



To	<b>SAUMA BREAKFAST DISCUSSION</b>	Location	<b>The 19<sup>th</sup> Hole, Johannesburg Country Club, Woodmead Friday, 16 April 2010</b>
From	RIC MARTIN	Location	SANDTON
Extension	(27 11) 523-6024	Date	15 April 2010
Your ref	RAF AMENDMEND ACT	Our ref	RIC MARTIN
Subject	<b>THE ROAD ACCIDENT FUND AMENDMEND ACT</b>		

Madam Chairperson, Ladies & Gentlemen,

Thank you for allowing me to share some information in respect of developments that affects all citizens, foreign visitors, insurers and underwriting managers.

I do not intend dealing with each and every argument that was raised in the recent case where the Act was challenged. The learned acting judge needed more than 200 pages to do so. I shall merely highlight certain aspects.

Finally I intend dealing with the current position and what the future may hold.

On 1 August 2008 the Road Accident Fund Amendment Act 19 of 2005 came into operation.

This ushered in a change to the way claims against the Road Accident Fund are dealt with. I briefly highlight the relevant changes:

1. Section 21 as substituted reads as follows:

*“21. Abolition of certain common law claims.*

*21.1 No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie –*

*(a) against the owner or driver of a motor vehicle; or*

*(b) against the employer of the driver.*

21.2 Subsection (1) does not apply-

- (a) *if the Fund or an agent is unable to pay any compensation; or*
- (b) *to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than the third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle.”*

2. In essence the amendment has thus abolished the common law right to sue the driver of the motor vehicle that caused the collision ("offending driver") with the exception that the offending driver can still be sued if:

2.1 the RAF is unable to pay, or

2.2 the claim is for emotional shock.

3. Compensation for general (non pecuniary) loss is excluded, unless the loss qualifies as "serious injury" in terms of the prescribed guidelines;

4. Compensation for special (pecuniary) loss is limited to either R160 000,00 per annum in respect of loss of earnings or support;

4.1 The limitation of R25,000.00 in respect of passengers claims has fallen away.

5. Compensation for special (pecuniary) loss in respect of emergency and other hospital and medical care is limited to a prescribed tariff.

6. **The constitutional challenge**

6.1 The Law Society of South Africa as well as other interested parties launched an application to have the Amendment Act, or rather certain of the amendments set aside as being unconstitutional. The grounds of the challenge are briefly listed below:

- 6.1.1 The rationale of the amendment is flawed as it seeks not to compensate the victim but rather to protect the driver.
- 6.1.2 The Applicants submitted that the 2008 amendments are unconstitutional on numerous separate grounds i.e.
  - 6.1.2.1 on account of numerous procedural irregularities,
  - 6.1.2.2 the impermissible abolition of the common-law claim,
  - 6.1.2.3 unlawfully ousting access to Courts,
  - 6.1.2.4 and on various miscellaneous grounds which were argued.
- 6.2 Strictly constitutionally it was argued that:
  - 6.2.1 The abolition of the common law right to sue the offending driver offends the constitution and particularly as follows:
    - 6.2.1.1 the abolition offends against section 9(1) and 9(3) of the Constitution (the right to equality);
    - 6.2.1.2 it offends against section 12(2) of the Constitution (the right to security of the person);
    - 6.2.1.3 it offends against section 25 of the Constitution (the right to property);
    - 6.2.1.4 it offends against section 34 of the Constitution (the right to access to Courts).
- 7. In the judgment the Honourable Acting Judge Fabricius clearly sets out that:
  - 7.1 the right to equality.
    - 7.1.1 The parties did not rely on Section 9 of the Constitution directly.
  - 7.2 the right to security of the person
    - 7.2.1 It was argued that the abolition of the common law right infringes the right to security of the person as the State is obliged to afford an appropriate remedy to the victims of motor vehicle accidents who suffer bodily injury as a result of someone else's negligence. T
    - 7.2.2 he Court, in my view, correctly found that this section can not be said to a situation where the state must afford an appropriate remedy to victims of motor vehicle collisions.
    - 7.2.3 The State, viewed historically, has seen the need for a system of compensation. The State has created the RAF and it allows victims to obtain compensation albeit limited to certain amounts and percentages.
  - 7.3 the right to property
    - 7.3.1 Only the 11 Eleventh Applicant relied on this ground.

- 7.3.2 The learned Acting Judge specifically asked when this right would ordinarily vest and this question remained unanswered.
  - 7.3.3 The answer was not forthcoming as it can not be answered.
  - 7.3.4 The right to access to Health Care Services (Section 27)
  - 7.3.5 The Constitutional Court has in any event held, in the context of section 27 of the Constitution that all that can be expected of the State, is that it acts reasonably to provide the relevant services on a progressive basis.
  - 7.3.6 The Court is not called upon to impose its will upon Government as regards the budget and to divert funds from one area to another.
  - 7.3.7 The Constitution contemplates rather a restrained and focussed role for the Courts, namely, to require the State to take measures to meet its Constitutional obligations, and to subject the reasonableness of these measures to evaluation.
- 7.4 The right to access to Courts (Section 34)
- 7.4.1 The abolition of the common law right to sue the offending driver was argued to limit the access of the victim to the Court.
  - 7.4.2 Notably similar provisions are contained in the Compensation for Occupational Injuries and Diseases Act, the Labour Relations Act and the Basic Conditions of Employment Act.
  - 7.4.3 These acts and their provisions have passed Constitutional muster.
  - 7.4.4 The irrationality argument relating to the abolition of the common law right.
  - 7.4.5 Fundamental rights enshrined in the Bill of Rights may, however, be limited by a law of general application and then the provisions of section 36(1) apply.
  - 7.4.6 There must be a rational connection between the legislation and the achievement of a legitimate Government purpose.
  - 7.4.7 Simply put the argument was that: "What is given is not proportional to what was taken away."
  - 7.4.8 The RAF argued that the risk of issuing summons against an impecunious offending driver has been removed as the victim is secure in the knowledge that the claim lies against a statutory body with deep pockets.
  - 7.4.9 The State has limited resources and imposing limitations ensures that compensations is extended as far and as wide as possible.
  - 7.4.10 The abolition of the common law right is a necessary trade off as the offending drivers are funders of the scheme. Leaving the drivers unprotected would result in them having to fund the scheme whilst also requiring of them to retain insurance cover.
  - 7.4.11 High-income earners can acquire top-up accident insurance cover.

- 7.4.12 A moment of inattention can result in financial ruin.
  - 7.4.13 Liability insurance is available.
- 7.5 Limiting compensation for general damages to serious injuries
- 7.5.1 The Court could not discern any reason to find that this limitation was to be regarded as irrational and for that reason offensive to the Constitution.
  - 7.5.2 Clearly a legitimate government purpose is achieved bearing in mind the limited resources.
- 7.6 The limitation for loss of income or support to the maximum amount of R160,000.00 which is increased quarterly.
- 7.6.1 The applicants argued that this limitation was irrational.
  - 7.6.2 It was argued that allowing the common law right would not impact upon the RAF.
  - 7.6.3 The pre-amendment Act system was unaffordable, inequitable, unreasonable and unsustainable as well as highly discriminatory and likely unconstitutional in view of the stark difference between the treatment of mostly poor passengers and others. That was the reason for the introduction of the Amendment Act as a transitional measure, and it pointed out the inequities in the pre-amendment system which are again relevant to the irrational argument and the so-called "capping" argument: The most glaring inequities were then said to be the following:
    - 7.6.3.1 For certain categories of claimants, including certain drivers, compensation was unlimited;
    - 7.6.3.2 In stark contrast certain passenger claims were capped at a maximum of R25 000,00;
    - 7.6.3.3 4Claims of foreigners were treated identically to claims of South Africans, despite the minimum contribution that they would make to the RAF via the fuel levy;
    - 7.6.3.4 The complete exclusion of various claimants, such as members of the same household or persons who were responsible in law for the maintenance of the driver;
    - 7.6.3.5 The problem of unreasonable cross-subsidization was especially acute, as the delictual system required that a victim be placed in the position they would have been in but for the accident, educated employed persons with entrepreneurial or professional careers, and who were financially successful, will have suffered, and would be able to prove greater financial loss than the unemployed, the poor and the less advantaged. These however pay the same fuel levy as the rich. Preference was then made to international research that has shown that the poor are at greater risk of being injured or killed in motor vehicle accidents, and they are also the hardest hit by the financial pressure resulting

from such injuries. Certain examples were then given of this unreasonable cross-subsidization with reference to amounts paid to victims way above R10 million. A further example of the inequity of the cross-subsidiaries of rich foreigners by poor South Africans was illustrated by a recent claim where a Swiss national claimed an excess of R4,4 billion from the RAF after being injured in South Africa whilst on holiday. This claim was settled for approximately R500 million, with the RAF paying R69,5 million of the settlement amount. The balance was paid by the RAF's re-insurers from whom cover had been purchased by the RAF. The number of foreign visitors had increased substantially over the last years, and another major influx was expected during the FIFA World Cup.

7.6.4 It was noted that 92% of claims paid by the RAF were under R50,000.00. Probably the traditional "Whiplash" claims.

7.6.5 The R160,000.00 is also not static and is adjusted upwards quarterly.

7.7 The limitation of medical costs to prescribed rates

7.7.1 It was argued that the poor will not be able to pay for private health care.

7.7.2 This objection deals with socio-economic factors.

7.7.3 The limitation applies to all equally and does not distinguish between classes of victims.

7.8 In issuing the regulations the Minister of Transport did not consult the Minister of Health.

7.8.1 The Court found that this had occurred.

## 8. **The current position**

8.1 As matters stand the offending driver would only be at risk if the RAF was unable to compensate the victim alternatively if the claim is in respect of emotional shock.

8.2 Notwithstanding the fact that the risk to the individual and his/her insurer has diminished the prudent individual will retain liability cover.

8.3 I am given to understand that the Applicants intend appealing to the Supreme Court of Appeal alternatively directly to the Constitutional Court. Should the Act be found to be unconstitutional then the Act will be scrapped and the individual may confront the risk of unlimited exposure once more.

## 9. **The Future**

9.1 Underwriters may wish to consider the value of extending this type of cover (the premium income) compared to the risk.

- 9.2 Underwriters will have to extend cover to provide for the situation where the RAF is unable to compensate the victim or where the claim lies for emotional shock.
- 9.3 Given this situation underwriters may wish to consider extending the cover by allowing passengers to claim as co-insured.
- 9.4 In this regard underwriters may wish to limit the cover too curb their exposure.

Thank you

**Ric Martin**