



## **COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON BOARD NOTICE 66 OF 2021: ROAD ACCIDENT FUND**

The Law Society of South Africa (LSSA) constitutes the collective voice of the approximately 30 000 attorneys within the Republic. It brings together the Black Lawyers Association, the National Association of Democratic Lawyers and nine provincial attorneys' associations, in representing the attorneys' profession.

Having considered Board Notice 66 of 2021, which appeared in Government Gazette 44747 dated 22 June 2021, the LSSA hereby submits the following comments:

### **1. VALIDITY OF BOARD NOTICE 66 OF 2021**

On 22 June 2021, the Board of the Road Accident Fund (the Board) published a notice, being Board Notice 66 of 2021, which stated as follows:

***“The Road Accident Fund hereby, in accordance with Section 4(1)(a) of the Road Accident Fund Act No 56 of 1996, publishes for comment the draft terms and conditions upon which claims for compensation shall be administered, as set out in the schedule below”.***

Interested persons were called upon to make comment within 30 (thirty) days of the date of publication of Board Notice 66 of 2021.

It is submitted that the notice is premised on an incorrect interpretation of Section 4(1)(a) of the Road Accident Fund Act No 56 of 1996 (the Act).

Section 4(1)(a) provides that:

***“The powers and functions of the Fund shall include -***

***(a) the stipulation of the terms and conditions upon which claims for the compensation contemplated in section 3 shall be administered;”***

The power to stipulate the terms and conditions for **administering** claims does not include the power to regulate and/or prescribe additional requirements for a substantially compliant and thus valid claim in terms of Section 24(1). Those requirements are established by legislation as interpreted by case law.

Section 11 of the Act sets out the powers and functions of the Board. In terms of Section 11, the Board is empowered, subject to the powers of the Minister of Transport, to exercise overall authority and control over the financial position, operation and management of the Fund and may, *inter alia*, **make recommendations** to the Minister in respect of any amendment to the Act or any Regulation to be made under the Act. Thus, the Board itself, does not have the power to regulate and may only make recommendations to the Minister. The Board and the Chief Executive Officer (CEO) exercise their powers and function within the parameters of the legislation. Any act beyond those parameters is *ultra vires* and thus invalid.

Section 12 of the Act, which deals with the CEO and other staff of the Fund, specifically omits Section 4(1)(a) from the powers and duties afforded to the CEO.

In terms of the Act, neither the CEO, nor the Board have the power to amend the Act or the Regulations. If a Board notice prescribing ***“terms and conditions upon which claims for compensation shall be administered”*** has the effect of amending the Act or the Regulations, such notice is *ultra vires* and invalid.

The Board effectively seeks to amend the Act by making provision for mandatory additional requirements to Sections 19 and 24.

Although the current Board Notice 66 of 2021 is not as specific as the notice issued by the CEO in March 2021, nor the notice gazetted by the Board on 4 June 2021, paragraph 2 of the Schedule states that:

**“...and in addition to the documentation required in terms of the Act to ensure that a valid claim is lodged which substantially complies with the Act, the following documents must be included and form part of the claim’s supporting documents when lodging a claim with the Fund:”**

It is submitted that this paragraph renders the content of the Schedule *ultra vires* as documents “**in addition to the documentation required in terms of the Act**” are now required for a “**valid claim to be lodged which substantially complies with the Act**”.

The notice does not spell out what response failure to provide the required documents will trigger. Whether delivery will be refused, as in the past, or whether an objection to the validity of the claim will be made in terms of Section 24 of the Act, either will have an extremely harmful effect on claimants, particularly those who are unrepresented. In this first case, claims may prescribe and in the second, needless costs and time will be wasted on litigating the Fund’s refusal to administer the claim on the basis of the objection raised in terms of Section 24.

It is the stance of the LSSA that the introduction of any procedure that has the effect of imposing additional requirements for substantial compliance with Section 24(1) of the Act is *ultra virus* the powers of both the Board and the Chief Executive Officer. The comment which follows is without prejudice to this stance.

## **2. COMMENTS ON THE CONTENTS OF THE SCHEDULE**

The comment below on the contents of the Schedule should be read in the light of the above.

### **2.1 STANDARD DOCUMENTATION APPLICABLE TO BOTH DEATH AND INJURY CLAIMS**

#### **2.1.1 Identity documents**

Certified copies of identity documents cannot always be provided by suppliers making claims direct in terms of Section 17 of the Act. In particular, claims arising in emergency situations where the injured party is unconscious, or for other reasons is not able to provide a copy of his or her identity document, it is in many circumstances simply not possible for a supplier to provide this.

Private ambulance services are often obliged to assist in providing lifesaving emergency transport services and should be compensated. The injured party is identified by name and

surname as well as identity number and / or date of birth, as well as contact numbers. In these circumstances this should be sufficient to investigate and compensate a supplier claiming direct.

### **2.1.2 Accident report form, case docket and sketch plan**

In many instances these documents are not available and / or never exist.

The Act requires that the claimant prove that he or she or a breadwinner was involved in an accident. The provision of an accident report form, case docket and sketch plan is not required for substantial compliance. A claimant cannot be denied compensation because the guilty motorist did not report the accident to the South African Police Services, or the police failed to record the accident details and / or open a docket.

Furthermore, if the accident report and case docket are made standard documents to lodge a claim, many claims will be susceptible to prescription as most often, the SAPS offices as well as the State Traffic Departments are unable to locate the report and docket timeously.

### **2.1.3 Power of attorney and contingency fee agreement**

The Road Accident Fund is entitled to request proof that an attorney representing a claimant has been authorised. However, failure to lodge a power of attorney does not render the claim invalid. A contingency fee agreement or any other fee agreement entered into between an attorney and the claimant is subject to attorney and client privilege.

### **2.1.4 Permission for the Fund to obtain hospital and medical records in terms of Section 19(e)(ii) & (iii)**

The provision of hospital and medical records is not required for substantial compliance in terms of Section 24(1). However, should a claimant refuse to provide copies of **medical or hospital records in his or her possession on request** then, in terms of section 19(e) the Fund is not obliged to pay the claim.

### **2.1.5 All statements and documents in claimant's possession as outlined in Section 19(f)(ii)**

An affidavit pertaining to merits is a requirement for substantial compliance in terms of Section 19(f)(ii) as read with Section 24(1) **provided that the claimant is reasonably able to produce one.**

### **2.1.6 Copies of unabridged birth certificate**

It is very difficult, if not impossible, to obtain an unabridged birth certificate from the Department of Home Affairs. This is not a requirement for substantial compliance.

### **2.1.7 Proof of *locus standi* of curator**

If a curator has been appointed, then it is usually possible for a copy of a court order to be provided. However, in some instances the obtaining of court orders can be unduly delayed, in which event a claimant should be entitled to proceed to a lodge a claim to interrupt prescription. The provision of evidence regarding the appointment of a curator is not an element for substantial compliance.

A copy of the court order appointing a curator (when available) will be sufficient to establish his *locus standi*.

## **2.2 CLAIMS ADMINISTRATION REQUIREMENTS FOR DEATH BENEFITS CLAIMS**

### **2.2.1 Funeral claim**

All the requirements stipulated in paragraphs 2.2.1.1 to 2.2.1.4 are not essential for substantial compliance. In particular, a post-mortem report is not required if it is apparent from another document, such as the police report, that the deceased died at the scene of the accident.

## **2.2.2 Loss of support**

None of the documents stipulated in 2.2.2.1 to 2.2.2.18 are required for substantial compliance other than a document proving that the deceased was killed in the accident, alternatively completion of the medical report, which is a substantial requirement.

### **General comment**

Many of the “official” documents are not readily available. In particular, obtaining any communication from the Office of the Compensation Commissioner and in particular obtaining details of any award which may have been made, is virtually impossible.

Many of the documents may be relevant to the assessment of quantum, but they cannot be elevated to peremptory requirements for substantial compliance for lodgement of a claim in terms of Section 24(1). In particular, it can be many years before a post-mortem report or inquest record is available. Marriage and birth certificates are sometimes lost and replacing them can be a long, drawn-out process. Many breadwinners do not have any financial records.

## **2.3 CLAIMS ADMINISTRATION REQUIREMENTS FOR INJURY BENEFITS CLAIMS**

### **2.3.1 Past medical expenses**

Tax invoices from a registered medical provider may be a requirement in order to quantify the claim, but it is not a requirement for substantial compliance when lodging a claim. Many claimants are treated at provincial hospitals who claim direct. However, to protect them from a potential claim in the future an estimated amount is often claimed as past medical expenses.

### **2.3.2 Loss of earnings**

All the documents required in paragraphs 2.3.2.1 to 2.3.2.11 are evidentiary in relation to quantum and cannot be elevated to peremptory requirements for substantial compliance. In particular, a requirement for a communication from SARS that the claimant is not registered for tax and / or bank statement for three years preceding death (presumably in a claim for

injury this should read the date of accident) may be inapplicable and / or difficult to obtain. The delay in obtaining supporting documents should not impact on the claimant's right to lodge a claim and thus interrupt prescription.

Obtaining any communication from the Office of the Compensation Commissioner is often impossible. In many instances, claims in terms of COIDA are simply not processed. Case law has established a claimant's right to proceed with a claim for compensation from the Road Accident Fund regardless of whether the Compensation Commissioner has made an award or not.

### **2.3.3 General damages**

There is established case law to the effect that an RAF 4 claim form can be lodged at any time after lodgement and need not accompany the initial lodgement. The other requirements provided for in 2.3.3.1 to 2.3.3.4 are evidentiary.

The provision that makes all the medico-legal reports part of the mandatory lodgement requirements transgresses the rule of separation of issues in terms of Rule 33(4) of the Uniform Rules of Court. Litigants may elect to deal with the aspect of liability in terms of Section 17 of the Act first and then finally quantify the claim for proven/agreed damages in terms of the court order or settlement agreement.

## **2.4 MANDATORY INFORMATION / DOCUMENTS TO BE SUBMITTED FOR CLAIMS PAYMENTS**

### **Items 2.4.1.1 to 2.4.1.5**

The Road Accident Fund will already be in possession of a power of attorney in favour of the claimant's attorneys and it is unclear why yet another copy should be lodged when the settlement is loaded for payment.

Of all the requirements, only the court order or duly signed discharged form or settlement agreement, together with confirmation of banking details, are reasonable requirements. In particular the imposition of a peremptory requirement to file a tax clearance certificate by the instructing attorney has been declared invalid in a recent court decision.

The requirement to submit a Contingency Fee Agreement (entered into between the client and his or her attorney) to the RAF violates the sacrosanct attorney-and-client privilege, which is regulated in terms of the Legal Practice Act, its Regulations and the common law. Furthermore, the RAF is a party to the proceedings, and it cannot force itself into a private province of the attorney and his or her own client. Contingency Fee Agreements are regulated by the courts and the Legal Practice Council, not the Road Accident Fund. These requirements are *ultra vires* the powers of the Fund.

### 3. GENERAL COMMENT

The LSSA believes that the proposed new requirements will also prejudice direct claimants, many of whom are illiterate and indigent. They are not only unable to decipher and understand the provisions of the peremptory claim requirements, but they will also find the additional requirements costly. At present (without the proposed requirements), the direct claimants are paying for the RAF1 and the medical records in terms of Section 24 of the Act for their claims to be substantially compliant.

The proposed new requirements regarding the lodgment of an RAF 4 form and cognate medico-legal reports will be financially onerous on the direct claimants and could undesirably and inadvertently cause claims to become prescribed.