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RISK MANAGEMENT COLUMN

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RISK MANAGEMENT COLUMN

Short risk notes

LPIIF application in respect of Board Notice 271 of 2022

Following on our previous updates, we can now report the Legal Practitioners Indemnity Insurance Funds NPC's (LPIIF's) application has been set down for hearing in the Gauteng Division of the High Court, Pretoria at 09:30 on 26, 27 and 28 February 2024. The application will be heard by a full bench. Several parties have joined as applicants and others have applied to participate as *amici*. We will provide a further update on the application after the matter has been heard.

We, once again, thank those parties that have provided us with information regarding claims rejected b≠y the Road Accident (RAF) purportedly relying on the impugned Board Notice. We now have sufficient information and request that firms refrain from sending us every rejection received from the RAF. We do not have the capacity to deal with every claim that has been rejected by the RAF. The LPIIF is not a law firm and thus cannot dispense legal advice. Firms are urged to have regard to our previous updates where our position was explained.

The related matter (*Mautla and Others v RAF and Others*) regarding Board Notice 58 of 2021 was argued on 9 May 2023, also before a full bench, and judgment in that matter was reserved.

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When the judgment in that matter is handed down, we will also share it with the profession. We are also aware of the litigation culminating in the judgment in *Road Accident Fund v Sogoni and Another* (EL660/2023) [2023] ZAECELLC 18 (21 July 2023).

Draft Road Accident Fund Amendment Bill

On 8 September 2023 the draft Road Accident Fund Amendment Bill was published for comments. A copy of the draft Bill can be accessed at https://www.gov.za/sites/default/files/gcis_document/202309/49283gon3868.pdf

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Interested parties are invited to submit written comments on the draft bill within 30 days from the date of publication. The parties to whom the comments are to be submitted and their respective email addresses are set out in the publication containing the draft Bill. Please access the link above for information.

Punitive costs orders against legal practitioners

There have been several judgments where legal practitioners have been saddled with punitive costs orders. Two recent judgments are summarised below with the intention of warning legal practitioners of the risks flowing from impugned conduct. The cases can be used by firms for their internal training programs.

The LPIIF policy does not indemnify legal practitioners for punitive costs orders (clause 16 (g)). Practitioners are also advised to read chapter 8 (Personal costs orders against legal practitioners) of Dr Bernard Wessels' book *The Legal Profession in South Africa: History, Liability and Regulation* (Juta, 2021).

Manamela v Maite (2023/055949) [2023] ZAGPJHC 1011 (6 September 2023)

The applicant launched an urgent spoliation application over a weekend and an order was granted on 10 June 2023 (the spoliation order). The applicant's attorney allegedly acted on a *pro bono* basis and had funded the litigation out of his own pocket. An urgent contempt application was launched on 15 June 2023 as a result of the respondent's alleged failure to comply with the spoliation order (the first contempt application). An attempt to enrol the first contempt application on the urgent roll for 20 June 2023 was unsuccessful, presumably because the applicant did not meet the requisite deadlines. The application was removed from the urgent roll on 27 June 2023 as the presiding judge was not satisfied that proper service had been effected by the Sheriff on the respondent.

The applicant again enrolled the first contempt application on the urgent roll for 11 July 2023. The spoliation application and the contempt application were only properly served on the respondent on 5 July 2023, that is after the launching of the first contempt application. The respondent opposed the application and launched a counter application seeking, firstly, the stay of execution on an urgent basis and, secondly, in the normal course, a rescission of the spoliation order. The respondent, in her answering affidavit, comprehensively set out the grounds on which she opposed the allegations of contempt and the grounds for the rescission order sought. She also raised the lack of proper service in the various legal proceedings. The matter was argued on 13 July 2023 and both the first contempt application and the respondent's counter application were struck from the roll, with costs to be costs in the cause. Both the first contempt application and the respondent's counter application thus remain pending to be heard in the normal course on the opposed roll. This was recorded in correspondence sent by the respondent's attorney to the applicant's attorney on 20 July 2023 and it was also recorded that the respondent could not restore possession of the property, was not responsible for the alleged dispossession and that portions of the order were unenforceable as the respondent was not resident on the property. The correspondence from the respondent's attorney further recorded that the applicant was unsuccessful in three attempts to approach the court on an urgent basis and cautioned him "against approaching the court for a further urgent application as, clearly, the matter is not urgent and [the applicant] is not entitled to urgent relief".

A second urgent contempt application was launched on 20 July 2023 and enrolled for hearing on 1 August 2023. On the eve of the hearing, the applicant's attorney addressed a letter to the presiding judge requesting a postponement due to his illness and thus his inability to represent the applicant at the hearing. Instead of briefing counsel to appear, the applicant's attorney sent his candidate attorney to appear at the hearing on 1 August 2023 (though the candidate attorney did not have a right of appearance in the High Court). The candidate attorney sought a postponement of the matter to 8 August 2023. The matter was removed from the roll and costs were reserved. During the proceedings, the applicant was cautioned by the presiding judge against enrolling the application again on an urgent basis and warned that it could result in an adverse costs order. The applicant was also warned about the proper processes and advised that the rescission application could be determined in time. The court instructed the respondent's counsel to convey the caution to the applicant's attorney by way of correspondence and this was acknowledged by the candidate attorney.

Ignoring the caution, the applicant's attorney, however, re-enrolled the application on the urgent roll on 8 August 2023 without notifying the respondent's attorneys and without service of the notice of set down on them, though he was aware of that respondent intended opposing the application. The respondent's counsel only became aware of the re-enrolment of the matter after being contacted by the applicant's counsel on the instruction of the court. The respondent opposed the application and contended that no proper service of the spoliation application had been effected on her, challenging the urgency of the first contempt application, that the first application had been removed from the roll by the court, accusing the applicant and her legal representatives of *mala fides* and seeking the dismissal of the application with a *de bonis propriis* costs order against the

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applicant's attorney. The applicant's attorney, in an affidavit filed, did not deal at all with why the notice of set down for 8 August 2023 was not served on the respondent's attorneys.

The second contempt application was described in the judgment as an abuse of process (at paragraph 52), "exacerbated by the lack of service of the notice of set down for 8 August 2023 on the respondent. This failure is egregious and flaunts a fundamental norm of our law" (at paragraph 56) and smacking of *mala fides* (paragraph 57).

Dippenaar J noted that:

"[1] The pernicious effect of legal representatives simply disregarding the rules of court is that the very fabric of the Rule of Law is being eroded.

[2] There appears to be an alarming trend that legal practitioners through apparent hubris or feigned ignorance directly ignore or flaunt their indifference towards the rules of Court and worse yet, merely do not comply with Court orders.

….

[6] This urgent contempt application sharply brings this relationship and the duties on a legal practitioner into focus.

….

[62] Seen cumulatively, the conduct of the applicant's attorney was entirely unbecoming of a legal practitioner and displays a disturbing disrespect for the Court, its rules and judicial authority.

[63] As illustrated by the history of the litigation, [the applicant's attorney] flouted important and fundamental tenets pertaining to service and urgent applications and ignored decisions made by the Judges who heard the matter in the urgent court."

The court dismissed the second urgent contempt application, ordered that the costs of that application, including the costs reserved on 1 August 2023, be borne by the applicant's attorney of record *de bonis propriis* on the scale as between attorney and client and directed that the applicant's attorney not present a bill, nor recover any fees or disbursements from the applicant in respect of the second contempt application.

Harker and Another v MGM Family Trust (Number: TM50521/1) and Others (2994/2022) [2023] ZAECQBHC 49 (5 September 2023)

Mr Harker was appointed executor of a deceased estate and also acted as the attorney of the applicant (the deceased estate). Simultaneously wearing the hats as executor and attorney for the deceased estate, Mr Harker gave himself instructions to act on behalf of the deceased estate. It is also worth noting that Mr Harker then appeared in person in this matter.

In the underlying matter (not explained in the judgment), an application by the applicants had been dismissed with attorney and client costs, "inappropriate and untenable relief" having been pursued "in circumstances where the Uniform Rules clearly provide for the correct procedure" (paragraph 4). The court found that an affidavit by Mr Harker, meant to set out reasons why he should not be ordered to pay the costs of the application *de bonis propriis*, "was of no assistance to determine whether he acted in appreciation of his fiduciary duty and with due regard to the interest of the estate or whether he was incorrectly advised in pursuing the application" and that the "affidavit ought to have focussed on the reasons why he should not pay the costs *de bonis propriis*. This was his obligation as executor, but moreso as an officer of this Court, which he has a duty to assist in arriving at a just decision." (paragraph 5)

There was no record that Mr Harker had been issued with a Fidelity Fund Certificate and thus entitled to practice. He acknowledged that "he is currently in trouble with the Legal Practice Council and accepted that he must bear the consequences flowing therefrom." (paragraph 17)

Mr Harker did not explain how he considered the interests of the estate before he embarked on unmeritorious litigation which was not in the best interests of the estate which was entrusted to him.

The court considered the authorities for punitive costs orders.

Ellis AJ wrote that:

"[1] The executor in a deceased estate occupies a fiduciary position and must therefore not engage in a transaction by which he will personally acquire an interest adverse to his duty.

….

[15] An executor must act [reasonably], meaning his conduct in connection with the litigation must be reasonable and with due regard to the resources in the estate. An attorney must act diligently, with due regard to the court rules and established principles, and never in a manner which can be considered to be improper.

[16] In this matter not only is Mr Harker as the executor the litigant in a fiduciary position, but he is also giving instructions in that capacity to himself as the attorney of record. The affidavit filed by Mr Harker does not clarify which hat he wore when embarking on this application, which application I have already found to be convoluted and without reasonable prospects of success. The costs of the application were therefore unnecessarily incurred and without heeding established principles." (footnotes omitted)

The court ordered that Mr Harker pay the costs in his personal capacity and that a copy of the judgment be brought to the attention of the Legal Practice Council and the Master of the High Court.

How professional complacency or a tick-box approach make your firm jaded

Introduction

Have you ever had the unpleasant experience of interacting with a professional service provider who comes across as being disengaged, disinterested or even nonchalant to what you are trying to convey or the question on which you seek professional advice? If so, imagine a client left with that impression after a consultation with a legal practitioner. Equally, a professional service provider who appears to be doing the bare minimum and is simply going through the motions does not make for a pleasant and engaged client experience. These experiences rapidly diminish a client's confidence in the legal practitioner.

The legal profession is a service industry that clients engage when seeking professional legal advice for an issue that they are faced with. Legal services are, in many instances, grudge purchases that clients would have avoided if they could. Where a client has taken the steps to entrust a legal practitioner with a legal problem, that practitioner owes the client several duties including the duty to deal with the matter meaningfully. How meaningfully you deal with the matter will be determined by several factors, including your attitude to the client and how diligently you execute your work. People in the firm often follow the tone set at the top by partners/ directors on how they engage with clients. Some unfortunate habits easily creep in and become difficult to shake off.

This article aims to highlight some of the risks that flow from the manner some legal practitioners approach their instructions. As stated above, the tone for, and approach to the execution of client mandates is set by the legal practitioners in a law firm. Junior professionals and other support staff will adopt a similar attitude to engaging with clients' matters as that set by their seniors. Some of the errors and omissions that ultimately result in professional indemnity claims against legal practitioners can be traced back to the attitude and approach of the firm to the execution of mandates. On the other hand, a positive approach to a matter will result in a positive experience and satisfied clients.

Professional complacency

By professional complacency I refer to situations where a legal practitioner has become so secure in the work that they do that they put minimum effort into the execution of clients' instructions. The standard of the output by such legal practitioners may not be the same as it once was, but they are oblivious to the consequences.

You may, on good grounds, consider yourself to be an expert or even an authority in the area or areas of law in which you practice. Your reputation may be what you are trading on. When clients instruct your firm, they expect your professed professional expertise to be applied to all areas of the execution of the mandate. The experience and expertise that you have gained over the years is your stock-in-trade and the commodity that clients seek when mandating you. The moment a client feels that you are not providing the required expertise will be the beginning of a breakdown of the professional confidence that had been placed in you.

Do not allow professional complacency to creep in and thus negatively affect how you execute client mandates. Your perception of your own expertise is never more important than the service expected by clients. Should you ever feel that a matter does not warrant your (real or perceived) status, politely decline the instruction and suggest that the client approach another legal practitioner.

Going through the motions and assuming that you can simply ride on your professional reputation is risky. The mandate you are expected to carry out for one client is hardly likely to be the same as another that you had previously carried out. The nuances in each matter must be carefully considered. Resist the temptation of believing that, based on your expertise, all you need to do is give a cursory consideration to a matter where you have accepted a mandate. I do not know of

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any lawyer who has attained the status of being the exclusive sage in any area of law. The fact that there are competing opinions on any legal point should be reason enough to know that there is always a risk that your opinion will not always prevail in every situation and that real effort on your part is required to ensure that considered advice is provided to the client. You must put in the work to earn your fee. Your concerted effort in the execution of every aspect of the mandate is what clients expect.

A dissatisfied client may refer to your purported expertise in the cause of action in a professional indemnity claim against your firm (as transpired in *Steyn NO v Ronald Bobroff & Partners* 2013 (2) SA 311 (SCA)). An attorney who, after accepting a mandate, is unavailable to consult with a client or to provide updates in a matter is equally at risk. One of the plaintiff's complaints in *Mlenzana v Goodrick & Franklin Inc* 2012 (2) SA 433 (FB) was that her attorney "was difficult to reach. [The plaintiff] received no regular progress reports. Every time she went to see her attorney about the matter she was merely told that the matter was receiving attention or that her attorney was not available." (at 443 I-J).

Tick box approach

The tick box approach I refer to is where the execution of the tasks, whether it be running the law firm or executing client mandates, is about merely following a set of rules or procedures in a bureaucratic manner. The aim is simply to tick the box that the task has been executed. Minimal meaningful effort is put into the execution of the task.

In this age of information overload, chasing multiple deadlines simultaneously and executing repetitive tasks, there is an ever-present risk of not properly engaging with information before you. There is the danger when attending to a matter that is like numerous others that have been attended to in the past, a legal practitioner falls into the trap of doing a cursory assessment of the information before them or merely ticks the proverbial boxes in the hope that prior experience will get them through. Examples of legal practitioners "going through the motions" or simply "winging it" are, unfortunately, very common. Your professional experience in the area in which you practice may get your through most situations with relative ease, but do not bank on sailing through all situations with little or no effort.

A common occurrence in the financial services industry serves as a good demonstration of the dangers of the tick box mentality. Since 1 July 2016, the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) has excluded claims arising from cybercrime (the current LPIIF policy and previous policies can be accessed on the website www.lpiif.co.za). This exclusion has been widely communicated to the legal profession and the insurance industry on various platforms since 2015 (a year before it came into effect). Notwithstanding the repeated and extensive communication, the LPIIF receives numerous cybercrime notifications from insurance brokers acting for legal practitioners (and many from the legal practitioners themselves). Letters sent to the brokers concerned reiterating the cybercrime exclusion do not deter them from repeatedly sending such claims to the LPIIF though they are, ostensibly, experts in the

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insurance structure for legal practitioners in South Africa and aware that this type of claim is not covered by the LPIIF. Some of the brokers concerned even place cyber insurance cover for law firms and, when selling such policies, inform law firms that this risk is not covered by the LPIIF and thus there is a need to procure that cover in the commercial market. How meaningfully are the brokers engaging with the information from their law firm clients when notifying a claim or potential claim to an insurer that they, purportedly, are aware does not cover the claim concerned? Are the brokers concerned just going though the proverbial motions or doing a tick box exercise when sending the claim to the LPIIF? Is this just a shotgun approach to notify the insurance market widely hoping that it will stick somewhere? What are the risks to the law firms concerned that the cybercrime related claims will not be notified (timeously or at all) by the brokers to the correct insurance company that is on risk? Lastly, when receiving communication from their brokers that the claim has been notified to an insurer, how many law firms enquire from the brokers which insurance company the cybercrime claim has been notified to and whether that insurance company is actually on risk for that claim? A law firm that is the broker's client in this example is an analogous position to the client who is placed at risk because that firm did not properly engage with the information provided and went through a tick box exercise in executing the mandate. The risk of a loss is ever present while the client is under the impression that the matter is being properly attended to, similarly to the law firm that suffered a cybercrime related loss and is under the impression that its expert broker is dealing with the matter prudently.

Do not use the tick box approach to compliance, whether that be compliance with the Legal Practice Act 28 of 2014, the Financial Intelligence Act 38 of 2001, the Contingency Fees Act 66 of 1997 (CFA) or any other legislation. A prudent approach is to aspire to comply with the spirit and the letter of the law.

There may be repetitive tasks involved in the execution of the mandates in the areas that you practice. You may have developed systems, processes, and internal procedures on how the mandate is to be executed. These should not lure you into a false sense of security. Executing a legal services mandate cannot be treated like a mathematical formula or even an exercise on an excel spreadsheet where there is a simple input of data, and a result is arrived at. A tick box methodology will also hinder the effectiveness of your oversight and supervision of staff in your firm as you will not meaningfully engage with information placed before you.

Using precedents blindly is another characteristic of the tick box approach and presents potential risks to law firms. *Hendry v Road Accident Fund* 2023 JDR 0373 (MN) is a demonstration of the risks of using precedents in the settlement of matters where contingency fees agreements have been entered into but there has not been meaningful compliance with the CFA requirements when entering into the settlement agreement. *Wheelwright v CP De Leeuw Johannesburg (Pty) Ltd* (JA 81/2022) [2023] ZALAC 6 (21 February 2023) illustrates the challenges that can arise from a commonly used clause in contracts. The judgments in *Mlenzana v Goodrick & Franklin Inc* and *Margalit v Standard Bank of South Africa Ltd and Another* 2013 (2) SA 466 (SCA), respectively, provide good training material for firms on the risks of failing to meaningfully consider information before them, resulting in liability for the firms concerned.

Conclusion

Negative client experiences posted on the internet or social media can do untold damage to your reputation. Do an honest self-assessment on how mandates are carried out in your firm. If there are any symptoms of professional complacency or a tick-box approach, take steps to remedy that and reinvigorate your practice. Prolonged periods of professional complacency and undertaking tick box exercises will lead to you and your staff becoming jaded. Clients will soon notice that and choose other legal practitioners who approach their work with enthusiasm. Professional complacency and a tick-box approach will hamper a law firm's ability to compete in the increasingly competitive legal services market.

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The 1,2, 3 of balancing the trust account

By Carl Holliday

Legal practitioners' trust accounts must be managed in compliance with s 86 of the Legal Practice Act 14 of 2014 and the Rules issued in terms of that Act. Rules 54, 55 and 56 also set out requirements that must be met in the management and administration of trust accounts. Compliance is recorded and reported by the appointed auditor, and monitored by the Legal Practitioners Fidelity Fund (LPFF) and the Legal Practice Council (LPC), respectively.

Compliance requires that, *inter alia*, the accounting records be written up not later than the end of the following month. Trust compliance is observed and confirmed through a three-step process which will be discussed below. For sake of brevity it is assumed that no investments exist in the books. These steps are:

1. Trust liabilities must not exceed equal trust assets (r 54.14.8).
2. Trust cash book must reconcile with trust bank statement.
3. Trust ledgers must balance.

1. Trust liabilities must equal trust assets

This is the first and final test. In its most basic form, this test requires a comparison of the trust assets to the trust liabilities.

The balance of the trust cash book (a debit is expected) represents the available trust assets, and the sum of client trust ledger balances represents trust liabilities (a credit is expected). The balance of the trust cash book must be at least equal to the balance of the trust ledger. It is important to note that the trust bank statement balance should generally not be directly compared to the trust ledger balance.

It is critical to be able to determine the trust position readily and accurately.

2. Trust cash book reconciles with trust bank statement

The second step requires the trust bank statement to be completely and accurately recorded in the trust cash book, with transactions clearly allocated. It is imperative that each receipt and payment be accurately and clearly recorded against a corresponding trust creditor.

A typical risk presents itself where a business creditor, such as an advocate,

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is paid directly from the trust account. The business creditor is not a trust creditor, and no trust funds stand to the credit of such a creditor. Funds allocated to a trust creditor may only be disbursed based on a properly executed mandate that authorises such disbursement, or by way of refund to the attorney where the payment is made from the business account.

Trust bank charges and interest present a unique situation. Net interest should be transfered to the LPFF by the bank, automatically, monthly. This implies that at the end of the financial year, it is unlikely that any trust interest will remain in the current account. Likewise, bank charges are generally transfered to the business account for payment. Note that where charges exceed interest, the attorney will be out of pocket for this expense. Also, Value Added Tax (VAT) on bank charges are refunded regardless of the VAT status of the account holder.

Commissions earned by the account holder should be received directly on the business account, and stands to the credit of the firm, not a client.

Care should be taken to ensure all bank transactions are allocated accurately every month, and that duplicate transactions or omissions do not occur. Where a time lapse occurs between a cash book entry and the corresponding bank statement entry, the difference will appear on the bank reconciliation.

In the final instance, a bank reconciliation is a document which contains details of the bank balance, and the corresponding cash book balance and an explanation of any differences. The successful reconciliation always ends on a nil balance. Outstanding transactions are expected to resolve by next month end. A non-nil balance indicates an incomplete or inaccurate, and failed reconciliation.

Outdated or non-nil balance bank reconciliations constitute a red flag instance which deserves immediate investigation.

3. Trust Ledgers are balanced

A client ledger account simultaneously represents a business asset, in the form of accounts receivable, and a trust liability, for the funds held in trust.

It is shortsighted to merely inspect client ledgers for apparent trust debit balances.

Risk: A client ledger should not reflect a trust debit balance. This situation most commonly obtains due to duplicate or inaccurate transaction processing. Where trust debit balances are discovered, these need to remedied forthwith.

Risk: A client ledger may also reflect a business credit balance. By defintion, the attorney is only entitled to receive such money in the business account, which does not retain a trust character. A client business credit balance indicates that funds, not due to the attorney, have been received in business. This situation needs to be remedied forthwith.

Only in the final instance, where simultaneously a business balance and trust balance exists, may the smaller of the two be transfered from trust to business. This constitutes a transfer from the trust ledgers. To expect a one-to-one match of invoices to transfers is simplistic, the net business and trust balances for each client must be considered.

Unfortunately excessive attention is paid to the last instance, and trust debit and business credit balances often ignored.

The Trust Position

Finally, once an accurate trust cash book balance is available, and an accurate sum of client trust ledgers has been determined, can a comparison be made.

The trust cash book balance acts as a benchmark. This amount is fixed and cannot be altered. Ledger balances must be compared to this amount.

Once the variation has been determined, the amount available as *surplus*, that is the amount by which the cash book balance exceeds the ledger balances, may be transfered from the trust banking account to the business banking account.

In the event where the variation amount indicates a *deficit*, that is the cash book balance is less than the ledger balances, this amount must be transfered from the business bank to the trust banking account.

Once these transactions are accounted for, the first test in the next cycle demostrates a a perfect trust position.