PRETORIA ATTORNEYS ASSOCIATION
PRETORIASE PROKUREURSVERENIGING
MOKGATLHO WA BAEMEDI BA PRETORIA

PO Box / Posbus 3864
PRETORIA
0001

Room 5.18 / Kamer 5.18
High Court Building / Hooggeregshofgebou
c/o Paul Kruger & Madiba Street
PRETORIA
0001

Tel: (012) 323 6201
ppv@ppv.co.za ; lana@ppv.co.za

COMMENTS AND OBJECTION TO THE ROAD ACCIDENT FUND AMENDMENT BILL 2023

DATE: 21 September 2023

TO: The Director General

C/O Ms Lindiwe Twala & Mr Trevor Mphahlele

The Department of Transport

Private Bag x 193

By e-mail: twalal@dot.gov.za // mphahlelet@dot.gov.za

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INTRODUCTION

1. On the 8th of September 2023, the Road Accident Fund Amendment Bill (hereinafter "the Bill"), which if promulgated, would amend the Road Accident Fund Act 56 of 1996 (hereinafter "the Act"), was published in the Government Gazette No 3868 of 8 September 2023. Interested parties were invited to present comments on the proposed amendments. The Pretoria Attorneys Association is such an interested party.

THE PRETORIA ATTORNEYS' ASSOCIATION

2. The Pretoria Attorneys' Association (PAA) represents about 1585 attorneys in private practice, mainly in the Pretoria area, but also further afield. Many of these members practice in the field of personal injury which included RAF litigation.

3. The objective of the PAA is contained in our constitution. Some of these are objectives are:
   3.1. To promote transformation in the legal profession with emphasis on gender equality, people with disabilities and previously disadvantaged individuals.
   3.2. To express the views on matters of common concern to the members and to make representations on behalf of the members to all bodies and/or organisations such as Government Departments, professional structures in the legal profession and other bodies or persons.
   3.3. To co-operate with other Attorneys' Associations, as well as with other professional structures created by statute.
   3.4. To consider legislation and to make representations where necessary, in connection therewith.
   3.5. To afford opportunity for the expression of the views of the members on matters affecting the legal profession.

3.6. To keep members informed on matters affecting the legal profession.

3.7. To act in the general interest of members and the profession and to ensure that state mechanisms, including the Constitution of the Republic of South Africa, fundamental human rights, legislation, the judicial system, the common law and the rule of law are maintained, upheld and developed in such a manner so as to protect and promote the general wellbeing of the profession, including safeguarding the interests of attorneys to make their skills available to those requiring their legal expertise in any manner whatsoever.

4. Voluntary associations, such as the PAA are run by attorneys. This association does not have political agendas or financial motives. Our exco do not receive any remuneration for its services. Members of Exco have their own practices and assist on the Association by sacrificing of their time to do so. This is done so that all can practice in a functioning environment, to enable all our members to practice independently and productively and to protect the wellbeing of the profession and that of their clients' rights.

5. Without being in a position to advance specific statistics, it is conservatively stated that thousands of road accident injured victims, who qualify for claims under the Road Accident Fund Act, are being represented by these attorneys.

6. The impact on attorneys (and professionals allied thereto) should without a doubt be a consideration in the objection to the Bill, but this is not the primary basis of the PAA's objections. The continued existence of the legal profession and the involvement of legal practitioners is fundamental to the effective exercise of the right to access to courts, in the context of claims in terms of the Act but also in respect of protecting and enforcing

constitutional rights. The PAA does not believe that any rational argument can be made out against the submission that the public interest is at stake.

7. We now deal with the basis of the objections to the proposed amendment to the Road Accident Fund Act. In some instances, we do so in a crisp and concise fashion, not because the objections is not legitimately pursued but to avoid prolixity and overstating the obvious. If so invited, we will elaborate on our submissions and provide supporting documents if so requested.

CHANGING THE OBJECT OF THE ACT

8. The Bill, if enacted, would change the object of the Act, from one of paying compensation for damages or loss, to one of social benefits.

9. To consider the Bill in context, it is important to understand the rationale for the Road Accident Fund Act in its current enacted form.

10. Under the common law, a victim of a motor accident, caused by a causally negligent driver had a claim for damages against the wrongdoer or negligent driver for all of his/her losses, including past and future medical expenses, past and future loss of income or earning capacity and general damages. This common law claim was superseded by the Act. Section

21 of the Act abolishes the common law claim in delict against the wrongful and negligent driver.[1]

11. In the stead of the common law, the Act as it now stands, obliges the RAF to compensate the victims of motor accidents. It replaces the old common law delictual claim against the negligent driver with a statutory claim against the Respondent. However, the statutory claim retains the underlying common law delictual elements for liability. The Constitutional Court put it as follows:[2]

> *". It has retained the underlying common-law fault-based liability. This means that any accident victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent."*

12. The SCA held that the effect of section 17(1), read with section 21(1) of the Act, is not to change the fundamental delictual basis of a cause of action against the Fund. Instead, the RAF is substituted for the wrongdoer without changing the substantive basis for liability:[3]

> *'[Section 21(1)] abolishes the right of an injured claimant to sue the wrongdoer at common law. Section 17(1), in turn, substitutes the appellant for the wrongdoer. It does not establish the substantive basis for liability. The liability is founded in common law (delictual liability). Differently put, the claim against the appellant is simply a common-law claim for damages arising from the driving of a motor vehicle, resulting in injury. Needless to say, the liability only arises if the injury is due to the negligence or other wrongful act of the driver or owner of the motor vehicle'.*

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[1] *Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC) at para 26.

[2] *Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC) at para 25.

[3] *Road Accident Fund v Abrahams* 2018 (5) SA 169 (SCA) at para 13.

13. The Bill endeavours to abolish the delictual foundation of the Act and to instead replace it with a characteristic of the Workman's Compensation social benefit system under the auspices of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. What such a scheme will entail and what the 'prescribed limits' will entail is deliberately but surreptitiously excluded from the Bill, obviously in an endeavour to attract less attention.

14. It is well ventilated in research and statistical reports that South Africa has one of the highest road crashes per capita and an exceptionally high mortality rate. According to the Road Traffic Management Corp (RTMC), 12,545 people died in road accidents in South Africa in 2021. That was 25.8% more than 2020 and 0.3% more than 2019, when different lockdown levels applied in 2020 and 2021.

15. About 40% of those who died in 2021 were pedestrians. That's almost twice the 23% international rate of pedestrian deaths, as calculated by the World Health Organisation. Of South Africa's dead, about 75% were men, 38% were people aged 25-35 and a dreadful 17% were children aged four or younger.

16. This brings me to the already existing social security nature taken up by the existing Act.

17. It is important to appreciate the social milieu under which the Road Accident Fund operates. As elsewhere in the world, statutory intervention to regulate compensation for loss spawned by road accidents became necessary because of an increasing number of motor vehicles and the resultant deaths and bodily injuries on public roads. The right of recourse under the common law proved to be of limited avail. The system of recovery was individualistic,

slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts.[4]

18. Section 27(1)(c) of the Constitution of the Republic of South Africa provides that every person has the right to have access to social security. Section 27(2) of the Constitution enjoins the State to take reasonable legislative measures and other measures, within its available resources, to achieve the progressive realisation of social security rights.

19. The Constitutional Court said that the Road Accident Fund scheme arose out of the social responsibility of the state.[5]

20. It is thus beyond reproach that The Road Accident Fund Act[6] is social legislation, the primary concern of which is to give the greatest possible protection to persons who have suffered loss through negligence or unlawful act(s) on the part of a driver or owner of a motor vehicle.[7]

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[4] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 17.

[5] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 17.

[6] 56 of 1996, as amended.

[7] *Road Accident Fund v Masindi* 2018 (6) SA 481 (SCA) at para 13; *Gabuza v Road Accident Fund* 2020 (2) SA 228 (GP) at para 17.

21. There can be no doubt that the Road Accident Fund Act 56 of 1996 is legislation contemplated by section 27(2) of the Constitution. *In Pithey v Road Accident Fund*[8] the court held:

> *'It has long been recognised in judgments of this and other courts that the Act and its predecessors represent social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle. Accordingly, in interpreting the provisions of the Act, courts are enjoined to bear this factor uppermost in their minds and to give effect to the laudable objectives of the Act.'*

22. The Constitutional Court in *Mvumvu and Others v Minister of Transport and Another*[9] at para 44 held:

> *'44.1 The Road Accident Fund Act constitutes social security legislation whose primary object has been described as being 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 the vehicle and the cap on certain claims undermines this purpose.'*

23. In *Law Society of South Africa and Others v Minister for Transport and Another*[10] the apex court held that:

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[8] 2014 (4) SA 112 (SCA) at para 18. Also see *Eksteen v Road Accident* Fund [2021] 3 All SA 46 (SCA) at para 14; *Gabuza v Road Accident Fund* 2020 (2) SA 228 (GP) at para 17.

In *Road Accident Fund v Masindi* (586/2017) [2018] ZASCA 94 (1 June 2018) para 12 the court held that:

> *"the RAF Act is social legislation, the primary concern of which is to give the greatest possible protection to persons who have suffered loss through negligence or unlawful act(s) on the part of a driver or owner of a motor vehicle"*

[9] 2011 (2) SA 473 (CC).

[10] 2011 (1) SA 400 (CC).

'The statutory road accident compensation scheme was introduced only in 1942, well after the advent of motor vehicles on public roads. And even so, it came into effect only on 1 May 1946. As elsewhere in the world, statutory intervention to regulate compensation for loss spawned by road accidents became necessary because of an increasing number of motor vehicles and the resultant deaths and bodily injuries on public roads. The right of recourse under the common law proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk. It seems plain that the scheme arose out of the social responsibility of the state. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants.'

24. In addition to social security, the Constitution also provide that the road accident victims have the right to dignity (section 10), equality (section 9), freedom and security of the person (section 12), health care and social security (section 26), access to courts (section 34) and fair administrative action (section 33).

25. The legislature must jealously protect and guard these constitutional imperatives for the often and mostly lay, indigent and disenfranchised road accident victim.

POWERS & FUNCTIONS OF THE FUND

26. The Bill, if enacted, will remove the following existing powers of the RAF:

    26.1. To stipulate the terms and conditions, upon which claims for compensation shall be administered.

    26.2. Procuring reinsurance for any risk undertaken by the Fund under the Act.

27. This is removed because the same powers are now provided under Section 26 of the Act, the section dealing with Regulations. I return to the objection thereto later, but for now it must be said that the Board is in effect given powers to make subordinate legislation, something that the architects of our Constitution most certainly did not anticipate. The power to make binding regulations (or Terms and Conditions as the Bill prefers to call it) is placed in different hands and the Bill gives power to certain offices, with very little or no oversight, over whom the Executive on the one hand and Parliament on the other may have reduced oversight and power. Parliament should guard against delegating law-making power to the proverbial 'every Tom, Dick and Harry'.

28. The Bill, if enacted, will add the following power of the Fund:

    28.1. To procure risk mitigation instruments for any risk undertaken by the Fund.

29. It must be brought to the attention of the Legislature, who will no doubt consider this comment and who will debate the Bill, that the RAF awarded a bid to Price Waterhouse Coopers Inc for R841 915 852 (EIGHT HUNDRED AND FORTY ONE MILLION, NINE HUNDRED AND FIFTEEN THOUSAND, EIGHT HUNDRED AND FIFTY TWO RAND), for an Integrated Claims Management System, where the service will be provided for 5 years.[11] The clause will simply pave the way for the RAF to continue with similar spending as opposed to paying injured victims. It may very well be that procumbent oversight will have to be placed sharply in focus given the legislated procurement that the Bill now provides for. This emphasises the foundational problem with the RAF. It has its priorities all wrong. The existing RAF scheme is sufficient all that is required is better

[11] Bid number RAF/2021/00004.

funding and better management. The Bill open paves the way for excessive spending in all the wrong places.

30. By implication, the Bill will take away the right of the RAF to reinsure any risk. There can be justifiable reasons for retaining this power of the Fund. The RAF may not wish to exercise the power, but it is in the interest of the sustainability of the RAF to retain this clause. Rather have it and not use it that the converse.

31. The new right, which allows the RAF to secure Risk Mitigation Instruments, is vague and bound to cause confusion. The words 'Risk Mitigation Instruments' is not defined in the Bill and it is prudent that this term be well defined.

AGENTS FOR THE FUND

32. The Bill, if enacted, will delete the RAF's option to appoint agents, as it is currently enacted at section 8.

33. Appointing agents is separate and distinct from the appointing of attorneys to act on instructions of the RAF. The RAF had been operating for an extended period without making use of agents.

34. Although it may be prudent to retain the option to resort to agents, which will retain the option to be exercised should the need arise in future, there can be no rational objection to the deletion of 'agents' from the Act.

THE BOARD OF THE RAF

35. The Bill, if enacted, will change the composition of the Board. Currently, in terms of section 10, the Board comprise of the Director-General of Transport, at least 11 but nor more than 12 members.

36. The Bill will now have it that the Board will comprise of the Director-General of Transport (DG) or a senior officer designated by the DG, 12 members who will now change from executive to non-executive board members and the Chief Executive Officers (CEO) and the Chief Financial Officers (CFO), as executive board members with a vote.

37. Making Board Members non-executive members will do little to make the Board Members independent as the commentary allege, especially given the fact that these Board members will be appointed by the Minister of Transport (Minister), who on her turn is appointed by the President. To secure independence, the Board members must be appointed by an independent panel and not by the Minister. Only then will an independent, and at the same time, experienced and competent Board members be appointed.

38. The CEO and the CFO are now, with the DG, the only executive members of the Board whilst the 12 members, who must command extensive knowledge in the fields of insurance, finance, medical services, law, accounting and actuarial science, are no longer executive members.

39. The RAF Act which provides for an RAF Board, does so in keeping with the ethos of the Constitution. Section 195(2) makes the provisions of section 195(1) applicable to organs of state. The SCA held that the RAF is an organ of state as defined in section 239 of the

Constitution.[12] Section 195 of the Constitution provides for the Basic Values and Principles Governing Public Administration and provides at s195(1) that:

> *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
>
> *(a) A high standard of professional ethics must be promoted and maintained.*
>
> *(b) Efficient, economic and effective use of resources must be promoted.*
>
> *(c) Public administration must be development-orientated.*
>
> *(d) Services must be provided impartially, fairly, equitably and without bias.*
>
> *(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
>
> *(f) Public administration must be accountable.*
>
> *(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
>
> *(h) Good human-resources management and career-development practices, to maximise human potential, must be cultivated.*
>
> *(i) Public administration must be broadly representative of the South African people…*

40. There can be no doubt that the Legislature had designed the framework of the RAF Act to, by deliberate design and not by coincidence, ensure greater accountability and a greater devolution of power to managers. The RAF Act in its current form create processes by which the RAF and its leadership and role players are directed, controlled, and held to account.

[12] *Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena* [2013] 1 All SA 543 (SCA); 2013 (6) SA 9 (SCA) at para 19.

41. It is not correct that appointing the CEO and the CFO to the Board as executive members is in line with good corporate governance, given the specific intention to created cross checks and balances in the Act to work as a bulwark against maladministration. The CEO was not made a board member by design, to ensure accountability and checks and balances.

42. The importance of 'good governance' cannot be overstated. The public sector in general and the RAF in particular, plays a major role in society, and effective governance within the RAF can encourage the efficient use of resources, strengthen accountability for the stewardship of those resources, improve management and service delivery, and thereby contribute to improving peoples' lives. Effective governance is also essential for building confidence in the RAF - which is in itself, is necessary if the RAF is to be effective in meeting its objectives.

43. The Public Accounts Committee in the United Kingdom noted in their Report on the Proper Conduct of Public Business that what was needed was '*…a framework … (which) must include effective systems of control and accountability, and above all responsible attitudes on the part of those handling public money*'.

44. One reason for the establishment of separate offices, i.e. that of the RAF Board on the one hand and that of the CEO and CFO on the other, may have been an expectation that greater efficiency would be achieved through a separate structure. Thus, while the governing bodies of such public sector entities require sufficient freedom to manage operations in a vigorous and enterprising manner, they need to exercise that freedom within a framework of effective governance and accountability. The CEO and the RAF Board, separately under the Minister of Transport's umbrella, function as a single part in a larger machine and they

are duty bound to consider the impact of their activities on other government branched such as the Ministry of Health and Finance, to align, as far as possible, their activities with the whole-of-government's objectives.

45. What the RAF Act should do, is create a balance between the freedom to manage, accountability and the legitimate interests of the different stakeholders. There should be difference trenches of checks and balances to act as a bulwark against the abuse of power and under no circumstances should all the power be vested in a single authority. This will negate the very design which reinforces accountability.

46. But this is exactly what the Bill endeavour to achieve. The CEO of the RAF is now an executive member of the Board. The Bill deletes Section 10(5) from the Act, which section was by its very nature included in the Act to reinforce accountability and within the RAF, checks and balances to ensure sound governance. Section 10(5) of the Act provides that the CEO may attend Board meeting but has no vote.

47. A further concern is the Bill will now read that only the non-executive members who bring specialised knowledge to the Board (they are currently executive members of the Board under the Act) will have a limited term of office. The CEO, CFO and the DG or person designated by the CEO (now the only executive board members) will have an indefinite term as the exclusive executive Board members.

48. This will once more place Parliament in a predicament to get rid of a possible delinquent Board Member who has an indefinite term. This remind starkly of the expensive and long wielding process that was employed to ultimately impeach the now axed public protector.

49. Under the Act, executive Board members held office for three years without the option of renewing this. The Bill now introduces a renewal of term of office for another three years, which open the system up to abuse and employing '*friends*' to the position, or those who are pliable as opposed to robust, independent, knowledgeable, experienced and objective people to the Board, as intended by the legislature.

50. Section 11(1)(*h*) of the Act allows the Board of the RAF to assign to the CEO any power or duty of the Board but shall not be divested of any power or duty delegated or assigned. This provision is clearly checks and balances which is introduced by the Legislature to ensure competent management and accountability and act as a bulwark against maladministration.

51. The Bill will negate this safety-net as there will now only be three executive members, one who will not have any voting powers in terms of s10(4), if the Act is amended as per the Bill.

52. By placing the CEO and CFO as an executive member of the Board, the clear distinction in the Act, between the functions of the Board and that of the CEO is adversely blurred. For instance, section 11 of the Act empowers the Board to deal specifically with issues regarding the CEO on the clear and obvious premises that the CEO is not a member of the Board. So, for instance, will the Board make recommendations to the Minister regarding the appointment of a CEO,[13] approve the appointment and determination of conditions of

[13] S11(1)(*iv*).

employment and the dismissal of the CEO[14] and delegate and assign to the CEO any power of the Board.[15]

53. Even more alarmingly, the Bill removes the oversight of Parliament, in that the Bill deletes section 13(2) of the Act. This section provides that the Minister of Transport SHALL lay upon the table of Parliament, a copy of the annual report within 30 days after receipt thereof. There is a good reason that the annual report be produced to Parliament, and this is simply that Parliament can exercise its oversight roll.

54. Section 92(1) of the Constitution makes the Minister of Transport responsible for the powers and functions assigned to her by the President. Section 92(2) of the Constitution makes members of cabinet, *in casu* the Minister of Transport, accountable collectively and individually to Parliament, for the exercise of their powers and the performance of their functions. Having the annual report will allow the National Assembly to exercise its watchdog function as contemplated by section 55(2) and 56 of the Constitution, read with section 69.

THE OFFICE OF THE RAF ADJUDICATOR

55. The Bill introduces an adjudicator. The '*adjudicator*' is defined by the Bill as the Road Accident Fund Adjudicator or Deputy Road Accident Fund Adjudicator and any Acting Road Accident Fund Adjudicator appointed under section 24B.

[14] S11(1)(*c*).

[15] S11(1)(*h*).

56. The Bill then amends section 15(2) of the Act and provides that an injured victim who may approach the court to enforce a claim, can now only do so if the injured victim exhausted the complaint process administered by the Adjudicator.

57. The court's jurisdiction is subjected to first approaching the Adjudicator. How this system will work and what the claim procedure will be is nowhere explained in the Bill and instead left to be introduced in subordinate legislation. The legislature cannot allow the exponential changes in the law, on the basis that the actual inner workings of the Bill be subdelegated to the Minister (and we submit to the Board). The changes are extensive and reduced existing rights and goes to the heart of social security measures which will now be excessively restricted if not eliminated.

58. The Bill is found wanting for lack of sufficient particularity and is aimed by design to circumventing the multi-party democratic law-making system.

EXCLUDING HIT AND RUN CLAIMS

59. The Bill amends the Act by eliminating the existing claim of an injured victim injured in a hit and run accident, defined by the Bill as '*a motor vehicle accident in which the vehicle involved does not stop or is unknown*'.

60. The Act has the purpose to provide social security to injured victims. The reason why the Act was promulgated was owing to the fact that a person who is injured in a motor vehicle accident can often not recovered substantial damages claim from the wrongdoer (often men

and women of straw). It also protects road users against being financially ruined by excessive claims.[16]

61. By excluding hit-and-run claims, road accident victims will yet again be placed in a position where their lives may be ruined owing to a devastating accident and they will be deprived of any social assistance should they be involved in a hit-and-run accident.

62. Although it is accepted that hit-and-run claims are susceptible to fraud, at least more readily than other claims, this is no justification to discard such a claim. There are ample ways to address fraud.

63. Section 27 of the Constitution directs that the State must take reasonable legislative and other measures to materialize the right to social security for everyone. This the State did by enacting the Road Accident Fund Act. The State is now regressing with this progressive realization, by taking existing rights, which already materialized, away from vulnerable road accident victims. If the State progressively realized access to water and housing, the State will not without more take these rights away. This is exactly what the Bill is proposing, drawing a line thought existing Constitutional social security rights.

64. Eliminating hit-and-run claim is unconstitutional and offends section 27 of the Constitution. Moreover, it offends section 9 of the Constitution, because a person that was knocked down at no fault of his or her own, by a delinquent driver, that breaches the law

[16] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) para 17.

and flee the scene, will not recover a 'benefit' whilst a person under the same circumstances may recover a 'benefit' where the vehicle (not the driver) is identified. This offends the Constitutional right to equality under the law and equal protection by the law.

65. The Bill in this context also takes away the right of the injured victim to access the courts which offends the Constitutional Rights in terms of Section 34. Discriminating against road accident victims in this fashion violates the Constitution and is *ultra vires*. As was held in *Moise*,[17] at para 23, "*untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom.*"

66. The Constitutional Court in *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) was faced with a Constitutional challenge of section 2(1)(c) of the Regulations.[18] This Regulation provided that:

> *"(1) In the case of any claim for compensation referred to in section 17(1)(b) of the Act, the Fund shall not be liable to compensate any third party unless –*
>
> . . . .
>
> *(c) the third party submitted, if reasonably possible, within 14 days after being in a position to do so an affidavit to the police in which particulars of the occurrence concerned were fully set out".*

[17] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as Amicus Curiae*) 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC).

[18] GN 17939, 25 April 1997.

67. The CC, mindful of the fact that a hit-and-run-claim is not enforceable at common law,[19] held that the 14-day period is too short and does not amount to a 'real and fair' opportunity to exercise the right of access to courts protected in section 34 of the Constitution. The regulation was declared invalid. The court held at para 30:

> *... will be unfair if it is so inadequate or restrictive as to unduly deprive the majority of claimants of the right of access to the courts, on the one end of the spectrum, or if it is indefinite and prolongs uncertainty because it depends on the subjective knowledge of the provisions of the regulation on the part of the claimant, on the other.*

68. Moreover, the definition of a hit-and-run accident in the Bill is wholly inadequate. It links the identity to a vehicle being unknown as opposed to the person or the owner being unknown. From reading the existing section 17(1)(*b*) it is clear that a claim is unidentified if the insured *driver* is unknown, i.e that the general description of the vehicle may be known but the identity of the driver or the owner in unknown.

69. Should this section somehow survive the objection here raised and the Department of Transport who wishes to introduce the Bill to Parliament, ignore the unconstitutional

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[19] It is for that reason that the compulsory motor vehicle insurance regime came into existence in the first place. The following remarks of Centlivres CJ in *Barkett v SA National Trust and Assurance Co Ltd* 1951 (2) SA 353 (A) at 364 are in this respect apposite:

> *"It is notorious that there are many people of very moderate means or even of no means who own cars. All these people must insure under the Act and the right of recourse given to insurance companies in the circumstances stated in sec. 14 of the Act is in many cases more illusory than real. The object that the Legislature intended was to ensure that third parties injured through the negligent driving of motor vehicles should receive adequate compensation and this object could only be achieved by placing a greater burden on insurance companies than they bore prior to the passing of the Act."*

provision thereof, the definition should include either that the registration or other identifying character of the vehicle (such as a Vin number or engine number) is unknown OR where the identity of the driver and/or owner is unknown.

70. The injured victim's current claim has been created by a statute, namely, the Road Accident Fund Act. The Act can be employed by anyone who is injured in consequence of the negligent driving of a vehicle in a hit-and-run situation. The Act is the latest statute in a long line of national legislation beginning with the Motor Vehicle Insurance Act 29 of 1942. The stated primary concern of the legislature in enacting these statutes is, and has always been, "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."[20]

ONLY CLAIMS FOR ACCIDENTS ON A PUBLIC ROAD

71. The Bill, if enacted, will eliminate all claims emanating from accident which do not occur on public roads.

72. A public road is defined to have the same meaning as in section 1 of the National Roads Traffic Act 93 of 1996 [NRTA]. Section 1(liv) in that the NRTA define a public road as any road, street or throughfare or any other place (whether a throughfare or not) which is commonly used by the public or any section thereof or which the public or any section thereof has a right to access, and included- (a) the verge of any such road, street or throughfare (b) any bridge, ferry or drift traversed by any such road, street or throughfare

[20] *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285E-F.

and (c) any other work or object forming part of or connected with or belonging to such road, street or throughfare.

73. The Act as it stands reads that the RAF is liable to compensate an injured victim for the negligent driving anywhere in the Republic. The Bill thus significantly narrows the application of the social security benefit, by providing only for claims on a public road.

74. The same objections about the unequal application of the law applies, with specific reference to section 9 of the Constitution. But a bigger concern arises. What will be the effect of a motor vehicle accident, driven negligent on a private road, say for arguments sake in an airport, causing the accident victim to be a paraplegic; or an accident occurring when a farm worker is injured on a privately owned farm, leaving the worker a double amputee? In both scenarios, the injured victim cannot claim benefits from the RAF but at the same time her common law claim against the wrongdoer is removed by the Legislature.

75. Before the Act was amended in 2008, the previous provision provided that the wrongdoer enjoyed immunity from the common law claim only to the extent that the RAF Act applied and the RAF compensated the injured for the damages. Put differently, if the Act did not apply, the injured victim could still enforce his/her common law rights against the wrongdoer.[21]

76. Section 21 of the Act abolished the common law claim and provides that no claim for compensation in respect of loss or damage resulting from bodily injury to or the death of

[21] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) at para 26.

any person caused by or arising from the driving of a motor vehicle shall lie against the owner or driver of the motor vehicle, against the employee of the driver.[22] In the result, in the examples listed above, the person injured by a qualifying motor vehicle on a farm or at the airport will not be able to claim against the RAF and will not be able to claim against the wrongdoer either.

77. Section 21 does not only indemnify an owner or driver from damages in the exclusive event that the RAF Act finds application and the injured victim has recourse against the RAF. The RAF Act is and will remain (even of the Bill is promulgated) an indemnification to the driver's and owners of motor vehicles under any and all circumstances.

78. The net result of this amendment will be that if the paraplegic or double amputee victim described above is not injured on a public road, she will not have recourse and cannot claim any damages from anyone.

79. Being left without a remedy is untenable and unconstitutional. Delictual damages would be *res perit domino* and unrecoverable. It is trite that any wrong without a remedy offends the constitutional right to dignity, bodily integrity and access to courts. The maxim *ubi jus ibi remedium* means that where there is a wrong, there is a remedy. If any wrong is committed, then the law provides a remedy for that. The maxim can be phrased that any person will not suffer a wrong without a remedy: once it is proved that the right was breached then equity will provide a suitable remedy.

[22] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) at para 26.

80. The Bill deprives such a person of his common law right to recover damages. It involves a deprivation of such a person's common law right. In *Minister of the Interior and Another vs Harris & Others* 1952(4) SA 769(A) at 780 -781C CENTLIVRES CJ said:

> *"There can to my mind be no doubt that the authors of the Constitution intended that those rights [that is, the rights entrenched in the Constitution] should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus, ibi remedium.*
>
> *If authority is needed for what I have said, I refer to the following cases. In Ashby v. White, 92 E.R. 126 at p. 136, HOLT, C.J., said:*
>
> *'If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."*

81. In *Dixon v. Harrison* 124 E.R. 958 at p.964, it was stated that the greatest absurdity imaginable in law is:

> *'that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same.*

82. The court in *Administrator, Transvaal v Brydon* 1993 (3) SA 1 (AD) at 14 held that: '*I think that the converse of ubi jus, ibi remedium is true: in the absence of a remedium there can be no jus.*

83. Section 38 of the Constitution gives every person a right to a remedy, including to afford a victim of a motor vehicle accident, who suffers bodily injuries, a remedy.[23] The State has

[23] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 57.

a duty to respect, protect, promote and fulfil the Constitutional rights enshrined in the Bill of Rights.[24]

84. The current Bill drops a guillotine on Constitutional rights and deprive vulnerable injured victims of their Constitutional rights.

85. The simple solution may be to reinstate the common law claim under circumstances where the RAF Act does not cover the injured victim, but this offends the reason for the introduction of the RAF in the first place. The State introduced the scheme to also protect road users from financial ruin. Said the CC:[25]

> *With the common law residual claim in place and with no legislative indemnity for negligent motorists, what the Fund would save in monetary terms because of capped liability for compensation would in effect have to be paid by liable motorists. This simply means that negligent motorists would have to bear the risk of substantially increased residual claims from accident victims.*
>
> *The colossal risk to which the new cap exposes all drivers (from which the Fund would previously have protected them by paying full compensation), as against the relatively small inattentiveness or oversight that could give rise to the risk, lends further support to the abolition of the common law action. What is more, the retention of the common law claim does not sit well with a social security compensation system that aims to provide equitable compensation (as distinct from the right to sue for compensation) for all people regardless of their financial ability. There are two aspects to this incongruity. The first is that the common law claim would be actually recovered only from those drivers or owners who are capable of in fact paying*

[24] S7(2) of the Constitution.

[25] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 49-50.

compensation or who are able to afford the required insurance. In my view, the number of drivers and owners who would be able to pay would be very small. It would be pointless for any person to sue in circumstances where actual recovery would not result. The second consideration is that the right to sue would be available only to those who can afford to pay legal fees or who are granted legal aid. And it is unlikely that legal aid would be granted to people who have claims that are in fact irrecoverable because of the inability of the driver or owner to pay. These two factors would have a negative effect on an equitable compensation system if the common law right of action were to be retained.

86. In *Law Society of South Africa and Others v Minister for Transport and Another* the CC held that the abolishment of the common law claim is not irrational[26].

87. But the court in *Law Society* was not confronted with injured victims that will be excluded from any remedy whatsoever, but instead with a victim who are most deprived of the capped loss or from general damages. The new Bill is entirely different to the extent that it may exclude claims for some victims (foreigners, those not injured on public roads, hit and run victims, etc).

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[26] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) para 55. The court held at para 69:

First, the lawgiver has the power to change or adapt the common law provided that the change is not inconsistent with the Constitution. Section 39(3) acknowledges the existence of other rights or freedoms that are recognised or conferred by the common law, customary law or legislation to the extent that they accord to the supreme law. This does not mean that the Constitution limits the legislative power of Parliament in relation to adapting or abolishing parts of the common law, indigenous law or of existing legislation. Whilst existing rights, whatever their origin, remain important, it is indeed open to Parliament to adapt or abolish existing rights sourced in any existing law provided that in doing so, it acts within the confines of the Constitution.

88. It must not be forgotten that a private law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right,[27] and if you take away this private law remedy, you at the same time breach constitutionally entrenched rights.

89. The CC said that if the common law right is abolished, it follows that the rights in terms of section 12(1)(*c*) is limited.[28] In *Law Society*, the court held that this limitation was justified owing to the Fund moving to a more financially viable position and the measure was interim, the need to protect road users from financial ruin and to make the scheme more inclusive, transparent and equitable.[29] But importantly, the CC held that the limitation is only partial because the victim is entitled to compensation although limited.[30]

90. Nothing has been done to make the RAF more financially viable and this should instead be the focus of the Bill.

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[27] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851(CC); *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 74.

[28] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 75.

[29] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) at para 77-79.

[30] Para 80.

GENERAL DAMAGES EXCLUDED

91. The Bill, if enacted, will eliminate the Plaintiff's claim for non-pecuniary damages. Currently, the Act only provides for general damages if the injuries are serious subject to the injured victim meeting a minimum threshold.

92. Currently, S17(1)(*b*) provides that the RAF shall:

> *'be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.'*

93. What had been said above, in the context of injured victim being left without a remedy, is repeated here. *Ubi jus, ibi remedium*. The injured victim's right to claim damages is eliminated and the Bill does not reinstate the common law claim for such damages to be recovered from the wrongdoer. S21 of the RAF Act abolished the common law claim and this abolition remains unaffected by the Bill.

94. In *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC), the constitutionality of the abolition of the common law claim was constitutionally challenged. This provision was challenged on the

basis that it was not rational and offended the constitutional right to security of the person,[31] the right not to be deprived of property arbitrarily,[32] the right to have access to healthcare services[33] and the right to an adequate remedy.[34]

95. The court dismissed the challenge on the basis that those seriously injured still have a valid claim. *In casu*, such a claim is eliminated altogether. Removing the right to claim general damages is unconstitutional.

FAULT-BASED

96. The Act, when it was amended in 2008, retained the underlying common law fault-based liability.[35]

[31] S12(1) of the Constitution. The CC held in *Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC) para 63 that:

> *Section 12(1) confers the right to the security of the person and freedom from violence on "everyone". There is no cogent reason in logic or in law to limit the remit of this provision by withholding the protection from victims of motor vehicle accidents. When a person is injured or killed as a result of negligent driving of a motor vehicle the victim's right to security of the person is severely compromised. The state, properly so, recognises that it bears the obligation to respect, protect and promote the freedom from violence from any source.*

[32] S25(1) of the Constitution.

[33] S27(1) of the Constitution.

[34] Section 38 of the Constitution.

[35] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC)

97. Subject to the express exclusions and limitations embodied in the Act,[36] none of which is relevant herein, the patrimonial damages for which the RAF is liable to the victims of road accidents are determined/calculated on the ordinary delictual basis.

98. The SCA has held that:[37]

> *"As a general rule the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict. In determining a plaintiff's patrimony after the commission of the delict advantageous consequences taken into account. But it has been recognised that exceptions to this general rule."*

99. To the Constitutional Court in 2011, the *Minister of Transport* said:[38]

> *45. the ultimate vision is that the new system of compensation for road accident victims must be integrated into a comprehensive social security system that offers life, disability and health insurance cover for all accidents and diseases. He acknowledges that a fault-based common law system of compensation for road accident victims would be at odds with a comprehensive social security model. The intention is therefore to replace the common law system of compensation with a set of limited no-fault benefits which would form part of a broader social security net as public financial support for people who are poor, have a disability or are vulnerable. He goes on to state that the design of a comprehensive social security system is complex and will take time. However, Cabinet has approved the principle on 18 November 2009 and published a draft no-fault policy for public comment and consultation.*

[36] *Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC) at para 27; S17 of the RAF Act.

[37] *Erasmus Ferreira & Ackermann v Francis* 2010 (2) SA 228 (SCA) at para 16.

[38] In *Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC) at para 45-46.

46. He would have us accept that the new scheme is a first step to greater reform. It is an interim measure towards the restructuring of the Fund's scheme into one which pays compensation on a no-fault basis. The new scheme has been adopted as an interim measure in order to arrest the ever bulging financial deficit of the Fund which cannot be adequately funded by constant increases in the petrol levy. If the unfunded deficit is left to grow it will, in time, harm the country's financial soundness. The Minister further explains that the purpose of the scheme is to make the RAF Act less vulnerable to constitutional challenges on the ground that it differentiates unfairly between accident victims and does not create reasonable access to social security and health care.

100. Whatever happened to this noble scheme? The Act as we know it today, based on a fault-system was to be an interim measure where the soft belly of the scheme is that it is still '*fault-base*'.[39]

101. The CC upheld most of the 2008 amendments to the Act on '*the basis that the government has committed to restructuring the Fund's scheme into one which would pay compensation on a no-fault basis and as part of its duty to facilitate access to social security and health care*'.[40]

102. The CC court said in its judgement that '*On the evidence, there is no cause to doubt this commitment*'. The CC held that on all the evidence it is clear, and the Minister and the Fund assure the CC, that the ideal legislative arrangement should not require fault as a pre-

[39] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 51.

[40] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) at para 52.

requisite for a road accident victim to be entitled to compensation for loss arising from bodily injury or death caused by the driving of a motor vehicle.[41]

103. Taking an existing right away as the Bill arbitrarily does, an injured victim's right to property (*in casu,* a claim for loss of support, loss of income and damages)[42] is expropriated, which is explicitly prohibited by section 25 of the Constitution.

104. The Bill will do well to remove the fault-based system.

PAYMENT OF BENEFITS

105. The benefit which the Bill provide for is considered next.

106. From the onset is must be confirmed that the Bill changes the damages payable to one of 'benefits' payable. The reason for this is patent. The Bill wishes to move away from being subjected to the provisions of the Insurance Act 18 of 2017, as this will have a bearing on the accounting policy.

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[41] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) at para 54.

[42] S25(4)(b) of the Constitution makes it clear that property is not limited to land. See *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) at para 83:

> *"I will assume without deciding in favour of the applicants that a claim for loss of earning capacity or of support is "property".*

107. In April 2021, the RAF changed its accounting policy from the International Financial Reporting Standards (IFRS) to the International Public Sector Accounting Standards (IPSAS). The AGSA argued that this led to the RAF understating its liabilities by approximately R300 billion compared to the prior financial year - specifically how it dealt with insurance contracts.

108. The Auditor General, which is a Chapter 9 Constitutional Institution,[43] which plays an oversight role and is a watchdog, is embroiled in a bitter dispute[44] with the RAF regarding this policy. The function of the AG obliges her to audit and report on the accounts, financial statements and financial management of institutions or accounting entities required by national legislation to be audited by her,[45] including the RAF.[46]

109. It is clear that the Bill wishes to assist in misrepresenting the true financial position and in effect understating R300 billion liabilities. This is significantly adverse to the constitutional democracy and the checks and balances which the Constitution introduced to mitigate maladministration.

110. Nothing in the method of quantification of the compensation will change. The net result will be that the injured victim must still prove the merits on a fault-based system and

[43] Sections 188-189 of the Constitution.

[44] *The Road Accident Fund v The Auditor-General of South Africa and Others* (19778/2022) [2022] ZAGPPHC 737 (30 September 2022). Also see *The Road Accident Fund v The Auditor-General of South Africa* (1452/2022) [2022] ZAGPPHC 307 (4 May 2022).

[45] Section 181(1)(c) of the Constitution.

[46] Section 14(2) of the Road Accident Fund Act 56 of 1996 (the RAF Act).

moreover must prove the individual heads of damages (excluding general damages) with the assistance of medico legal experts.

111. As for **<u>past medical expenses</u>**, the Bill makes provision for such expenses, provided that it is subject to a tariff (unknown at this stage) and only on the basis that such costs are not part of the Prescribed Minimum Benefits of Emergency Medical Conditions as the Medical Schemes Act. The preamble of the Bill provides surreptitiously in this regard that the Bill has the purpose to *'clarify exclusions of liability'*.

112. Despite the position in law having been trite that payment of medical costs covered by a medical aid is *res inter alios acta*[47] and should not be deducted from compensation as an

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[47] In *Thomson v Thomson* 2002 (5) SA 541 (W) at 547:

> *"A medical aid scheme is, if not in law then in substance, a form of insurance. One pays a premium against which there may be no claim, or claims less than the value of the premiums, or claims which far exceed the value of the premiums. Were this a claim for damages, whether in delict or in contract, there is little doubt that the defendant would not have been entitled to rely on the payments received from the medical aid scheme"*

This dicta was approved in *D'ambrosi v Bane and Others* 2006 (5) SA 121 (C) par 40-45 at 133-4, was confirmed in *Bane and Others v D'ambrosi* 2010 (2) SA 539 (SCA) para 19 at 550:

> *"Van Zyl J pointed out that payments which the medical aid was and is obliged to make to the respondent constitute the discharge by the medical aid of contractual obligations flowing from the contract concluded between it and the respondent. As such they constitute res inter alios acta and the appellants cannot claim the benefit of them".*

The plaintiff is entitled to recover damages in respect of medical and hospital expenses which have been reasonably incurred and are fairly attributable to the bodily injuries[47] *sustained in the accident"*

See *Gauntlett, op cit, par 5(a) bl 37; vide Selikman v London Assurance* 1959 (1) SA 523 (T) at 527.

accelerated benefit, the RAF was embroiled in litigation, where it refused to pay medical expenses where such medical expenses had been covered by a medical aid which was the subject of judicial attention.[48]

113. This is indeed a provision which the legislature may amend in the Act, but this will have a devastating effect practically. The Bill is respectfully ill-considered in the context of the existing provisions regarding accelerated benefits (Law of Damages) and the Law of Subrogation (Insurance law).

114. In Discovery's urgent application, Prof Roseanne Harris, the deponent, said in her founding affidavit, deposed to on 18 August 2022 at para 69-70:

> *'Since the inception, the RAF has consistently included past medical expenses paid by a medical aid in its compensation to claimants under section 17 of the RAF Act.*

"The wording of the statute is clear. An injured person such as the plaintiff is entitled to be compensated for the actual loss which he has suffered as a consequence of bodily injury sustained in a collision. In practice such losses are usually proved by the submission of vouchers which establish the extent of the expenditure and the fact that it has actually been incurred": See *D'oliveira v Road Accident Fund* 2019 (2) SA 247 (WCC) para 35 at 257. Also see *McKenzie v SA Taxi Cab* 1910 WLD at 234.

[48] See *Mawila v RAF* [15105/2022) Justice Vorster (AJ); in Mbombela, consented to an order in *Themba Nelson & Discovery v RAF* (Case number 106/2018), *Watkins v RAF* (Western Cape High Court) [19574/2017], *Malgas v RAF* (Eastern Cape Local Division, Gqeberha) [126/2020]; *Discovery Health (Pty) Ltd v Road Accident Fund and Another* (016179/2022) [2023] ZAGPPHC 523 (26 June 2023); *Discovery Health (Pty) Limited v Road Accident Fund and Another* (2022/016179) [2022] ZAG at PPHC 768 (26 October 2022)

Medical schemes in South Africa have assessed their members' contributions and undertaken long and short-term budgeting and risk-analysis on the assumption that the medical scheme will be reimbursed for the medical expenses arising from road accident.

The immediate change, without notice, means that medical schemes must carry the full costs of these expenses. This will put huge strain on medical schemes in circumstances where they had no opportunity to prepare for the change.'

115. Either medical aids will no longer cover road accident victims, leaving injured victims to the devices of the already struggling public hospital (which in our experience exacerbate the claims as there is no prober rehabilitation) or medical aid will adversely increase their premiums, making private medical aid more expensive, especially for the middle and lower class and which would place additional strain on the public health sector.

116. The RAF does not function in a vacuum. Any decision made will inevitably have a knock-on effect on the Department of Health, Finances and Social Development. It must by now be common knowledge that the public health system is at a breaking point. It cannot accommodate road accident victim which will now be compelled to go through the public health system, and which otherwise would have received private health care.

117. As for the **future medical expenses**, this can be covered by the well-known s17(4)(a) undertaking. In ***Knoetze obo Malinga and Another v Road Accident*** [2023] 1 All SA 708 (GP); 2023 (3) SA 125 (GP) a full court of the Pretoria High Court division held at para 2:1

Adv Mullins SC, appearing on behalf of the Fund together with adv Pillay, argued the matter on a slightly different basis. He contended that the reason for so many plaintiff claiming (and the courts granting) directives to the Fund to furnish undertakings, is because "a blanket

election has been in operation for decades now", to such an extent that it has become a fact which is so notoriously known that the courts may take judicial notice thereof.

118. Similar to the realm of past medical expenses, the RAF had been taken to court over the way in which they approach claims for future medical expenses. The court in ***Muller obo Human & 2 others v RAF*** (2023-066777) on 8 September 2023, under Rule 42, declared that the RAF, when invoking s17(4)(a) may not limit the undertakings and must adapt the wording of s17(4)(a). This review application came after the RAF decided on a frolic of its own to disregard orders of court and to contemptuously limit the undertakings by subjecting it to self-imposed caveats, limitation and restrictions such as by limiting the number of medical visits, applying a tariff, limiting treatment to treatment in the RSA, and limited to only some injuries etc. This order is hardly groundbreaking as the SCA dealt with this matter authoritatively in ***Katz***.[49]

119. The Bill, if enacted will limit the treatment to a medical tariff, which is not disclosed at this stage, and subject to the RAF pre-authorizing the claims. What became apparent from the ***Muller obo Human & 2 others v RAF*** case is that the RAF limits the treatment only to some injuries as opposed to all, excluded experimental or unproven type injuries where there is there must be a clinically accepted outcome studies for the treatment, exclude novel treatment, retain the right to in its sole discretion, or in the discretion of its created Medical Advisory Team, refuse treatment, excluded treatment abroad, cover only what it deems as medically appropriate, exclude aesthetic treatment or treatment for convenience, exclude travel costs for minor injuries, retain the right to send the victim to a medical practitioner

[49] *Marine & Trade Ins Co Ltd v Katz* NO 1979 (4) SA 961 (A) 970.

of its choice or receive treatment of its choice and exclude costs of covered by a medical aid.

120. It is trite law that a victim can only recover medical expenses that is both accident-related and fair and reasonable. Under the existing law, the RAF is already well-protected and any pre-assessments will only overburden the RAF. The disadvantages of such a system outweigh any benefits. It may happen that treatment may be urgently required and the Bill is extremely inflexible in this regard.

121. What is an injured victim, provided with a s17(4)(a) undertaking to do if urgent life-saving surgery is required but the RAF cannot be reached for a pre-approval or if the RAF fails to agree to such surgery. If she undergoes the surgery without the pre-approval the RAF can refuse to reimburse her under the provisions of the Bill.

122. There can be no objection to the service provided being paid directly, provided the injured victim had not already made such payment to the service provider upfront, in which case the injured victim must be reimbursed.

123. As for such future costs being limited to unknown tariffs, judge Van der Westhuizen J in Muller ***obo Human & 2 others v RAF*** (2023-066777) on 8 September 2023 held at para 6 that:

> *"A declaratory order is issued to the effect that the costs incurred under the section 17(4)(a) undertaking is not limited to any tariff's'.*

124. In Regulation 5(1), the Minister of Transport has, pursuant to section 17(4B)(*a*) of the Act, prescribed tariffs for health services, which are to be provided to accident victims **by public health establishments**.

125. The RAF applies medical tariffs to the section 17(4)(a) undertaking. This is not permissible. Such medical tariffs were declared unconstitutional in ***Law Society of South Africa and Others v Minister for Transport and Another*** 2011 (2) BCLR 150 (CC), relating to tariff's introduced at that time. The court held at para 108(4)(e):

> *Until the Minister for Transport prescribes a new tariff for health services in terms of* section 17(4B)(a) *of the* Road Accident Fund Act, a *third party who has sustained bodily injury and whom the Road Accident Fund is obliged to compensate as contemplated in* sections 17(4)(a), 17*(5) and (6) of the* Road Accident Fund Act, is *entitled to compensation or health services as if he or she had been injured before the Road Accident Fund Amendment Act, 19 of 2005 came into operation.*

126. *In National Council of and for Persons with Disabilities and Another v Minister of Transport and Others* (GJ) (unreported case no 039100/2022, 15-12-2022) (Tolmay J) the court granted an interim interdict and prohibiting the RAF from enforcing the later tariffs published in the Government Gazette No 46747 of 19August 2022, which deals only with Emergency Medical Care.

127. In the result, the RAF is by law permitted to prescribe tariffs but no such tariffs had been published and we reserve our rights to supplement these submissions should more information on the tariffs come to hand.

128. The Bill now deleted Section 17(4B) which links the tariffs to the National Heath Act. Instead, the Bill introduces S17(2A)(i) which subject the medical costs to the 'prescribed medical tariff'. What this tariff is, is anybody's guess.

129. Private medical providers do not charge RAF tariffs. The tariffs are concerning in that it creates a situation where a person is out of pocket under circumstances where he/she was injured at no fault of his/her own.

130. Prescribed tariffs make any claim for future medical expenses inherently unfair, unless they are tariffs which a reasonable medical practitioner may charge. When the tariffs are so low, as is clear from the Law Society and *National Council of and for Persons with Disabilities and Another*, that they have the effect of being unconstitutional.

131. We do not support the limitation of this benefit by prescribing some tariff to it.

CAP APPLIED

132. In *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC), the constitutionality of the limitation (cap) placed on the recoverable loss of income and loss of support claim was challenged.[50] The court held that the cap, coupled with the removal of the common law claim is not unconstitutional.

[50] Para 81 et seq.

133. The Bill does not do away with this cap, as it is currently enacted at s17(4)(c)(i)-(ii).

ANNUITY PAYMENTS

134. In *RAF v LPC*[51], the RAF (for the first time in their replying affidavit) sought a Rule Nisi calling on interested parties to show cause why payments for future loss of earnings and future loss of support be paid by annuities, but the RAF abandoned this relief so sought.

135. If the Bill is enacted, both the claims for future loss of income and future loss of support shall be payable by annuity payments, subject to the reassessment of the Fund's liability.

136. In the current format, s17(4)(*b*) allows the same heads of damages as now encompassed in the Bill, to be paid in instalments, as opposed to annuities, by agreement.[52] The nuts and bolts of how these annuity payments are going to work is not clear from the Act and the Bill proverbially leaves more questions than answers. Some key questions which must be answered, and which cannot competently be addressed later in Regulations are:

136.1. Will the court fix one amount and that amount will be paid in equal instalments over the expected lifetime of the injured victim?

136.2. Can either party, the RAF or the injured victim approach the court should their circumstances change and the loss be higher or lower?

[51] 2021(6) SA 230 GP.

[52] See *Coetzee v Guardian Insurance* 1993 (3) SA 384 (W) 391D; *Marine and Trade Ins v Katz* 1979 (4) SA 961 (A) 970; *Kleinhans v African Guarantee & Indemnity Co* 1959 (2) SA 619 (E) at 629

137. In effect, annuity payments have the net result that the legislature will depart from the once-and-for-all Rule.[53] This is even more relevant owing to the '*re-assessment*' provision of the Bill. This make comment on the system difficult and it is accepted that some of the remarks below may not find application, depending on how the 'annuity' system will work.

138. The Bill disregards the disadvantages of an annuity system which is inextricable difficulties which the inevitable irreconcilable decisions being handed down by different courts in the various legal proceedings and which ensure an end to the litigation. A periodical payment system (or annuities as the Bill refers thereto) requires piecemeal consideration on the injuries and sequelae, the court system which is already under pressure, will be overburdened, the administrative burden increases, it's makes financial planning difficult as the RAF's ultimate and long term liability is unknown, and injured victims has no incentive to mitigate damages which will overburden the RAF.

139. The RAF and the state may be placed in a position of no return. Clause 21(2)(a) allows the common law to be reinstated should the RAF not be in a position to pay any compensation. Should the RAF be directed to pay compensation by annuity and found itself in a position where it is unable to pay compensation, such an injured victim will be adversely affected.

140. Insurance companies generally avoid the periodical payment system owing to the extra burden in administration and the instability in actuarially calculated predictions, costs

[53] *Cape Town Council v Jacobs* 1917 AD 615 620; JCFC Van der Walt *Die Sommeskadeleer en die 'Once and for All' Reël* (unpublished LLD thesis, UNISA, 1977.

estimations and the necessity of techniques to adjust claims, variations up or down, inflation adjustments and taxation.[54]

141. Most importantly, the claim of the injured victim remains to be quantified. This will require a great deal of financial costs to quantify the claim, the bulk of the costs being expended on medico legal experts. Attorneys expend significant resources on personal injury clients, and if their clients are to receive monthly instalments only, there may be no incentive for these lawyers to expend such costs on their clients, to the detriment of the poor and disenfranchised who rely on the contingency fee system to secure legal representation.[55]

142. Attorneys acting for injured victims will have to carry their files for life and will never finalize a matter in a periodical milieu.[56]

143. The RAF did try to employ the periodical system in the past and the system did not work. There is nothing to suggest that the system will work better today. The RAF would in effect run on two separate systems because the Bill cannot be applied retrospectively.[57]

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[54] A Spandau 'Inflation and the law' (1975) 92 *SALJ* 31 49; London Law Commission, Report No 56 *Report on Personal Injury Litigation-Assessment of Damages* (1973) §§ 27.

[55] I Currie & J de Waal *The Bill of Rights Handbook* (2005) 709.

[56] This will increase cost of litigation, especially in reviewable periodic payment systems: R Lewis in 'Pensions replace lump sum damages: Are structured settlements the most important reform in the modern times?' (1988) 15 *Journal of Law and Society* 392 400.

[57] *S v Mhlungu & Others* 1995 (3) SA 867 (CC) paras 65 -67; *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) at 311H; *Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C) at 351.

144. The annuity payment system is a recipe for a disaster and should not be implemented.

ABOLISHING THE SUPPLIER CLAIM

145. The Bill, if enacted, will also abolish the supplier claim. A supplier claimant derives its right to claim compensation directly from the Road Accident Fund under the auspices of the Road Accident Fund Act 56 of 1996, as amended.[58] Section 17(5) is apposite:

> *'Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of any services rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may claim the amount direct from the Fund or an agent on a prescribed form, and such a claim shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered'.*

146. The supplier cannot claim more for supplied services, treatment or goods than the injured victim would have been able to claim. Section 17(5) provides that the claim may '*not exceed the amount which the third party could, but for this section, have recovered*'.[59]

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[58] See the Road Accident Fund Amendment Act 43 of 2002 & the Road Accident Fund Amendment Act 19 of 2005.

[59] In *Van der Merwe V Road Accident Fund* 2007 (6) SA 283 (SCA) the court held:

> *The appellant had rendered medical treatment to a patient (G) following injuries G had sustained in a motor vehicle collision that had occurred more than three years previously. About five months after rendering the treatment, the appellant submitted a claim for his fees to the respondent (the Road Accident Fund), under s 24(3) of the Road Accident Fund Act 56 of 1996. He did this after G had submitted his claim to the Fund, but before G's claim had prescribed.*

147. The scope of the supplier claim is wide in respect of who the services are rendered to: To this end, a *third party* as encapsulated in section 17(5) is a person who incurs cost for himself/herself or for ***any other person***.[60] A relative may undertake to a hospital to pay for the injured victim's hospital expenses. The hospital may still submit a supplier claim, even if the agreement for payment is between the hospital and a third person (not the injured victim).

The Fund contended that the appellant's claim had prescribed because it had been submitted more than three years after the accident. On appeal,

Held, that the right of a supplier to recover directly from the Fund under s 17(5) of the Act, arose only if the third party was entitled to claim the amount as part of his or her compensation from the Fund. The right arose only if the third party had a valid and enforceable claim against the Fund and had complied with the necessary formalities. A supplier's claim was dependent upon the third party being able to establish his or her claim and, in that sense, could be described as an accessory claim. (Paragraph [7] at 286H - 287A.)

Held, further, that if the third party's claim had not prescribed when the supplier submitted his or her claim, the supplier's accessory claim, being part and parcel of the third party's claim, similarly could not have prescribed. (Paragraph [9] at 287D.)

[60] In *Road Accident Fund v Abdool-Carrim and Others* 2008 (3) SA 579 (SCA) the court held:

The phrase in s 17(5) of the Road Accident Fund Act 56 of 1996 (the Act) that suppliers' claims are 'subject mutatis mutandis to the provisions applicable to the claim of the third party concerned' does not render s 19(d) of the Act applicable to suppliers' claims. Section 19(d) is applicable only to agreements made by third parties. If a supplier enters into an agreement with someone other than an attorney or the class of persons in s 19(c)(ii) of the Act, that the supplier will pay such person after settlement of the claim, the supplier's claim against the Fund does not become unenforceable.

148. The Bill will not reduce the RAF's liability, it simply shift the claim or the benefit payment to the injured victim. Put differently, in stead of the supplier claimant being paid by the RAF for medical treatment received, the RAF will now have to pay these medical costs to the injured victim. There is thus no saving for the Fund.

149. The supplier claimant is the ambulance, the helicopter and the hospital that treat the injured victim and that saves lives. Because of the urgency of an accident-related injury, there is not always time to secure or arrange for upfront payment and the supplier, at its own expense, treat the injured victim, with the security that a claim can be lodged with the RAF.

150. The government ambulance and emergency medical service is at a breaking point. If Parliament removes the supplier claims, the emergency suppliers will refuse to assist road accident victims and many road accident victims will therefore die and the number of medical negligent claims against the State will no doubt exponentially escalate. Many victims mitigate their loss exponentially by receiving private medical care, where the medical supplier of such services claim the compensation from the RAF. This also relieves the struggling Government Health System.

151. The State will be in dereliction of its constitutional duty to create social security and the removal of supplier claims will be a massive leap backwards in the progressive realization of social security rights to the road accident victims, specifically the right to social security.

INTEREST

152. The Bill, in amending section 17, changed the period in which the RAF is indemnified from interest, from the existing period of 14 days to 120 days.

153. Section 2(1) of the Prescribed Rate of Interest Act 55 of 1975, provide that interest accrue on a judgement debt on the day that judgement debt is payable. The RAF was recently challenged on the way in which they compensated injured victim in respect of the interest on judgement debt.[61]

154. The Bill differs extensively from other legislation in respect of interest due. The only reason why the Department of Transport wishes to extend this period is because it anticipates not being in a position to pay the judgement debt when it falls due. The Department of Transport in *Law Society v Minister of Transport* conceded that 'for decades the Fund was not fully funded'.[62] This is significantly concerning.

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[61] See the order granted by Van der Westhuizen J in *Barnard v RAF* (Pretoria High Court, Case number 87319/2018) granted on 5 September 2023:

> *It is declared that interest can be charged on any judgement debt, ex lege, after 14 days of the date of the judgement at the applicable mora interest rate, even in the event that the applicable court order does not make provision for interest.*

This is trite law: See *Saunders N.O v MEC of the Department of Health: Limpopo Province* (A899/2013) [2015] ZAGPPHC 360 (1 June 2015) para 28 et seq.

[62] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) at para 41.

155. For the past two financial years, the RAF and Board did not ask the Minister of Finance to increase the fuel levy. It is clear for all to see that the RAF needs its financial shortage to be addressed and this should be addressed by securing additional funding and vigorous oversight of the spending and utilisation of the resources.

156. If anything, the Bill should look into securing adequate funding for the RAF Scheme, which had been a long-standing problem for the RAF and which brough about ongoing applications to the High Court to seek a moratorium on the execution of judgement debts,[63] and extending the payment of debts to 180 days, which offends the constitutional rights of access to courts for injured victims.[64]

CLAIM EXCLUSIONS

157. Section 18 of the Act will be amended by the Bill in that:

157.1. The provision is deleted that a claim is excluded unless instituted by a person who is entitled to practice as an attorney within the Republic.

157.2. If an operator provides for passenger insurance cover, the RAF claim will be excluded.

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[63] See *Road Accident Fund v Legal Practice Council and Others* [2021] 2 All SA 886 (GP); 2021 (6) SA 230 (GP) (9 April 2021) extended a number of times already.

[64] *Mieni v Minister of Health and Welfare EC* 2000 (4) (TK) 452:

> *The constitutional right of access to courts would remain an illusion unless orders made by courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order*.

Also see *Chief Lesapo v North West Agriculture Bank and Another* 2000 (1) SA 409 (CC) para 13.

157.3. If the claim is covered by medical aid or medical insurance.

157.4. A claim where the pedestrian or driver is over the alcohol limit.

157.5. A claim where a pedestrian is on the Highway.

157.6. If the accident involves a train or an aircraft.

157.7. If the producer, importer, distributor or retailor is liable for the harm by arising from the driving of the motor vehicle as contemplated by section 61 of the Consumer Protection Act 68 of 2008.

157.8. Where the vehicle accident occurred whilst filming a movie, advertisement, drag racing or during a stunt.

157.9. If the claimant is not a South African citizen.

158. Before I briefly consider each in turn, a brief remark must be made in general. The Bill does not reinstate the common law claim and many, if not most exclusions, may be present despite an injured victim having no fault at all in his/her injuries. If a driver ever so slightly over the influence, unbeknown to him/her, and another vehicle who is exclusively the cause of the accident drive into victim, the claim will be excluded.

159. The exclusion grounds now introduced are ill-considered, nefarious, and designed to exclude claims. The existing fault-based system provides ample remedy for the RAF to exclude claims by negligent and delinquent road users.

160. What has been said above about the common law claim is repeated. The only way that the proposed exclusions will pass constitutional muster is for the legislature to reinstate the common law claim, failing which, a foreigner for instance may have no claim, not against the RAF nor against the guilty and negligent wrongdoer. The Act also protects the negligent

road user from financial ruin, which is seemingly completely disregarded and scant attention is paid to the consequences of the proposed exclusionary provisions.

Claims lodged by an attorney seemed to be excluded

161. The Bill now provides that a claim is excluded if not instituted by a third party or on behalf of a third party by persons, functionaries of institutions yet to be prescribed in the Regulations.

162. It is inconceivable that legal practitioners are excluded, and that the clause allowing practitioners to lodge the claim is not retained. It is accepted that the Regulations remain unclear at this stage as to who such functionaries would be.

163. To exclude attorneys would be greatly adverse to the system as it currently works. The benefit amounts would still need to be quantified. This not only goes with significant disbursements but also with unparalleled administrative labour. There is simply no way that the RAF would be able to meet these demands if history is anything to go by. What is more, it is no secret that the RAF is reducing staff and not increasing their staff compliment.

164. Even if the legal practitioner will still be permitted to represent an injured victim, the Bill introduces Section 26(1A)(*h*) which allows the fees of practitioners, on a party and party scale, to be regulated.

165. Party and party fees are prescribed by the Rules of Court. The functions of the Rules Board are usurped if these functions are to be given to the Minister. There is also no basis

in law why party-and-party costs for one litigant should be different to party and party costs for a different litigant.

166. There is already a Commission appointed to look into the legal fees.[65] One of the aspects that the SALRC is considering is the payment of the legal costs of the losing party (the opponent's costs).

Passenger Operator has insurance

167. To exclude liability of the RAF *in toto* because a passenger operator has some liability insurance or cover, loses out of sight that the RAF benefit may exceed the cover which a passenger may receive. The fact that the common law claim is excluded and replaced with an RAF claim is a valid defence to a liability claim.

168. Little or no research has gone into the nature of the insurance of Passenger Operators and from the reading of the Bill, the slightest of cover under liability insurance, will exclude the entire RAF benefit without more.

169. The common law provisions of *res inter alios acta* and subrogation is undermined without considering what the broader implications thereof could or may be.

[65] South African Law Reform Commission, Investigation into Legal Fees, Project 142, Issue Paper 36 (16 March 2019).

Medical aid cover the treatment costs

170. This had already been addressed above.

Over the alcohol limit/ cross a highway

171. In our experience, reliable evidence in the form of admissible blood alcohol test results of sufficient probative value in hardly even taken and gathered. It is found in a handful dockets but hardly ever.

172. The corollary of this provision is that it excludes a claim of an innocent person over the legal limit. Take this example: Person A consumed a glass of wine and has a blood alcohol level of 0.05g/100 millilitre. On his way to his uber, he is knocked down on the sidewalk by a negligent driver. His claim will be excluded.

173. Intoxication does not equate to negligence without more.

174. The Act already provides for a right of recourse against the intoxicated owner or driver, who drives the vehicle negligently. The injured victim, if intoxicated, under the Bill will simply have no claim.

175. There are ample remedies to exclude the claim of a negligent driver, pedestrian or cyclist and that of a pedestrian crossing the highway. Many displaced communities and formal and informal settlements are built on bilateral ends of a highways, forcing disenfranchised people to make uses of the highway. The state does not always provide adequate alternatives such at footbridges. It is inconceivable that claims of such individuals be excluded, over and above the existing fault-based exclusions that already exist.

The liability under Section 61 of the Consumer Protector Act 68 of 2008

176. The inclusion of this provision is not well understood. It is difficult to understand how liability for damage caused by goods can be ascribed to the manufacturer, distributor, retailor or importer in the context of RAF legislation, unless perhaps this may be a vehicle importer, - manufacturer or - distributor.

177. Should any damaged be caused as a result of unsafe goods (cars), product failure or inadequate instructions or existing hazards, as contemplated by Section 61 of the CPA, then and in that event the RAF's liability is in any event excluded, on the existing fault-based system.

178. The same can be said for accidents whilst filming a movie, advertisement or drag racing. There are existing defence to such claims, for instance *volenti non fit iniuria* (voluntary assumption of risk).

Foreigner claimant

179. It is accepted that foreign nationals are a big problem. The topic is also an emotional one.

180. There are other foreigners in the RSA, who are not permanent residents, such as Asylum Seekers[66] and others,[67] who may live and work in the RSA. According to the Immigration Act[68] a foreigner is any individual that is not a (South African) citizen.[69] No person may employ an illegal foreigner[70] or a foreigner whose status does not allow them to be employed.[71] The RAF has taken a policy decision to exclude foreigner claims, where such a foreigner is not legally in the RSA, which is currently taken on review by *Adam Mudawo* (In the Pretoria High Court- 2022/011795), an asylum seeker permit holder.

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[66] Section 23 of the Immigration Act 13 of 2002. An asylum transit visa is issued for 5 days only, to allow an asylum seeker to reach a Refugee Reception Office, where such a seeker can apply for asylum in terms of the Refugees Act 130 of 1998. In terms of the Refugee Act, a person seeking asylum will be granted the right to sojourn in the RSA, pending the outcome of the asylum application and an asylum seeker permit will be granted [s22(1)]. No proceedings may be instituted against any foreigner, in respect of their unlawful entry into the country, pending the application for asylum [s21(4)]. Once asylum has been granted, a refugee may seek employment [S27(f)].

[67] People who enter the RSA as a foreigner with a visa to temporarily sojourn in the Republic, [Section 10 of the Immigration Act 13 of 2002], on a Study visa Section 13 of the Immigration Act 13 of 2002], Business visa, Section 15 of the Immigration Act 13 of 2002, Crew business [Section 16 of the Immigration Act 13 of 2002], Medical treatment visa [Section 17 of the Immigration Act 13 of 2002], Relative's visa [Section 18 of the Immigration Act 13 of 2002], Work visa [Section 19 of the Immigration Act 13 of 2002], Retired person visa [Section 20 of the Immigration Act 13 of 2002], Corporate person visa [Section 21 of the Immigration Act 13 of 2002], Exchange visa [Section 22 of the Immigration Act 13 of 2002].

[68] 13 of 2002.

[69] Section 1. A citizen on its turn is defined as South African Citizenship as contemplated in the South African Citizenship Act 88 of 1995.

[70] Section 38(1)(a) of the Immigration Act 13 of 2002.

[71] Section 38(1)(b) of the Immigration Act 13 of 2002.

181. Illegal income cannot be taken into account in any loss but more recently, the courts have followed the approach where the loss of earning capacity is compensated and the illegality of the income doesn't disbar claimants from qualifying for a claim for loss of earning capacity. In *Lesaoana v Road Accident Fund (1135/2011) [2013] ZAFSHC 39 (7 March 2013)* the court allowed a loss of earning capacity.[72]

182. If the Bill were to exclude the foreigner claims, the common law for such a foreigner cannot be excluded. It would cause a diplomatic nightmare if a person enters the road lawfully, is injured at no fault of his/her own in an accident and cannot claim from the RAF or the wrongdoer.

183. The Bill respectfully disregards diplomatic nuances and responsibilities and disregard international obligations.

TERMS & CONDITIONS

184. The Bill exponentially expands the law-making power, albeit subordinate law-making power of the Minister. It is clear from the specific power which the Bill confers on the Minister, that the lodgement compulsory requirements, designed to exclude claims, will be at the order of the day. The Bill specifically gives the Minister the authority to make regulations regarding the procedure to lodge a claim, the additional documents that must be lodged, etc.

[72] Also see *Masiza v Road Accident Fund* (28354/2012) [2014] ZAGPPHC 329 (23 May 2014) and *Rumbidzai v RAF* Case number 83879/2014 North Gauteng High Court heard 2 September 2015.

185. Alarmingly, the Bill confer authority to the RAF Board, of a similar nature, permitting the Board to stipulate terms and conditions upon which claims shall be administered, the form to be used, etc.

186. The reason why this section is encapsulated in the Bill is patent and was already the subject of litigation. The Board and the CEO of the RAF was under the impression that they could regulate the lodgement procedures, much the same that the Minister may, under the auspices of the existing Section 4(1)(a) of the Act.

187. But Section 4(1)(a) of the Act does not deal with lodgements and submissions of claims. This is dealt with elsewhere in the Act, specifically section 24, among others. Section 4(1)(a) is a machinery which deals with administration. The Board of the RAF does not have the authority to legislate or to impose lodgement conditions.

188. The honourable Neukircher J in *Nel v RAF* was asked to adjudicate an urgent application where Nel asked the court to declare that he validly lodged his claim notwithstanding his non-compliance with the RAF's Directive 1/2021. The court held in an *ex tempore* judgement that Section 4(1)(a) of the Road Accident Fund Act does not deal with lodgement of claims and that Section 4(1)(a) cannot be interpreted to give the RAF authority to make lodgement requirements (as the RAF does). The court held:

> *'In my view, the administration has to do with whether or not the lodgement of the claim has been done correctly. It is not prescriptive as to the manner in which lodgement takes place'.*

189. In the making of legislation, the Constitution of South Africa encapsulates the notion of the legislative authority as being supreme. Legislative authority is the power to enact, amend and repeal rules of law/legislation. This authority is exercised by the different

government bodies at all levels of government. Section 43 of the Constitution provides that the Legislative Authority of South Africa of the national sphere of government vests in Parliament, the provincial sphere in the provincial legislature and in the local sphere, in the Municipal Councils. Schedule 4 of the Constitution is clear: The portfolio of Roads and Transport falls within the functioning areas of concurrent National and Provincial Legislative Competence.

190. The people who serve in the legislative bodies (National/Provincial Parliament and the Municipal Councils) must be representative of the people of the nation, a notion duly incorporated into the South African law. This democratic principle is a founding value of the SA Constitution.[73]

191. The function of Parliament is key to the constitutional law of the state and has key functions. One such a key function is the system of representation. Parliament represents the people of the State and is a channel of communication between the central government and the citizens of the State. Parliament also has control over the executive. Parliament addresses and regulates the conflict that arises between different interest groups. Although all these key functions are important in the context of the RAF's Directives and Board Notices, the most important key functions of Parliament are to consider, debate, amend and approve the new laws and old laws submitted by the executive or individual members.

192. Many of the legislative mandates has been transferred to the executive branch of government with a substantial growth in subordinate legislation. Section 101(3) of the

[73] S1(d) pf the Constitution of the RSA.

Constitution provides that Proclamations, Regulations and other instruments of subordinate legislation must be accessible to the public. Section 101(4) of the Constitution provides that national legislation may specify the manner in which, and the extent to which, instruments mentioned in section (3), must be (a) tabled in Parliament and (b) approved by Parliament.

193. Section 26 of the Road Accident Fund Act 56 of 1996, delegates the subordinate legislation making power to the executive, which is the Minister of Transport in this case. It is not delegated to the CEO of the RAF nor is it delegated to the Board of the RAF.

194. In making regulations and disguising it, surreptitiously so, as a Management Directive or as an RAF Board Notice, the CEO and the Board of the RAF is unlawfully usurping the function and mandate of parliament, alternatively the executive, specifically that of the Minister of Transport. The RAF management conflate the mandate to make and to internally stipulate terms and conditions upon which claims are to be administered, with the delegated power to make subordinate legislation.

195. Section 92 of the Constitution makes members of the Cabinet in general (and the Minister of Transport specifically), accountable collectively and individually to Parliament for the exercise of their powers and performance of their functions. They are required to report these to Parliament. By circumventing the route of subordinate legislation, the RAF and its board is short-circuiting the legislative processes, in which conduct can at best be described as unlawful, *ultra vires* and unconstitutional. This breaches the checks and balances introduced by the constitutional principle of the separation of powers.

196. The Bill does not express so explicitly, but in effect both the Minister and the Board has the right to make Regulations. This is exactly what the intention is with the Bill.

197. Making legislation of this nature creates a dangerous precedent and amount to executive overreach. It is unconstitutional. It also does little to secure checks and balances designed to ensure effective management and spending of resources.

BILL DESIGNED TO EXCLUDE CLAIMS

198. The Bill, if enacted, has a well embedded but surreptitious tone, that is designed to make the provisions of the Act peremptory as opposed to directory.[74]

199. As one example, section 19(f) now provides in the Bill that the injured victim shall provide the affidavit at lodgement and not thereafter as was previously possible, but moreover, not only with the section 19(f) but the '*prescribed documents that relate to the claim concerned*'. I remind the reader that the failure to do so will render the RAF's liability excluded. This new section 19(f) is couched in compulsory peremptory terms and the Bill makes no provision for condonation or any exceptions.

200. We invite the Department of Transport and any Parliamentary Committee that may consider this submission to have regard to the submissions made to the RAF and the RAF Board, when they called for such submissions in Board Notice 66 of 2021[75] so as to

[74] It is currently directory and all that is required is substantive compliance: See *SA Eagle Insurance Co Limited v Pretorius* (397/96) [1997] ZASCA 107; 1998 (2) SA 656 (SCA).

[75] Government Gazette 44747 dated 22 June 2021

introduce these new peremptory lodgement requirements. The submissions and objections and complaints were legio[76] and fell on deaf ears.

201. The RAF's attempt, perhaps desperate attempts, aimed to introduce such peremptory requirements is in an abundance, much like the plague,[77] and is the subject as to two review applications, known as the *Mautla* case (interim interdict granted[78] and final judgement pending) and the *LPIIF* review where a trial date is scheduled for 26 – 28 February 2024.

202. From the amendment to section 18, it is clear that the submission of a claim is to be done on the 'stipulated' form.

203. If the purpose of the RAF Act is to provide social security to vulnerable and injured victims, then the last thing that the Bill should do is to exclude claims on arbitrary grounds. There is simply no way that injured victims, many indigents, poverty stricken, undedicated, disenfranchised and lay can meet the stringent demands of complying with the RAF Act to the letter of the law. All that will happen in practice is that claims will be excluded in

[76] Made by The Law Society of South Africa, Adams & Adams Attorneys and Mduzulwana Attorneys to mention but a few.

[77] See the RAF Management Directive 1 of 2021 dated 22 June 2021, the '*Supplier Claims- Compulsory Supporting Documents for Lodging Claims with the Road Accident Fund*', Board Notice 58 of 2001 in Government Gazette No 44674 (of 4 June 2021). Road Accident Fund's Board Notice 66 of 2021 [Government Gazette No 44747 of 22 June 2021], SUBSTITUTION OF RAF 1 CLAIM FORM" published in the Government Gazette on 4 June 2021, RAF Board Notice 271 of 2022 [GG No 46322 of 6 May 2022], RAF Board Notice 281 of 2022 [GG No 46422 of 27 May 2022], RAF Board Notice 281 of 2022 [GG No 46456 of 31 May 2022], RAF Board Notice 302 of 2022 [GG No 46661 of 4 July 2022].

[78] Per judge Davis J on 15 June 2021: *Mautla and Others v RAF and others* [Case number

exponential numbers. The RAF's liquidity will no doubt improve but the social injustice will be off the proverbial charts.

SECURING DOCUMENTS

204. The Bill adds section 22(3) which compel state institutions to provide the RAF with certain documents.

205. This clause may not be in line with the stringent requirements of the Protection of Personal Injuries Act and moreover, seem to be a tall order placed on state institutions.

206. Any provision which gives access to information, to the RAF or any other party, is to be welcomed, provided that it complies with existing legislation.

207. We propose that should this new clause survive scrutiny and is indeed in compliance with POPIA, then and in that event, the state institutions should also make the information available to the injured victim and his/her legal practitioners and not exclusively to the RAF.

208. Consequences should also be introduced in the event of non-compliance, otherwise the new clause will have no practical implication and would not be able to be readily enforced.

PRESCRIPTION

209. The Bill now provides that all claims prescribe after a period of three years.

210. The CC in *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at para 50 held that:

> *[50] There is therefore a clear reason for the difference between the* Prescription Act and *the RAF Act. The* Prescription Act regulates *the prescription of claims in general, and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the Fund for those injured in road accidents. The legislature enacted the RAF Act – and included provisions dealing with prescription in it – for the very reason that the* Prescription Act was *not regarded as appropriate for this area.'*

211. From the above decision, it is clear that the RAF Act has a special dispensation for prescription of claims.

212. Under the current Act, the injured victim must first lodge a claim, and once lodged, the injured victim is granted a further period in which to proceed with summons, up to 5 years from the date of the accident.

213. The extension has a very specific purpose, and that is to offer the injured victim the widest possible protection. This protection is now taken away from injured victims.

214. The Bill also does away for the period in which the RAF is to investigate claims, 120 days under the existing Act. The Bill deletes sections 24(2) to 24(6). Many, if not most of these provisions are incorporated to protect the RAF. Because the Bill makes provisions of unachievable lodgement requirements, setting the bar beyond reach for almost everyone, deleting these protective measures for the RAF are apparently of no concern. The RAF will be covered under the peremptory and compulsory lodgement requirements.

215. Of course the Bill then amends section 15(2) of the Act and provides that an injured victim who may approach the court to enforce a claim, can now only do so if the injured victim exhausted the complaint process administer by the Adjudicator.

216. Section 17, the liability of the RAF, is also made subject to any regulation made under section 26.

217. Considering the Bill as a whole, exactly how the new scheme will operate is not clear. Can an injured victim lodge a claim and issue summons at the same time? How will the Adjudicator impact on the issue of Prescription. It is respectfully submitted that these are not issues which can and should be left for subordinate legislation. These are extremely important issues which should be addressed in the Bill.

218. The Bill is respectfully found wanting for lack of sufficient particularity and leaves more questions than answers as to the lodgement of claims and how this is linked up with the institution of action and/or the Office of the RAF Adjudicator.

219. Clarity should be provided.

CONCLUSION

220. This Bill encapsulates numerous issues which the RAF and the CEO had been litigating in the courts in the last 3-5 years. It received little favour with the court because it offended the existing Act. The legislative amendments would pave the way for RAF's 'project' to finally see the lights, but at a significant expense to the vulnerable, disenfranchised, indigent and lay South African. The middle class may fend off the adverse consequences

by resorting to insurance cover, but this is not a luxury available to the significant part of the South African population. It is regressing the progress made in securing the Social Security rights which the State must progressively realize under section 27 of the Constitution.

221. The design is clearly to exclude as many claims as possible and the make it almost impossible to reach the insurmountable hurdle in complying with the compulsory stringent lodgement requirements.

222. Of great concern is the significant administrative changes that would be brought about by the Bill. The RAF must make payments by annuity for future loss of income, the RAF will be compelled to pre-assess medical costs to be undertaken under the section 17(4)(a) undertaking.

223. The Bill affords less protection. Why should those that is not covered under the Bill pay the fuel levy if they don't receive protection under the Bill? The fuel levy is also seemingly not being reduced, notwithstanding the reduced cover and the reduced liability.

224. The RAF is already understaffed and fail to secure to perform their constitutional duties effective and efficiently. Given the history of the RAF and its management inabilities to perform even the most basic of administrative tasks, the legislature cannot burden the RAF with such an insurmountable mandate. If history is anything to go by, this Bill is a recipe for a constitutional implosion if not a disaster and the already overburdened courts would be flooded with litigation.

225. The poor administrative capacity and functioning of the RAF and its board had been set out in the celebrated judgement of *Hlatshwayo and Another v Road Accident Fund* (3242/2019) [2023] ZAMPMBHC 2 (24 January 2023).

226. The Bill is not constitutional and will not pass constitutional muster.

227. In addition to the submissions on constitutionality already made, it cannot be said that the Bill is rational.

228. It is trite law and accepted that rationality is an incident of the rule of law, which in turn is a founding value of our Constitution.[79] The rule of law requires that all public power must be sourced in law.[80] This means that state actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily.[81]

229. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government

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[79] Section 1(c) of the Constitution.

[80] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[81] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 74-5 and *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 19.

purpose. The requirement is meant "to promote the need for governmental action to relate to a defensible vision of the public good" and "to enhance the coherence and integrity" of legislative measures.[82]

230. A decision whether a legislative provision or scheme is rationally related to a given governmental object entails an objective enquiry.[83] Where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.[84]

231. It is trite and accepted that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there is other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise.[85]

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[82] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) at para 36 and *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

[83] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at paras 263; 274 and 284

[84] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

[85] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) at para 35.

232. But in South African jurisprudence, legislation can also be challenged and placed under rigorous judicial scrutiny on the basis that it offends fundamental rights, in which case regard is not paid to proportionality.[86] No law may limit a fundamental right except if it is a law of general application and the limitation is reasonable and justifiable in an open and democratic society based on a number of grounds, including whether there are less restrictive means to achieve the purpose and the relation between the limitation and its purpose.[87]

233. That the RAF has a funding crisis, can surely not be disputed with any earnest, although one can certainly lay much fruitless and wasteful expenses and mismanagement at the door of the RAF management and leadership, and the Minister of Transport cannot be excluded from this indictment. As far back in 2011, the CC was told by the Minister of Transport that urgent steps must be taken to make the Fund sustainable so that it can fulfil its constitutional obligations to provide social security and access to healthcare services.[88] It was on this premise that the CC upheld most of the 2008 amendments to the Act.

234. The Bill can achieve the same or similar outcome by making small amendments without the significant changes. A good start will be to employ competent leaders to positions and to appoint an experienced knowledgeable Board which bring expertise to the RAF.

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[86] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) para 35.

[87] S36 of the Constitution.

[88] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) para 52.

235. The Bill is most-certainly not promoting the financial sustainability of the RAF and undermines the RAF and Minister's constitutional obligations towards road accident victims. It further truncates constitutional rights of road accident victims and leaves the door wide open for judicial scrutiny.

236. The Bill is objected to on the grounds set out herein and for the reasons set out above.

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ADV FHH KEHRHAHN

FOR THE PRETORIA ATTORNEYS' ASSOCIATION

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CONRAD VAN DER VYVER

EXECUTIVE COMMITTEE MEMBER PRETORIA ATTORNEYS' ASSOCIATION – ROAD ACCIDENT FUND

20 SEPTEMBER 2023