COMMENT BY LAW SOCIETY OF SOUTH AFRICA ON THE ROAD ACCIDENT FUND AMENDMENT BILL, 2011 ("THE BILL")

INTRODUCTION

The amendments to the Road Accident Fund Act 1996 proposed in the Bill arise from the judgment of the Constitutional Court in the matter of **MVUMVU AND OTHERS VS THE MINISTER OF TRANSPORT AND ANOTHER 2011 (2) SA473 (CC)**.

In the course of its above judgment the Constitutional Court repeated its earlier finding in the matter of **ENGELBRECHT VS ROAD ACCIDENT FUND & ANOTHER 2007 (6) SA 96 (CC)** that:-

> ***"The Act constitutes social security legislation whose primary object has been described as to give the greatest possible protection... to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle".***

(Emphasis added.)

The Constitutional Court went on to say in the **MVUMVU** judgment:-

> ***"By placing a cap of R25 000.00 on certain claims Section 18 undermines this purpose".***

and, further, that

> ***"The impugned provisions are inconsistent with Section 9(3) of the Constitution.***

It follows that the invalidity order issued by the High Court must be confirmed."

When considering whether the impugned provisions offended either Section 9 (1) or 9 (3) of the Constitution (the equality clause) the Constitutional Court found that to the extent that the impugned provisions overwhelmingly affect black people they create indirect discrimination that is presumptively unfair. It held:-

"This is so because the discrimination is based on one of the grounds listed in Section 9 (3). Absent a rebuttal of this presumption from the Respondents, I have to accept that the type of discrimination we are concerned with here is indeed unfair".

The Court went on to say: -

"But the impugned provisions do constitute discrimination on another basis. There can be little doubt that the cap imposed by these provisions affects the applicants and other similarly situated victims adversely when compared to claimants whose claims are not limited. In some matters the limited amount of R25 000.00 as the present facts demonstrate, cover medical costs only and sometimes not even the entire costs.

Where victims were workers whose bodily injuries have rendered them unemployable, the cap denies them compensation for the loss of capacity to work. Consequently they may not even afford the basic necessities of life such as food and shelter. This is the situation in which they find themselves even though they played no role in causing the accident. Moreover other victims who were also passengers like themselves enjoy full compensation for their loss only because they fall outside the targeted categories. This is manifestly unfair. In the circumstances I am satisfied that the impugned provisions discriminate unfairly against the applicants.

The issue that remains to be considered is whether this discrimination is justified.

(Emphasis added.)

And in relation to justification in terms of the limitation clause:-

"Whilst it may be legitimate for the State to limit compensation accruing to victims of motor vehicle accidents, it has failed to show why the applicants ought to be singled out in pursuit of this purpose. There is nothing on record which indicates that the unfair discrimination the applicants are subjected to is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Accordingly I find that the impugned provisions are inconsistent with Section 9 (3) of the Constitution. It follows that the invalidity order issued by the High Court must be confirmed".

The issue of a suitable remedy was the real dispute between the parties.

In considering this the Constitutional Court stated:

"However, in determining a suitable remedy, the courts are obliged to take into account not only the interests of parties whose rights are violated, but also the interests of good government. These competing interests need to be carefully weighed."

In the light of evidence presented by the **MINISTER OF TRANSPORT** and the **ROAD ACCIDENT FUND** that the application of an order of invalidity with unlimited retrospective effect will increase the Fund's financial liability by approximately R3 billion (which, so they argued, would pose a serious threat to the sustainability of the Fund) the Constitutional Court ruled that the respondents (The **MINISTER OF TRANSPORT** and

the **ROAD ACCIDENT FUND**) were not required to show that there was a potential risk of the Fund collapsing in order to persuade the Court to intervene and adjust the effects of the order of invalidity. It was sufficient for them to show that the order will have serious budgetary implications. It went on to say:-

> ***"This Court has cautioned against remedies that are likely to lead to unsupportable budgetary intrusion. Two reasons motivate this approach. First, budget matters fall eminently within the domain of the legislature and the executive. Secondly, ordinarily Courts are ill-suited to determine such matters.***
>
> ***The considerations mentioned above point to the fact that Parliament is best suited to determine the extent of compensation to which the Applicants are entitled. It is regrettable that when Parliament decided to cure the defect, it left their position unaltered. Nevertheless I am of the view that the matter must be remitted to Parliament for it to provide relief for the inequality which the old scheme continues to cause."***
>
> ***"Therefore, I intend to suspend the invalidity order for eighteen months to give Parliament the opportunity to fix the problem."***

The Court also pointed out that Sections 18 (1) (a) (ii),18 (1) (a) (iii) and 18 (1) (a) (iv) of the Act suffer from the same defect as the impugned provisions and that it is desirable that Parliament address the plight of those affected by these sub-sections as well.

It is against the background of this judgment that the proposed Bill should be evaluated.

COMMENT ON THE BILL

Transitional Third Party: Section 18(A)(1)

The Bill firstly defines the "***new Act"*** as the **Road Accident Fund Act, 1996** as it stood from **1 August 2008** (after the **Road Accident Fund Amendment Act, 2005** was implemented) and the "***old Act"*** as **Road Accident Fund Act, 1996** as it stood before **1 August 2008** (before the **Road Accident Fund Amendment Act, 2005** was implemented.)

It then creates and defines a new class of claimant, to be known as a "***transitional third party***" who, subject to certain procedural steps, would be entitled to claim compensation as if their claims had arisen on 1 August 2008 (and thus be governed by the provisions of the new Act) ("***the transitional regime****")* despite the fact that the accidents giving rise to their claims actually took place before 1 August 2008, and, as such, should be governed by the old Act.

In short, the Bill seeks to apply the provisions of the Road Accident Fund Amendment Act 2005, retrospectively, to a limited class of claimants, being, of course, the same class of passengers who challenged the constitutionality of Section 18 of the old Act (the impugned provisions) in the first place.

In other words, if the Bill becomes legislation there will still be a differentiation between ***transitional third parties*** and other passengers who claims also arise under the provisions of the old Act.

This differentiation would once again give rise to the following enquiry:-

(a) does the differentiation amount to 'discrimination'; and if so

(b) does it amount to 'unfair discrimination'; and, if so

(c) can it be justified under the limitations clause contained in Section 36 of the Constitution.

The Constitutional Court already found that discriminating against this class of passengers was unfair and not justified but the real issue was that of an appropriate remedy.

The question therefore remains as to whether the proposed Bill does "***fix the problem***" and ***"provide relief for the inequality which the old scheme continues to cause***" and/or whether the continued inequality between this class of passengers and other classes of passengers claiming under the old Act is justified in the light of the "***serious budgetary implications of removing the limitations unconditionally***."

The Election: Section 18(A)(2)

The fact that claimants have an election, at all, as to whether to stick with the compensation afforded them in terms of the old Act, or to become a "***transitional third party*"** underscores the fact that this class of claimants continues to be materially discriminated against in the Bill when compared to other passengers claiming under the old Act and that the "***relief***" offered them in the Bill is more apparent than real. (See comment on the "***transitional regime"*** below.)

The position of claimants for whom there is a clear advantage in electing to become a "***transitional third party***" (such as a paraplegic or head injured passenger whose claim was previously limited to special damages only and capped at R25 000.00 terms of the old Act) needs to be further clarified. Those claimants will be entitled to general damages (non-pecuniary loss) far in excess of the R100 000.00 (or even R300 000.00).

In many instances action could have been instituted on their behalf against the **RAF** out of a Magistrate's Court in order to interrupt prescription. The Supreme Court of Appeal

has already ruled that a claimant is not entitled to transfer an action **from** a Magistrate's Court to a High Court. It would therefore only be open to those claimants whose claims had arisen less than five years ago to take advantage of the "***transitional regime***" as they would be able to withdraw the action form the Magistrate's Court and institute fresh action of the High Court.

The Constitutional Court clearly intended the relief be afforded in respect of all claims still alive as at the date of its judgment when it ordered that:

> "***(3) ….the order of invalidity will not apply to claims in respect of which a final settlement has been reached or a final judgment has been granted, before the date of this order*.**"

And when it also said:

> "***(54)…However, the declaration of invalidity ought not to apply to claims in respect of which a final settlement has been reached or a final judgment has been granted, before the date of this judgment*.**"

Provision needs to be made for the transfer of affected actions from Magistrate's Courts to Regional or High Courts, or prescription in respect of claims where action has already been instituted in a lower court should be waived so as to allow claimants to institute proceedings afresh out of the higher court of appropriate jurisdiction.

Procedure and time limit: Section 18(A)(3)

Section 18 (A) (3) limits a transitional third party's right of election to a period of one year after the transitional arrangements come into effect. Within this period a transitional third party is not only required to notify his or her election but also to procure and submit to the Road Accident Fund a **RAF 1** and **RAF 4** (serious injury) Form:-

(a) before his or her claim under the Old Act prescribes or is finally determined by settlement or judgment; and

(b) by no later than one year after the transitional arrangements come into effect.

This time period is manifestly unfair and unrealistic.

It is not clear whether the intention is for the one year period to run regardless of whether the claimant is under a legal disability or not. The reference to Section 24(1) in (3)(a) and (c) of the Bill relates to the procedure for lodgment, only, and there is no reference to Section 23. If any time period is retained, it needs to be spelt out that the time period will be subject to the provisions of Section 23.

It is difficult to understand the purpose for imposing a one year time limit, a completely arbitrary period, if not to create another prescriptive period with a view to eliminating claims rather than compensating claimants. This is in direct contradiction to the underlying purpose of the legislation "***to give the greatest possible protection***" and completely contrary to the spirit of the Constitutional Court judgment.

It is submitted that this time period be removed altogether.

Furthermore, the imposition of the requirement of submitting yet further forms at significant additional cost further prejudices "***transitional third parties***" (as opposed to other passengers) most of whom would have, in any event, already lodged claims in terms of the Old Act (utilizing the old Form 1) and many of whom may already have instituted legal proceedings.

Because the Bill imposes the procedure stipulated in Section 24, without any limitation or exclusion, does this mean that "***transitional third parties***" who lodge a **RAF 1** form have to "wait" 120 days before proceeding? And how can this apply where action has

already been instituted? And does this also mean that a "***transitional third party***" is obliged to file a **RAF 4** form as well and if so, will the **RAF** be entitled to object to it (the **RAF 4**) and, if so, how will this impact on claims already instituted out of the High Court where pleadings are closed and enrolled for a trial date.

Because of the uncertainty as to whether "***transitional third parties***" will be better off under the new Act, those claimants who are injured in circumstances where there may be negligence on the part of another driver or owner would be forced to continue to litigate in the hopes of proving that 1% negligence and so gain full compensation in line with that afforded to other passengers. This cannot be what was intended by the Constitutional Court.

As further submitted below, we are of the view that trying to impose the provisions of the new Act, retrospectively, on claims arising before 1 August 2008 is impractical and unfair and does not:

> ***"provide relief for the inequality which the old scheme continues to cause***".

The Transitional regime: Section 18(A)(4)

Section 18(A)(4)(a)

Section 18 (A) (2) affords a transitional third party an election as to whether to have his or her claim governed by the "***transitional regime***" created in terms **Section 18(A)(4)** of the Bill or to continue to claim compensation, as provided for in terms of the old Act.

The necessity for providing an election arises from the fact that, in certain cases, even though the claimants are materially discriminated by the limitations imposed by the impugned provisions (section 18 of the old Act) they, nevertheless may be better off under the old Act than under the new Act!

This is because, under the old Act, passengers for reward or being conveyed in the course and scope of their employment would be entitled, as of right, to claim general damages for pain and suffering, loss of amenities of life, disfigurement, disability and shock (albeit capped at R25 000.00) in common with any person who claims damages arising from a delict. However, in terms of the new Act, a novel exclusion in our law was created by the imposition of a very high threshold (as defined in the new Regulations) which claimants have to meet in order to have their injuries classified as "***serious***" before they are entitled to claim general damages.

The stated intention of the Road Accident Fund Amendment Act, 2005 (which gave rise to the new Act) was to virtually eliminate general damages with a view to saving at least **R4 billion** per annum in payouts.

The Fund's own statistics vary depending on where they are quoted but confirm that the vast majority of claims paid by it are for general damages, only. In the **RABS POLICY DOCUMENT** published for public comment it was stated that:

> "***84.1% of the total number of claims are smaller than R50 000.00 and account for 29.2% of the total amount paid***"

In the **NORTH GAUTENG HIGH COURT** hearing of the challenge to the provisions of the Road Accident Fund Amendment Act, the judgment records in paragraph 45.4 that:

> "***I have mentioned that the vast majority of personal injury claims paid by the RAF are for less than R50 000.00. i.e. of the claims finalized by the RAF in 2009, excluding supplier claims, 92% were below R50 000.00…..This occurred in 2008 as well, and the Second respondent's reasoning then was that most of these claims of less than R50 000.00 relate to matters where less severe injuries have been sustained. It was not unusual in these claims for only general damages to be claimed……The RAF was thus utilizing its scarce resources to pay claimants who had not suffered***

serious injuries.

In the 2009 Road Accident Fund Financial Statements, themselves, the average payout per claim for claims paid over the previous five years is listed. In the years 2005 to 2009 the average payout per claim increased pretty uniformly from **R28 829.00** in 2005 to **R52 875.00** in 2009 for non-supplier claims and from **R23 492.00** in 2005 to **R33 171.00** in 2009 for all claims.

The Road Accident Fund's 2009 financial statements also record that **R4.9 billion** was paid out in that year for general damages, which represented 57% of the compensation that was paid, excluding costs.

It is not only self evident from the awards made to date that "***serious***" injuries (as contemplated by the new Act) would qualify for compensation for general damages far in excess of the averages set out above, and also far exceed R50 000.00 but, as recorded by the **NORTH GAUTENG HIGH COURT**, it is also in the "***reasoning"*** of the **ROAD ACCIDENT FUND** that imposing the general damages threshold would effectively eliminate general damages in the overwhelming majority of claims and as a result, 91% of claimants who could have claimed under the old Act will have no claim at all under the new Act.

It would be safe to say that a significant percentage of these claims would be brought by passengers, many of whom would be now faced with an "election". And, unlike other passengers "***transitional third parties***" will only be entitled to compensation for general damages should they be able to prove that the injuries are "serious" as defined by the Regulations promulgated in terms of the Road Accident Fund Amendment Act 2005.

Furthermore should tariffs be promulgated in terms of Section 17 (4B)(a) and (b) of the new Act, a "***transitional third party's***" right to claim compensation for medical and hospital services will further be restricted to that tariff in contrast with other passengers whose claims for medical and hospital expenses are unlimited and unrestricted.

There is a further complication now facing "***transitional third parties"*** by virtue of **Section 18(A)(4)(e)** which provides:-

> "***The owner, driver and employer of the driver of the motor vehicle in the motor accident concerned are absolved, with effect from the date of the transitional third party's election, from any further liability to the transitional third party."***

So, a "***transitional third party"*** is dealt a double blow. If his or her claim eventually fails to meet the threshold to qualify for general damages he or she is left without even a common law remedy, unlike other passengers claiming under the old Act, whose common law rights are only limited to the extent that their claims against the **RAF** succeed. And, in terms of the time limits imposed to make the election (see comment above) he or she may be forced to take a gamble at a time when the injuries have not yet stabilized.

In any event, in terms of the Bill if a "***transitional third party***" elects to have his or her claim governed by the "***transitional regime***" then **all** the provisions of the new Act apply, including the abolition of all common law rights except for secondary emotional shock.

The reality is that the fact that a "***transitional third party"*** is given an election, at all, means that Parliament acknowledges that even though the Constitutional Court has found such passengers have been unfairly discriminated against in terms of the old Act, they may nevertheless prefer to be compensated in terms of the Old Act as it would give them better compensation than in terms of the "***cure***" provided by the Bill.

Section 18(A)(4)(b)

If one accepts the underlying principle that, following a valid election, the claims of "***transitional third parties"*** are deemed to have arisen on **1 August 2008** (and are

thus covered by the new Act) it is difficult to understand the necessity for **Section 18(A)(4)(b)** at all, as by operation of law, all common law claims are lost and under both the old and/or the new Act a claimant is obliged to deduct payments received from **COIDA** or made direct to suppliers.

The subsection is also not clearly expressed with regard to the interaction between suppliers' claims and claimants' claims. In particular, it should be spelt out that if a supplier has been paid R25 000.00 in terms of section 17(5) of the old Act prior to the coming into effect of the Bill, this does not preclude a "***transitional third party"*** from pursuing any claim that has not been finally settled as between that "***transitional third party***" and the **RAF** and/or has not otherwise prescribed.

Section 18(a)(4)(d)

The introduction of **Section 18(a)(4)(d)** will no doubt create considerable confusion (if tariffs are ever published) as to what amounts are claimable by suppliers. As matters stand, there are no enforceable tariffs and the **RAF** is obliged to pay for the actual hospital and medical costs incurred, including at private tariffs.

This subsection is difficult to read. Does it mean that suppliers are at the mercy of a claimant and if that claimant decides to claim under the old Act and is paid R25 000.00, the supplier's claim is expunged (and vice versa) or does it mean that suppliers' claims are totally unlimited (apart from the introduction of tariffs at some future date). If so, this is a further "***differentiation***" between suppliers and "***transitional third parties"*** whose claims arise from the same cause of action.

Section 18(A)(4)(e)

This would follow by operation of law if the principle of making the new Act apply retrospectively to "***transitional third parties****"* at the election of a claimant is adopted.

This consequence is manifestly unfair to the innocent injured passenger (particularly when coupled to a time limit for an election) and creates uncertainty for the common law defendant as to whether liability exists or not.

What happens, for example, with a bus load of passengers, some of whom may opt to claim under the old Act, whilst others may elect for the new Act. In some cases the common law defendant will have a defense and in others, not. In the case of insured common law defendants, insurers would have difficulty in setting realistic reserves and claimants would be uncertain as to whether the cover would be sufficient to meet all claims.

THE SOLUTION

In our view the Bill is cumbersome and complicated and does not, in essence, provide a "***cure***", nor "***fix the problem***" nor "***provide relief for the inequality which the old scheme continues to cause***".

It does, however, address, fully, ***"the serious budgetary implications of removing the limitations unconditionally"*** by ensuring that very few of the affected passengers will qualify for general damages, which for the vast majority of them, is their only real claim of any substance.

In this regard have the "***competing interests***" *been "****carefully weighed****"?*

It is unknown how the **RAF** arrived at its estimate of R3 billion, exposure, for uncapped passenger claims, as there can be no data available to estimate the value of claims that did not exist in the past. However, if, for the purposes of the debate, it is accepted that the total of those claims could be **R3 BILLION** then it has to be conceded that these claims would not be settled all at one time and the payouts could take place over several financial years.

We would submit that it would be far fairer for the vast majority of claimants that, if there are to some limitations applied to their claims, those limitations take the form of a cap on loss of income (at the annual cap imposed in terms of the Amendment Act updated for inflation and currently at **R189 017.00 per annum**) rather than a threshold for general damages. This would allow the majority of affected passengers to claim rather than exclude the claims of 92% of them and, at the same time, provide some financial savings for the **RAF**.

Although, by no way minimizing the amounts involved, to put the reserve of **R3 BILLION** in perspective reference is made to the recently published article in The Pretoria News regarding claims for compensation against the **MINISTER OF POLICE** which carried the headline, "**R7bn cop brutality price tag**". The decision by the Johannesburg City Council to write off **R7.2 BILLION** in arrear rates has also made recent news. As pointed out in our submission on **RABS** the three government social insurance schemes (**UIF, WORKMEN'S COMPENSATION AND RAF**) taken as a cluster are cash flow positive to the tune of **R9 BILLION** per annum (2009 financial statements).

The payouts for the affected class of passengers, would not only be spread over several years, but would also be made in the financial years when it is anticipated that the effects of the **AMENDMENT ACT 2005** would already have started to impact positively on the cash flow of the **RAF.** The actuarial reserve and its validity in relation to a "**pay as you go**" fund, guaranteed by the state is, in any event, contentious and has been the subject of ongoing debate. The **R3 BILLION** estimate, it is assumed, has been arrived at in the same manner as the reserve has been calculated.

We would further submit that the mechanism for applying any cap on loss of income should take the form of appropriate amendments to section 18 of the old Act with appropriate waivers in regard to prescription for actions already instituted out of lower courts rather than seeking to apply the restrictions of the new Act retrospectively. This would serve to preserve the common law rights for those claimants (anticipated to be in

the minority in number as opposed to quantum) who have loss of income claims in excess of the cap.