



LAW SOCIETY
OF SOUTH AFRICA

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LAW SOCIETY CHALLENGES CONSTITUTIONALITY OF ROAD ACCIDENT FUND AMENDMENT ACT WHICH DEPRIVES ROAD ACCIDENT VICTIMS OF RIGHTS, PROPER TREATMENT AND COMPENSATION

The Law Society of South Africa (LSSA) today issued court papers to be served on the Minister of Transport and the Road Accident Fund (RAF), challenging the constitutionality and legality of the Road Accident Fund Amendment Act 19 of 2005 and some of its regulations, which came into effect in August 2008.

Every year between 166 000 and 267 000 claims are lodged with the RAF in which victims or their dependants – often widows and orphans – seek compensation for loss as a result of injury or deaths caused by road accidents. ‘The amendments to the compensation system which came into effect in August last year severely curtail the rights of many thousands of accident victims and their dependants in the case of death,’ says Jacqui Sohn, the chairperson of the LSSA’s RAF Committee. She adds: ‘This is made worse by the fact that, for the first time in our legal history, victims can no longer claim compensation for damages not covered by the Act, from the wrongdoers who cause their injury.’

The LSSA contends that the Amendment Act promulgated by the Minister will have the effect of

- denying the many badly injured road accident victims of compensation from the RAF; and
- entitling those who are able to claim to less compensation and lower levels of medical and hospital treatment than under the previous Act; while at the same time depriving them of their fundamental common-law rights to claim compensation for substantial damages now no longer covered by the Act from the wrongdoer.

The Amendment Act abolishes victims’ common-law rights while at the same time reducing their compensation. This unreasonably and irrationally deprives victims of their right to obtain effective relief and violates section 38 of the Constitution. ‘The LSSA has submitted in its founding papers that it is inexplicable and unjustifiable that, at the very time that the legislature has substantially reduced (and in some instances entirely removed) the right to statutory compensation, it has also deprived injured parties of the right which they have always had to seek compensation from the wrongdoer for any damages not covered by the Act,’ explains Ms Sohn.

According to the LSSA, it is unconstitutional for the Amendment Act to remove a road accident victim's common-law right to claim for fair compensation from the wrongdoer; and, at the same time

- to provide that only persons who suffer 'serious' injuries are entitled to claim general damages from the RAF;
- by definition (of 'serious' injury) exclude many claimants who may, in fact, have suffered severely debilitating injuries from qualifying in terms of the definition and thus the right to claim from the RAF any compensation for pain and suffering, disfigurement and loss of the amenities of life;
- capping a claimant's claim against the RAF for past and *future* loss of income or support to R160 000 per year;
- restricting compensation for emergency treatment to a reduced tariff which will be insufficient reasonably to ensure that accident victims will obtain emergency medical care where they need it; and
- limiting claims for past and future hospital and medical care to provincial hospital tariffs.

'This breaches road accident victims' right to security of their person, the right to an appropriate and effective remedy for breaches of that right, as well as the obligation of the State to respect, protect, promote and fulfill those rights. The LSSA submits that this is a violation of section 38 of the Constitution. No justification has been given for the deprivation or limitation of these rights and this is accordingly not justifiable in an open and democratic society based on human dignity, equality and freedom,' says Ms Sohn.

Also, the LSSA points out that a number of the RAF regulations are inconsistent with the RAF Act and also deprive accident victims of their rights:

- The Minister has purported to define what a 'serious injury' is in the regulations, when he is not authorised to do so by the RAF Act. In fact, the definition of 'serious injury' is not a reasonable definition as it excludes many serious injuries. This deprives many victims of compensation.
- The method of assessment of a 'serious injury' prescribed in the regulations does not comply with the Act because it does not ensure that the assessment takes into account the circumstances of the victim.
- The system prescribed for lodging claims cannot reasonably be implemented under the current circumstances in South Africa. For example, the medical assessment in terms of the American Medical Association (AMA) Guides prescribed by the RAF is highly complex and costly. Only 45 medical practitioners attended the course last year to assess serious injuries in terms of the AMA Guides and the assessment can cost between R6 000 and R20 000.
- The regulations create an administrative tribunal to which victims who are dissatisfied with the compensation from the RAF can appeal. This tribunal's decisions are 'final and binding'. However, the tribunal is not impartial or independent from the RAF. This deprives victims of the right

to have their dispute settled by a court of law and to a fair trial in terms of s 34 of the Constitution.

- The tariff for emergency medical care and the state hospital tariff for other hospital and medical treatment decided by the Minister deprives poor victims of the proper access to healthcare that they enjoyed under the previous Act. They will be able to receive treatment only at State hospitals where treatment is either not available, or of an unacceptably low standard.

The LSSA is joined in the matter by the South African Association of Personal Injury Lawyers, the Quadpara Association of South Africa and the National Council for Persons with Physical Disabilities.

In terms of its constitution, the LSSA strives towards the achievement of a system of law that is fair, equitable, certain and free from unfair discrimination. For this reason, among others, the LSSA brings the matter in the Pretoria High Court on behalf of the tens of thousands of road accident victims whose rights to obtain damages from the RAF have been severely prejudiced by the RAF Amendment Act. 'Many of these victims cannot themselves challenge the rights removed by the amendment Act because they are too badly disabled, live in remote areas or are disadvantaged by poverty,' says Ms Sohn.

ISSUED ON BEHALF OF THE LAW SOCIETY OF SOUTH AFRICA

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Editor's note:

The Law Society of South Africa brings together its six constituent members – the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers – in representing South Africa's 18 400 attorneys and 4 900 candidate attorneys.

In Afrikaans items, please refer to the 'Prokureursorde van Suid-Afrika'.