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

OCTOBER 2021 NO 4/2021

IN THIS EDITION

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

LEGAL PRACTITIONERS' FIDELITY FUND
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RISK MANAGEMENT COLUMN

LIABILITY ARISING FROM A MANDATE YOU (MISTAKENLY BELIEVED YOU) DID NOT HAVE

Introduction

In assessing a professional indemnity claim brought against a legal practitioner, one of the initial assessments is whether the practitioner concerned had a mandate to act in the underlying matter. Whether the claim against the practitioner is framed in contract or delict, the existence of the mandate and the terms thereof are central to the assessment of liability.

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From time to time, there are cases where the practitioner will initially dispute that there was a mandate in place. Depending on the circumstances of the individual matter, such a defence may wane with time as the litigation progresses and evidence contrary to the initial position of the practitioner emerges when the matter is investigated. Explanations such as that the matter was dealt with by a staff member who has since left the practice are commonplace. It is also not uncommon for practitioners in these circumstances to claim that they bear no knowledge of the matter or even that the matter only came to their attention after the staff member concerned has left the practice or, quite commonly, when a clean-up of the office was being conducted and the 'file' was 'discovered' having been hidden, the client made enquiries or the notification of the claim was received. A distinction must, however, be drawn with those claims where the practitioner in good faith did not know of the existence of the mandate.

RISK MANAGEMENT COLUMN continued...

In this article I will highlight some of the examples of cases where there has been an about-turn after the mandate was initially disputed but is later admitted. I will also make suggestions that legal practitioners can consider to mitigate the risk of claims arising from matters that they, ostensibly, bore no knowledge that their practices were dealing with.

At the outset it must be stated that providing dishonest information not only jeopardises the right to indemnity under the firm's insurance policy, but also exposes the practitioner/s concerned to possible disciplinary action as it amounts to unprofessional conduct. It also results in a waste of resources where a lack of mandate is pleaded and a defence is investigated and pursued on that ground, only to be withdrawn later when the practitioner is faced with extrinsic evidence that the firm did, in fact, accept the mandate. The fact that a firm accepted a mandate but did not pursue it (to finality or at all) does not change the fact that the mandate existed and that the practice will be liable for losses arising from its failure to diligently carry out such mandate.

Case study 1

The plaintiffs instituted a claim against a firm alleging that they had instructed the practice to pursue a claim on their behalf to recover damages suffered because of the death of their son at the hands of an on-duty police officer. It was alleged that the plaintiffs had, at all times, dealt with a professional assistant who had been employed by the firm. The claim against the Minister of Police was not pursued timeously and prescribed in the hands of the firm.

The sole director of firm at the time, in good faith, indicated that he had no knowledge of the matter and could not recall having dealt with the plaintiffs. The existence of the mandate and, thus, a duty of care and liability to the plaintiffs was denied. After an investigation of the matter, it emerged that at the time that the instruction was given to the firm, a system had been in place where the details of all clients visiting the firm's office were recorded in a visitors' book (a type of register) together with the details of the matter that the clients came to enquire about. The details had been entered in the register by a member of staff on the date/s of the visit and the plaintiffs' details were recorded accordingly in the register. The fact that that the director of the firm at the time that the cause of action arose did not have personal knowledge of the matter nor could the file be located could not assist him in escaping liability in this case.

The former professional assistant was also contacted, and he confirmed having received and accepted a mandate in the matter and that he had left the file with the firm when he departed. At all times he acted within the course and scope of his employment with the firm, and the firm was thus vicariously liable for his actions.

The firm could thus not escape liability in this instance and the matter was settled.

Case study 2

Client X suffered serious injuries in a motor vehicle collision in June 2009. He visited the offices of an attorney, B, in May 2010 in order to obtain advice and assistance in pursuing a claim against the RAF. B consulted with X and got the latter to sign a standard power of attorney and documents in which X consented to B obtaining his hospital records and the accident report. The documents authorised B to lodge the claim with the RAF on X's behalf, sign all documents as his agent and to settle the matter for an amount that B deemed appropriate. B informed X that claims against the RAF take a long time to be finalised and that the matter will be complicated as X will be entitled to substantial compensation because he had suffered serious injuries. As the years passed, X enquired from B's office what the status of his matter was and received assurance, verbally, that the matter was being attended to. B never sent X any written correspondence. X was semi-literate and thus did not write to B.

By 2014, X became uneasy and was advised by a police officer to contact the RAF directly to enquire whether a pay-out has been made in his claim. He did so. The RAF informed X that there was no claim registered with his name or the details of his accident on its system. X decided to consult with another attorney, DD, a few weeks later. DD investigated that matter and informed X that his claim against the RAF had prescribed as it was not lodged timeously by B.

DD, acting on X's instructions, then issued summons against B in a professional indemnity claim aimed at recovering the damages suffered because of the prescription of the RAF claim. B denied liability and claimed that he did not have a mandate from X to pursue the RAF claim. He denied the existence of a contract between X and himself and thus said that he was not liable. He contended that his discussion with X was a

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general one, that no contingency fee agreement was signed, and that X did not place him in funds to cover the costs of the disbursements.

X persisted that B had accepted the mandate and produced copies of the documents he signed at the consultation in May 2010, which were handed to him by B. B was not able to seriously counter X's version or to give an explanation why, if his dispute of the existence of a mandate was correct, his office allegedly informed X that the RAF claim was being pursued. B also had no explanation for his failure to either have sent a draft contingency agreement to X, or not to have followed up with X after the meeting in May 2010, if his version was correct. As the litigation continued and preparation for trial commenced, B dug his heels in on the mandate issue but was resistant to allowing the parties to consult with any of his staff who had knowledge of the matter and who had spoken to X. It was found that X had given B a mandate to act on his behalf and he was found liable for X's damages.

Some of the lessons learned

It is in the interests of a legal practice to have a record of all instructions received and to retain a record thereof as prescribed by legislation.

Case study 1:

- Issues regarding the level of supervision of the professional assistant come to the fore. A system of regular discussions with the professional assistant and keeping a record of the matters he was dealing with would have mitigated the risk;
- Regular file audits should have been implemented;
- A formal handover process could have been implemented when the professional assistant left the practice to ensure that 'nothing fell through the cracks'; and
- Being alert for professional (or even administrative) staff who effectively run parallel practices from your office is important. Understandably, it is neither desirable nor pleasant to act as a police officer constantly looking over the shoulders of your staff. At the end of the day, liability and professional responsibility and accountability will lie with you. Impressing on your staff that the measures that you have implemented are for the protection of all stakeholders in the firm may go a long way in getting their buy-in and cooperation.

Case study 2:

- B should have indicated to X that he (B) did not have the appetite, capacity or resources to pursue the matter;
- In the event that he did not wish to accept the mandate, that could be set out in a letter to the client (a letter of non-engagement/ non-acceptance of the mandate. A precedent is available under the risk management section on the LPIIF website, www.lpiif.co.za);
- The further unilateral requirements on B's part for acceptance of the mandate (signature of the contingency fee agreement and receipt of funds to cover the disbursements) must be explained to the client and also recorded in correspondence sent to the client;
- All discussions and updates given to the client must be recorded in file notes and confirmed in correspondence;
- The person instructed to deal with the matter would be the most appropriate person to give the client feedback on the matter. This avoids the situation where inaccurate and contradictory reports are provided to the client;
- Ensure that the person giving what purports to be updates actually has knowledge of the status of the matter; and
- A system of file audits and the tying up of any potential loose ends would have gone a long way in mitigating the circumstances that led to this claim. This would have avoided a situation where B got X to sign documents at the consultation, handed the latter copies but seemingly did not know what he had done with the originals nor take any further action in the matter.

Conclusion

If the firm disputes a mandate, it is important that it has all the correct information at hand on which to base its challenge of the plaintiff's allegations. Remember that the information you need to dispute the mandate in a professional indemnity claim may be the same as that needed defend yourself in a disciplinary proceeding launched by the Legal Practice Council. A half-hearted or ill-informed challenge to the existence of the mandate will not suffice.

Undertaking internal checks and ascertaining from staff whether anyone has knowledge or a matter may go a long way to avoiding a situation where you dispute a mandate that you firm has actually accepted.

A SHOCKING CASE OF POLICE BRUTALITY: EGREGIOUS CONDUCT OF TWO ATTORNEYS AND A FILE GONE WITH THE WIND

By: Thomas Harban,
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"To the plaintiff, Mr Tarquin Julies, the problem with the law has been lawyers."

Eksteen J, in *Julies v Peter McKenzie Attorneys* (1117/2019) [2021] ZAECPEHC 49 (7 September 2021) at paragraph 1.

Introduction

When faced with some or other legal problem, members of the public consult with lawyers. In so doing, the expectation is that being experts in the legal field, the lawyer who has accepted the mandate, will give their matter the appropriate attention and perform the legal services in a proper and professional manner and without negligence. Lawyers solve legal problems, and it is unimaginable (it is hoped) that they will become the problem the clients face. As observed by Eksteen J in quotation above, that certainly was not the case for Mr Julies in the case that is the subject matter of this article.

Mr Julies, the plaintiff, embarked on a quest for justice that has lasted for longer than a decade. However, along the way he was let down not by one, but two attorneys who failed to meet the standard of care expected of attorneys in the circumstances and carry out the respective mandates that he had given them.

In the years spent giving risk management education to attorneys and their staff, I have noted that case studies with practical examples of conduct that has resulted in professional liability of legal practitioners have resonated with the audiences. The *Julies v Peter McKenzie Attorneys* case is an example of such a 'war story'. This article examines the case in the hope that the breaches of the respective legal duties by the two law firms are avoided by others.

The conduct of the members of the South African Police Services (SAPS) in the initial incident which set off the series of liability claims is nothing short of shocking. The protagonists in this, and any other similar delictual claim, are human beings who must forever live with the consequences of the series of events. I make this point as the consideration of the legal and risk management points arising in these cases can, in many instances, be debated in a sterile, academic manner without an acknowledgement of the underlying affected persons.

Background

The plaintiff, described in the judgement as an 'unsophisticated man', was 25 years old at the time of the incident which led to this tragic tale. He had grown up in the northern suburbs of Gqeberha and, due to financial constraints, terminated his education after successfully completing Grade 7 at school. He had no further education. He lived with his mother and was to have been employed as a handyman before the shooting.

On Saturday, 6 December 2008, Mr Julies had been at his home with friends. Two unmarked police vehicles arrived and parked in the street in the vicinity of his home. Two policemen in civilian clothing alighted from the vehicles, entered the home and, shortly thereafter, left to return to their cars. It was unclear what they did inside the

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house. While Mr Julies requested an explanation for their conduct inside the house, one of his friends threw a beer bottle at the police, striking one of their vehicles. A sergeant De Maar who had remained in one of the vehicles then alighted and shot Mr Julies in the face with a shotgun without saying a word. Mr Julies was rendered unconscious immediately and only regained consciousness in hospital. Three of Mr Julies' friends were subsequently arrested and charged with public violence, assault and malicious damage to property. The judgement does not specify who the arrested parties were alleged to have assaulted, the property alleged to have been damaged or the details of the alleged public violence. The incident was investigated, and a police docket was prepared but the charges were, unsurprisingly, ultimately withdrawn.

Mr Julies lost one eye because of the shooting and, ultimately, a loss of all vision in his other eye.

The instruction to Masimla attorneys

In February 2009, Mr Julies instructed Masimla Attorneys in Gqeberha to institute action against the Minister of Police (the Minister) for the damages he had sustained as result of the injuries he suffered in the shooting. That firm accepted the mandate. The plaintiff testified that:

- He had known Mr Masimla as the latter had assisted previously assisted him in legal matters;
- He had no knowledge of litigation and trusted Mr Masimla;
- Mr Masimla had told him that "this was a big case and that it would take very long" (paragraph 5 of the judgement);
- He met Mr Masimla two or three times each year after the initial instruction, but the attorney did not explain the delay in finalising the matter;
- Mr Masimla always assured him that the matter was being attended to and that an advocate would be briefed to assist him;
- After undergoing a procedure in October 2015 aimed at saving his eyesight, he contracted Mr Masimla to enquire about funds as he (Mr Julies) was concerned about that the private institution at which the surgery was conducted may look to him for payment; and
- As Mr Masimla did not provide him with a satisfactory response, he went to see the attorney in November 2015 and was informed by the latter that he was not pursuing any claim on his behalf and had no file in respect of that litigation.

Shocked by the news that Mr Masimla was not pursuing his claim, Mr Julies was advised by a police officer to approach the SAPS Litigation Centre to verify whether a claim had been lodged in his name. He approached the Centre on 11 July 2016. An officer at the SAPS Litigation Centre handed him a written note confirming that no claim had been issued in his name and advised him to see another attorney.

The instruction to McKenzies attorneys

On 15 August 2016, Mr Julies instructed the defendants, McKenzies attorneys, and handed Mr McKenzie a copy of the handwritten note received from the SAPS Litigation Centre.

The following points emerge from the judgement regarding the handling of the matter by McKenzies attorneys:

- The firm admitted having accepted a mandate to pursue a claim against Masimlas for allowing Mr Julies' claim against the Minister to prescribe and that they did not carry out the mandate;
- The firm had a copy of a contingency fee agreement signed by Mr Julies on 15 August 2016, but it had been misfiled and only handed to Mr Julies' current attorney at a pre-trial conference shortly before the trial;
- The firm admitted never receiving a power of attorney from Mr Julies;
- The remainder of the contents of the file, including file notes that Mr Mckenzie had made, had been

lost. It is stated at paragraph 9 of the judgement that:

"The loss of the file content occurred, [Mr McKenzie] said, when he moved offices at the end of August 2017. He explained that his brother-in-law helped him to carry files when a gust of wind blew the contents of several files away. They retrieved all the documents that they were able to gather, but some were beyond their reach. The note from [the SAPS Litigation Centre at] Mount Road, dated 11 July 2016, Mr Julies' hospital cards and all McKenzies' file notes were among the documents that were lost. When he was pressed under cross-examination, Mr McKenzie acknowledged that he had not attended to the file at all after August 2017."

- Mr Julies lost faith in McKenzies and instructed his current legal representative in December 2019. The current legal representative attempted to obtain a copy of McKenzies' file but only received two letters from Masimlas evidencing their acceptance of the mandate given to him.

The issues for determination

By agreement between the parties, an order was granted at the commencement of the trial that the issue of McKenzies' alleged liability to Mr Julies be separated from the remaining issues in the matter. Three questions thus arose for adjudication, being whether:

(a) the shooting of Mr Julies was wrongful and unlawful;

(b) Masimlas had negligently permitted the claim against the Minister to prescribe; and

(c) McKenzies had negligently permitted the plaintiff's claim against Masimlas to prescribe.

The court, at paragraph 12, found in favour of Mr Julies on question (a). The question in (b) was also found in favour of Mr Julies (paragraph 15 of the judgement).

Dealing with Masimla's liability, the court stated that:

"[13] The liability of an attorney to a client for damages resulting from the attorney's negligence is based on breach of contract between the parties. It is an implied term of the mandate that an attorney will exercise the skill, adequate knowledge and diligence expected of an average practising attorney. Where an attorney falls short of this standard, he commits a negligent breach of his mandate.

[14] In order for a plaintiff to succeed in a claim against an attorney he is required to allege and prove:

(a) [a] mandate given to the attorney;

(b) a breach of the mandate;

(c) negligence in the sense of his failure to exercise the skill, adequate knowledge or diligence expected of an average attorney;

(d) damages, which would generally require proof of the likelihood of success in the aborted proceedings; and

(e) that damages were within the contemplation of the parties when the contract was concluded."

(footnotes omitted)

On the third question ((c) above), McKenzies raised two defences being:

(i) a denial of the negligent breach of their mandate; and

(ii) a contention that their failure to issue summons was not the cause of the damages allegedly suffered by Mr Julies.

The court found against McKenzies on both defences. In the end, the defendant was ordered to pay Mr Julies such damages as the he is able to prove that he has suffered in consequence of the shooting which occurred on 6 December 2008. The defendant was also ordered to pay the plaintiff's costs of suit.

Discussion

Accepting the mandate and doing nothing

The first observation I wish to make is that the two firms, Masimlas and McKenzie, having respectively accepted mandates from Mr Julies, elected to do nothing in order to fulfil their mandates. An attorney must only accept a mandate for a client where that attorney has the

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capacity, appetite, resources and knowledge in the area of law to carry out that mandate. If the firm is unable or unwilling to continue with the mandate, the client must be informed accordingly. Further steps that need to be undertaken and important upcoming dates such as prescription must be explained to the client and set out in a letter confirming the discussion and advice. Mr Julies, like many other plaintiffs in similar cases, was a particularly vulnerable client and both firms should have taken that into account in how they handled the matters.

Mr Masimla only informed Mr Julies more than six years after accepting the mandate that he had not acted on the mandate and had, purportedly, no file for the matter. The plaintiff's claim against the Minister had prescribed by then. There is no explanation from McKenzies on their failure to carry out the mandate. Even after part of Mr Julies' file had blown away with the wind, the firm could have taken steps to reconstruct the file and to obtain the necessary information. Mr McKenzie's admitted that he not attended to the matter at all after August 2017, a year after he had accepted the mandate.

The conduct of both firms can, with respect, only be described as egregious.

Avoiding prescription related claims

Prescription related claims make up the highest number and value of claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF). Prescription is thus one of the main risks facing legal practitioners. Prescription related claims can be avoided by the implementation of internal control measures such as:

- Registering all time-barred matters with the LPIIF's Prescription Alert unit and adhering to all the reminders sent out by that unit. In matters against the state, the Prescription Alert system will send reminders for the date on which the statutory notice is due and notify the practice ahead of the date by which summons is to be served
- Not taking instructions close to the prescription date
- Obtaining full and detailed instructions at an early stage in the matter
- Obtaining all the information necessary to institute the action and all the relevant documents from the client as early as possible
- Acting on client instructions promptly and without procrastination
- Properly supervising all staff to ensure that all matters are timeously and adequately attended to
- Conducting regular file audits and ensuring that files are safely stored
- Educating all staff on the prescription periods, the statutory notice periods for claims against the state and the circumstances where the running of prescription begins to run, is suspended or interrupted
- Reviewing files and, where necessary, closing problem files after discussing the matter with the client. If necessary, refer the client to another attorney
- Keeping abreast of judgments and legal developments on the law in respect of prescription
- Not assuming that prescription is a three-year period in all cases
- Implementing a peer review system in the firm- even a sole practitioner can have a peer review system with an experienced secretary/ paralegal/ candidate legal practitioner
- Designing and implementing a dual diary system with the secretary or filing clerk so that nothing "falls through the cracks"
- Obtaining more than one contact number and an accurate address (physical, email and postal) for your client
- Ensuring that the correct cause of action is pleaded and that action is instituted in the correct court. There have been claims where action is instituted in the incorrect court and by the time this fact comes to light the claim has prescribed and the ac-

tion cannot be withdrawn and instituted afresh in the correct court. Similarly, a new cause of action or head of damages added by way of amendment after the prescription date may elicit a special plea of prescription

- Being wary of the tactics of the defendant- not naively accepting a verbal assurance that a matter will be settled before the prescription date and that there is thus no need to serve summons to interrupt the running of prescription.
- If the parties agree that the running of prescription is to be suspended while a settlement is being negotiated, this must be recorded in writing
- Noting that it is the service of the process whereby payment of the debt is claimed that interrupts prescription and not the issuing thereof. Service must thus be affected before the prescription date.

Was there a sustainable defence to the claim?

I think not.

To succeed in defending a claim such as this one, a substantial amount of work would have been required in investigating the events underlying the three questions placed before the court.

On the first question before the court, the police officer who shot Mr Julies, sergeant De Maar, was not called to testify. He would have been the most appropriate person to testify in discharging the onus for the contention that the shooting was justified. I pause to note that the charges laid against Mr Julies' friends and later withdrawn are common in cases where members of the SAPS seek, after the fact, to justify wrongful and unlawful conduct. Having noted the *modus operandi* in other cases, I was quite surprised that an unconscious, blinded Mr Julies was not also arrested. Be that as it may, the defence on this ground was unsustainable without evidence justifying the shooting. In such cases, the law firm against which the claim is brought steps into the shoes of the Minister and must discharge the onus of proving a justification for the shooting if that is its defence.

Turning to the second question, it is unclear why Mr Masimla was not called as a witness when it was disputed that he allowed the plaintiff's claim against the Minister to proceed. It will be noted from the judgement that letters from his firm evidencing the acceptance of the mandate to act in that matter were provided. In the nature of professional indemnity litigation, the defendant would have to step into Masimla's shoes to in discharging the onus that would otherwise have rested on him had the claim been pursued against him.

If the defendant doubted whether Mr Julies had a sustainable claim against the Minister on the one hand and against Masimlas on the other, why was this not communicated to him in the year between the acceptance of the mandate and his file being blown away by the wind? Was there any work done on pursuing the mandate prior to August 2017?

The assurance given to the plaintiff by Mr Masimla that his claim was being attended to, when it was not, is a common feature of claims of this sort. In many instances, in instituting professional indemnity claims the plaintiff explains that the attorney gave assurances that the matter was being attended to. Commonly, the plaintiff only becomes aware that this is not the case when an enquiry independent of that attorney is conducted. Prescription of the professional indemnity claim then only starts running when the plaintiff acquires such knowledge.

On the last question, the defendant in this matter could hardly have disputed its own liability when, by his own admission, he did nothing to pursue the matter since August 2017.

It is hoped that the lessons learned from this case will not be blown away with the wind like the contents of the defendant's file of papers.