THE ASSOCIATION FOR THE PROTECTION OF ROAD ACCIDENT VICTIMS

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RAF'S NEGLECTFUL CLAIMS ADMINISTRATION AND WASTEFUL LITIGATION: A JUDICIAL PERSPECTIVE

Sufficiency of fuel levy to cover RAF budget

During 2015/2016 the RAF levy was increased by 50 c/l. With the current 30 c/l this results in a total increase of R16 billion p.a in RAF revenue. The approximate shortfall prompting the 2015/2016 increase was approximately R2 billion p.a. Motorists were assured by the then Minister of Transport that 50 c/l would be adequate. Moreover, claims against the RAF have since 2008 decreased by approximately 50%because of legislative restrictions on claims by road crash victims. Notwithstanding, the RAF's legal bill has grown from approximately R2.1 billion in 2008 to R8 billion in 2016/2017.

Less claims but higher annual legal costs

Year	Number of claims (all types)	Legal Costs (Million)
2005	185773	R 941
2006	190468	R 1,319
2007	107418	R 1,700
2008	267133	R 2,100
2009	166146	R 2,500
2010	85397	R 2,700
2011	74162	R 3,500
2012	52445	R 3,500
2013	47159	R 3,700

2014	53230	R 4,600
2015	62436	R 5,500
2016	71664	R 6,600
2017	73860	R 7,900

It is suggested that the above is directly attributable to neglectful and inefficient administration of claims by the RAF. See *Daniels v Road Accident Fund* (8853/2010) [2011] ZAWCHC 104 (28 April 2011) where Binns-Ward J states after reviewing some 17 cases where the RAF was taken to task by judges for their approach to the handling of claimant's claim and litigation:

> "A depressing feature of all of the aforementioned judgments is that they instance examples of cases in which the Fund must have incurred substantial legal expenses in taking to trial, or on appeal, claims which it had no basis to responsibly contest. In the context of the evidence before us that legal expenses constitute a very significant component of the Fund's overall expenditure,[21] this is an aspect of the Fund's conduct which is demanding of conscientious attention by the responsible authorities, including the second and third respondents."

The above amount does take into consideration the R1,8 billion spent by the RAF to finance their cash flow strategy which entails deferring pay-outs to claimants who have who pursued their claims to finality and obtained a court for payment of their claims. Claimants are made to wait up to 1 year. All the while the RAF is pursued with writs of execution, attachment of its bank accounts and a legal liability to pay claimants 10,5% interest on their outstanding claims. The RAF was for using litigation as a cash flow tool in *Daniels v Road Accident Fund* (8853/2010) [2011] ZAWCHC 104 (28 April 2011) where Binns-Ward J states:

> "[58] The evidence, judged in historical context, suggests that the delays in conceding liability in principle are a means by the Fund to manage cashflow issues. The Fund admits as much. This is unacceptable. A state of affairs in which an organ of state is unable to discharge its statutory objects because of inadequate funding is inimical to the rule of law and deserves urgent and appropriate attention from the executive and the legislative arms of government. The recent amendments to the Act are, no doubt, a manifestation of such attention, but it seems that more might be required. Financial constraints on the Fund's ability to pay claims as immediately as it should afford no excuse, however, for the failure to administer the claims received efficiently, or for drawing out litigation and driving up legal costs by what is sometimes euphemistically described as 'tactical pleading'."

RAF Act of 1996 makes litigation extremely risky for claimants

The RAF Act makes litigation extremely risky for any claimant provided that the RAF makes a suitable offer of settlement even before summons. A plaintiff risks paying all his own and the RAF's legal costs from the date of the offer should he/she not beat the RAF offer in court. Generally, the RAF does not avail itself of this provision. Notwithstanding more than 90% of cases on the rolls of our courts are against the RAF. Of these cases about 1% are heard. 99% are settled on the steps of the court.

RAF's approach to litigation – recent judicial criticism

Despite this advantage, the RAF's approach to claims and litigation appears from the case *Hlalele v Road Accident Fund* (5668/2016) [2017] ZAFSHC 210 (18 October 2017) where Justice Daffue states:

> "On the other hand, the RAF seldom investigates claims properly and its legal teams are often not in a position to proceed to trial … Mostly, the RAF's legal teams come to court, not to settle, but to throw in the proverbial towel. In the majority of cases the outcome can be predicted: the merits are settled 100% in favour of the plaintiff… counsel (if one is appointed) is not instructed to conduct a defended trial but receives instructions in respect of settlement only. To make matters worse, the court is often asked to stand matters down as the (RAF) litigation officer cannot be contacted in order to give instructions to settle. Judges are even requested to stand matters down to the next day or even a third day. In the meantime, legal costs soar."

The judgment indicates that the RAF's approach to claims and especially litigation, needs urgent investigation and reconsideration. If litigation expenditure had been critically evaluated and effective suitable adjustments made, an increase of the RAF fuel levy could have been avoided.

In *Friedemann v Road Accident Fund* (2459/12) [2017] ZAKZDHC 44 (13 December 2017) Henriques J states:

> "[46] As already indicated hereinbefore, the conduct of the officials is to be depreciated as these are public funds. The defendant has publicly indicated it has no funds to compensate victims. It constantly seeks additional funds from Parliament to do so. Costs could have been saved had instructions been forthcoming specifically in respect of the future medical expenses and general damages. Reports could have been agreed. Yet the defendant did not provide instructions to its legal representatives… Having regard to the authorities referred to, and more specifically the decision of the Constitutional Court, it would appear that in light of the explanations proffered by the officials, they do not warrant a cost order *de bonis propriis*. However, I trust that this matter will serve as a warning to the officials that they bear in mind the purpose of the legislation and constantly bear in mind that these are public funds which they are dealing with and this ought not to be wasted, and they should deal with such Funds in a responsible manner."

The RAF's approach to litigation was again severely criticised by Legodi J and a punitive cost order made in *Ingrid Jaquoline Stuurman, Sibongile Mathebula, Phethile Rececca Zulu and Adv Babalwa Nodada v Road Accident Fund* Mpumalanga Circuit Court Case 704/2017 (22 November 2017):

> "Having considered again the terms of the draft order in the paragraphs aforesaid, I do not think that there is anything unto what regarding the terms. Both Ms Muyelane Molemi (Occupational Therapist) and Ms Baloyi (Industrial Psychologist) were in court on behalf of the plaintiff. Their attendance to court and properly preparation, qualifying and reservation fees could have been curtailed had the matter been settled timeously. It is these kinds of unnecessary costs that the court sought to curtail in the directive dealing with the time limits by which the parties should settle. The fact that a matter that is settle-able is not is settled on the date of trial, but rather earlier, is an indication of the desire by this court that every party involved must come to the play. Enormous legal costs that are incurred by the Fund make it forever ailing in regard to its budget and in meeting its obligations and commitment. This is a Fund which is sustained through the public purse and

> therefore it is the responsibility of everyone involved in litigation against or for the Fund to ensure that legal costs are saved for the Fund to be sustainable."

The Registrar was ordered to bring this matter under the attention of the RAF's CEO and the RAF officials requested to file reasons why they should not together with the RAF be ordered to pay the wasted costs.

The preceding is a selection of more recent judgments. There are numerous previous similar judgments which are critical of the RAF's execution of their constitutional mandate some of were referred to above.

More efficient claimant attorneys or less robust defence of claims?

The RAF contends that its cash flow problems emanate from attorneys who have since 2008 upped their game when claiming from the RAF. If it is accepted as stated by Daffue J, that most cases are settled with the RAF, the RAF as defendant has a measure control over the settlement amounts. As appears from the above judgments, the RAF does not properly investigate or prepare claims for litigation and is consequently at a disadvantage to negotiate more favourable settlements and are forced to "throw in the proverbial towel." Settlements were highlighted in *Mzwakhe v Road Accident Fund* (24460/2015) [2017] ZAGPJHC 342 (26 October 2017) by Weiner J:

> "Our courts are inundated with matters relating to the RAF and the Minister of Law and Order (in re unlawful arrest claims). The settlement agreements reached often bear no association to the damages actually suffered. The reasons for this are not apparent, although speculation is rife in regard to the motives behind such settlements. For these reasons, our courts must be vigilant when dealing with State funds. The court can take judicial notice of the fact that the RAF claims that it is bankrupt. It is the court's duty to oversee the payment of public funds. The applicant must prove its claim with reliable evidence. The claim is for a substantial sum. The RAF, for reasons known only to it, has agreed to pay out this sum without any investigation into its validity. A court cannot allow that, when, on the face of it, the claim is based upon contradictory and flimsy evidence."

The RAF's proffered reason of higher claim amounts is consequently akin to an accused convicted of murdering his parents pleading in mitigation that he is now an orphan. This observation equally applies to the RAF's reference of the repeal of section (17)(2) regarding offers of pre-litigation costs. This section was repealed at the behest of the RAF.

Litigation can be prevented by the RAF by astutely and effectively making use of section 17(3)(b) of the RAF Act by properly investigating and handling claims and making offers within the 120 days from date of lodging of a claim afforded by the RAF Act to do so. The RAF's approach to claims handling and litigation is and remains in urgent need of review – especially since it is costing the motorist and the country approximately R10 billion p.a. which is equal to two SAA bailouts every year.

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