



# LEGAL PRACTITIONERS FIDELITY FUND

SOUTH AFRICA

## Commonwealth Lawyers Association Conference GOA India 5 – 9 March 2023

The Commonwealth Lawyers Association bi-annual conference was held in Goa India and attended by a delegates from the commonwealth countries including South Africa. The Conference had 500 delegates from 52 countries in attendance The Fund together with other role players in the legal profession have always attended this conference which in many ways talks to matters of relevance to the South African legal environment. This year the delegation from South Africa was as follows:

The Fund Delegation: Chairperson – Sophie Thabang Peppy Kekana

	: CEO	Motlatsi Molefe
LPC delegation	: Chair	J K Myburgh
		B P Joseph S C
LSSA delegation	: President	Mabaeng Denise Lenyai

Since 1955, the Commonwealth Law Conference has been bringing together lawyers, judges and academics from across the 56 nations of the Commonwealth to debate current issues affecting the legal profession in a stimulating environment where they can network and share innovation and creativity from across the globe. These conferences cover a range of legal topics and issues relevant to lawyers and legal professionals in the Commonwealth. South Africa lat hosted the conference in the year 2012 and the Board re-iterated the support it would give to attendees including their spouses and the conference took place in Cape Town.

The 23rd Commonwealth Law Conference was inaugurated by Goa Governor P.S. Sreedharan Pillai. The five-day conference, which was held from March 5-9, 2023, was also attended by Union Minister for Law and Justice Kiren Rijiju and Chief Minister of Goa Dr Pramod Sawant. During his address, Union Minister Kiren Rijiju emphasized the importance of the conference as a platform for open discussions on critical issues. He stated that the law

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must be comprehensible to the common man to achieve its desired result. He further highlighted his government's commitment to good governance and the welfare of the people.

During this particular conference different sessions took place, some of which are listed hereunder:

- Freedom of movement in post COVID world – Are internal passports on the rise?
- Freedom of expression and the right to peaceful protest.
- Financial services best practice
- Democracy and the COVID aftermath – Abuse of emergency powers
- Judicial appointments – developments and regressions

Not all these sessions are discussed in this report but only those writer hereof is of the view touch upon the most pertinent discussions taking place in South Africa and very topical.

## **1. Safeguarding and strengthening the independence of judiciary**

This is currently topical in our country given the positioning of our judiciary in sensitive political matters it has to adjudicate and the criticism it has had to deal with from politicians. The Zondo commission is a case in point. Fundamental points made during this session are listed hereunder:

- It is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective ( P.N Bhagwati. J in S.P Gupta v. Union of India 1981 Supp SCC 87, para 27)
- An independent judiciary is the ultimate shield that preserves and protects the rule of law in all modern democratic societies.
- It is pivotal to the separation of powers of government, as a check and balance on the exercise of unlimited powers. In discharging this critical function, judges are expected to act impartially and fearlessly, immune from influence or interference. Independence and impartiality inspire public confidence in the judiciary and promote the rule of law.

An independent judiciary is the bane of authoritarians and despots hence my reference to the Zondo commission and the recent criticism he has had to endure for his speech for what he said when he gave the Oliver Tambo lecture at the University of Fort Hare. Attempts to undermine judicial independence are on the rise, whether by branding judges



as “enemies of the people” or spuriously accusing them of intruding into the domain of the executive or legislature. This is often driven by political gain, private ambition, or unabashed opportunism. It is an onslaught that erodes confidence in the independence of the judiciary and threatens the rule of law.

The Commonwealth ( Latimer House) Principles declare that “An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.”

As Commonwealth lawyers it was emphasised the we must unequivocally reaffirm the importance of the independence of the judiciary, remain alive to insidious challenges, and be vigilant in safeguarding and strengthening the judiciary.

## **2. Freedom of movement in post COVID world – Are internal passports on the rise`**

The Covid-19 pandemic has had a significant impact on freedom of movement, with many countries implementing restrictions on travel and border controls to limit the spread of the virus. While these measures were put in place to address the public health emergency, there have been concerns that they could lead to a rise in internal passports or other forms of restrictions on movement. South Africa was no different where even inter provincial travel was restricted for a long time. This session was about the unintended consequences of regulations associated with pandemics and in this specific instance COVID19.

Internal passports, also known as domestic passports or even travel permits as was the case in SA, are documents that restrict the movement of individuals within a country's borders. While they are not a new concept and have been used in various forms in the past, they are generally considered to be an infringement on personal freedom and civil liberties. The question was what remedies ordinary people have given the curtailment of their freedoms.

Currently, there is no evidence to suggest that internal passports are on the rise in the post-Covid world. While some countries have implemented measures such as quarantine requirements or mandatory testing for individuals traveling within their borders, these measures have been temporary and are generally intended to be lifted once the public health emergency is over.



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However, some experts have raised concerns that the pandemic could lead to a more permanent shift towards greater restrictions on movement. For example, some countries have introduced digital health passports, which are designed to verify an individual's Covid-19 status and facilitate travel. While these passports are intended to be voluntary and temporary, there are concerns that they could become permanent fixtures, leading to a de facto internal passport system.

Ultimately, the future of freedom of movement in the post-Covid world is uncertain. While the pandemic has led to significant disruptions in travel and migration, it is unclear whether these changes will be permanent or temporary.

Governments will need to balance public health concerns with the need to protect civil liberties and personal freedom, and it remains to be seen how this balance will be struck in the years to come.

In the South African context, the Constitution guarantees the right to freedom of movement, and the government has generally been cautious in balancing public health concerns with the need to protect civil liberties and personal freedom. While there have been criticism of the government's handling of the pandemic, including concerns about the impact of lockdown on the economy and vulnerable populations, there has been no indication that the government is considering the implementation of internal passports/travel permits as these and other regulations were challenged as unlawful even during the pandemic because they were considered an invasion of democratic rights. All that matters for lawyers should be their ability to hold the government of the day accountable and litigate on behalf of the vulnerable against abuse of power.

### **3. Professional Indemnity Insurance in litigious (or any ) times**

If there is any subject that is a hot potato in South Africa currently this is it. Professional indemnity insurance is a type of insurance that provides protection for professionals who may be sued by clients or customers for alleged errors, omissions, or negligence in the course of their work. In litigious times, such as the present, professional indemnity insurance is becoming increasingly important for businesses and individuals working in



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professions where the risk of litigation is high out to carry same and in South Africa which is increasingly litigious it is very topical for the legal profession.

The rise in litigation is due in part to several factors, including a more litigious culture, increased awareness of legal rights, and the complexity of modern business operations. In addition, the Covid-19 pandemic has led to a surge in lawsuits, particularly in areas such as employment law and healthcare, as businesses and individuals struggle to navigate the legal implications of the pandemic.

Professional indemnity insurance can provide businesses and individuals with protection against the financial consequences of a lawsuit. The insurance can cover the cost of legal fees (which is the case in South Africa), damages awarded to the plaintiff, and other expenses associated with a lawsuit. This can be particularly important for small businesses and individuals who may not have the financial resources to pay for legal costs and damages out of pocket.

It is important to note that professional indemnity insurance does not provide protection against intentional or criminal acts like theft which in South Africa is carried by the Legal Practitioners Fidelity Fund. In addition, there may be limits to the coverage provided by the insurance, depending on the specific policy and the circumstances of the lawsuit.

Professional indemnity insurance is becoming increasingly important in litigious times, as businesses and individuals face a growing risk of lawsuits. While the insurance cannot prevent a lawsuit from being filed, it can provide protection against the financial consequences of a lawsuit and help businesses and individuals manage their risk in an increasingly complex legal environment. Professional Indemnity cover presented in the Province of Nova Scotia in Canada is organised via the Law Society of Nova Scotia. It provides for both PI Cover as well as Cyber Security breaches which quite clearly is a separate category for PI Cover. Individual Practitioners pay for same contrary to the South African scenario where PI Cover is provided for free to the exclusion of cyber crime cover which is excluded by the Legal Practitioners Indemnity Insurance Fund. A one size fits all approach is used in Nova Scotia with all practitioners contributing an amount of \$1800 per annum over and above their subscriptions to ensure that they are not found wanting.



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In South Africa PI cover is provided for free with the LPFF responsible for the premium and the scheme administered by the LPIIF although there is move towards a contribution regime by Practitioners in South Africa.

#### **4. How Professional Indemnity Insurance is Managed:**

Professional indemnity insurance (PII) is typically managed by insurance companies in the South African Instance by the LPIIF or brokers who specialize in providing coverage for specific professions or industries. These insurance providers assess the risks associated with a particular profession or industry and offer coverage to protect against financial losses due to claims made against professionals for errors or omissions in their work.

The process of managing PII typically involves the following steps:

- Identifying the risks: Insurance companies or brokers assess the risks associated with a particular profession or industry to determine the appropriate level of coverage needed to protect against potential losses.
- Setting premiums: The insurance provider determines the premium rate based on the level of risk associated with the profession or industry, as well as other factors such as the size of the business and the coverage required.
- Underwriting: The insurance provider underwrites the policy, which involves assessing the applicant's risk profile, including their claims history and level of experience.
- Issuing policies: Once the underwriting process is complete, the insurance provider issues the policy to the applicant.
- Claims management: If a claim is made against a professional, the insurance provider manages the claim and provides financial support for legal defence, settlements, and damages, up to the policy limits.
- Renewals: PII policies are typically renewed on an annual basis, and the insurance provider reassesses the risks associated with the profession or industry and adjusts premiums accordingly.



- It is important for professionals to carefully review the terms and conditions of their PII policy and ensure that they have adequate coverage to protect themselves and their businesses from potential losses. In all these instances in South Africa none takes place in the base layer of the cover since it is provided for free by the LPIIF but only occurs in relation to top up cover which is obtained in the open market by any practitioner at own cost. However there is as risk assessment document which each practice has to fill in notwithstanding.

##### **5. Distinction between PI cover and cyber Security cover**

Professional indemnity insurance (PII) and cyber security insurance are both types of insurance coverage that can protect businesses from financial losses due to different types of risks. PI covers professionals and businesses against financial losses resulting from claims made against them for errors, omissions or negligent acts related to their professional services. This coverage can include legal defence costs, settlement or judgment awards, and other related expenses.

On the other hand, cyber security insurance (also known as cyber liability insurance) is designed to protect businesses against financial losses due to data breaches, hacking, and other cyber-attacks. This coverage can include the costs of notifying affected customers, restoring systems and data, and any liability claims arising from the breach, among other things.

While there is some overlap between PII and cyber security insurance, there are some key differences. PII is focused on protecting businesses from losses resulting from professional errors or negligence, while cyber security insurance is focused on protecting businesses from losses resulting from cyber-attacks. In addition, cyber security insurance often includes coverage for a range of different risks, such as data loss, network interruptions, and cyber extortion, among others.

Overall, both PII and cyber security insurance can be important types of coverage for businesses, and it's important to carefully consider your specific needs and risks when selecting insurance coverage.



## **6. Indemnity Program**

- In Nova Scotia the program is mandatory and compulsory for 10 000 lawyers and in South Africa mandatory for free.
- Optional coverage - in house lawyers-This is not the case in South Africa
- A Division of the Law Society , Lawyers Indemnity Fund, manages the programme in Nova Scotia but in South Africa as has been pointed out it is run by the LPIIF.
- Managed entirely in-house contrary to south Africa where the service sits in a special vehicle the LPIIF which is responsible for the services below:
  - Policy wording/ optional coverage
  - Claims management
  - Risk management / loss prevention

The indemnity program is made of indemnity policy issued by LIF and the network security and privacy liability (cyber) insurance policy arranged by LIF. These LIF's indemnity policy are designed to provide compensation or reimbursement for losses, damages, or liabilities that may arise from various situations, such as accidents, errors, omissions, or negligence. On the other hand, a network security and privacy liability (cyber) insurance policy is designed to protect against losses or damages resulting from data breaches, cyber-attacks, or other cyber incidents that may affect a company's information technology systems or data. These two types of insurance policies may be offered separately or in combination, depending on the specific needs and risks of the insured entity.

## **7. What to do in litigious times?**

In litigious times, when there is a high risk of legal disputes and lawsuits, it is important to take proactive steps to protect yourself and your business. Here are some things we can do: Respond, Repair and Resolve.

- Respond for example in Cyber category by enrolling your business or obtaining an insurance. Insurance policy started 2021, 1<sup>st</sup> in Canada, insured by coalition, Inc, Swiss Re backed, no application form and it has currently 3500 firms and 10000 lawyers. With Cyber insurance programme, cyber crime prevention is key and has some of





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proactive approach to security and risk. In terms claims, one can report that \$1 million paid on 23 claims since the inception and 51 claims in 2021 with 37 claims in 2022. In South Africa this is on an individual people could do what they can to obtain the necessary cover and set the limits tailored around their own requirements.

Privacy of breach is another concern and some of the examples one can record are attaching wrong document to an email, scanning more than one document into a PDF, loss of USB sticks, phones, laptops, over sharing confidential information in social setting and sending emails to wrong recipients. When it comes to Ransomware claims only 5 ransomware were reported to Coalition in which all 5 firms were completely locked out. 3 firms had no back-ups, only recourse was to pay the criminals for an encryption key, Coalition provided IT support, legal advice and expert ransom negotiators. Lawyer and client stress was massive while unable to carry on business, \$150k was paid on each claim. 2 firms full weekly back ups data restored in 4 days and \$20K paid on each claim. These are examples of what can possibly happen and firms ought to be aware of same and take the necessary precautions. In South Africa for instance one of the biggest firms ENS recently had a judgement against it as a result of such breaches taking place thus putting a burden on the profession to start exploring this on a serious basis for all.

### **8. The need to Plan, Act and Learn**

- Maintain indemnity insurance with an ample limit of indemnity so you can sleep at night
- Fail to plan and you plan to fail. We measure success but we should also risk assess/plan
- Have systems in place to spot when things have gone or are going wrong
- Don't prevaricate. Prompt action is key, but not in a state of panic. Take senior advice and think several steps ahead before acting.



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- Should the matter be passed to a colleague ( or another firm if the client wants)? Don't make it half baked or repeat the same (or different) mistakes "Take two" must be perfect!
- A prompt apology to the client coupled with an action plan can avoid a complaint/claim. Speak to your insurers.
- Analyse and talk about what went wrong. Not just for catharsis but to avoid repetition: look at workloads, supervision/ support, wellbeing, know-how/training, risk assessment/systems.

## 9. Risk Management

Proactive risk management practices:

- Client screening
- Clear and comprehensive engagement letters
- Effective communication with clients,
- Ongoing legal education and training.

## 10. Controlling costs of PII

To control legal costs of professional indemnity insurance lawyers can employ the following strategies:

- Risk Management
- Selection of insurers
- Negotiation of policy terms
- Alternative dispute resolution.

## 11. Selection of Insurers

- The right insurer can also help to control legal costs



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- Lawyers should look for insurers that offer competitive premiums and deductibles, as well as comprehensive coverage that is tailored to their specific needs.
- Choose an insurer with a strong reputation for responsive claims handling and a proven track record of defending claims.

## 12. Alternative Dispute resolution

Mediation or arbitration, as a way to control legal costs associated with professional indemnity insurance. Can be less expensive and time – consuming than traditional litigation, and may also help to preserve relationships with clients.

## 13. Emerging areas PII

- Cybersecurity risks
- Globalisation and cross-border practice
- Claims against Non lawyer professionals
- Regulatory changes
- Reputational risks

## 14. Exclusions in PII

- International or criminal acts
- Fines and penalties
- Prior knowledge
- Contractual obligations
- Insolvency or bankruptcy
- Claims by other lawyers

This report is just focused on what writer believes South Africans and in particular lawyers ought to actually concentrate on going forward and ensure that not only is the rule of law protected but the most vulnerable amongst them.



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**Motlatsi Molefe**

**Chief Executive Officer**

**29<sup>th</sup> March 2023.**