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DISPUTE RESOLUTION ALERT

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Professional indemnity insurance amidst COVID-19

Economies across the globe, specifically small businesses, have taken a pounding from the effects of the pandemic. Practicing lawyers have not been immune to the adverse effect of it. This discussion is centered more directly on the impact of COVID-19 on professional indemnity and the impact it may have on South African lawyers and law firms.

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CLIFFE DEKKER HOFMEYR

Professional indemnity insurance amidst COVID-19

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Briefly, professional indemnity insurance is designed for the protection of professional person/s. It protects them against legal liability for claims for financial loss arising from professional negligence of the professional or their employees, in the conduct of the business and/or professional space.

Professional indemnity policies (the policy) often do not have the standard wording as found in most insurance policies, but rather have bespoke wording for each of the different professions. They are generally on a "claim made" basis, and not on a "claim occurring" basis. A "claims made" occurrence is where the claim is made during the lifespan of an insurance policy taken out by the insured. Cover in these instances will not apply to a claim made after the expiry of the policy. However, the insured may include a retro-active date, where their insurer will be liable to the insured for a claim made during that period.

Position of professional indemnity in England and Wales as compared to South Africa

In England and Wales, professional indemnity for solicitors is governed by the Solicitors Regulation Authority (SRA). The SRA requires solicitors and firms to maintain their own professional indemnity insurance that:

- Provides adequate and appropriate cover in respect of services they provide or have provided (whether or not the services comprise reserved legal activities); and
- Takes into account any alternative arrangements you or your clients may take.

Further to the above, the SRA provides for the minimum terms and conditions of professional indemnity and the scope of cover professional insurance is as follows:

"1.1 ..., the insurance must indemnify each insured against civil liability to the extent that it arises from private legal practice in connection with the insured firm's practice..., provided that a claim in respect of such liability:

(a) is first made against an insured during the period of insurance; or

(b) is made against an insured during or after the period of insurance and arising from circumstances first notified to the insurer during the period of insurance."

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The LPIF provides for the primary layer of professional indemnity insurance to firms of practicing attorneys against professional legal liability to pay compensation to any third party.

Professional indemnity insurance amidst COVID-19...continued

The position in South Africa is that professional indemnity for legal practitioners is by and large regulated by the Legal Practice Act 28 of 2014 (the Act), that empowers the Legal Practitioners' Fidelity Fund (Fund) to contract with an insurer being the legal practitioners Insurance Fund (LPIF) to provide professional indemnity insurance to practitioners (insured) that have a Fidelity Fund Certificate, these persons are:

- a sole Practitioner
- a partnership of Practitioners;
- an incorporated Legal Practice referred to as section 34 (7) of the Act; or
- an advocate referred to in section 34(2) (b) of the Act.

The LPIF provides for the primary layer of professional indemnity insurance to firms of practicing attorneys against professional legal liability to pay compensation to any third party:

- a) that arises out of the provision of legal services by the insured; and
- b) where the claim is first made against the insured during the current insurance year.

In England and Wales, the International Underwriting Association (IUA), the body representing underwriters that is based in London recently published an open letter to the legal industry highlighting its concerns with the lack of progress made in discussions to allow insurers to cancel professional indemnity policies when lawyers fail to pay their premiums in the wake of COVID-19 pandemic.

In South Africa, many small firms have felt the brunt of the COVID-19 pandemic. As a result of the National Lockdown, firms were compelled to close their offices. With many not having access to the technology required to operate remotely, it resulted in devastating financial consequences. Many were unable to pay for their firm's overheads. One can only imagine the devastating impact this might have on the annual contribution by legal practitioners to the fund next year when renewals of legal practitioner Fidelity fund certificates fall due. Some practitioners may well find themselves having to cut their contributions to the fund, leaving those practitioners with no cover. This during a time when many firms are most vulnerable to potential claims based on negligence with remote working bringing about reduced supervision of junior attorneys and reduced access to office files which may result in lapses.

Conclusion

The impact of COVID-19 on professional indemnity insurance on certain legal practitioners is likely to be significant. It may also result in the victims of the potential negligence finding themselves without recourse in the event of practitioners losing their cover.

*Byron O'Connor and
Lubabalo Mbolekwa*

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CHAMBERS GLOBAL 2020 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2020 in Band 3: Dispute Resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2020 as Senior Statespeople: Dispute Resolution.

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 as an up and coming Restructuring/Insolvency lawyer.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2020 in Band 2: Dispute Resolution.



CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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