IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **16864/2013**

In the matter between:

PROPELL SPECIALISED FINANCE (PTY) LTD	Plaintiff
v	
ATTORNEYS INSURANCE INDEMNITY FUND NPC	First Defendant
BUURMAN STEMELA LUBBE INC.	Second Defendant
WILHELMINA JACOB LUBBE	Third Defendant
XOLA COLUMBUS STEMELA	Fourth Defendant

Coram: ***Dlodlo J***

Date of Hearing: **29 May 2017**

Date of Judgment: **30 June 2017**

JUDGMENT

DLODLO, J

INTRODUCTION (ISSUES FOR DETERMINATION)

[1] The plaintiff instituted an action as cessionary alleging that it took cession of the second defendant's rights of recourse and it claims as insured, against the first defendant as insurer. The plaintiff specifically relies on a written cession agreement in terms of which the second defendant ceded and made over its rights and claims against the first defendant to the plaintiff. In terms of its amended particulars of claim, the plaintiff seeks monetary relief against only the first defendant and more particularly payment of its six damages claims which it has against the second defendant.

[2] The second defendant is a registered firm of attorneys, i.e. Buurman Stemela Lubbe Incorporated whilst the third and fourth defendants are two directors of that firm of attorneys. Relief is claimed by the plaintiff under the abovementioned case number against the second and fourth defendants. All that was claimed by the plaintiff under the abovementioned case number from the from the second to fourth defendant was rectification of clause 14 and 15 of the written agreement in terms

of which the cession took place between the second defendant and the plaintiff. The rectification relief sought by the plaintiff against the second to fourth defendants was granted by default on 26 March 2014. All the remaining relief sought by the plaintiff is sought against the first defendant.

[3] The first defendant filed a plea on the merits of the plaintiff's action, taking issue with its liability for the six monetary claims of the plaintiff made against the second defendant; and it also took issue with the right of the plaintiff in general to have instituted action against the first defendant.

[4] The first defendant specifically raised three special pleas, which included a first special plea of prescription. Prior to the matter proceeding to trial, the special plea of prescription was withdrawn and the plaintiff's costs in respect thereof were tendered. Thus, this court does not need to concern itself with the first special plea. The matter was set down for hearing for 29 May 2017 on the basis of the parties agreeing that the trial should first proceed only in respect of the special pleas raised by the first defendant and be postponed *sine die* as far as the remainder of the issues are concerned. The parties thus agreed on a separation of issues in terms of Rule 33 (4) of the Uniform Rules of Court.

[5] At the commencement of the trial in the morning of 29 May 2017, and as a result of the joint application of the plaintiff and the first defendant, this court ordered

that the two remaining special pleas raised by the first defendant be separated from the remainder of the issues and that the trial would only proceed in respect of the two special pleas, the remaining issues are to be postponed sine die. The two remaining special pleas deal with respectively: (a) The plaintiff's *locus standi in iudicio*, i.e. whether the plaintiff as cessionary is entitled to make the claims under the abovementioned case number against the first defendant. This special plea is in effect an attack on the cession upon which the plaintiff relies for its *locus standi in iudcio*. I point out that should a finding be made that the cession is bad in fact and/or in law, then the plaintiff simply would have no *locus standi in iudicio* and that would be the end of the matter as it presently stands. (b) The third special plea and the second one for adjudication is a plea in terms of which it is pleaded that the action under the abovementioned case number should be stayed pending the final adjudication of a claim instituted by the second defendant against an entity called Ashtons. This special plea is dependent on the content of the agreement upon which the plaintiff relies and to which reference is made in paragraph 67 of the amended particulars of claim on page 44 of the pleadings bundle. Needless to mention that the first defendant accepted the duty to begin in respect of the two special pleas raised by it. It also conceded that it bears the onus to prove the two special pleas. The first defendant led evidence, the summary of which appears hereunder.

EVIDENCE ON BEHALF OF THE FIRST DEFENDANT

[6] Mr Thomas Harban testified on behalf of the first defendant. He identified himself as the general manager of the first defendant, who is the second most senior executive in control of the day to day management of the first defendant. Mr Harban practised as attorney for ten years until 2007, when he took up employment with the Auditor-General of South Africa, where he remained employed until the 1st of April 2009. From the 1st of April 2009 to 2011, he was employed by Glenrand MIB, a company which by means of contract with the first defendant attended to the day to day management and administration of the first defendant. In 2011, AON South Africa (Pty) Limited took over Glenrand MIB and as a result thereof Mr Harban was transferred to the employment of AON, attended to the management and administration of the first defendant from 2011 until the 31st of December 2014.

[7] On the 1st of January 2015, the contract in terms of which AON SA (Pty) Limited oversaw the administration and management of the first defendant expired. The mentioned agreement was not renewed and since the 1st of January 2015, the first defendant took over the management and administration of its day to day business and attended thereto itself. Mr Harban testified that the first defendant was established as a creature of statute in 1993 and in terms of Section 40A(a)(i) of the Attorneys Act by the Attorneys Fidelity Fund, which is an independent and different fund that has been established some 75 years ago (in terms of Section

25 of the Attorneys Act). The purpose of the Attorneys Fidelity Fund is to compensate members of the public directly for the misappropriation and theft of monies from an attorney's trust account whereas the purpose and aim of the statutory enacted first defendant is to provide insurance cover to practitioners in respect of claims which may proceed from the professional conduct of such practitioners. Mr Harban referred the court to Section 40A (a) (i) of the Attorneys Act.

[8] The first defendant had a predecessor in title, i.e. a Scheme as opposed to a Fund that was known as the Attorneys Fidelity Fund Professional Indemnity Scheme, which was also established by the Attorneys Fidelity Fund in 1986 in terms of Section 40A(a)(ii) of the Attorneys Act. The Scheme did not operate as an insurance company, but was underwritten by a commercial registered insurer, i.e. Aegis (the first defendant however is an insurance company in its own right).

The Scheme that operated and was in place between 1986 and 1993 was replaced by the first defendant. There was a need for a specialised insurer to only take care of the specific needs of a closed group of insureds, i.e. practising attorneys. It was realised that such a special insurance company would be better suited and equipped to deal with the insurance needs of practitioners, than a commercial insurance company like Aegis. This was so because the commercial insurer, i.e. Aegis dealt with the provision of indemnity insurance to practitioners

as part of its larger business which also included attendance to other clients and insureds that were not necessarily practising attorneys.

[9] Mr Harban testified that the only person at the AIIF who is his senior in respect of the day to day management of the Fund is the managing director, who also serves on the board of directors of the first defendant. The board comprise of ten directors of which six are practising attorneys who are nominated by the four Law Societies to serve on the board of the first defendant. The four Law Societies nominate the six attorneys who serve on the board of directors because the individual members of the four Law Societies, i.e. practising attorneys registered with the four Law Societies are in essence the members of the first defendant.

With the aforementioned as the relevant background, Mr Harban testified that the first defendant as an insurer is in fact a *sui generis* insurer who also regards its insureds as being sui generis and accordingly also regards the relationship between itself and its insureds as *sui generis*.

[10] In this respect, Mr Harban's testimony can be summarised as follows: The first aspect which renders the first defendant *sui generis* according to Mr Harban is the fact that it has its origin in legislation. It is a creature of statute, i.e. Section 40A(a)(i) of the Attorneys Act as opposed to commercial insurers like Aegis, which do not originate from legislation, but for reasons of commerce. This aspect places the first defendant on a different footing from other commercial insurers, in

that it was born from legislation for a specific purpose, i.e. to provide insurance cover to a specifically defined risk pool, i.e. practitioners for a limited purpose, i.e. in respect of claims which may proceed from the professional conduct of such practitioners. The enacting legislation also has the result that the licence issued to the first defendant as a licenced insurer is restricted to the aspects for which it was expressly enacted, i.e. to provide insurance cover to practitioners and to enter into bonds of security to the satisfaction of the Master of the High Court, so as to provide security on behalf of a practitioner in respect of work to be done by such practitioner as executor in the estate of a deceased person, etc. In comparison, a commercial insurer comes into existence in order to fulfil a commercial purpose and is therefore not restricted in the licence for which it applies.

[11] The first defendant is a non-profit company and is registered as such. It does not concern itself with the making of a profit but rather the delivery of a service to its members, i.e. all admitted practising attorneys in South Africa. On the other side, the commercial insurer exists for purposes of being commercially viable and has as part of its business the intention and aim to make a profit to the satisfaction of its shareholders as opposed to the members of the first defendant.

[12] All members of the first defendant, i.e. all practising attorneys enjoy automatic insurance cover without it being necessary to apply therefore regardless of whether such indemnity cover is required or not, as opposed to the commercial insurer's client who need to apply for cover. The process of applying for insurance cover is used by the commercial insurer as a means to assess its risk in providing insurance cover, whereas the first defendant does not conduct any risk assessment save for it being known to the first defendant that its risk pool is restricted to a specifically defined group, i.e. practising attorneys. In the case of the first defendant, no premium is paid by the individually insured attorneys who enjoy insurance cover from the first defendant. A single annual premium is instead paid by a separate entity, the Attorneys Fidelity Fund, who in turn generates its income from the interest raised on the trust accounts of all practising attorneys. On the other hand, the commercial insurer only accepts the risk placed with it, against payment of a pre-determined premium by the individually insured. The premium is determined in accordance with the risk assessment conducted by the insurer.

[13] Upon the decision to accept the risk, a commercial insurer will in addition to the premium determined by it, against payment of which it would accept the risk, also dictate other terms and conditions of the policy on the basis of which it is willing to accept the risk. On the other hand, the first defendant has one standard master policy with exactly the same terms and conditions applicable to every insured

irrespective of the individual details applicable to every respective insured. The insured placing insurance with a commercial insurer will make known to that insurer at least its identity. That identity will be part of the risk analysis and risk assessment conducted by the commercial insurer as opposed to the First Defendant, who do not have any details of the identity of the insureds covered by it until a claim is made. The only information available to the first defendant is that its insureds all belong to a defined group, i.e. practising attorneys. In the case of the commercial insurer, it will be in possession of a file in respect of its respective insureds, containing inter alia the application form, risk assessment, correspondence pertaining to renewal of insurance, unique terms and conditions etc. as opposed to the first defendant who keeps no records in respect of its insureds, who enjoy insurance cover irrespective of the differences between them. With reference to the aforegoing aspects, Mr Harban during his testimony emphasised the sui generis nature of the first defendant as an insurer in comparison to a commercial insurer.

[14] In respect of the *sui generis* nature of the first defendant's insured, Mr Harban has emphasised that: It is only admitted attorneys who qualify for cover with the first defendant as opposed to the public at large which qualifies as potential insureds of commercial insurers. To be an admitted attorney a person needs to satisfy no less than six requirements. To be admitted as an attorney you need to be a South African Citizen, pass matric with University exception, obtain the

prescribed law degree, serve the prescribed period of articles, successfully complete the Attorneys Admission Examination and satisfy a Court on application that you are a fit and proper person to be admitted as an attorney. In addition to it being a requirement that the insureds of the first defendant should be admitted attorneys, they should also practise on a day to day basis as attorneys as the enacting legislation stipulates that the first defendant shall provide insurance cover to practitioners in respect of claims which may proceed from the professional conduct of such practitioners. Lastly, the insureds enjoying cover with the first defendant, need to be in possession of a Fidelity Fund Certificate or they need to be obliged to apply for a Fidelity Fund Certificate. The requirements to obtain a Fidelity Fund Certificate are an annual unqualified audit and payment the requisite annual fee. Mr Harban emphasised the fact that the requirement pertaining to an annual unqualified audit is regarded by the first defendant as important as it serves as evidence of the healthy status of its respective insureds' practices.

[15] The *sui generis* nature of the insured enjoying cover with the first defendant can be summarised by stating that all insureds fall within a specifically defined closed group, i.e. practising attorneys who on an annual basis receive an unqualified audit of their trust accounts. The insureds enjoying cover with the first defendant are accordingly a group of people to which very specific requirements are applicable in order to qualify as a member of the group. When dealing with the *sui*

generis nature of the relationship between the *sui generis* insurer, i.e. the first defendant and its *sui generis* insureds, i.e. the practising attorneys, Mr Harban highlighted the following aspects:

The relationship is a relationship borne out of legislation. The public company to which reference is made in Section 40A(a)(i) of the Attorneys Act is the first defendant. The only other party or entity referred to in that section is the practitioners which are the defined closed group of people. The relationship is thus regarded by the first defendant as a personal and closed relationship which allows for no one else, but the first defendant and practitioners.

[16] In the case of the commercial insurer, its relationship with its insureds is not borne from legislation but in fact comes into existence as a result of commerce. It is also for this reason that the commercial insurers' insured is not restricted to a specific closed group but virtually allows for the public as a whole to enjoy cover upon making successful application for such. In the case of the first defendant, the very same legislation giving rise to the personal relationship also restricts the cover applicable to that relationship. The relationship is ex facie the empowering and enacting legislation restricted to claims which may proceed from the professional conduct of the practitioners enjoying cover. In the case of the commercial insurer, the relationship is restricted by the election of the parties only and on the basis of commercial decisions and not as a result of any of legislation.

[17] In the case of the commercial insurer, the insurance contract usually has a limited duration of one year where after a renewal is considered by the insurer. On the side of the AIIF, the insurance cover is continuing on condition only that the attorney remains a practising attorney. The cover extended by the first defendant to its members is more lenient than the cover enjoyed by insureds under a commercial policy. Clause 6.5.1 on page 5 of exhibit "A" serves as an example of the more lenient nature of the cover extended by the first defendant to its insureds. This clause specifically provides that the first defendant shall not seek to void, repudiate or rescind the insurance upon any ground whatsoever including in particular non-disclosure or misrepresentation. This type of leniency is ordinarily not associated with the terms and conditions of a commercial insurance policy. In the case of a commercial insurance policy the expense of litigation incurred as a result of the defence of any claim is deducted from the cover enjoyed by the insured and as a result the cover is diminished by the cost of litigation. In the case of the first defendant, the expense pertaining to litigation in defending any particular claim, is covered in addition to the indemnity cover enjoyed by the insured, the extent of which appears from clause 8.4 of the policy and pages 7 and 8 of exhibit "A".

[18] In addition to the more lenient nature of the policy, the first defendant's insurance policy in fact makes it possible for its insured to elect to approach the first defendant to consider the settlement of the claim being made against the

insured and not to necessarily defend such a claim. This provision enables the closed group of insureds, i.e. practising attorneys to maintain its relationship with its client and to ensure the future existence of that relationship. He referred to Clause 6.12 of the insurance policy on page 6 of exhibit 'A'. The aforementioned is the evidence specifically adduced in respect of the *sui generis* nature of the relationship between the *sui generis* insurer, i.e. the first defendant and its *sui generis* insureds, i.e. the practising attorneys.

In response to questions posed under cross-examination and dealt with in re-examination, Mr Harban testified *inter alia* as follows:

Although the first defendant is a registered short-term insurer like other short-term insurers, it differs from other short-term insurers in that it is a creature of statute that originates from Section 40A(a)(i) of the Attorneys Act. The enacting legislation gives rise to the personal relationship between the first defendant and the only other party mentioned in the legislation, i.e. practitioners. The empowering legislation also restricts the business of the first defendant. Although the policy concerned is more lenient than ordinary commercial insurance policies, it is more lenient towards the intended beneficiary, i.e. insureds as defined, i.e. practitioners.

[18] Although the plea in response to the plaintiff's citation denies that the plaintiff was previously known as Baedex, paragraph 67 of the particulars of claim in terms of which it is alleged that *inter alia* the plaintiff and second defendant entered into

the agreement containing the cession, is common cause for purposes of adjudicating the special pleas. The admission of liability that appears *ex facie* the agreement entered into between the plaintiff and the second defendant is an admission of liability in respect of the damages allegedly suffered by the plaintiff and in respect of the six claims of the plaintiff instituted against the second defendant in the Magistrate's Court. This admission of liability by the second defendant prejudices the first defendant in that it would be bound by the admission if it is held that is liable to indemnify the second defendant in terms of the policy. In such a case, it would not be able to defend the six claims on the merit thereof, because the insured have already admitted liability in the very same agreement which contains the cession. It is for this reason that the first defendant is prejudiced by the mentioned admission.

[19] The admission set out on page 31 of exhibit "A" is to be differentiated from clause 14.2 of the very same agreement in terms of which it is stated that the second defendant does not guarantee that it has any right to cede. The admission, on page 31 pertains to an admission of liability in respect of the six claims based on the misappropriation of money whereas clause 14.2 deals with the rights of recourse and claims ceded by the Second Defendant. The repudiation of the second defendant's claims for indemnification does not result in the first defendant not having any further interest in the policy. This is so because a finding that the repudiation was not justified will give rise to liability on the part of

the first defendant in terms of the insurance policy. Such finding by a Court or other entity will constitutes the first stage of a two-stage enquiry. If it is held that the first defendant is liable in terms of the policy to indemnify the second defendant, the first defendant would in terms of the remainder of the policy inclusive of clause 6.6 and 6.7.1 thereof be entitled to insist upon defending the underlying claims, i.e. the six claims of the plaintiff in the name of the insured, i.e. the second defendant. The first defendant would also be entitled to insist upon the assistance of the insured, i.e. the second defendant in resisting the six underlying claims. The six underlying claims will constitute the second stage of the enquiry. The effect of the cession is to render the first defendant's rights in terms of clause 6.6 and 6.7.1 nugatory because it is absurd and nonsensical to expect of the plaintiff who then because of the cession finds itself in the shoes of the insured to defend its claim against itself and/or to render assistance to the first defendant to defend its claim against itself.

[20] In practice, the two-stage enquiry would be dealt with irrespective of the form of the pleadings by first dealing with the first issue, i.e. the issue of liability for indemnification under the policy before the second issue, i.e. liability in respect of the six claims are dealt with. This happens every day in practice and in terms of the provisions of Rule 33(4) of the Uniform Rules of Court. It is thus not a case where because it has repudiated the claims of the second defendant under the policy and has thus walked away, the first defendant can thereafter not rely on the

provisions of the policy if it is found that it is in fact in terms of the policy liable to provide indemnification. In the context of the present matter and present litigation, the first defendant is prejudiced and its position is weakened because the cession brought about a factual situation where the insured and the third party claiming against the insured are effectively the same entity, i.e. the plaintiff. The effect of this is that the aforementioned two-stage enquiry is forced into one, because if it is found that the first defendant is liable to provide indemnification, such indemnification needs to be provided to the new insured, i.e. the plaintiff who would not be able to effectively assist in the defence of its very own six underlying claims.

[21] The drafter of the policy probably did not include an express prohibition against cession in so many words because on a proper construction of the policy as a whole and with reference to the preamble, clause 2.5, clause 1, clause 6.6, 6.7.1 and 6.8 thereof in particular, it is clear that the drafter contemplated that an insured would not be entitled to transfer its rights of indemnification. Other than what the plaintiff seems to suggest, there is no difference between a claim for specific performance and effectively becoming the insured in terms of the policy. The only party who can by means of specific performance claim performance of the obligations of the insurer under the policy is the insured. Therefore, a claim for specific performance can only be brought by the insured. It is therefore nonsensical to suggest that whilst the plaintiff is claiming specific performance of

the first defendant's obligations under the indemnification policy, it has not taken in the position of the insured.

DISCUSSION (APPLICATION OF RELEVANT LEGAL PRINCIPLES)

[22] Mr Van Der Merwe was very critical of Mr Harban's evidence. He described him as argumentative and evasive. In his observation, this was not a good witness. He described him further as not independent. He asked this court not to trust or rely upon Mr Harban's evidence. I must hasten to mention that I totally differ from the views expressed by Mr Van Der Merwe with regard to Mr Harban. I expand on this later in this judgment. Mr Van Der Merwe contended that the second defendant did not admit liability to the plaintiff or made any admission in respect of the grounds upon which the relief is sought against the first plaintiff vicarious liability of second defendant) for the damages suffered by the plaintiff due to the actions of Buurman and/or Van Der Merwe alternatively, a breach of the second defendant's legal duties to the plaintiff. Cf **Absa Bank Ltd v Swanepoel NO** 2004 (6) SA 178 (SCA) at [6] and [7]. Referring to **Christie's Law of Contract in South Africa** (7th ed) at page 261, Mr Van Der Merwe contended that in the event of any difficulty in interpreting or dealing with any contradiction between clause 14.2 and the recordal of the Cession Agreement, Clause 14.2 have greater weight in the light of the maxims of *generalia specialibus non-derogant or expressio unius est exclusio alterius.* He rejected the argument regarding the sui generis identity of the insurer and the insured (inclusive of the sui generis

relationship between them and due to the *sui generis* origin), nature and extent of the insurance contract and related legislation and dismissed same as a red herring.

[23] Mr Van Der Merwe contended that whatever the nature, origin or cause of the existence of the first defendant and its insured, the fact remains that the first defendant is a short-term insurer and that the Policy is a written insurance contract. In his contention, the rights and obligations of the parties to the Policy should be determined from the Policy itself and according to ordinary contractual principles. He referred me to DM Davis: Gordon & Getz – **The South African Law of Insurance** (4 ed), Volume 12.1 of **LAWSA** at 261, and at page 246. In Van Der Merwe's contention, there is no statutory or other legal prohibition against the cession, nor is it immoral or contrary to public policy. He pointed out that, on the contrary, the rule of our law is that all rights in *personam*, subject to certain exceptions based principally upon the personal nature of the right, can be freely ceded. He referred to **Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd** 1968 (3) SA 166 (A).

[24] The first defendant seeks to rely on alleged implied term (never pleaded) or a tacit term. Of course a tacit term will only be inferred if it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that one can be confident that if at the time the contract was being negotiated someone had said to

the parties: *'What will happen in such a case?'* they would have both replied: *'of course, so-and- so we did not trouble to say that; it is too clear. This is known as the officious bystander'* test. However, since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional. See **Wilkins NO v Voges** 1994 (3) SA 130 (A) at 136-137.

It appears that the first defendant is alleging that if it should be held that it wrongly repudiated the Claims, it has the option to elect to either pay same or to defend the actions instituted by the plaintiff against the second defendant. However, because of the alleged admission made in the Cession Agreement, as well as the fact that it cannot secure the assistance of the second defendant as provided in terms of the Policy, particularly in opposing the Action, it is materially prejudiced to such a degree that the Claims could not and were not lawfully and validly ceded.

[25] The Policy is and remains an insurance contract between the first defendant (as the insurer) and the second defendant (as the insured). Cession is a juristic act which transfers the right from the estate of the creditor, the cedent, to that of another, the cessionary, who thereby becomes creditor, in his stead. See **Johnson v Incorporated General Insurance Ltd** 1983 (1) SA 318 (A) at 331 G-H. It is not

an assignment or a combined cession and delegation whereby a third party, by agreement of all concerned, steps into the shoes of one of the parties to a contract and replaces it entirely both as creditor and debtor. See **Simon NO v Air Operations of Europe AB and Others** 1999 (1) SA 217 (SCA) at 2281. In Mr Van Der Merwe's submissions, the plaintiff only acquired the claims. It did not substitute the second defendant as the insured in terms of the Policy. He pointed out that nothing precludes the first defendant from relying on, *inter alia*, clauses 6.7.1 and 6.7.2 of the Policy as against the second defendant, whilst the claims were submitted by the second defendant prior to the repudiation by the first defendant, as required by clause 6.1 thereof. Mr Van Der Merwe maintained that the first defendant repudiated the claims and once it had done so, the second defendant had no option but to deal with the actions instituted against it as it deemed appropriate in its sole discretion. In the exercise of its discretion, the second defendant concluded the Cession Agreement on terms it deemed to be appropriate.

[26] In **Dettmann v Goldfain & Another** 1975 (3) SA 385 (A) it was held, *inter alia*, that:

'…prima facie, all contractual rights can be transmitted unless their nature involves a delectus personae or the contract itself shows that they were not intended to be ceded.'

The above decision also held that in order to determine whether the nature of the contractual rights involves a *delectus personae* and whether the contract itself

shows that the rights were not intended to be ceded, all circumstances would have to be taken into account. In other words, the proper interpretation depends on all circumstances. What this tells me is that in order to adjudicate whether the nature of the contractual rights concerned in the present case involves a *delectus personae* and whether the contract itself shows that the rights concerned were not intended to be ceded, all circumstances need to be taken into account. The fact that all circumstances need to be considered even when it comes to the interpretation of the contract concerned, is also borne out by the recent law on the issue of interpretation. In **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** 2014 (2) SA 494 (SCA), the following was held in respect of interpretation at paragraph 12:

"[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.'

[27] In the recent decision of the Supreme Court of Appeal reported as **G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd & Another** 2017 (2) SA 24 (SCA), the following was held in context of a trial concerned with the interpretation of a contract in the Court *a quo* at paragraphs 10, 12 and 13:

'[10] No evidence was led at the trial and, after argument, Van Oosten J held that the time limitation in clause 9.9 of the agreements did not apply to the respondents' delictual claims. The trial court accordingly dismissed the special plea. As recorded above, the appellant's subsequent appeal was dismissed by the full court which agreed with Van Oosten J that clause 9.9 of the agreements did not apply to delictual claims and that the respondents' claims were accordingly not time-barred.'

'[12] To determine whether or not the respondents' delictual claims are time-barred, it is necessary to interpret the agreements and in particular clause 9.9 thereof. Whilst the starting point is the words of the agreements, it has to be borne in mind, as emphasised by Lewis JA in Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA) ([2015] ZASCA 111) para 27, that this court has consistently held that the interpretative process is one of ascertaining the intention of the parties — in this case, what they meant to achieve by incorporating clause 9.9 in the agreements. To this end the court has to examine all the circumstances surrounding the conclusion of the agreements, ie the factual matrix or context, including any relevant subsequent conduct of the parties.

[13] As recorded above, the special plea was determined separately and at the hearing neither party presented any evidence. In the result no facts were available to the court in the interpretative process regarding the circumstances surrounding the conclusion of the agreements or of any relevant subsequent conduct of the parties. The only available evidence upon which the court had to determine what the parties meant to achieve by incorporating clause 9.9 in the agreements, and in particular whether or not they intended including delictual claims within the ambit of clause 9.9, was the agreements themselves. Whilst it is not for the court to prescribe to litigants whether or not, or to what extent, they should present evidence, it seems to me that a party bearing the onus in a dispute regarding the proper interpretation of a contract, should bear in mind that to simply rely on a linguistic interpretation alone may not suffice to discharge the onus. Therefore, if available, relevant evidence regarding the factual

matrix in which the contract was concluded and the subsequent conduct of the parties, should be called in aid of the interpretative process.'

[28] In respect of the nature of the rights involving a *delectus personae* courts have expressed themselves fully. For instance in **Hersch v Nel** 1948 (3) SA 686 (A), it was held within the context of a right to buy being ceded that where the contract was for cash, it could make no difference to the vendor (in *casu t*he insurer) whether he is dealing with a millionaire or a pauper, with an honest man or a convicted thief. It was held that because the right to buy, that was ceded, was one of purchase for cash, there could not be any objection but that an option to obtain a loan would obviously stand on an entirely different footing from an option to buy for cash. This is authority for the proposition that in order to determine whether the nature of the right involves a *delectus personae*, it is necessary in the present context to determine if it makes a difference to the insurer (i.e. the first defendant) whether he is dealing with a millionaire or a pauper etc and thus whether it makes a difference to it, whether he is dealing with an attorney as opposed to the plaintiff, i.e. an entity that is not a practitioner. The testimony led in this matter is that it is important to the first defendant to only deal with practising attorneys as its legislative mandate restricts it to the provision of insurance cover for practising attorneys.

[29] It seems correct to contend that if the rights of the practising attorneys to indemnification are held to be capable of transfer, it will prejudice the position of the first defendant because then whenever the stage enquiry arises, it would not be able to defend the underlying claims in the name of the insured and would not be able to insist upon the assistance of the insured in defending those underlying claims. In **South African Board of Executors and Trust Co. Ltd (in liquidation) v Gluckman** 1967 (1) SA 534 (A), the Court had to decide whether the right of a liquidator to bring proceedings for the setting aside of a disposition without value could be ceded to a third party. The court held that the rights concerned involves a *delectus personae*. In this regard, the court specifically held that the right had its origin in legislation and that the legislation clearly did not contemplate the exercise of the right by a third party. The court further held that the right in terms of the legislation could only be exercised by the liquidator in a representative capacity and that, that capacity cannot by cession be bestowed upon another. In the present matter, the right to automatic indemnification / insurance cover originates from legislation. See Section 40A (a) (i) of the Attorneys Act. The legislation does not provide for the right to enjoy insurance cover to be exercised by a third party, i.e. a party other than a practitioner. The empowering legislation (the Attorneys Act) do not contemplate the exercise of the right by a third party (the plaintiff – an entity which is not an attorney). All what the empowering and enacting legislation stipulates is that the first defendant shall

provide insurance cover to practitioners, i.e. a capacity that cannot by cession be bestowed upon another.

[30] In **McPhee v McPhee & Others** 1989 (2) SA 765 (N), the following was held at 768C:

'I am in respectful agreement with the learned Judge's views. Some rights are so personal that they can never be transferred to anyone else. The examples given by Nestadt J are, in my view, clear. Others can be found in the law of cession where a delectus personae is involved, although, of course, in that instance the impediment need not be absolute for in some cases at least the right may be ceded with the consent of another party. See Eastern Rand Exploration Co Ltd v Nel and Others 1903 TS 42 at 53. Perhaps a more suitable example can be found in the prohibition against the cession of maintenance orders. See Schierhout v Union Government (Minister of Justice) 1926 AD 286 at 291 and Greathead v Greathead 1946 TPD 404 at 411.

Consider the (perhaps fanciful) case of a husband suing his wife for a divorce. In the course of the proceedings the wife obtains an order for maintenance; in some interlocutory step the husband obtains an order for costs. Clearly, on the cases, he could not set off his claim for costs against her right to maintenance. Nor can she cede her right to maintenance to a third party. Could she, in order to enforce her claim for maintenance, attach his right, title and interest in his action? Clearly she could not. Mr McLaren submitted that this is so because the transaction would be contra bonos mores. It might be, but that is surely not the whole answer. The reality is that the right is so personal to her husband that he cannot be deprived of it and no one else could exercise it."

Thus a right to maintenance cannot be ceded to a third party because the right is so personal to the relationship between husband and wife that it cannot be transferred to anyone else. In the present matter, the right to indemnification originates from the personal relationship between the first defendant as a creature of statute and the only other party to which reference is made by the enacting legislation, i.e. practitioners. I am of the view that the right of an attorney

for indemnification in the present matter cannot be ceded because of the personal and restricted nature of the relationship brought about by the empowering and enacting legislation. The evidence by Mr Harban which I accept, shows that all short-term insurers are not on exactly the same footing. As opposed to other short-term insurers, the first defendant was enacted and borne from legislation. The relationship which entitles any practising attorney to indemnification by the First Defendant is a relationship that would not exist outside of the specific legislative provision. It is comparable to a right of maintenance that would not exist outside the relationship of husband and wife.

[31] I was also referred to **Densam (Pty) Ltd v Cywilant (Pty) Ltd** 1991 (1) SA 100 (A) where the then Appellate Division held the following at page 112B to G:

'This approach I consider to be contrary to principle and authority. The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a delectus personae falls to be answered with reference, not to the nature of the cedent's obligation vis-à-vis the debtor, which remains unaffected by the cession, but to the nature of the debtor's obligation vis-à-vis the cedent, which is the counterpart of the cedent's right, the subject-matter of the transfer comprising the cession. The point can be demonstrated by means of the lecture-room example of a contract between master and servant which involves the rendering of personal services by the servant to his master: the master may not cede his right (or claim) to receive the services from the servant to a third party without the servant's consent because of the nature of the latter's obligation to render the services; but at common law the servant may freely cede to a third party his right (or claim) to be remunerated for his services, because of the nature of the master's corresponding obligation to pay for them, and despite the nature of the servant's obligation to render them. In Eastern Rand Exploration Co Ltd v A J T Nel, J L Nel, S M Nel, M M E Nel's Guardian and D J Sim 1903 TS 42 at 53 Innes CJ stated the principle of our law as follows:

'Now, speaking generally, the question of whether one of two contracting parties can by cession of his interest, establish a cessionary in his place without the consent of the other contracting party depends upon whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it. Subject to certain exceptions founded upon the above principle rights of action may, by our law, be freely ceded.'

When the learned Chief Justice referred to the contract being personal in its character, it is clear, in my view, that he had in mind the obligation of the debtor ('the other party'), for it is only in relation to the performance of that obligation that it can make any difference to the debtor whether it is the cedent or the cessionary who is entitled to enforce the contract.'

In the present matter, the nature of the debtor's obligation *vis-à-vis* the cedent is to provide indemnity to a defined and closed risk pool. Not only is that obligation restricted by the empowering legislation to a specific group, i.e. practitioners, the licence conditions under which the first defendant operates also restricts its obligation to the provision of indemnification to practitioners. The current situation does fall within the ambit of the lecture room example mentioned above. The practitioner may not cede his right or claim to receive this personal service from the first defendant to a third party without the first defendant's consent because of the restricted and legislative nature of the first defendant's obligation to render the service. In this regard I put importance to the evidence led which shows that the first defendant is rendering a service as a non-profit company to its members, i.e. the practitioners as opposed to commercial insurers who undertake and accept the risk in return for commercial gain.

[32] In **Namex (Pty) Ltd v Commissioner for Inland Revenue** 1992 (2) SA 761 (C), this court had to decide whether the Commissioner for Inland Revenue could cede its claim for income tax in circumstances where the evidence revealed that the Commissioner had participated in numerous schemes involving remitting of taxes and cession of the Commissioner's claim for taxes. The court held *inter alia* as follows on page 773 to 774:

'How does one deal with questions of confidentiality? Can the cessionary have access to defendant's files? What if plaintiff wishes to review the Government Mining Engineer's determination or to appeal against the assessment? Need I continue?

The claim of the defendant for income tax cannot be ceded. He is, in relation to all matters of tax, akin to a delectus persona and he may not dispose of his rights or his duties. The rights and duties of a local authority to collect rates and taxes have similarly been held not to be capable of waiver or remission (see the Mercian case supra).

It is apposite to note that in Nokes v Doncaster Amalgamated Collieries Ltd [1940] 3 All ER 549 (HL), the House of Lords held that an order under the Companies Act 1929 which transferred the property, rights and liabilities of a company to another company did not ipso facto transfer contracts of personal service, which are by their nature incapable of transfer. Viscount Simon LC put it thus (at 555):

Such a right cannot be the subject of gift or bequest. It cannot be bought or sold. It forms no part of the assets of the employer for the purpose of administering his estate. In short, s 154, when it provides for "transfer", is providing, in my opinion, for the transfer of those rights which are not incapable of transfer, and is not contemplating the transfer of rights which are by their nature incapable of being transferred.'

It is also clear from what I have said above that defendant cannot agree to accept payment from the 'receivers' and thereby release the company as the scheme requires creditors to do.

Where the Legislature intends defendant to have the power to remit moneys due to the State, the power to do so is expressly and specifically given. Thus, in terms of s 76 of the Income Tax Act, defendant may remit a penalty or allow payment by instalments. Nowhere in the Income Tax Act is defendant given a general power to reduce, waive, cede or otherwise alienate a claim for tax.'

Mr Heyns submitted that in the present circumstances, the claim of the practitioner for indemnification is by its very nature incapable of transfer. I agree. The automatic right originates from legislation and is afforded to all practitioners. In my view, it being an automatic right specifically given, it cannot be the subject of gift or bequest. It cannot be bought or sold. It forms part and parcel of the capacity of a practitioner as such, its capacity cannot by cession be bestowed upon another. The obligation on the part of the first defendant to provide insurance cover is expressly and specifically given by the legislator in respect of only practitioners and no one else.

[33] As to *a pactum de non cedendo*, one must have regard to what was held in **Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd** 1968 (3) SA 166 (A) at 189D:

'The rule of our law is that all rights in personam, subject to certain exceptions based principally upon the personal nature of the rights, not here relevant, can be freely ceded, but an owner's rights of free disposal of his property may be restricted by a pactum de non cedendo. The effect of such a pactum depends upon the circumstances. Voet, 2.14.20 and Sande, Restraints, 4.1.1, and 4.2.1, point out that an agreement whereby an owner deprives himself of the free right to deal with his own property, is without effect unless the other contracting party has an interest in the restriction, contained in the very agreement recording the right, for in such a case the right itself is limited by the stipulation against alienation and can be relied upon by the debtor for whose benefit the stipulationwas made. G (Paiges v Van Rhyn Gold Mines Estates Ltd., 1920 AD 600 at pp. 615 and 617, and see Windscheid, op. cit., para. (C) and note 5, and Dernburg, Pandekten, 7th ed., vol. II, p. 141).'

The full bench of this division upheld the aforementioned principle in the matter of **Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd** 2008 (4) SA 510 (C). It indeed

follows from the abovementioned decisions that an owner's right of free disposal may be restricted by a *pactum de non cedendo*. All that must be borne in mind is that all circumstances need to be considered in order to determine whether *a pactum de non cedendo* is present. The truth is where the right is created with a restriction is contained in the very agreement recording the right, the restriction is enforceable without qualification against the entire world. I consider Mr Harban's evidence as important. He testified that although the Policy document and the enacting legislation do not in so many words contain an express prohibition against cession, both the legislation and the Policy properly construed at the very least provide an implied alternatively, tacit agreement between the only two parties to the relationship, i.e. the first defendant and the insured as defined not to transfer rights and/or claims without the consent of the insurer.

[34] In **Densam (Pty) Ltd v Cywilnat (Pty) Ltd** 1991 (1) SA 100 (A), the following was said on page 114B:

'An agreement between a banker and its customer that the former will not cede its claim against the latter cannot be implied in the contract between them as a matter of law; if there is no express agreement to that effect it can be found to exist only by way of tacit consensus between the parties, which is to be inferred from all the relevant surrounding circumstances.'

One must point out though, other than in the instance of an agreement between a banker and its customer where an agreement not to cede cannot be implied into the contract between them as a matter of law, it is possible in the present matter for such an agreement to be implied from the empowering legislation, which

expressly restricts the obligation to provide insurance cover to practitioners i.e. a specifically closed defined group. Additionally, the agreement can be found to exist by way of tacit consensus between the parties, i.e. the first defendant and the second defendant (which is to be inferred from all the relevant surrounding circumstances).

[35] The evidence has shown that the Policy specifically provides for three parties. The first party is the insured as defined. Importantly, the definition of the insured is in line with the enacting legislation and it restricts insureds to practitioners. The second is the insurer, i.e. the first defendant. The Policy also provides for a third party who is to be differentiated from the insured as defined. A further reference to the third party is to be found in clause 6.8 which refers to *'any person'* other than the insured (as defined). It is clear from a proper consideration of the wording of the Policy concerned that the insurer and insured by way of tacit consensus at least agreed that the insured's rights of indemnification would not be capable of transfer as such transfer will bring about a situation where the three parties envisaged by the Policy will effectively become two parties. Clause 6.6 and 6.7.1 evidence that the at least tacit consensus referred to above would not be capable of cession. These two clauses *inter alia* provide that the insurer shall be entitled if it so desires, to take over the conduct in the name of the insured of the defence of any claim. These clauses further provide that the insured shall

render such assistance as the insurer may reasonably require (in respect of any claim being made against the insured).

[36] Perhaps it may be of importance to point out that clauses 6.6 and 6.7.1 of the Policy cannot and do not vanish or cease to exist simply because there has been a repudiation. If it is held during first stage of the two-stage enquiry referred to by Mr Harban that there is liability on the part of the first defendant under the Policy, the first defendant is and remains entitled to rely on the provisions of *inter alia* clause 6.6 and 6.7.1 of the Policy. As mentioned above, it follows from *inter alia* those clauses that the parties at least had tacit consensus that the rights of the second defendant would not be capable of cession. In **Bellingan v Clive Ferreira & Associates CC & Others** 1998 (4) SA 382 (W), the following was said at page 396C:

"If the respondents' case is indeed that the alleged term restricting Prima Bank's right to cede was tacit, then considerations such as business efficacy or the application of the meddlesome onlooker test would arise. On that score, in my view, business efficacy would not require the implication of such a term and I consider that the parties would have given different answers to the questions posed by the hypothetical meddlesome onlooker.'

If the meddlesome onlooker is asked in the present circumstances whether an attorney who enjoys an automatic right of indemnification, without the obligation to make payment of a premium, which right originates from legislation and is restricted in its application to attorneys and claims arising out of the conduct of the profession, would be entitled to cede that right to a non-attorney, the answer most

certainly would be in the negative. This would even be more so if considerations of business efficacy are applied.

[37] The right to indemnification applies automatically because the duty to provide the insurance cover originates from legislation. Attorneys pay no premium in respect of the insurance cover enjoyed; at least they make no direct payment of premiums. The provisions of the Policy are more lenient than those applicable to ordinary insurance cover. The Policy even provides for an election on the part of the insured not to defend claims being made against it but for same to be settled.

I am of the view that it would not make business sense to conclude that rights so personal in nature are capable of being transferred outside of the ambit and scope of the defined closed group entitled to those rights. In practice, that will mean that the public at large may become entitled to rights which the legislator never contemplated to bestow upon anybody else but a practitioner. It will mean (I imagine) that the public at large may become entitled to rights which the parties to the Policy certainly did not contemplate.

[38] In **Corinth Properties (Pty) Ltd v Firstrand Bank Ltd** 2002 (6) SA 540 (W) the court held as follows (in respect of a cession that impairs and negatively impacts the right of the debtor, i.e. the first defendant in this matter:

'At page 159 he said, following Voet 18.4.13, that 'a creditor cannot make the position of the debtor more grievous by means of a cession, and that, speaking generally, the cessionary must be subject to the disadvantages that are incidental to his position. . . . Voet says it must also be

considered inequitable that the rights of debtors should be impaired or made more grievous by the acts of their creditors, especially as what is not permitted to the defendant or debtor ought not to be allowed to a plaintiff or creditor.'

Voet 18.4.13, after referring to the rule that a cessionary should be subject to the same rights and exceptions as the cedent, stated that:

'Finally if a non-privileged person has ceded his actions to one who is privileged, the cessionary cannot in the collection of such an account exercise any privilege arising out of his own status, but ought to employ the common law of the cedent. It would be extremely harsh for the cause either of the debtor or of other creditors to be made the harder by a change of creditor. Just as it was thought ridiculous for the claim of creditors to be destroyed or altered by the agreements with the debtors, so contrariwise ought it also to be deemed unfair for the rights of debtors to be rendered worse or harder by the act of a creditor. Especially is that so since nothing ought to be allowed to a plaintiff or creditor which is not allowed to a defendant or debtor; and generally the cause of a purchaser in regard to claiming and defending ought to be the same as that of his vendor.'

The evidence showed at least three instances in which the position of the debtor was made more grievous by means of cession. It is pointed out that the rights of the first defendant would be impaired. In this regard, Mr Harban specifically testified that the second defendant in violation of the provisions of clause 6.6 of the insurance Policy admitted liability in respect of the six claims that the plaintiff have instituted against the second defendant. The admission of liability appears from page 31 of Exhibit "A" where it is stated that the second defendant has suffered a loss caused by misappropriation of money and is liable to the plaintiff for such funds that the plaintiff has lost by the aforesaid misappropriation. The evidence by Mr Harban is that in addition to this admission being a contravention of the provisions of clause 6.6 of the Policy, it is also rendering the position of the first defendant more grievous. He testified that it is in fact impacting on the first

defendant's its rights as it would be bound by the admission of its insured if it is held that it is liable in terms of the insurance Policy to indemnify the insured.

[39] The same clearly applies to the right of the first defendant to insist upon assistance from its insured in defending the plaintiff's claims made against the insured, i.e. the second defendant and in respect of the first defendant's right to defend the plaintiff's claim against the insured, as envisaged in clause 6.6 of the Policy in the event of it being held that the first defendant is liable to indemnify the second defendant. Mr Heyns contended that the suggestion by Mr Van Der Merwe that because of the repudiation, the second defendant was sent away whereafter the right to step into the shoes of the insured and to defend the six claims in the name of the insured as well as the right to insist upon assistance from the insured can never be claimed, is simply wrong. Mr Heyns argued that *'The correct position is, if it is held during the first stage of the enquiry referred to by Mr Harban that there is liability on the part of the First Defendant to indemnify the Second Defendant, then such indemnification needs to be done in terms of the policy. It is this very policy that contains clauses 6.6 and 6.7.1 amongst others. The last-mentioned clauses are thus available for the First Defendant to rely upon irrespective of whether it initially repudiated the Second Defendant's claim.'*

Clause 6.6 states that the insured shall not without the written consent of the insurer make any admission.

[40] I bear in mind the evidence by Mr Harban that the relationship between the first defendant and its insured, i.e. practitioners was of such a personal and close nature that the rights flowing from that relationship cannot be ceded. Mr Harban specifically relied upon the legislation and defined the relationship as being restricted to the parties to which express reference is made by the empowering legislation, i.e. the first defendant and practitioners. The objection is accordingly that the enacting legislation give rise to personal rights and obligations and thus the nature of the right involves a *delectus personae* as a result of which the right is not capable of being transferred. I agree. Mr Harban demonstrated that clause 6.6 of the Policy concerned stipulates that the insured, i.e. the second defendant shall not without the written consent of the first defendant negotiate or offer in connection with any claim. In this regard the objection is that the cession agreement could not come into existence without negotiation and/or offer. The cession agreement in fact constitutes the result of negotiation and offer and as such clause 6.6 is an express, alternatively *tacit pactum de non cedendo*. By making an admission of liability in respect of the six claims, the testimony that such an admission apart from being a clear violation of the provisions of clause 6.6 of the Policy, it also weakens the position of the first defendant. It is our law (as shown above) that a creditor such as the second defendant cannot make the position of the debtor such as the first defendant more grievous by means of cession. Needless to mention that clause 6.6 in this context states that the insured shall not without the written consent of the insurer make any admission.

[41] Mr Harban raised the fact that clause 6.6 provides that the insurer shall be entitled (if it so desires) to take over the conduct in the name of the insured of the defence of any claim. Now that cession has the effect of the plaintiff becoming the insured as well as the party who is making the claim against the insured and as a result the entitlement of the insurer, i.e. the first defendant to defend the claim (of the plaintiff) in the name of the insured is affected negatively to the extent to which the right is rendered nugatory. Clearly the prejudicial effect on the rights of the first defendant is real irrespective of the fact that it repudiated the claims of the second defendant under the Policy.

[42] Mr Harban relied on the provisions of clause 6.7.1 of the Policy (providing that the insured shall render assistance to the insurer if such is reasonably required). This right to assist is also rendered nugatory if the plaintiff against whose claims assistance may be needed in fact becomes the insured and thus the very same party who should render the assistance. The point is that the first defendant is entitled in terms of the very same Policy from which the right to indemnification flows to rely on clause 6.7.1 and to insist upon assistance being rendered to it in order to defend the underlying claims. The third party envisaged and contemplated by the Policy appears from the express wording of clause 1.1 which stipulates that the indemnity granted in terms of the Policy is in respect of the insured's legal liability to any third party arising out of the conduct of the

profession by the insured (which legal liability is the subject of a claim first made on the insured during the period of insurance) irrespective of when or where such liability arose.

[43] Cession will bring about the effective elimination of one of the three parties envisaged by the Policy. The truth is that the moment that the third party also becomes the insured, it is not only the definition clause that is violated but also the tripartite relationship envisaged and contemplated by the Policy. Importantly, Mr Harban referred to clause 6.8 stipulating that nothing contained in the Policy shall give any rights against the insurer (as defined) to any person other than the insured. It is common cause that the first defendant relies upon the provisions of clause 6.8 as an express, alternatively *tacit pactum de non cedendo*. It appears from the clause that the objective of the Policy shall not give any rights against the insurer, i.e. the first defendant to any person other than the defined insured. Thus, properly construed and interpreted against all relevant circumstances, inclusive of the *sui generis* nature of the insurer, the insured and the relationship between them, the clause is clearly indicative of consensus between the insurer and the insured, not to cede or transfer rights and/or claims.

CONCLUDING REMARKS

[44] The rights and/or claims purportedly ceded could not be validly ceded in that nature of the rights involves a *delectus personae*, i.e. a personal and closed relationship between the first defendant and the insured, i.e. a practitioner. The legislation giving rise to the right of indemnification and the obligation to provide insurance cover in law imply an agreement between the parties referred to in the legislation, i.e. the insurer and the practitioner not to cede the rights and/or claims referred to in the Policy and as such impliedly creates *a pactum de non cedendo*. In fact having regard to the preamble, clause 1, clause 2.5, the prohibition against negotiation and offering in clause 6.6 and the wording of clause 6.8, the parties to the Policy expressly, alternatively tacitly agreed not to cede rights and/or claims and thereby created *a pactum de non cedendo*.

[45] Cession of the rights and/or claims of the second defendant to the plaintiff will undoubtedly render the position of the first defendant weaker (as said above) and will prejudicially affect its rights and renders its position more grievous. This is specifically so in circumstances where the second defendant in contravention of clause 6.6 admitted liability in respect of damages suffered by the plaintiff. These damages are the exact same damages which the plaintiff seeks to recover by means of the particulars of claim in this case. I agree with the submission made by Mr Heyns that the first defendant proved on a balance of probabilities that the particular rights and claims are not susceptible to cession. Cession averred *in*

casu to which the first defendant had not consented is indeed bad in law. I hold that Mr Harban was a good witness. His evidence was systematic and logical. He painstakingly took the court through the relevant legislation and did very well under grilling cross-examination. I can safely place reliance on Mr Harban's evidence in this matter. Having found that the cession was bad in law, I proceed to hold that the plaintiff does not have *locus standi in iudicio.*

THE THIRD SPECIAL PLEA (THE STAY OF PROCEEDINGS)

[46] The second issue for adjudication (3rd special plea) is concerned with the provisions of clause 12 of the memorandum of agreement on which the plaintiff relies read with clause 14.1 of the very same agreement. Clause 12 states that the pending litigation between the plaintiff and the second defendant will be suspended with all further steps in the litigation suspended until the litigation between the second defendant and Ashtons has been finally resolved. It is common cause that the action between the second defendant and Ashtons is still alive and pending.

[47] The status of the litigation between Ashtons and the second defendant and the fact that, that litigation has not been finally resolved and is alive (has not been abandoned) appears from a letter from the second defendant's attorney of 22 May 201. This letter reflects the current status of litigation between Ashtons and the second defendant. That this litigation is alive and pending is not presently

disputed by the plaintiff. In fact the status of litigation between the second defendant and Ashtons became common cause when the plaintiff's attorneys recorded that they have no objection in the aforementioned letter being handed in as evidence. I gather that currently, the litigation between the plaintiff and the second defendant comprising of the six claims to which reference is made in the particulars of claim in this matter, is suspended until the litigation between the second defendant and Ashtons has been finally resolved.

[48] In opposition to the stay of proceedings between the second defendant and Ashtons, Mr Van Der Merwe contended that nothing contained in the cession Agreement prevents or prohibits the plaintiff from pursuing any action against the second defendant once it has been instituted. He submitted that if the plaintiff should succeed in the action and recover the amounts claimed from the first defendant, the latter will in any event (by way of subrogation), obtain the plaintiff's rights against the second defendant in terms of the cession agreement as far as the proceeds of the Ashton's litigation to the first defendant until such time as it has repaid the full amount it actually received from the first defendant.

[49] Strangely clause 14.1 of the agreement provides that the plaintiff may not institute any action against the first defendant whilst the litigation between the second defendant and Ashtons is in progress, unless the action is instituted to prevent the claims becoming prescribed. Although (clearly) the current action was

instituted in order to prevent the claims becoming prescribed, clause 14.1 and 12 should be read in context together. If the two clauses are read in context, it becomes apparent that there cannot be indemnification in respect of claims that are suspended. The indemnification claimed, is in respect of the very same claims that are suspended in terms of clause 12.

[50] The indemnity granted in terms of the Policy is in respect of the insured's legal liability to any third party arising out of the conduct of the profession by the insured (which legal liability is the subject of a claim first made on the insured during the period of insurance) irrespective of when and where such liability arose. It follows that there cannot be indemnification and that no monetary relief sought by means of the prayers of the present particulars of claim can be granted. The monetary claim sought is suspended by means of clause 12 of the relevant agreement. I therefore conclude that this special plea too has been proved on a balance of probabilities and it stands to be upheld. The finding that this special plea be upheld is academic in view of the finding I have already made concerning the earlier special plea dealing with the *locus standi in iudicio*.

ORDER

[48] In the circumstances the following order is made:

(a) The second special plea in respect of the absence of *locus standi in iudicio* on the part of the plaintiff is hereby upheld with costs.

(b) In view of the order in (a) above, the plaintiff's action against the first defendant be dismissed with costs.

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D V DLODLO

Judge of the High Court

APPEARANCES:

HEARD:	29 May 2017
DELIVERED:	30 June 2017
COUNSEL FOR PLAINTIFF:	Adv. D J Van Der Merwe
ATTORNEY FOR PLAINTIFF:	Marais Muller Hendricks Inc. Francois Burger
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