

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

BROKERS, INSURE YOU ADHERE TO YOUR DUTIES!

As professionals, insurance brokers must be aware of the duties they owe to their clients. Consumer protection legislation and regulation is a local trend and the insurance industry has been placed in the spotlight. What are these duties? Where do they come from? And, most importantly what happens if a duty is breached? These are the questions we will briefly consider below.

THE MPUMALANGA CIRCUIT COURTS: TREAD WITH CAUTION ON THE QUESTION OF JURISDICTION

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As professionals, insurance brokers must be aware of the duties they owe to their clients. Consumer protection legislation and regulation is a local trend and the insurance industry has been placed in the spotlight. What are these duties? Where do they come from? And, most importantly what happens if a duty is breached? These are the questions we will briefly consider below.

Duties

Insurance brokers enter into contracts with the insured to provide for their insurance needs. The contractual and legal duties of a broker may be express, tacit or implied by law. Basic duties such as the scope of the broker's mandate should be expressly stated in the contract, but brokers commonly overlook the common law duties which arise from the contract of mandate. As set out in the second edition of LAWSA's 'Insurance agents, brokers and intermediaries' implied legal duties include:

- The duty to act in good faith arising from the fiduciary relationship. The insured has placed special trust, confidence, and reliance in his broker and he is influenced by the broker who has a fiduciary duty to act for the benefit of the insured. This requires the broker to perform her mandate in the interest of the insured; to be open and honest with the insured and not to make a secret profit. This duty has both a common law and statutory basis. See s16 of Financial Advisory and Intermediary Services Act, No 37 of 2002.
- The duty to advise the insured properly. Brokers must advise a client of the most suitable products to meet that client's needs. Although seemingly obvious and simple, the broker must be cognisant to discharge this duty with reasonable care and skill. This duty includes warning the client of the risks of being uninsured and underinsured referring a client to experts where applicable and explaining each element of the cover provided.
- The duty to obtain insurance coverage. This includes understanding and evaluating the insurance needs of the client, requesting the necessary documents for the evaluation and recommending the appropriate cover. See *Lenaerts v JSN Motors (Pty)* [2000] (1) SA 1100 (W) 1109. Failure to ensure that a client is adequately covered - for example underinsuring a client for business interruption - may result in a breach of this duty. This duty does not, however, require the broker to ensure that the client complies with the obligations provided by the policy as this is the insured's responsibility. See *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group Ltd and Another* [2004] (2) SA 1 (SCA).

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These Rules are in fact not 'new' but serve as a more specific manifestation of the general duty to exercise reasonable skill and care when performing services under a contract of mandate.



- The duty to explain the meaning of the policy. This relates to the nature of the contract and all of its material terms. Additionally, if the contract contains any 'unusual provisions' which limit or exempt an insurer's liability then the broker must alert the insured of this this.

New statutory rules regulating these duties

New Policy Holder Protection Rules (Rules), including significant amendments, were promulgated on 1st January 2018. The Rules now formally incorporate the Treating Customers Fairly provisions: a regulatory regime that aims to provide better protection of customers against unfair business practices by life companies and short-term insurers.

These new Rules are in line with National Treasury's broader policy goals to reform the financial services industry including the introduction of Twin Peaks legislation and the new Insurance Act.

These Rules are yet to be tested. Some fear that the increase in regulation will result in increased insurance costs which will be passed onto the insured driving up the price of an already "grudged purchase". However, these Rules are in fact not 'new' but serve as a more specific manifestation of the general duty to exercise reasonable skill and care when performing services under a contract of mandate. These duties are not unreasonable considering the professional services insurance brokers provide. It is now up to every broker to insure and ensure that they adhere to these duties.

Roy Barendse and Lee Shacksnovis

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



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THE MPUMALANGA CIRCUIT COURTS: TREAD WITH CAUTION ON THE QUESTION OF JURISDICTION

On 29 January 2016 the Judge President issued practice directive 1 of 2016 in terms of s7(1) of the Act, establishing circuit courts in Middelburg (Emalahleni) and Mbombela (Nelspruit).

On 1 September 2017 the Judge President issued and published in the Gazette practice directive 1 of 2017, which makes it clear that the Pretoria High Court shall no longer have jurisdiction to hear matters arising in the magisterial districts listed therein.



In terms of s6(1) of the Superior Courts Act, No 10 of 2013 (Act), the High Court of South Africa consists of nine divisions, with each province constituting a division of the High Court.

As the Mpumalanga and Limpopo Provinces did not have High Courts at the time of enactment, s50(2) of the Act that states that:

The Gauteng Division shall also function as the Limpopo and Mpumalanga Divisions, respectively, until a notice published in terms of s6(3) in respect of those Divisions comes into operation.

Section 6(3) of the Act states that the Minister must in consultation with the Judicial Services Commission, by notice in the Gazette, determine the area under the jurisdiction of a Division. There has been no notice by the Minister in relation to the Mpumalanga Province and therefore s50(2) of the Act remains in force.

On the other hand, s7(1) of the Act states that:

The Judge President of a Division may by notice in the Gazette establish circuit districts within the area under the jurisdiction of that Division for the adjudication of civil or criminal matters, and may by like notice alter the boundaries of any such districts.

On 29 January 2016 the Judge President issued practice directive 1 of 2016 in terms of s7(1) of the Act, establishing circuit courts in Middelburg (Emalahleni) and

Mbombela (Nelspruit), in order to ease pressure and caseload from the Pretoria High Court.

All action and motion proceedings including urgent applications in any area in the Mpumalanga Province shall, with effect from 1 FEBRUARY 2016 be issued through designated officials and at the offices situated at the Mbombela and Middelburg Magistrate Courts specified in Clause 4 below and which shall operate as the Registrars offices of the Circuit Courts.

In *Nedbank Ltd v Rossouw* [2016] ZAGPPHC 916 the Pretoria High Court interpreted practice directive 1 of 2016 to mean that it is mandatory for a party to institute proceedings involving a dispute or matter arising out of the Mpumalanga area of jurisdiction in one of the circuit courts established by the Judge President in terms of s7(1). Notwithstanding the fact that the Judge President had not yet published the abovementioned practice directive in the Gazette as prescribed by s7(1) of the Act, the Pretoria High Court enforced it and dismissed the matter with costs due to lack of jurisdiction.

On 1 September 2017 the Judge President issued and published in the Gazette practice directive 1 of 2017, which makes it clear that the Pretoria High Court shall



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A litigant must therefore institute proceedings in respect of matters that fall within the jurisdiction of the Mpumalanga Province in one of the Mpumalanga Circuit Courts.

no longer have jurisdiction to hear matters arising in the magisterial districts listed therein (Mpumalanga Province).

Paragraph 1.5 of practice directive 1 of 2017 states:

The Gauteng Division of the High Court shall, with the coming into effect of this Notice, *cease to have jurisdiction* (own emphasis) in any matters emanating and arising in and from the Magisterial Districts set out in the schedule.

As mentioned above, other than for mere convenience, the circuit courts were established in order to alleviate pressure from the Pretoria High Court. In *First National Bank v Lukhele and seven other cases* [2016] ZAGPPHC 616, the court held that even if a particular magisterial district is not listed in the schedule to the practice directive, a plaintiff must still establish the closest court to the defendant, as it is not difficult to determine areas or districts closer to the Middelburg and Mbombela circuit courts respectively.

In dismissing the applications for default judgment the court held:

The applications for default judgments in all the eight matters ... of this judgement are hereby struck-off from the roll.

All the plaintiffs in the present proceedings are hereby ordered not to debit any of the defendant's accounts with legal costs or charge them for any legal fees and/or disbursements arising from the issuing of the summonses to date hereof.

As from 1 September 2017, a litigant must therefore institute proceedings in respect of matters that fall within the jurisdiction of the Mpumalanga Province in one of the Mpumalanga Circuit Courts, otherwise they run the risk of dismissal of the matter with costs.

*Thabile Furhmann and
Thapelo Malakoane*

CHAMBERS GLOBAL 2017 - 2018 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 named our Corporate Investigations sector as a Recognised Practitioner.

CHAMBERS GLOBAL 2018 ranked our Dispute Resolution practice in Band 2: Insurance.

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CHAMBERS GLOBAL 2017 - 2018 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

Janet MacKenzie ranked by CHAMBERS GLOBAL 2018 in Band 3: Media & Broadcasting.

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Tim Fletcher ranked by CHAMBERS GLOBAL 2018 in Band 4: Dispute Resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012 - 2018 in Band 1: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 2: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 - 2018 in Band 4: Construction.



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Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).

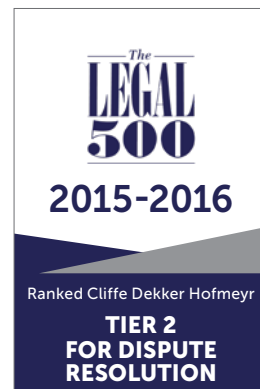
Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.



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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. 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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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