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ABOUT

#### MICHAEL'S WEBSITE

Email Michael

RSS FEED 

#### TRIAL DATES

These are the trial dates currently allocated by the following courts:

JHB High Court

19-February-2008

JHB Magistrates Court

18-June-2007

Randburg Magistrates Court

6-August-2007

Please Note

#### ARCHIVES

April 2007

March 2007

February 2007

January 2007

### Robert Koch gives his side

Robert Koch took up my offer to let me publish his comments on my Blog. So here they are, unedited below. Incidentally the Law Society have advised that, given he sent the letter to them also, "that the comments made by Mr Koch do not in my view warrant any official action or response from the Law Society" but will forward it to the MVA Committee, which is chaired by Ronald Bobroff, if I request so - which I have done.

Objectionable material on [www.lawblog.co.za](http://www.lawblog.co.za)

Your website contains the following blog:

### Experts get greedy

*"I received a phone call from a well respected colleague today who is now being sued by an expert. I must say that experts involved in personal injury litigation are beginning to go a bit over the top. Unfortunately a lot of the time they are in fact misinformed by the RAF that the attorney has been paid when in fact it is only the Fund's own attorneys who have been paid on this matter."*

The above text insinuates one untrue allegation, and one seemingly defamatory allegation as to the conduct of expert witnesses who engage in personal injury litigation:

You imply that an expert is only entitled to payment after the RAF has paid out to the claimant's attorney. That is indeed a false representation. My own terms of business, of which you have been reminded in writing on several occasions, are that payment is due when the claim is "settled, abandoned, or transferred to another attorney" and that my fee is payable after 3 years in any event regardless of what payments you may have received from the Fund. The terms of business of other experts may be different. There is certainly no general rule binding on experts that they must wait until the Fund has paid. Rule 68.4 of the code of conduct of your Law Society expressly states that an expert's fees must be paid within a "reasonable time".

You state that an expert is "greedy" if he issues summons for his fees before the RAF has made payment. "Greedy" is an unpleasant word. The expert has done the work and is thus entitled to his fee. If he is prepared to wait for his fee that is a decent thing to do. However, it does presuppose a relationship of trust between the expert and the attorney. There may also be a tacit arrangement that deferment of payment of fees is dependent on the attorney continuing to send a regular flow of work to the expert. If that trust relationship has broken down due to a refusal by the attorney to answer phone calls or other such conduct implying that the attorney is avoiding making payment, then it is the expert's right to issue a letter of demand and, if needs be, a summons. The same is true if the attorney takes an excessively long time with bringing the claim to finality. There is an implied term (confirmed by your professional code) that payment will be made within a reasonable time. If the deferment of fees is conditional on a continuing flow of instructions then the redirection of instructions to some other expert could also be a good ground for demanding immediate payment of fees.

The tone of your blog suggests that experts are second class citizens whose involvement in personal injury matters is a privilege which will be tolerated by lawyers for just so long as the experts do what they are told and accept what fees the lawyers see fit to pay them. Not so Mr de Broglio. We all have equal rights and work for our money and expect to be paid properly and timeously. Can you honestly say you have never sued a client for your own fees?

In truth the legal nature of an expert witness' relationship with his instructing attorney and the attorney's client is extremely complicated and thoroughly confusing, even for lawyers. It is high time that the professional bodies for the experts (notably the SA Medical Association and the Actuarial Society of SA) initiated negotiations with the Law Societies to agree a fair and reasonable set of protocols governing the payment of expert fees.

One obvious problem area is the transferred claim file. There is no direct relationship between the new attorney and the experts who were briefed by the previous attorney. I have heard apocryphal reports of taking-over attorneys who have received expert fees from the RAF and then failed to pay over such fees to the experts.

I myself have fulltime staff who follow up on unpaid fees and it is quite remarkable how many attorneys we catch who closed their files without paying their actuary.

One benefit of agreeing to deferment of payment of fees is that the running of prescription is suspended. Time does not wipe the slate clean and the attorney remains liable, even after leaving the profession.

One simple solution is that experts insist on payment for their fees in advance. If advance payment of expert witnesses becomes widespread, and I have heard several attorneys complaining that it is increasingly frequent, then attorneys have only themselves to blame for having abused a trust placed in them in the past, and for having lost such trust.

Posted by Michael de Broglio on Friday 13-Apr-07 | [Permalink](#)

### **Defamation and untrue allegations**

My last blog, which I thought was fairly innocuous and really just symptomatic of the calls I am receiving has resulted in a response from Robert Koch who sent the letter also the Law Society and the SA Medical Association together with a copy of my blog. So, readership continues to grow but Koch thinks the text you can read in my previous blog "*insinuates one untrue allegation, and one seemingly defamatory allegation*".

The false representation you will be interested to hear, is that experts are only entitled to payment after the RAF pays out the claimant's attorney. Koch goes on to give examples as to when an expert is entitled to amend an agreement - which include, as far as he is concerned if the "*deferment of fees is conditional on a continuing flow of instructions then the redirection of instructions to some other expert could also be a good ground for demanding immediate payment of fees.*" He also says if the trust relationship breaks down, by for example, "*due to a refusal by the attorney to answer phone calls or other such conduct.....*"

I must say I personally would never work with an expert who made terms along the lines of continue to use me, or everything becomes payable - and I have never been approached to - but obviously we are all free to contract how we like. What I am sure

of is that will make the pleadings in such a case most interesting! If any case does come up, we will certainly keep you advised. On the other hand he says that a benefit of deferment of payment is that the running of prescription is suspended. Whether that is correct or not I am not so certain, being aware of another case where the opposite was conceded by Counsel and attorneys for the expert concerned, but I would say that I think that is the correct moral approach where payments are deferred. Then again, you cannot have the expert simply deciding when prescription will start running due to the agreement being breached by the failure to return a phone call.

The bottom line is the best way to avoid problems is to have an open and good relationship and work together with someone you have confidence in and who will come to the party whether the sun is shining or it is raining. There are two sides to every story and no doubt we will hear the other in due course - and I will be happy to publish the full text of his letter here as soon as it is supplied in Word or text format.

Posted by Michael de Broglio on Tuesday 10-Apr-07 | [Permalink](#)

### **Experts get greedy**

I received a phone call from a well respected colleague today who is now being sued by an expert. I must say that the experts involved in personal injury litigation are beginning to go a bit over the top. Unfortunately a lot of the time they are in fact misinformed by the RAF that the attorney has been paid when in fact it is only the Fund's own attorneys who have been paid on this matter.

Posted by Michael de Broglio on Wednesday 04-Apr-07 | [Permalink](#)

### **Danisa Baloyi resigns**

I see that the media are reporting, that subsequent to the queries about her qualifications, that Danisa Baloyi has resigned from all boards on which she sits. Presumably this relates to the Road Accident Fund also. What is surprising is how long she took to do so - and why she never did so when people were going out about widows not getting paid, but only did so when her PHD was questioned.

Posted by Michael de Broglio on Wednesday 28-Mar-07 | [Permalink](#)

### **Danisa Baloyi and the RAF**

The Fidentia disgrace, which has seen theft of money from a trust amongst others and widows without funds has already seen ABSA group terminating the services of Danisa Baloyi, who holds a prominent position on the board of the Road Accident Fund.

There is now some allegation that she does not in fact hold the PHD she advertises and i in fact cannot thus hold the title "Dr" either. These are very serious allegations and one trusts the RAF is looking into them and close to finalizing its investigations. You can read the latest allegations on the Moneyweb site [here](#).

Posted by Michael de Broglio on Monday 26-Mar-07 | [Permalink](#)

### **BEE or Equality**

I see the whole BEE / Equality Act debate within the profession made it into the Sunday Times this weekend. It will have a major impact on our profession and yet very few white attorneys have said anything, become involved or done anything on the issue. Its an issue well worth following and more of you should do so. The Law Society President emphasized that at the moment there are simply not nearly enough