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## **NEWSLETTER**

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### **Vital statistics:**

CAP determination April 2011:	R185289
CPI year-on-year April 2011	4,2%
RSA long bond yield May 2011:	8,3%
Real rate of return (8,3-4,2):	4,1%

**Corrigenda:** The official RAF CAP determination for January 2011 was R182857, and not R183830 as was incorrectly stated in my newsletter for March 2011.

**Notional COID benefits:** It is not uncommon that an employer has failed to register an employee with the Compensation Commissioner. In the event of serious injury or death in a motor vehicle or other accident the COID Act protects even the defaulting employer from a civil action for damages (*Boer v Momo Developments* 2004 5 SA 291 (TPD)). The victim (or his dependants) is not deprived of a right to claim COID benefits. The only limitation is that the claim for such benefits must be lodged within 12 months of the date of the accident. In the event that a victim has failed to claim COID benefits within 12 months and there is a claim against the Road Accident Fund, can the RAF be held liable for the full damages without COID deduction, or may the RAF deduct the notional COID benefits that would have been provided had the COID claim been submitted timeously? It is important to remember that if the victim has been awarded COID benefits then the total liability of the RAF is the same as had there been nil COID award, the only difference being that the RAF must first pay the value of the COID award to the COID Commissioner and only the balance is payable to the claimant. In the event that a victim can prove that COID commissioner is not liable to pay any benefits and that there will be no recovery claim against the RAF then there is no reason why the victim should not be paid the entire common-law damages. In other words there should be no deduction for notional COID benefits.

**Life partner claim for maintenance from deceased estate:** In *Robinson v Volks* 2004 6 SA 288 (C) it was ruled that an unmarried common-law wife has a right to claim maintenance from the estate of her late life partner in terms of the Maintenance of Surviving Spouses Act 27 of 1990. This ruling was upheld in *Volks v Robinson* 2009 6 SA 232 (CC) but only for a limited period of two years from 21 February 2005 or until Government passed appropriate amending legislation. The Civil Union Act of 30 November 2006 now applies and requires formal prior registration of a relationship if the surviving partner is to be successful with a claim for maintenance.

**Unlikely earnings:** In a recent report by an industrial psychologist for an injured child it was stated that 'Should there be grounds to conclude that there was indeed an

earning capacity without the event of the accident, I am of the view that her role model's work status should be considered, noting that her mother who is solely responsible for her is a single unemployed parent'. The legal requirement that loss of earning capacity be based on probable "likely earnings" (*Minister van Veiligheid v Geldenhuys* 2004 1 SA 515 (SCA)) suggests that for this, and many similar, the claim for loss of earning capacity may be pressed to extinction by the weight of accumulated contingencies. Those who frequently handle claims for loss of support will be aware of the extremely high incidence of mothers, married and unmarried, who are stated to be permanently unemployed and unable to make a contribution to the support of their children.

Industrial psychologists tend to be vary careless with the use of the word "possible". A possibility is a chance of less than 50%, and in many instances can be less than 1%. A court that awards compensation based on a "possible" earnings scenario runs the risk of substantially overcompensating the claimant. An industrial psychologist who states a "possible" earnings scenario in his or her report should at the same time express an opinion as to the percentage chance of such a possibility. The percentages attaching to possible earnings scenarios can be a fruitful area for cross examination.

**Job seeking skills:** Industrial psychologist Johan Venter has expressed the view that amongst the less sophisticated there is a serious dearth of job finding skills. This prevents otherwise employable persons from making contact with employers and can delay meaningful entry into the job market by many years. Government has expressed concern about job creation. Perhaps Government could devote some time and money to assisting young work seekers with making contact with existing job opportunities.

**"Piece worker":** A piece-worker is a person who is remunerated according to the number of "pieces" produced. It could be baskets, or cakes, or whatever. Such persons are normally quasi-independent contractors, and not salaried employees. There is usually an "employer", who may supply the raw materials and work premises, and who has agreed to purchase all goods produced at an agreed price per unit. On farms at harvest time the workers are often paid according to boxes filled or weight delivered, and not according to time worked.

**Joint minutes:** It is standard practice for industrial psychologists acting as expert witnesses for a trial to meet with a view to resolving their differences and narrowing down the issues requiring a decision by the Court. Sadly many of these so-called "joint minutes" fail to achieve this purpose and end up being a convoluted minute which merely details the main points of each expert's own report and does little, if nothing, to resolve the differences or clarify the issues. Such joint minutes, fraught with Delphic ambiguity, are then sent on to the actuary who is then, most unfairly, expected to produce calculation results from a document which should have been condemned as "vague and embarrassing". There is much to be said for ordering such experts to meet again and make a better effort to find common ground, or else for the advocates to provide proper clear calculation instructions for the guidance of the actuary, and the Court.