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NEWSLETTER
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RAF AMENDMENTS: CONSIDER YOUR COVER

On 1 August 2008 a number of far-reaching amendments were made to the Road Accident Fund Act (RAF Act) which have serious ramifications for victims of road accidents occurring after this date.

The most notable amendments and their implications include:

- the removal of the common law right of a claimant to claim compensation from the wrongdoer;
- the limitation of the claimant's right to claim for future loss of earnings. In the case of serious injury in a road accident, a claim for loss of earnings will be limited to a maximum of R 172 806.00 per annum irrespective of what the claimant's earnings were at the time of the accident. Moreover, the injured party is precluded from claiming any shortfall from the negligent driver.
- the limitation, except in the case of emergency healthcare, of the claimant's right to claim for medical and hospital expenses to State medical tariffs, which are substantially less than private sector tariffs. This may result in private hospitals refusing to treat road accident victims (especially those without medical aid) on the grounds that should they do so they stand to suffer financial loss, in that they will not be fully compensated for their services.
- the requirement that an injury must be a 'serious injury' as defined in the RAF Act before any compensation will be paid. In addition, before a claim can be submitted the claimant must have the extent of his

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Russell Argue and Subashnee Moodley attended the PMR Africa awards function and accepted an award on behalf of the directors and staff of Livingston Leandy.

LLI RECEIVES GOLDEN ARROW

Earlier this year LLI was placed second nationally and received the Golden Arrow award in the 'small legal firm' category at PMR Africa's awards ceremony, held at the Hyatt Regency Hotel in Rosebank.

The national survey took a random sample of 255 respondents comprising in-house advisers, MDs, CEOs, financial directors, company secretaries, and senior management, and looked at their perceptions of legal firms. The survey had a strong focus on customer service and customer satisfaction and some of the aspects considered by the respondents were: accessibility, added value, range of services offered, commitment to transformation and the firm's BEE policy, competence, and the cost-effectiveness of the legal process.

Too sick to work ... or just sick of work?

In terms of the Basic Conditions of Employment Act of 1997 (BCEA) sick leave accumulates over a 36-month cycle, commencing on the date of employment. In the first 6 months, one day's sick leave is accumulated for each 26 days' work, while over the 36-month period the entitlement equals the number of days the employee would work in a period of 6 weeks. In certain industry sectors conditions of employment, including leave, are regulated by the relevant Collective Agreement. It follows that for an employee to be paid for sick leave taken, he/she must satisfy the employer that he/she was indeed sick.

The usual method of proving that one has been ill is by submitting a medical certificate which must have been issued by a person competent to diagnose and treat a condition in terms of a recognised medical discipline. This means that medical certificates are not restricted to medical doctors and dentists but can be issued by other practitioners such as homeopaths, naturopaths, physiotherapists, psychologists, and other professionals registered with the Health Professions Council of South Africa (HPSCA). At present, traditional healers do not qualify for registration with HPSCA.

The ethical and professional rules of the HPSCA prescribe specific requirements for medical certificates and what they should contain. Of particular importance is the requirement that a certificate must indicate whether it reflects the personal observations of the practitioner or merely information received from the patient. Very often a medical certificate states "I was informed that ...." which implies that no examination and no diagnosis was made by the health practitioner. Such a certificate cannot be accepted as proof of a genuine illness and the employee concerned may be told that his/her absence is being treated as unpaid leave.

It is worth noting that a medical certificate need not include a diagnosis, as this is a matter of patient privilege. Regrettably, there is little that can be done about the oft-appearing vague diagnoses (when they are disclosed in a certificate) such as "stress", "influenza", or that all-time favourite, "lower backache". As long as the certificate claims that the employee has been examined and found to be unfit for work, that certificate, if it is compliant in all other respects, cannot be ignored.

Then there is the fraudulent medical certificate. Altering, tampering with, or presenting a false certificate are serious acts of misconduct involving gross dishonesty, which is as serious in its nature as, for example, theft. In such cases disciplinary steps should be taken and, if the employee is found guilty, a sanction of dismissal may well be appropriate.

Another interesting situation concerns those employees who repeatedly (and conveniently) fall ill on a Friday or Monday, or the day before or after a public holiday. Since the BCEA only requires proof of incapacity if an employee has been absent for more than 2 consecutive days, this has led to significant abuse by some employees.

Some Bargaining Council agreements provide specifically, as a condition of payment, that a medical certificate is required to secure payment for absence on a Friday, Monday or public holiday, or the day before or after a public holiday. In such cases the answer is clear – if the employee is absent without a certificate he/she does not get paid.

While the BCEA does not require proof of incapacity for an absence of two days or less, it does provide that where an employee has been absent on more than two occasions during a consecutive 8- week period, the employer may require the employee to produce a medical certificate confirming his/her inability to work on account of sickness or injury. This is useful to prevent employees falling into the habit of taking one or two days per month sick leave, certificate free.

Sick leave must be carefully managed. Every employer should have a policy in place regulating how allegedly sick employees are dealt with when absent from work. Such a policy must be made known to all the employees and it must be applied consistently. This approach can go a long way to curbing the abuse of sick leave privileges. Once the policy is made known to the employees and it is reasonable, failure to abide by the policy would result in a breach of a rule of the workplace, entitling the employer to take disciplinary action.

Typically, such a policy should provide that the employee must notify the employer of any intended absence from work, either in person or by some other acceptable means. It should also incorporate the provisions of the HPCB relating to valid medical certificates and stipulate a "no work, no pay" policy. A provision for a formal interview with the human resources department at which the employee must hand in the medical certificate and offer a reasonable explanation for his/her absence, is also useful as it makes the employee realise that his/her absence is being monitored.

One might ask if an employer is obliged to pay an employee for further absences due to illness after his/her sick leave has been exhausted. If the employee is genuinely ill, it is good industrial relations practice to allow him/her to use his/her annual leave before penalising him/her with non-payment for absence. However, the employer is not obliged to allow further absences by an employee who has already exhausted his/her sick leave to be taken as part of his/her annual leave, and the "no work, no pay" rule may be applied.

"The first step in disciplining employees for the abuse of sick leave is to formulate a policy and to ensure its consistent application. Employees who show patterns of consistent sick leave abuse must be interviewed and warned that continued conduct of that nature will result in disciplinary steps," sums up Roy Monk of LLI's labour law department.

"Despite the fact that an employer is entitled to deduct absent days from the employee's remuneration, the situation often spirals out of control to the extent where the leave abuse becomes a real problem and needs to be dealt with. The application of a comprehensive policy, issuing warnings to the employee, and counselling sessions are all precursors to formal disciplinary action which, in appropriate cases, can result in dismissal," he concludes.

Giving back to the community

As part of our commitment to social responsibility, LLI recently made donations to two community upliftment organisations.

Indlela is a registered non-profit organisation based at the Church of the Good Shepherd in Durban North that is active in caring for the vulnerable and impoverished in the north Durban and Amaoti communities through a variety of upliftment projects such as a feeding scheme, an abandoned-baby transition home, and life-skills and literacy programmes.

Mount Moriah Ministries is a community outreach ministry based in Shakaskraal, which functions as a school and child-care facility for about 300 children from the impoverished local community where HIV and AIDS are rife. Mount Moriah Ministries also assists with home-based care for the elderly and those with HIV/AIDS-related illnesses.

From left, Mickey Wilkins (Chairman Indlela), Abigail Ellary, (Indlela ambassador); Barry Lewis (director LLI) and Subashnee Moodley (director LLI).

Estate duty update: continue to plan

Notwithstanding comments by the Minister of Finance in his recent budget speech that the whole question of the efficacy of estate duty as a taxation was being reviewed, Russell Argue of LLI's estates department believes that one must continue to plan and have regard to the law as it currently stands.

On 1 January 2010, amendments to the Estate Duty Act came into operation and gave spouses access to each other's estate duty abatements. Before these amendments, the first R 3.5 million of a deceased estate, together with any amount bequeathed to the surviving spouse, was exempt from estate duty (levied at 20%). This meant that if the first-dying left his/her entire estate to his/her surviving spouse, the R3.5 million abatement would have been lost and the surviving spouse on his/her death would have been entitled to make use of only a R 3.5 million abatement. This led to the use of trusts and other vehicles to enable each spouse to benefit from the R 3.5 million abatement.

The new amendment eliminates this need and effectively provides for a roll-over of the unused portion of the abatement of the first-dying spouse. In other words, if the first-dying spouse leaves his/her entire estate to his/her surviving spouse, no estate duty will be payable and on the death of the surviving spouse the entire abatement of R 3.5 million each (totalling R7 million) can be claimed in the estate of the second-dying.

Should you need to review your will or estate plan contact Russell Argue or Lance Coubrough.

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injuries professionally assessed. Should the injury not be regarded as sufficiently serious, not only will there be no claim against the Fund but there will also be no recourse against the negligent driver.

- the insertion of the requirement that a claimant has to suffer a 30% bodily impairment before a claim can be made for general damages. (General damages refer to what is commonly understood as "pain and suffering".)

Owing to the far-reaching implications of these amendments, the Law Society of South Africa, together with various other interested parties, launched an application against the Minister of Transport and the RAF in the North Gauteng High Court challenging the constitutionality of the amendments. The Law Society contended that the amendments:

- irrationally deprive victims of their fundamental common law right to claim compensation from those who caused their injuries and to claim for substantial damages no longer covered by the RAF Act;
- radically reduce the benefits the Fund pays to victims of road accidents; and
- deprive many road accident victims of their ability to obtain effective medical treatment for injuries they have suffered.

In March 2010, the Court handed down judgment dismissing the application, finding that the amendments are not unconstitutional. The Law Society and the other interested parties have now simultaneously sought leave to appeal to the Constitutional Court and the Supreme Court of Appeal, the outcome of which is awaited.

"Bearing in mind the high accident rate on South African roads, in the light of these developments it may be advisable to consider taking additional insurance cover to deal with possible loss of earnings and medical expenses," cautions Errol Sibiya of LLI's RAF department.

Product liability: Law modified

The recent spate of motor vehicle recalls by manufacturers has highlighted the thorny issue of product liability, a topic that received special attention in Section 61 of the new Consumer Protection Act (CPA) which came into operation on 29 April 2010. Prior to this, a claim against a manufacturer or supplier of goods would have arisen either in contract, where a contractual relationship existed between the parties, or in delict, where no such relationship existed.

In contract, liability was often avoided as a result of exemption clauses in the contract document or limited to the cost of rectifying the defect. In delict, however, a claimant was previously required to prove, amongst other things, that the manufacturer or supplier was at fault (negligent).

Both internationally and locally, much debate surrounded the issue of whether or not liability should be fault-based or strict liability-based. In line with international trends, South Africa saw fit in the CPA to move away from fault-based liability to a modified strict-liability approach.

Section 61 of the CPA introduces, for both physical and economic harm, a modified strict liability for producers, importers, distributors, and retailers (the entire supply chain) in respect of harm caused wholly or partly by, or as a result of:

- The supply of any unsafe goods; or
- Product failure, defects or hazards in goods; or
- Inadequate instructions or warnings provided to the consumer relating to any hazard arising from or associated with the use of any goods;

irrespective of whether or not the harm resulted from negligence on the part of the producer, importer, distributor, or retailer.

Strict liability has been modified in that a number of defences are available.

Liability will not arise:

- Where the defect, failure or hazard is wholly attributable to compliance with public regulations;
- Against a particular person if the defect, failure or hazard did not exist at the time the goods were supplied by that person to another person alleged to be liable;
- If the defect, failure or hazard was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to him;
- Where it is unreasonable to expect the distributor or retailer to have discovered the defects given his role in marketing the goods.

"These provisions will undoubtedly have significant impact on product liability law in South Africa, making it easier for consumers to pursue claims against manufacturers and suppliers of defective or hazardous goods," comments Barry Lewis, LLI director.

"It must be borne in mind that many of the other provisions of the CPA have not yet come into operation, with the general effective date of the Act set for 29 October 2010. This period, however, may be extended by a further six months after that date," concludes Barry.

Candidate attorneys

Three new candidate attorneys have joined LLI. They are, from left, Tess Nielson, Gabriel Mncwango and Gaylene Banjo.

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