



29 November 2017

Via email: vcarelse@parliament.gov.za

ATTENTION: MS VALERIE CARELSE
The Portfolio Committee on Transport
Cape Town

Dear Ms Carelse

ROAD ACCIDENT BENEFIT SCHEME BILL [B17-2017]

We refer to the above matter.

Herewith, please find comments prepared by the Law Society of South Africa (LSSA) for your consideration.

Please note that the LSSA is interested in making a verbal presentation to the Committee.

We have also, upon invitation to the attorneys' profession, received the comments from the following legal practitioners:

1. Mr Sebastian Arends,
2. Mr Merlin Petersen, and
3. Mr Herman Bekker, Goldberg & De Villiers Inc.

We thank you for taking the above comments into consideration.

Yours faithfully

A handwritten signature in cursive script, appearing to read "Lizette Burger".

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The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

LSSA COMMENTS ON THE ROAD ACCIDENT BENEFIT SCHEME BILL 2017

The Law Society of South Africa (LSSA) represents approximately 25 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).

INTRODUCTORY COMMENTS

The current version of the Bill repeats verbatim much of the previous Bill published for comment in May 2014. As such the major criticisms raised by LSSA in its comment in 2014 remain cogent.

Once again, and contrary to the recommendations of the **SATCHWILL COMMISSION**, the common law rights of the innocent road accident victim to recover the balance of damages suffered by him or her which are not covered by the statutory scheme have been abolished and road accident victims who are catastrophically injured are even denied life enhancement benefits.

Thus, in stark contrasts to any other person injured as a result of the negligence of another, a road accident victim is denied reasonable compensation for the damages suffered, is also denied any lump sum payment and is thus denied a financial life line to provide rehabilitation following life changing injuries. In contrast, the negligent motorist is entitled to exactly the same compensation for injuries suffered in an accident caused by his or her own negligence and is completely absolved of any financial responsibility to make good the loss occasioned by that negligence. To our mind, this offends the mores of the public.

The benefits offered in terms of **RABS 2017** remain identical to those offered in the 2014 Bill save that the fixed amount in respect of funeral benefits of R10 000.00 has been replaced with a “**prescribed lump sum**” the amount of which is at this stage unknown.

Children still receive family support to age 18, only. Thereafter they will have to try to qualify as an “other dependant” subject to the proof as required in terms of section 38(11) (namely proof of a legal entitlement to such support and proof that he or she would have received such support, had the breadwinner not died). None of these limiting requirements pertain to unemployed injured parties seeking income support. A dependant who is a surviving spouse is entitled to family support for 15 years calculated from the death of the breadwinner or until the surviving spouse reaches the age of 60, whichever is the shortest.

Income support remains as in the previous Bill, namely that the first 60 days from date of the Road Accident Fund are excluded and support ceases once the injured person has reached the age of 60 years or dies.

There is a change in the powers of the Chief Executive officer in that the Chief Executive Officer no longer has the power to delegate any of his or her functions. The power to delegate now resides with the Board as per Section 15 (2) of the 2017 Bill.

Appeals are no longer to be heard by an internal appeal body. Section 48 of the 2017 Bill provides for the establishment of an Appeals Committee comprising three members to be appointed in writing by the Minister of Transport. The members and alternates of the Appeals Committee will be remunerated as determined by the Minister of Transport in consultation with the Minister of Finance, presumably from the budget of the Administrator.

A decision by the Appeals Committee remains final and is only subject to judicial review, similarly to the current legislation where disputes regarding the classification

of injuries are referred to a Road Accident Fund Appeal Tribunal established by the Health Professions Council South Africa. The decisions of that tribunal are also final and can only be taken on review (as opposed to on appeal) on very narrow grounds.

The right to claim lapses if a claim is not submitted within three years of the accident giving rise to the claim. Prescription is suspended for persons under legal disabilities and commences to run once the claimant has knowledge of the facts giving rise to the claim (usually the date of accident). An extremely truncated period of 30 days is allowed to lodge an appeal to the Appeals Committee, failing which the right to appeal lapses.

The vast majority of road accident victims will not have the funds to appoint an attorney to assist them with a claim. Many will be unaware of the time limits and even unaware that they have the right to claim. The other statutory insurance funds, namely the **COMPENSATION FUND** and the **UNEMPLOYMENT INSURANCE FUND**, where claimants by and large do not have access to legal assistance, have built up substantial reserves, one assumes by virtue of the fact that many persons who are entitled to claim are either unaware that they can claim or have difficulty in accessing their payouts.

The **COMPENSATION FUND** declared assets of **R27 BILLION** in its **2016/2017** annual financial statements.

In a **2015** article **GROUNDUP** reported:

“Injured and sick workers have to wait long periods, usually years, for their claims to be settled and payments to begin.

Attempts to deal with the huge backlog of unsettled claims, estimated to be in the hundreds of thousands, have been a constant theme. This year, a task team within the Compensation Commissioner’s office has tried to tackle 93 issues raised by the Auditor General, ranging from weak internal controls and staff shortfalls in both core business and financial controls, to unresponsiveness to client inquiries and court orders, and an outdated and cumbersome contribution assessment structure which is open to abuse.

The one thing everyone agrees on is that the Fund is very large, with total assets of R28bn in the year 2010/11, a year in which it paid out total benefits of only... R800m. The reserves of the Fund have been growing, unsurprisingly in view of the slowness of claim management, and under-reporting of accidents and diseases.

Puleng Mninele is the Health and Safety Officer of NUMSA, the largest trade union in the iron and steel sector. He has experience as a health and safety officer in the mining industry, and has been working for NUMSA since 2007.

“Our experience with the Compensation Commissioner has been bad,” he says. “I have files and files of claims from our members, and the time taken to settle them can be upwards of five years, even up to ten years. The same applies to both accidents and occupational disease claims.”

This year the **UNEMPLOYMENT INSURANCE FUND** had an **annual surplus of R13.2 BILLION** and has **R133.3-BILLION** cash in reserve, according to its financial statements. Because of difficulties in accessing payouts an industry of consulting services has developed which at least ensures that those able to afford those services are helped to recover what they are entitled to receive. An article in October 2017 in the **MAIL AND GUARDIAN** reported:

“Unemployment is rising — the latest Statistics South Africa figure has risen to 27.7% — but employees’ payments into the UIF increased by 6.4% last year to reach R18.2-billion, up from the previous year’s R17.1-billion.

The UIF paid out R8.4-billion last year compared with R7.6-billion the year before, according to department of labour spokesperson Teboho Thejane — an increase of 10%. This amounts to 675 416 claims settled. He said 90% of submitted applications were processed in the 2015-2016 financial year.

The M&G’s respondents reported that long queues and bad customer service are typically the picture at labour centres and that some of them had even given up on their claims.

While the problems at labour centres persist, UIF consulting services are thriving. They provide professional services to make claims “hassle-free” but they charge on average between R350 and R500 for a claim. Most of the claims are for maternity benefits.

But even this often does not help those desperately in need of unemployment benefits.

“I got my money when I was back at work,” said a respondent who applied for a maternity benefit.

The UIF has been under scrutiny for the past four years because of bad financial management. The auditor general reported irregular expenditure in the UIF of R64-million last year.

But Buthelezi said the noncompliance “is largely due to procurement processes and procedures and not theft”.

RABS creates a scheme (similar to **COIDA** and **UIF**) where a claimant has to rely on the efficiency of the Administrator to be compensated for loss of earnings and/or loss of support. Payment of medical and hospital expenses will be made directly to the suppliers or medical aid concerned.

Currently the Road Accident Fund (unlike **COIDA** and the **UIF**) is held accountable when payments or settlements are not forthcoming by a legal process of enforcing compliance by way of litigation and the courts. Road Accident Fund claims expenditure in the 2017 financial year approximated its income. R31.3 Billion was spent on claims and R33 billion was received as income. Statutory insurance schemes are not supposed to make a “profit”. The fact that they do is indicative of the failure of the scheme to properly compensate claimants or that the “premiums” are too high for the claims experience.

As with **COIDA** and **UIF** claimants, very few claimants of **RABS** benefits will be represented by lawyers.

Despite the fact that the **ROAD ACCIDENT FUND** is currently kept accountable by lawyers representing claimants, there are still significant inefficiencies in its administration and, in particular, in its claims handling process. If these inefficiencies were effectively addressed significant savings of billions of rand in legal, expert and other operational costs could be achieved. Many claims should be settled long before a trial date is allocated (when costs escalate considerably) and many more before action is even instituted. Merits in cases involving passengers, and to a large extent, loss of support claims and claims for children under the age of 7 should be conceded very early on in the claims process. The fact that an injury is “serious” should also be conceded early on in cases where there are clearly catastrophic injuries, thus avoiding the costs of superfluous medico legal reports and unnecessary attendances associated with this.

If legal and other costs associated with the enforcement of payment of compensation were only halved, the **FUND** would be strongly cash flow positive and would have the financial reserves to start to eliminate its backlog of payments due at any one time.

The current system affords fair, equitable, reasonable and affordable compensation to injured road accident victims. Loss of income and support claims are capped to avoid disproportionately large claims, only the seriously injured are afforded compensation for general damages, which often provides seed capital to start a new business or rebuild a family traumatised by the effects of a seriously injured family member. The smaller claims are slowly being worked out of the system (apart from supplier’s claims which need to be streamlined) and in time the backlog of claims and debt will be eliminated. If the costs of delivery are significantly reduced with the implementation of efficient claims procedures and administration the financial health of the **ROAD ACCIDENT FUND** will soon be restored, claimants will continue to receive adequate compensation and motorists, and their employers as well as owners of motor vehicles will continue to enjoy a complete indemnity without the fear of a constitutional challenge exposing them to uninsured risks.

The introduction of **RABS** will create another class of state pensioner receiving less than adequate compensation for injuries caused to them by the fault of another. If,

despite all, it is decided to persist in implementing **RABS**, injured persons should, at the very least, have their common law rights restored to them, putting them on the same footing as any other person injured by the negligence of another. In our view, failure to do so will render the entire scheme vulnerable to constitutional attack.

COMMENT ON THE DRAFT BILL 2017

CHAPTER 5

LIABILITY OF ADMINISTRATOR AND OTHER PERSONS

Section 27 (1) provides that the Administrator shall not be liable to provide benefits for injury or death arising from any terrorist activity, as defined in Act 33 of 2004. It is assumed that the words “***nor is the liability of any person excluded,***” refers to the exclusion of liability on the part of drivers, owners and employers in section 28.

There seems little rationality in this. SASRIA only covers material damages. This leaves the innocent victim totally exposed as the likelihood of being able to recover compensation from a “terrorist” or “terrorist organization” is remote.

Section 27(4) still limits benefits to emergency health care, only, for foreigners illegally in the Republic but has been reworded. The section now refers to persons who are not citizens or permanent residents of the Republic, or persons who are not the holder of a valid permit or visa issued in terms of the appropriate legislation. It is anticipated that there will be many cases of hardship as a result of this exclusion. However the definition of the exclusion is much clearer than before.

Section 28 abolishes civil actions for damages against the owner or driver of a vehicle involved in an accident or the employer of the driver. As has already been pointed out, the rights of the motorist have been preferred to those of an injured innocent victim. Is this what public policy demands?

PART A

The Act makes provision for the following benefits:-

- Health care services (Part A)
- Income support benefits (Part B)
- Family support benefits (Part C)
- Funeral benefits (Part D)

HEALTH CARE SERVICES

SYNOPSIS

This scheme provides for treatment to be rendered by either contracted health care service providers or non contracted health care service providers. Contracted health care service providers will be those who are prepared to enter into agreements with the administrator binding them to an agreed fee structure. Both contracted and non contracted health care providers are obliged to lodge proof as per prescribed rules that the injury was caused in a road accident and must obtain pre-authorisation for non emergency health care services. Tariffs still to be promulgated making further comment difficult.

COMMENT

The administrator is liable to pay for health care services reasonably required for the treatment, care and rehabilitation of injured persons provided within the Republic. However the health care service is limited to care that is required for the purpose of restoring the injured persons health to the extent practical, is appropriate and of a quality required for that purpose and to be performed only on a number of occasions necessary for that purpose. The Administrator has the discretion to refuse ongoing purely palliative treatment not aimed at restoring an injured person's health.

The provision relative to individual treatment and rehabilitation plan to be determined by the administrator has been expanded to provide for the appointment of a curator or curators to assist the beneficiary if the beneficiary is not able to provide informed consent to a plan due to a legal disability or other vulnerability of physical condition. Nevertheless the administrator retains the power to determine an individual treatment of rehabilitation plan and once determined the liability of the administrator for payment for health care services is limited to the health care services provided in terms of the plan.

Comment has already been made on the cumbersome system for claiming payment for services rendered and pre-authorisation. If the Rules and Regulations remain as published in 2014 then, in order to submit a claim a health care provider is required to complete the **RABS 2 FORM** which has to be accompanied by documentary proof of the injured party's identity, a certified copy of the service provider's certificate of registration and detailed invoice relative to the treatment, a certified copy of the identity document of the health care provider, a completed **RABS FORM 10** (Bank indemnity form) and the RAF's preauthorization number. The **RABS2 FORM** requests details regarding the vehicles and drivers involved in the accident, witnesses, South African Police details and the like. It is unlikely that these details will be readily accessible to treating practitioners and hospitals, particularly at an early stage post accident.

Provision is also made in Section 32 for the Administrator to pay non contracted healthcare service providers in accordance with a tariff to be promulgated by the Minister of Transport after consultation with the Minister of Health and failing such tariff limited to the “**reasonable costs**” of the healthcare service provided. Liability is limited to healthcare services provided in the Republic. Failing prior approval in respect of any non emergency healthcare services the administrator is not liable.

The Administrator is given far reaching powers to dictate the nature and extent of future treatment via the creation of an individual treatment or rehabilitation plan for the injured party concerned. For the purposes of preparing such a plan the Administrator may require the beneficiary to be assessed by a healthcare service provider at his cost.

Once an individual treatment or rehabilitation plan is determined the Administrator directs the healthcare services required in terms of the plan be provided by contracted healthcare service providers or other healthcare service providers approved by him and the liability of the Administrator for payment for treatment or services is limited to the treatment plan.

The injured party is thus denied the freedom to choose the nature and extent of treatment and services from a medical practitioner or at an institution of his or her own choosing.

INCOME SUPPORT BENEFITS

SYNOPSIS

No lump sums. If the previously promulgated pre-accident income cap remains at R219 820.00 per annum then maximum payment is R13 738.75 per month which can be reduced in the Administrator’s discretion by any deemed residual earning capacity he considers the injured party to have, regardless of

actual employment. No compensation for first 60 days. There does not appear to be a provision for a back payment for this period. Benefit ceases on death or at age 60.

COMMENT

Income support remains divided between temporary income support covering the first 2 years post accident and long term support benefits commencing in year 3 and ending on death of the beneficiary, alternatively at age 60.

Section 34(2) now provides that for the purposes of sub-section 1 a person other than a citizen or permanent resident of the Republic, shall be deemed not be ordinary resident in the Republic if he or she was absent from the Republic for a period of longer than 6 months per year calculated over the consecutive three-year period immediately preceding the road accident or any consecutive three-year period following the road accident, or fails to submit an affidavit confirming that he or she remains ordinary resident in the Republic. However Section 34 (1) continues to provide that the Administrator is not liable to provide income support benefits to a person not ordinarily resident in the Republic. It is assumed that the intention of the amendment is to ensure that South African citizens and/or permanent residents are not denied income support, regardless of residence and if so, Section 34 (1) and (2) should be amended appropriately, so as to make this clear.

The definition of persons deemed to earn the ***“average annual national income”*** in Section 35 (3) (b) has been extended and now includes any injured person who failed to submit acceptable proof of income with the claim or if during the 3 years preceding the road accident the injured person was economically inactive, for whatever reason, including studying being unemployed, or electing not to exercise a trade, occupation or profession for gain.

It seems therefore the intention is to compensate persons injured in a motor vehicle accident at the level of average annual national income regardless of the fact that

such person had no intention of working and would not have earned any income uninjured. In terms of the previous regulations published in 2014 the average annual national income was R43 965.00 per annum or R3 663.75 per month. This means that unemployed persons who would never have been commercially active will now receive approximately 3 times more by way of income support than those who qualify for a disability grant.

Clause 34 (3) now provides that the Administrator shall not take into account any income ***“illegally earned”*** by injured persons. What constitutes income ***“illegally earned”*** will no doubt give rise to debate.

What remains unchanged is the right of the Administrator to reduce a support benefit by an injured person's deemed residual earning capacity, despite the fact that it has been conceded that determination of residual earning capacity adds complexity to the administration of claims, increases administration costs and prolongs the time frame to assess claims and to review benefit entitlements. Section 36 (5) continues to provide for determination by the Administrator of an amount which approximately represents the injured persons annual post accident earning capacity, with reference to all relevant information including availability of employment, other income generating opportunities, and passive income available to an injured person.

Similarly Section 36 (9) continues to stipulate that a long term income support beneficiary is not entitled to inflationary adjustments but that the Minister of Transport may with concurrence of the Minister of Finance, subject to affordability, from time to time adjust the long term income support benefit by notice in the Gazette to take account of the affects of inflation. The diminishing benefits in real terms will add to the losses suffered by seriously children and breadwinners further prejudicing them and putting them at a significant disadvantage in relation to other persons who are harmed as a result of the negligence of another.

The previous comment regarding the fact that income benefits cease on the death of the beneficiary has been misunderstood. It was intended to apply to death of a beneficiary from an unrelated cause and not as a direct result of injuries sustained in

the road accident. In terms of the current system where compensation for loss of earnings or a loss of earning capacity is paid to an injured breadwinner in a lump sum he or she can make provision for the future support of his or her family even if he or she should die from causes which cannot be attributed to injuries suffered in the accident. This option is no longer available as the monthly paid income support benefits terminate upon the death of the beneficiary. If, of course that death is directly related to the injuries suffered in the accident, then family support benefits can be claimed. Presumably this will not be a seamless process and there will inevitably be a period during which no support is paid pending processing of the death benefits claim.

In order to claim temporary income support benefits an injured person is obliged a claim as provided for in the Rules by lodging a **RABS 3** (temporary) or **4 FORM** (long term) together with proof of pre-accident income (such as tax returns or salary slips) and proof of inability to perform his or her pre-accident occupation or work or earn an income and that that inability is caused by a road accident.

In terms of Section 36 (4) the claim must be accompanied by a medical report by a medical practitioner compiled after conducting a physical examination confirming that the inability to work relates to injuries sustained in the accident and stipulating the period that the incapacity is likely to endure. The claimant must also confirm that his inability to work relates to injuries sustained in the accident and should he be unable to do so such confirmation may be provided by any other person with knowledge of the reasons of the inability to earn an income.

According to the Rules in order to claim income support benefits a **RABS 3** (temporary) or **RABS 4** (permanent) claim form must be submitted accompanied by a **RABS 7** form (incapacity certificate completed by a medical practitioner) plus proof of the injured persons pre-accident income (if applicable) a **RABS 10** form

(completed bank indemnity form) and documentary proof of identity of the injured person.

The **RABS 3 FORM** calls for information regarding the accident and the injured person would have to have obtain a South African Police report (or obtain the details from the South African Police) so as to provide the information required to establish that the injuries arose as a result of a specific motor vehicle accident. An accident report form costs approximately **R150.00**. Accessing information from the South African Police is often a time consuming and drawn out exercise which may require repeated visits and calls to the police station involved. Sometimes just identifying which police station is supposed to investigate the accident is difficult. Once the station has investigated the report may be sent to the Accident Data Centre in another city. Providing a police report or obtaining information from the police may prove an insurmountable obstacle, particularly for unsophisticated claimants, who may be injured far from their home and would have to try and obtain the necessary documents or information from the particular police station responsible for investigating the accident, months later. This would be relevant particularly where a claimant has been hospitalised or incapacitated for a lengthy period as a result of the injuries suffered. The same information is required when lodging a claim for medical or hospital expenses or any other treatment arising from the accident.

The Administrator has the power to require either a temporary or long terms income support beneficiary to participate in vocational training. Failure to co-operate or participate can result in the income support benefit terminating. The Administrator selects the vocational training service provider and the program to be provided.

Any decision made by the Administrator regarding income support benefits can only be challenged by referral to the Appeals Committee established by the Minister in terms Section 48. The decision of the\is committee, however, remains final and binding and is not subject to appeal. A decision can be taken on review to a court but

the grounds for a review are extremely narrow. The jurisdiction of the courts to adjudicate a dispute between a claimant and the Administrator has been ousted. A court can only review a decision.

FAMILY SUPPORT BENEFIT

SYNOPSIS

No lump sum payments support of surviving spouse limited to 15 years maximum regardless of age children supported to age 18 only. Thereafter would have to qualify as “*other dependants*” support to non resident dependants unclear. The limitation on payment to dependants not “*ordinary resident*” in the Republic has been modified by the inclusion of the words “*other than a citizen or permanent resident of the Republic*” in Section 38 (2). It is not clear whether the deeming provision overrides Section 38 (1) which limits family support benefits to the dependants of a deceased breadwinner provided that such dependants are ordinary resident in the Republic.

COMMENT

Section 38 (2) now provides that for the purposes of sub-section 1 a dependant other than a citizen or permanent resident of the Republic, shall be deemed not be ordinary resident in the Republic if he or she was absent from the Republic for a period of longer than 6 months per year or fails to submit an affidavit confirming that he or she remains ordinary resident in the Republic. However Section 38 (1) continues to provide that the administrator is only liable to provide family support benefits to the dependants of a deceased breadwinner, provided that such dependants are ordinary resident in the Republic. It is assumed that the intention of the amendment is to ensure that South African citizens and/or permanent residents

who are abroad are not denied support. In order to clarify this Section 38 (1) should be amended appropriately.

Section 38 (3) has been added to provide that the administrator shall not take account of income that was **“illegally earned”** by the deceased breadwinner. The same comments as in relation to income support apply.

The surviving spouse’s support remains for a maximum period of 15 years calculated from the date of death of the breadwinner or until he or she reaches the age of 60 whichever period is the shortest.

The criticism of limitation of support to a dependent child to age 18 is countered with the argument that once a dependent child becomes a major, he or she is entitled to claim loss of support in terms of Section 38 (11) as an “other” dependent who is not a spouse or child. Section 38 (11) does not entitle that class of dependent to automatic support, as with a child under the age of 18. A dependant wishing to claim support in terms of Section 38 (11) is obliged to prove that he or she would have been legally entitled to support and would have received such support had the breadwinner not died. Whether someone is **“legally entitled”** to support is often open to dispute and similarly **“adducing proof”** that the support would have in fact been paid may not be possible, if more than the assertion of the claimant is required.

In determining the amounts of family support the pre-accident income of the deceased breadwinner, less taxation, may not exceed the prescribed pre-accident income cap and may not be less than the prescribed average annual national income. In addition the pre-accident income of the surviving spouse less taxation is taken into account also limited to the pre-accident income cap.

A complicated family support benefit formula is provided for in schedule which merely articulates the current practice of pooling joint family income and dividing the total so as to allocate two parts per adult and one part per child in calculating the loss arising from the death of a breadwinner.

FUNERAL BENEFITS

SYNOPSIS

The flat rate of R10 000.00 has been replaced by a “*prescribed sum*” payment may be made to a family member or to a funeral director.

COMMENT

The previously prescribed amount of R10 000.00 has been substituted for payment of a “*prescribed amount*”.

If it is “*impractical*” to await a claim for a funeral benefit the administrator may, independently, pay either to an immediate family member, or, after consultation with a family member, or, if unable to locate a family member, without consultation, to a funeral director the prescribed lump sum.

The amount awarded may be inadequate to cover the costs of transporting the body of a deceased migrant worker back to family for burial. The family of a foreigner without a visa or permit killed in an accident, are denied any compensation for the costs of repatriating the body or the funeral.

PART E

BENEFIT REVIEW

The remarks on the death of the beneficiary remain cogent. It was postulated on the assumption that the beneficiary died from causes unrelated to the accident. This would leave his or her dependent family destitute. Under the current legislation a lump sum is paid out and provision can be made for the financial security of the

family. Now that income support benefits are paid monthly there is no mechanism to enable financial security to be insured.

CHAPTER 7

CLAIMS PROCEDURE

The procedure remains the same and previous comments remain cogent.

It is important to note the distinction between a review procedure and an appeal. A review can only be brought on certain very narrow grounds. The fact that another body or panel considering the issues would have come to another decision is not grounds for review. That is grounds for appeal.

The current Bill still limits the period within which a claimant can appeal to 30 days after a claimant or beneficiary has been notified of a decision of the administrator or after the expiry of the period specified in Section 47 (1). Section 47 (1) stipulates that the administrator shall accept or reject a claim within 180 days after the submission of the claim failing which a claimant may lodge an appeal in terms of Section 55.

Bearing in mind that this is an aggrieved claimants only remedy it is our view that the period prescribed is unreasonably short and will inevitably be struck down.

CHAPTER 8

APPEALS COMMITTEE

Section 48 provides that the Minister may establish 1 or more appeals committees to hear appeals in terms of the Act. Each committee will comprise 3 members and 3 alternates, a member of a Law Society, a member of the medical or nursing profession registered with the Health Professions Council and a person qualified in

accountancy and registered as a member of a professional controlling body. Members of the appeals committee will serve for a period of 5 years and maybe reappointed for 1 further period not exceeding 5 years. The Minister is empowered to prescribe the procedures for meetings of the appeals committee as well as the remuneration allowances for members and alternates. The appeals committee may after hearing an appeal:-

- a) Confirm the decision of the administrator
- b) Vary the decision of the administrator
- c) Rescind the decision and replace the decision of the administrator with such other decision as it considers just.

The Appeals Committee is obliged to hear and determine an appeal within 180 days of the lodgement of the appeal and inform the Appellant of the outcome within 14 days.

A decision by the appeals committee is final subject only to judicial review.

This is an improvement on the previous dispute resolution procedure which provided for the establishment of 1 or more internal appeal bodies comprising of at least 3 officers employed by the administrator and authorised by the chief executive officer to decide appeals.

CHAPTER 9

GENERAL PROVISIONS

A driver of a vehicle involved in an accident is no longer obliged to report to the Administrator in the manner set out in the rules (**RABS 1**) within 30 days.

Section 56 excludes liability for the Administrator to contribute to the costs of an injured person, claimant or beneficiary including his or her medical and legal costs to prepare and submit a claim or an appeal or to meet any requirement of the Act.

The Administrator and any official employed is indemnified for any failure to perform or negligence unless intentional wrongdoing is proved. (Section 57)

No benefit may be transferred ceded or pledged or in any other way encumbered unless the Minister of Transport consents thereto in writing on good grounds shown. (Section 58)

Section 60 empowers the Minister of Transport to prescribe by regulation tariffs for healthcare services, medical reports and vocation ability assessments as well as for subpoenas, the form to be used to lodge an appeal, the procedure to follow in an appeal, procedure to be followed in meetings of the Appeals Committee, the manner in which a notice or other process commencing litigation against the Administrator in any court must be served.

The Minister is also empowered, in consultation with the Minister of Finance, to prescribe the annual average income, the pre-accident income cap, the lump sum funeral benefit and limits on vocational training as well as caps on any amount to be spent per beneficiary.

All such regulations must be published in draft form for public comment with 30 days notice for comment.

With the concurrence of the Minister of Finance the Minister may adjust the tariff, the average annual national income, the pre-accident annual income cap and the funeral benefit to take into account the effects of inflation. There is no public participation in this decision.

The Minister is also empowered to prescribe any ancillary or incidental matter necessary for the implementation or administration of the Act.

The Board of the Administrator is empowered in terms of Section 61 to make rules relating to forms and precedents deductions of benefits made by other State agencies, pre-authorisation, proof that the injury arose in a motor accident, proof if inability to earn an income, proof that a claimant is a dependent, and any medial report.

The Board is also empowered to make rules for assessors contemplated in section 36 and accreditation of assessors in terms of section 36.

The draft Rules must be published for comment on 30 days notice.

Comment on the rules and regulations and other outstanding matters, is reserved for when those are actually available for comment.

Section 62 provides for offences and penalties and 63 and 64 for transitional provisions and savings. Section 65 deals with funding.

22 NOVEMBER 2017

Comment on the Road Accident Benefit Scheme bill.

This scheme brings about major changes to the victims of road accidents. One of the most important change it brings is that contrary to the current Road Accident Fund Amendment Act where you have to establish fault on the part of the other driver (insured driver) will be a no fault base system. In terms of the new Bill negligence and intention falls away for example where a person walks intentionally in front of a motor vehicle that person would have a claim against the Road accident Fund provided he complies with the provisions of the Bill.

In our country with a high rate of unemployment some people would in desperation intentionally throw themselves in harm's way in the hope that they would be able to get some financial relieve via the claim. Therefore with the no fault system the perpetrator or the guilty party causing the accident will also be able to claim the same as the victim and in other instances will receive more compensation.

In our country where the main source of public transport is taxis there will be an influx of claims. Taxis generally have a disregard for other road users and with the no fault base scheme they will also be able to claim even if they cause the accident i.e. jumping the robot or the driving in the lane for oncoming traffic.

This bill also seeks to prevent Attorneys from assisting the victims of road accidents as the administrator will not be liable for medical cost and disbursements incurred by the attorney.

This will put the ordinary person under a financial burden as they have to pay for all the reports in order for them to lodge the claim and with the current unemployment rate it will not be possible for most of the victim to acquire such reports. The bill is therefore aimed to discourage victims from instituting claims against the Road Accident Fund.

The fact that the Bill want to do away with the Attorneys representing the victim is unconstitutional as every person has the right to legal representation, the same as a person accused of a crime has the right to legal representation to ensure that he is not prejudiced.

S 29 of the Bill

This section makes provision for the following benefits:

1. Healthcare services;
2. Income support benefit;
3. Family support benefit; and
4. Funeral benefits.

However the Bill does not make provision for General Damages which include claim for pain and suffering, loss of amenities of life, disability, disfigurement and shock. It is unfair for the injured person as most of the victim uses the money to restore their lives as it was prior to the accident i.e. they may start a business if they are unable to work after the accident and thus be a productive member of society and not a burden on the State, as they would have to apply for social grant due to the result of the accident.

Furthermore the Bill does not provide for loss of earning capacity or future loss of income where the injured person did not earn an income at the time of the accident, this would include minors or a person studying towards a career. These persons will not have a claim entirely as general damages does not form part of the new Bill.

This will also increase the unemployment rate and the burden on the Government in respect of social grants.

S30-31

In respect of these sections no provision has been made for a second opinion regarding the extent of the injuries. Healthcare providers are contracted by the Road Accident Fund which leaves the door open for corruption as they may give reports that is more favorable to the Road Accident Fund and thereby causing prejudice to the victim.

The administrator also decides which medical provider must be used with that the victims are restricted to the recommended provider. If the victim uses another medical provider not recommended by the administrator the Road Accident Fund will only be liable for reasonable costs leaving the victim liable with the outstanding amount.

This is unfair as the victim is already under so much financial strain with him not working.

S 32(1) (f)

Pre- authorization in respect of non-emergency healthcare will undoubtedly result in unnecessary and hardship of the injured to get necessary medical treatment.

Section 34

According to this section there will be no protection for visitors to our country. This will severely hamper our tourism industry, which a major source of revenue for our country.

South Africans who reside or work outside South Africa for six months every year for the previous three consecutive years, will be excluded from claiming against RABS.

Section 35

This section is vague and ambiguous as it does not specify the highest annual income.

Section 36

The section makes it compulsory to participate in vocational training programs and if the person does not participate in the programs he/she will not benefit. This is unfair for in respect of a person who is paralysed as result of the accident who unable to participate in the programs.

Section 36(3) (4)

According to this section the Administrator will only recommend assessors who complied with their requirements which will limit the choice of assessors.

This will cause unnecessary delays as the injured person will have to cue for long hours. The assessors' objectivity will also be compromise as they are subject to the Administrator's requirements.

The injured person must also subject him or her for assessment by an Occupational Therapist for which he or she will be liable. This also places an unnecessary burden on the victim.

Section 38

According to this provision, the dependent is not entitled to claim for loss of support if he resides outside the country for six months in every year of the previous three consecutive years, preceding the death of the breadwinner.

Section 39

In this section, the Administrator limits the amount of funeral benefits to R10, 000 – 00 (TEN THOUSAND RAND), which is unreasonable as there are additional expenses relating to the funeral. For instance, where the deceased died in Port Elizabeth, but resides in Cape Town, which means that the body needs to be transported from Port Elizabeth to Cape Town, which is an additional expense.

Section 40

According to this section the Administrator has the right to terminate a benefit at any time where the breadwinner is deceased. This is unfair and unconstitutional as this will leave the dependents destitute to fend for themselves.

This right must be left to the discretion of the Court.

In conclusion this Bill is no way a benefit to the community; it rather places more burden on the victim, health and medical department and the government at large.

This Bill is unconstitutional in that it infringes on the person's common law right to institute action against the wrongdoer.

It is not fair that the wrongdoer enjoy the same benefits as the victim.

SEBASTIAN ARENDS

Email: naidoociv@telkomsa.net

COMMENTS ON THE ROAD ACCIDENT BENEFIT SCHEME (RABS) BILL

THE PORTFOLIO COMMITTEE ON TRANSPORT

Prepared by Mr Merlin Petersen

Dear Sir / Madam,

This letter is sent to your institution in respect of the proposed RABS Bill, wherein I address certain points which is a cause for great concern in South Africa's movement to legal certainty, legal fairness, and the uphold of the Constitution.

THE NO-FAULT SYSTEM

In terms of the South African Law of Delict, the element of Fault consists of two branches, namely that of Intention and that of Negligence.

Under the current Road Accident Fund (RAF) legislation, persons who cause accidents intentionally or by way of voluntary assumption of risk, will not be successful in their claims against the RAF. This position is correct and understood by the South African public, which promotes legal fairness and legal certainty.

The proposition by RABS to introduce a No-Fault system into South African legislation, with respect to motor vehicle accidents, is absurd. The consequence of this is that any person, irrespective of whether he was the direct cause of the accident, will be entitled to a claim. That is to say that even in the event where a person intentionally dives in front of oncoming traffic, or intentionally drives a motor vehicle in the lane of oncoming traffic, such a person will not be delictually blamed for such accident. One would not go too far in saying that this proposition is an incentive to all reckless road users on South Africa's, already dangerous roads.

Will this be to the benefit of the public? For years the answer has been NO, but RABS answers YES.

GENERAL DAMAGES

General Damages became part of the South African Law of Delict, with the purpose to compensate persons who sustained injuries as a result of the wrongful conduct of another person. It is further part of our Law to ensure such a person is adequately compensated for his/her pain and suffering, discomfort, loss of amenities of life, and decrease in life expectancy, as a result of the injuries sustained.

Under the current RAF legislation, injured persons are entitled to claim for General Damages as compensation for their pain and suffering, discomfort, loss of amenities of life etc caused as a result of the injuries sustained.

The proposition under RABS, is that such a person will not be entitled to claim for General Damages whatsoever the nature of the injuries sustained.

It is quite difficult to comprehend how South African Courts, Magistrate Courts, High Courts, the Supreme Court of Appeal and the Constitutional Court, have been in favour of awarding General Damages to persons who sustained serious injuries in motor vehicle accidents. The brilliant minds of the respective presiding officers came to the conclusion that General Damages was warranted in each of these respective matters.

In the event that General Damages was deemed to be an unnecessary compensatory tool to those who have sustained serious injuries as a result of the wrongful conduct of another, Courts would not have granted such awards.

It has always been part of South African Common Law and our current legislation, and not limited to victims of motor vehicle accidents.

Therefore, to do away with General Damages in respect of road accident claims, is unfair, unreasonable and extremely prejudicial to all South Africans and those present in South Africa.

We must take cognisance of extreme examples, for instance, where a passenger sustains injuries rendering him a complete paraplegic. Such a person did not contribute to the accident in any manner, suffered a severe loss of amenities life, had the quality of his life adversely affect and life expectancy decreased.

In the Supreme Court of Appeal case of Marilyn Fortuin v The Minister of Safety and Security, the Honourable Judge expressed his views on a person's entitlement to a General Damages compensatory award:

"...it must be obvious that, generally speaking, a generous award of general damages will always go further in the direction of providing adequate compensation for the victim of a delict in a case as this, than will a niggardly one."

The Judge continued:

"Just compensation for the plaintiff ought not, in my respectful view, to be sacrificial simply for the sake of sympathy for or undue leniency towards the defendant: after all, it is the unlawful conduct of the latter which has brought about the losses which the blameless plaintiff has suffered. Precisely whatever it is that fairness to the defendant may be conceived to comprise, it cannot, to my mind, be permitted to entail depriving the plaintiff of proper compensation for the shock, pain, suffering, discomfort, disability, disfigurement, loss of amenities of life and other similar consequences which she has had to endure as a result of the defendant's conduct, and which she will continue to have to endure for the rest of her life."

The approach of RABS regarding the absence of General Damages is not in line with South African law and should therefore be regarded as unlawful.

From a humanitarian point of view, the absence of a claim for General Damages is unfair, unwarranted, unreasonable, *contra bonos mores*, and highly prejudicial to the general public of South Africa and those present in our country.

A further negative effect of this proposition is that it will create legal uncertainty, as General Damages may be claimed in respect of all personal injury claims, except those that fall within the scope of RABS.

Do these facts not warrant a General Damages compensatory award?

For years the answer has been YES, but RABS answers NO.

MINOR CHILDREN

It is common cause that the South African legal system places most emphasis and weight on the protection and best interests of children.

In terms of Section 28(2) of the Constitution of the Republic of South Africa, the supreme law of our country, a child's best interests are of paramount importance in every matter concerning the child.

Under the current RAF legislation, children are protected and their best interest considered. The current position makes provision for children, who were involved in motor vehicle accidents, to claim General Damages and Loss of Earning Capacity, where applicable. This position is assumed in order to protect and promote the best interests of children, and to ensure that they are fairly and adequately compensated for the injuries that they have sustained in such motor vehicle accident.

The position is, therefore, legally correct and in favour of public policy.

The proposition in terms of the RABS Bill, does away with the possibility of a child being able to recover damages suffered as a result of the motor vehicle accidents i.e. Neither General Damages nor Loss of Earnings will be a possibility for children.

One will not go too far in posing the following scenario, as it has occurred in South Africa on numerous occasions:

A minor child is involved in a motor vehicle accident, loses a limb, sustains spinal injuries resulting in paralysis, or sustains severe brain damage. Such injuries result in severe pain, suffering, discomfort, loss of amenities of life, shortened life expectancy, and no real possibility of securing suitable employment.

Under RABS, such a child will neither be able to claim for General Damages, nor Loss of Earning Capacity.

Is this to the benefit of the public, in particular our minor children?

For years the answer has been NO, but RABS answers YES.

NO LEGAL REPRESENTATION

Under the current RAF legislation, persons involved in motor vehicle accidents have always had an opportunity to exercise their right to freedom of association, as enshrined in Section 18 of the Constitution of the Republic of South Africa. They can make a voluntary decision to either enter into an agreement with literally any Attorney in the country to represent him/her in their action against the RAF, or they can voluntarily decide to approach the RAF directly. The current legislation, therefore, passes constitutional muster by providing the person with an option to exercise their right to freedom of association and to obtain legal representation.

The proposition by RABS completely demolishes such a person's right to freedom of association and to obtain legal representation. All claims are to be taken directly to the Administrator of RABS, with no option to do otherwise.

In taking cognisance of the aforementioned, one must further consider the following:

A lay uneducated person, involved in a motor vehicle accident, must approach the Administrator of RABS, empowered by legislation and knowledge of the RABS system.

When one places this situation on a scale, it will tip heavily in favour of the Administrator of RABS, who is in the driving seat. How will the claimant be in a position to adequately present the fact of their case when they do not have knowledge of the legal system. There will only be one version on the Administrator's table, and that will be the version of the Administrator (a version to suit the pocket of the RABS).

This proposition clearly does away with the *audi alterem partem* rule, which has been the cornerstone of all legal cases in South Africa. A person must be in a position to adequately place his/her case and present his/her version.

Unfortunately, under RABS, and without legal representation, such a person will not be in a position to adequately present his/her case to the fullest.

Is this to the benefit of the public?

For years the answer has been NO, but RABS answers YES.

CONCLUSION

When one considers the above arguments against the enactment of the RABS, it becomes clearer that the Bill is constitutionally flawed, legally flawed, and contrary to public policy.

It is an attempt, by those responsible and who stand to benefit, to retain the high influx received from the fuel levy contributions made by the South African public, to the detriment of the South African public.

As referred to above, it is a violation of numerous of Rights enshrined in the Bill of Rights, which, without a doubt, should render the Bill unconstitutional.

It creates the situation where the victim has to beg the thief to return what he has stolen, without having the option to approach law enforcers to assist.

It is legislation that will aggravate the ever increasing unemployment rate, will cause legal uncertainty, will burden the State with more physically and mentally unfit State grant dependants, will burden the public with having to financially maintain physically and mentally unfit family members and children, and will cause majority of personal injury Attorneys' Practices to close up shop, resulting in retrenchments.

When one considers the above, is the Road Accident BENEFIT Scheme really to the BENEFIT of the public?

IF YOUR ANSWER IS NO, THEN THIS RABS BILL MUST NOT BE ENACTED, AND MUST NOT FORM PART OF OUR LEGAL SYSTEM.

Yours faithfully,

MR MERLIN PETERSEN

mhpetersen13@gmail.com



From: Rosetta Obermeyer [<mailto:rosettan@goldlaw.co.za>]
Sent: Monday, November 27, 2017 8:57 AM
To: Kris Devan <Kris@lssa.org.za>
Cc: vcarelse@parliament.gov.za
Subject: COMMENTARY ON THE ROAD ACCIDENT BENEFIT SCHEME BILL

Dear Sirs

1. **AD SECTION 2 OF THE ACT:**

- 1.1 The objective of the Act is to inter alia compensate the general public in respect of bodily injury or death caused by or arising from road accidents.
- 1.2 The scheme is supposed to be reasonable, equitable, affordable and sustainable yet the public's claim for general damages is disposed of with *in toto!*
- 1.3 The common law right for claiming against the perpetrator is abolished because the scheme does not adequately provide for damages suffered. This is inequitable and is unconstitutional, despite the best endeavour of the Constitution Court to procure otherwise.
- 1.4 It is incumbent upon the administrator to establish procedures for the assessment and determination of claims. This is inherently a flawed system as all claims are against the Administrator but simultaneously the Administrator is given the sole power to control the process of assessment, determination and adjudication of disputes. This represents an inherent clash of interests and can never be equitable or in the interest of the public.
- 1.5 Provision is further made for transitional arrangements regarding inter alia the Board, Staff, assets etc. of the Road Accident Fund. The Fund has already been transformed. This is an unnecessary further expenditure of public money on a Public Body which, if it is properly administered, is quite capable of managing the current system as it has historically.

2. **AD SECTION 15 OF THE ACT:**

It is incumbent on the Board to ensure that adequate systems are put in place to support the operations for National Controls monitoring of Management etc. Furthermore it has to ensure that effective Human Resource, development and succession planning are put in place by the Administrator. This is clearly much more easily said than done. As far as information technology is concerned, that which is available in the resources of the RAF could possibly be employed but to ensure effective Human Resource Development is a different kettle of fish.

The Government is experiencing serious difficulties with providing adequate schooling and training for scholars and students. It is not believed that the Administrator has the ability and capacity to ensure effective Human Resource Development as envisaged in the proposed Act.

3. **AD SECTION 30(2), SECTION 33(1)(c), SECTION 35(4)(a)(b) AND (c), SECTION 36(1)(c), SECTION 36(2) AND SECTION 40(2)(b):**

All of the above Sections and sub-sections presuppose obtaining decent medico-legal reports for establishing medical conditions. These reports are expensive. It is incumbent upon the injured party to supply these reports alternatively to obtain such reports to ensure that the reports by the Administrator are correct and not manipulated in any way. Yet, in terms of Section 56 the Administrator is not obliged to contribute to the costs of an injured person! The injured will in many instances not be able to fund the reports and therefore runs a serious risk of not being fairly compensated or compensated at all.

4. **AD SECTION 35(5)(C), SECTION 36(7)(C) AND SECTION 38(9)(i):**

4.1 There is no reasonable explanation why a person entitled to compensation should wait for a period of 2 years since the date of the accident before compensation is received. In view of the time periods allowed for consideration of the claim and investigation thereof this period will lead to unnecessary hardship.

4.2 The ages of 18 and 60 are also unreasonable and designed to prejudice the public. As we know many people leave school before the age of 18 and start work. Whilst many more people work past the age of 60 to 65 and even 70. It is common knowledge that people generally live longer rather than shorter and by limiting the scheme to the shortest possible period as is envisaged in these sections the public are prejudiced.

5. **AD SECTION 35(7) AND SECTION 36(9):**

It is irrational not to adjust awards in concert with inflation. By not doing so the public is prejudiced.

6. **AD SECTION 35(2)(b), SECTION 35(5)(a) AND SECTION 36(7)(a):**

The national "income cap" cannot be used as a norm for compensation of all accident victims. The social position and level of income of victims must be taken into account as realistically they have a standard of living which they are entitled to maintain. It is unconstitutional to disregard this fact as this Act seeks to do.

7. **AD SECTION 36 PERTAINING TO AN ACCIDENT VICTIMS VOCATIONAL ABILITY:**

This Section seeks to force an accident victim to explore a notional residual earning capacity and to force victims into a vocation not originally chosen by such a victim. This is inherently unconstitutional and contrived as the Act seeks to limit its exposure by manipulating an accident victim's personal circumstances to fit a vocation, which such a victim may in theory be able to do but in practice is un-fitful or not interested in. Then in Section 37(2)(b) the Act seeks to make the benefit conditional on an accident victim's participation in such a vocational programme. This is inherently inequitable and manipulative and will be used by the State to deny compensation where it is and should be due. It gives the State unacceptable power and control over individuals personal circumstances.

8. **AD SECTION 47:**

After an accident victim had received an award which he or she may not accept an accident victim in terms of Section 47 of the Act is forced to go through a further State controlled procedure being an Appeal. Only after the Appeal had been decided and after a further substantial period of time had expired will an individual be able to approach a Court in a judicial review. This is prejudicial to the public and designed to induce hardship.

9. In the abovesaid circumstances and particularly where the Act does not provide for the victims costs to be paid, it cannot be said that the implantation of this Act will lead to equitable or reasonable compensation for road accident victims.

Kind Regards

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