had been appointed as the curator over his practice. Mossop J directed his registrar to urgently seek further information from the LPC regarding the grounds for Mr Kwela's suspension from practice and why the suspension remained in place four years after it was initially granted. The LPC appeared to have closed for the festive season and the court thus could not obtain further information before the matter was considered. Considering the power and function of the LPC as the *custos morum* of the legal profession, the court decided to "cautiously accept" that Mr Kwela's suspension was justified.

The court noted that:

"[7] Our legal system cherishes the right to legal representation in legal proceedings, especially criminal proceedings. Section 35(3) of the Constitution permits an accused person the right to choose, and be represented by, a legal practitioner, and to be informed of this right promptly following upon arrest. Section 73(1) of the Criminal Procedure Act 51 of 1977 reinforces that right when it proclaims that:

'An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.'

And s 33(1) of the Legal Practice Act 28 of 2014 provides that:

'Subject to any other law no person other than a legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward:

(a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear;'.

[8] Mr Mkhize was represented at his criminal trial by a person that had no entitlement or right to do

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so, given his suspension. In appearing as he did, it is entirely probable that Mr Kwela misled both Mr Mkhize and the regional magistrate. Neither of them knew that he was not entitled to act as an attorney or to represent any person while under suspension. By failing to disclose this to either Mr Mkize or to the regional magistrate, Mr Kwela intended to deceive both. That goal he achieved for it was only after the criminal proceedings had ended that it emerged that Mr Kwela had been suspended.

….

[11] Those qualified legal practitioners that are given the right of audience before our courts must be persons of unquestionable honesty and integrity. These qualities, on the known facts, appear to be lacking in Mr Kwela. It barely needs saying that he ought to have disclosed the fact that he had been suspended before embarking on the defence of Mr Mkhize. If suspended legal practitioners are permitted to appear without consequence before the courts of this country the proper administration of justice, in my view, will fall into disrepute." (footnotes omitted)

The irregularity that occurred in this matter was found to be so profound that it invited the intervention of the court. In the court's view, it is in the public interest that defences in criminal trials be conducted by persons in good standing with the LPC. In the absence of such good standing, because the LPC has prevented a legal practitioner from continuing to practice, that conduct is so fundamentally irregular that it nullifies the entire proceedings. In the circumstances, Mr Mkhize's conviction and sentence had to be set aside.

The court ordered that:

1. Mr Mkhize's conviction and sentence imposed on 27 June 2023 be set aside;
2. pending a decision by the Director of Public Prosecutions on whether to prosecute Mr Mkhize *de novo*, he was to be released from prison and the registrar was directed to notify the Department of Correctional Services urgently of the terms of the order;
3. a copy of the judgment was to be sent to the KwaZulu Natal office of the LPC to consider whether further disciplinary steps were necessary in respect of Mr Kwela's conduct; and
4. a copy of the judgment was to be sent to the South African Police Services to consider the desirability of investigating whether Mr Kwela is guilty of a criminal offence.

Depending on the terms of the order suspending a practitioner, practising during while subject to a suspension may also violate the terms of that order, thus rendering the person concerned liable to a contempt of court charge. Section 33(4) of the Legal Practice Act provides that:

"A legal practitioner who is struck off the Roll or suspended from practice may not—

(a) render services as a legal practitioner directly or indirectly for his or her own account, or in partnership, or association with any other person, or as a member of a legal practice; or
(b) be employed by, or otherwise be engaged, in a legal practice without the prior written consent of the Council, which consent may not be unreasonably withheld, and such consent may be granted on such terms and conditions as the Council may determine."

Section 84 (1) will also apply in these circumstances as a suspended practitioner in Mr Kwela's position will not have a Fidelity Fund certificate. Anyone interested in reading the cases (civil and criminal) where the consequences of practising without a Fidelity Fund certificate have been considered can contact the LPIIF and the relevant citations will be provided.

A person in Mr Kwela's position will not be indemnified under the LPIIF Master Policy because:

(i) the person concerned did not have a Fidelity Fund certificate (clause 5);
(ii) practiced in violation of the Legal Practice Act (clause 16 (u)); and
(iii) such conduct is dishonest (clause 18).

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Struck off attorney's appearance in a matter vitiates proceedings

Platinum Wheels (Pty) Ltd v National Consumer Commission and Another **(612/2023) [2024] ZASCA 163 (29 November 2024)**

Mr Ludwe Mbasa Biyana had been struck off the roll of attorneys on 23 August 2019. Shortly before his striking, the National Consumer Commission (NCC) employed him as a legal advisor and in-house counsel on 2 August 2019. In the current case, he had, representing the NCC, appeared before the National Consumer Tribunal in 2021, and in the High Court on 1 September 2022. The NCC had carried out a verification process on him in 2021. The outcome of that verification process was that his status as an admitted attorney was "pending".

In the course of the conduct of this matter, the appellant's legal representatives became concerned by what they described as "sharp" practices in Mr Biyana's conduct of the appeal. The appellant's legal representatives made enquiries and ascertained that he had been struck off the roll on 23 August 2019. They wrote to the NCC informing it of this and attached the judgment against Mr Biyana. The NCC only became aware of the striking at this point. The NCC suspended Mr Biyana on 31 August 2023 on the grounds that he had fraudulently accepted employment as a legal advisor with a right of appearance in court, knowing that, at the time, he was suspended from the roll of legal practitioners. He had, after 23 August 2019, also misrepresented that he was an attorney and had withheld that he had been struck off the roll. The NCC terminated his employment on 31 December 2023.

Nicholls JA delivered a minority judgment in which she found that Mr Biyana's conduct did not vitiate the entire judgment of the High Court. Her reasoning included the fact that the NCC was not involved in the fraud, that there was no suggestion of any irregularity in the make-up or conduct of the bench, and there was no prejudice to the consumer at the centre of the underlying dispute in this case. Nicholls JA also considered relevant criminal cases and distinguished the current matter from those. The minority judgment examined Namibian cases dealing with similar issues, noting that, in this case, "[there] has been no suggestion that any of the litigants' fair trial rights have been impinged" and "this is an instance where the irregularity is not such that it should vitiate the judgment. To do so would be a waste of scarce judicial resources." (at [23])

Baartman AJA (as she was then), writing for the majority, disagreed with the conclusion that Mr Biyana's conduct did not vitiate the proceedings. She noted that "[the] administration should meet the standard required to give the public at large confidence in the administration of justice and so instil respect for the courts and compliance with court orders. Therefore, an indulgent attitude towards fraud within the administration of court proceedings, broadly, is intolerable." (at [36])

Baartman AJA also criticised the NCC;

- a body with a legal duty to act in the public interest, for its failure, to the public's detriment, to carry out a proper due diligence on Mr Biyana; (at [39] and [40])
- for its initial attempts to persuade the appellant not to persist with the point regarding Mr Biyana's status, noting that "[it] is the duty of any legal practitioner to disclose incidents of fraud in court proceedings, irrespective of the consequences. The court is owed that duty" (at [39]).

The majority judgment also found (at [42]) that, in contravening the provisions of the Legal Practice Act, Mr Biyela "committed a criminal offence and brought the administration of justice into disrepute", and

" [43] …, that the absence or presence of prejudice to the consumer is irrelevant to the question of whether the fraud committed impacted negatively on the administration of justice to the detriment of the public interest. The proper functioning of the courts is premised on the absence of fraud in the process. The fraud committed in these proceedings was against the administration of justice, therefore, no litigant can condone it. It is for the court to protect the integrity of the proceedings and so retain public confidence in its orders and induce compliance. The people must be able to trust the judiciary to uphold the integrity of the judicial process." (footnotes omitted)

The appeal was upheld and the registrar directed to forward a copy of the judgment to the LPC.