

Risk Alert

A joint publication of the Attorney's Fidelity Fund and the Attorneys Insurance Indemnity Fund (Association incorporated under S21 of Act 61 of 1973)



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General Manager's Column

RAF AMENDMENT ACT AND REGULATION 2(1) (C)

At the time of writing, we have nothing new to report since the Road Accident Fund Amendment Act 19 of 2005 was published in GG 28374 of 5 January 2006.

The constitutionality of Regulation 2 (1) (c) has as yet not been tested in the Constitutional Court, and we will keep readers advised of developments in this regard. There has, however, been another helpful decision pertaining to the Regulation.

STRAUSS V ROAD ACCIDENT FUND 2006(1) SA 70(T)

Briefly, the court held that the Fund could not raise lack of compliance with Regulation 2(1) (c) where uncooperative conduct on the part of the police prevented the appellant from complying.

Because of a shortage of space, we will report on the full judgment in a later Bulletin.

EX GRATIA PAYMENTS

The Board of Directors of the Attorneys Insurance Indemnity Fund has resolved that the Company will in future deal with a limited number of claims on an *ex gratia* basis. Please see the explanatory note below, for more information.

EXPLANATORY NOTE

1. The policy issued by the Attorneys Insurance Indemnity Fund provides indemnity (on a claims made basis) in respect of an insured's legal liability to any third party arising out of the conduct of the profession by the insured. Only an insured (as defined in the policy) may claim indemnity under the policy. There are rare cases where an insured has absconded and cannot be located after diligent search, thereby preventing a third party with a claim from proceeding against the insured who accordingly does not seek indemnity in terms of the policy.
2. The Fund has decided that in those circumstances it may, in its sole and absolute discretion and without conferring any rights on third parties, make an *ex gratia* payment to the third party in regard to any claim that such third party may have had against an insured arising out of the conduct of the profession.
3. Any third party who seeks the assistance of the Fund in this regard will be required at the third party's own cost to provide the Fund with all such information, documentation and assistance as the Fund may require in order to assess the claim, the quantification thereof and what steps the third party has taken to attempt to locate the insured.
4. The Fund may impose such terms and conditions on the grant of any *ex gratia* payment as it thinks fit and may in its sole and absolute discretion limit or restrict such *ex gratia* payment or decline altogether to grant such payment. The exercise of such discretion or imposition of conditions shall be final and binding.

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5. Any *ex gratia* payment will always be subject to the limits of indemnity of the policy and the deductible which would have applied, had the claim been dealt with in the ordinary course of events.

OPTIONS TO REDUCE THE LIMIT OF INDEMNITY AND DEDUCTIBLE

As we have done for the past few years, we once again offer the profession the option, for the 2006/2007 year, to reduce their limits of indemnity by 50 or 75%, with a corresponding reduction in deductibles. Please see the insert for more information and the forms for submission on or before 30 June 2006.

I urge you to think very carefully, if you decide to take one of the options. If you are uncertain about your choice, please feel free to contact me or my team in order to discuss the options more fully.

New Team member

Finally, I introduce and welcome our new team member, Seonita Avery, who joined us during March.

Seonita has over 8 year's experience in dealing with MVA matters as a paralegal at the RAF, Borman Raphela Attorneys and Du Plessis & Associates. She is currently in the process of studying toward her BCom Law degree through Unisa and will be assisting the legal advisers of the scheme in a paralegal capacity.



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Useful Tips for MVA

De Jongh v Du Pisanie 2005(SA) 457 (SCA)

GENERAL DAMAGES FOR SERIOUS INJURIES

FACTS

The respondent appeared in his capacity as curator *ad litem* for JR Rabe (Rabe) who was involved in a collision on 9 July 1993. Rabe was a passenger in a vehicle, which was driven by the appellant, De Jongh.

The court *a quo* awarded R5 697 388, 14 made up as follows:

a) Future medical expenses	R3 778 921, 70
b) Loss of income	R1 096 225, 00
c) General Damages	R400 000-00
d) Costs of curator bonis	R412 241, 44
(7, 8% of total of above)	

De Jongh appealed the above decision.

JUDGEMENT

On appeal, the court had to re-assess the general damages of Rabe who had suffered serious brain injuries.

Brand A.R acknowledged the recent trend towards higher awards but stated that this trend could not be attributed to the view that miserliness in compensation does not become a civilised society. Rather, conservatism in awards for general damages took into account the need for fairness to the defendant, as it is not society who has to pay these damages, but rather the defendant. A 1957

Policy Queries



When a matter becomes settled, the insurer pays its portion less the deductible to the plaintiff. If the insured then arranges with the plaintiff to pay off the deductible in instalments, can the commission and any other charges related to the collection thereof, be recovered from the insurer when a Bill of Cost is taxed?

In terms of clause 4 of the policy, "the insured shall be responsible for the first amount of any claim and claimant's costs and expenses arising out of one event or occurrence..."

The deductible is therefore not indemnifiable in terms of the policy and any charges related thereto would not be covered by the insurer.

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case was referred to, which stated:

“the court must take care to see that its award is fair to both sides-it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant’s expense.”

In addition, where the appellant is held liable for the future medical costs of the respondent, the opinion of the appellant’s experts regarding the reasonable costs cannot merely be ignored where it has been substantiated, even if they are less than the costs estimated by the respondent’s experts. The appellant cannot be forced to pay the more expensive costs and the fact that the more expensive model may be better is not relevant.

In conclusion, the court also held that the assessment of damages cannot be determined with mathematical precision. Many relevant factors have to be taken into account by the court, including past awards. However, past awards should not be the definitive factor and should serve merely as a guideline.

In the recent judgement of Road Accident Fund v GSO Guedes (2006) SCA (RSA), the court reduced the award for future loss of earnings awarded by the court a quo from R3 119 048 to R2 323 633. The basis for the reduction in damages was that the trial court had relied upon a passage in a text book which dealt with a person who was 45 years old at the time of the accident, whereas the claimant in the present case was only 26 years old.

The amount awarded, on appeal, for future loss of earnings was still substantially high. However, we may argue that there is a move away from the previously high awards in Road Accident Fund v Marunga 2003(5) SA 164 (SCA), especially with regard to general damages.

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Prescription Matters

Rule 10, Its Application and the Constitution- Part 1

INTRODUCTION

Rule 10 of the Magistrates Rules of Court may have a significant impact on a plaintiff’s claim where the plaintiff does not take a further step in the litigation process after having served summons. It is designed to prevent a plaintiff from abusing court procedures and in so doing prevent prejudicing the defendant.

Rule 10 provides that:

“If summons in an action be not served within 12 months of the date of its issue or, having been served, the plaintiff has not within that time after service taken further steps in the prosecution of the action, the summons shall lapse: Provided that where the plaintiff or his attorney files an affidavit with the clerk of the court before the expiration of such period setting out -

- (a) that at the request of the defendant an extension of time in which to pay the debt claimed or any portion thereof has been granted to him;*
- (b) that in terms of the agreement judgment cannot, save in case of default, be sought within a period of 12 months from the issue of the summons; and*
- (c) the period of the extension,*

the summons shall not lapse until 12 months after the expiration of the period of extension.”

In effect, Rule 10 provides that where a plaintiff has not taken any further steps in the litigation process within 12 months after having served summons, the summons will be deemed to have lapsed. Similarly, this rule applies to situations where summons has been issued by the court, but not served on the defendant within 12 months after issue. The summons will then, also, be deemed to have lapsed.

PERIOD OF EXTENSION

In *Minister of Law and Order and Others v Zondi* 1992 (1) SA 468 (N) it was held that the proviso to Rule 10 sets out the requirements which have to be complied with in order to prevent a summons from lapsing on the expiration of the period of 12 months mentioned in the main part of the Rule. The proviso makes provision for the extension of the period only in the case where the defendant has been granted, at his request, an extension of time within which to pay the debt claimed and then only if the agreement granting such extension embodies the terms set out in paragraphs (b) and (c) of the proviso. This is an important indication that the Legislature contemplated that only in the case provided for in the proviso, and in no other, can there be an extension of the period of 12 months.

In order to extend the period in which the summons will be deemed to

have lapsed, as set out above, Rule 10 provides that a plaintiff may submit an affidavit to the Court for an extension of the time periods envisaged in Rule 10. The procedure provided for entails the filing of an affidavit with the clerk of the Court before the expiration of the 12 month period, setting out that at the request of the defendant an extension of time in which to pay a debt has been granted to him, that in terms of the agreement judgment cannot be brought against him within 12 months from the date of the issue of the summons and lastly the period of extension. Rule 10 further provides that the summons shall not lapse until 12 months after the expiration of the period of extension.

Accordingly it seems that the rule envisages that the summons will not lapse even though no further step is taken during the time of the extension and a further 12 months after expiration of the extension. However, the above only applies where the provisions in Rule 10 (a) (b) and (c) have been met. No indication is given in the rules as to the purpose for the above provision.

Further, case law does not provide an indication as to whether the legislature intended to provide an additional 12 months to the period of extension. In *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) it was held that "There being no apparent ambiguity, the wording of Rule 10 is to be given its ordinary grammatical meaning unless to do so would lead to an absurdity so glaring that the legislature could not have contemplated it."

It therefore seems that on the ordinary grammatical meaning of Rule 10, the summons will only be deemed to have lapsed if no further step is taken within 12 months after the period of extension.

APPLICATION TO DEFENDED AND UNDEFENDED ACTIONS

In *Langenhoven v Comyn t/a Rags to Riches* 1998 (1) SA 710 (T) the issue before the court was whether Rule 10 applied to defended actions.

Here, the plaintiff served summons on the defendant on 18 January 1993. The defendant entered an appearance to defend and served a request for further particulars on the plaintiff on 23 January 1993. The plaintiff only replied to the request for further particulars on 7 July 1994. The defendant filed a special plea, relying on Rule 10, to the effect that more than a year had lapsed after the plaintiff had taken a further step, and as a result, the summons had lapsed.

The court *a quo* upheld the special plea. Accordingly, the plaintiff appealed the decision of the court *a quo* on the basis that a further step had been taken by the plaintiff and the non-applicability of Rule 10 to defended actions. (Those actions where the defendant has entered an appearance to defend.)

The court provided that irrespective of whether the action is defended or not, Rule 10 has direct application. Accordingly, Rule 10 applies to all actions irrespective of whether the defendant has entered an appearance to defend or not.

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Part 2 will deal with the meaning of a 'further step', the Plaintiff's remedies in order to revive the summons and the Constitutionality of Rule 10



Conveyancing

WITHHOLDING TAX ON FIXED PROPERTY TRANSFERS BY NON-RESIDENTS

Practical problems of collecting taxes due by non-residents, including where a non-resident disposes of fixed property and then remits the proceeds abroad, appear to have prompted the latest amendment, which introduces a withholding tax on the sale of fixed property by a non-resident.

The amendment provides for a withholding tax of 5% of the proceeds if the non-resident seller is a natural person, 7, 5% of the proceeds if the non-resident seller is a company or 10% of the proceeds if the non-resident seller is a trust. This withholding tax rate is 50% or the GCT otherwise applicable.

The onus to withhold the tax and pay it over to SARS lies with the purchaser, if that person knows or should have known that the seller is a non-resident- by way of example if the seller is unable to provide a South African identity number.

Estate agents and conveyancers processing the transaction are each required to notify, in writing, the purchaser of the withholding obligation. The obligation on the agent or the conveyancer applies if they knew or should reasonably have known that the seller is a non-resident. Failure to comply will render the estate agent or conveyancer to be jointly and severally liable for payment of the withholding tax, limited to any commissions or fees earned from the transaction.

The practical implications of the withholding tax system will be addressed by conveyancers in the conveyancing process.

PROPERTY WERKS, VOLUME
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