

ROAD ACCIDENT FUND – JUDGEMENT OF CONSTITUTIONAL COURT re LEGISLATIVE RESTRICTIONS

On 25 November 2010, the Constitutional Court handed down Judgement in an Application for Leave to Appeal against a previous Judgement given in the North Gauteng High Court pertaining to a Constitutional challenge to certain provisions of the 2005 Amendment to the Road Accident Fund Act.

At the outset, certain concepts need perhaps to be placed in perspective.

The primary source of Law in the RSA is the legislation provided for by Acts of Parliament. In the absence of such legislation, the common law, which broadly speaking is a system of rules created by usage and decisions by Courts in similar cases, applies.

Generally speaking prescribed legislation becomes enforceable once verified by the State President and after being duly promulgated. The Constitution of the RSA however provides certain entrenched provisions and which provisions, if inconsistent with legislative provisions provided by Parliament, may be challenged in an appropriate Court, the highest of which is the Constitutional Court and who may declare certain provisions of the legislation (or all for that matter) to be unconstitutional and therefore invalid and unenforceable.

In the present case the Legislature promulgated certain provisions in terms of Road Accident Fund Amendment Act (“**the Amendment Act**”), which were challenged in the Constitutional Court.

The full nature and extent of the challenge is extensive and beyond the ambit of this memo, save for the crux of the Court’s findings which will be referred to hereunder.

Simply by way of background, the claims that have been submitted in recent times to the Road Accident Fund have been excessive, particularly as regards claims of foreign nationals who have incorporated claims, many of which have been upheld for issues including extensive loss of earnings and general damages, including damages for “*emotional shock*”.

In order to limit such claims, the Legislature placed limitations on the claims which may be submitted to the Road Accident Fund by proverbially “*capping*” claims in respect of particular injuries, similar to the limitations which apply to the Workmen’s Compensation Commissioner in terms of the Workmen’s Compensation Act. It also excluded claims for damages for “*emotional shock*” flowing from a motor vehicle accident.

These limitations are not unusual in general terms, in that they are found in various other forms of legislation and it is indeed clear that the intention of the

Legislator was to limit the exposure, financially or otherwise of both the Road Accident Fund and drivers of motor vehicles.

Furthermore, the common law generally provides that any victim of a wrongful act or “delict” has a residual common law right to claim damages from a person who is responsible for the occasioning of such damage as a consequence of some form of negligence.

The Amendment Act now excludes claims against the delinquent driver and limits all claims flowing from motor vehicle accidents to the claims against the Road Accident Fund and then subject to the parameters and limitations expressed for particular injuries and sequelae to those as provided in the Amendment Act.

The challenge to the Constitutional court essentially attacked both the right to abolish a claimant’s residual common law claim for any shortfall in compensation from a delinquent party and the limitations placed on claims, both in respect of quantum and for other specific exclusions.

In applying an established standard, the Court found, in respect of the Amendment Act, that the abolition of a claimant’s residual common law claim to be a necessary and rational part of an interim legislative scheme, whose primary thrust was to achieve financial viability and a more effective and equitable platform for the delivery of social security services. The Court accordingly held that the abolition of the common law residual claim is a justifiable limitation and that the “capping” on compensation for the loss of income does not infringe the right to property as there was no arbitrary deprivation of property by the Amendments and that the right to adequate remedy has not been infringed.

Another aspect which was attacked was the limitation of recovery in terms of a Prescribed Medical Tariff for health services as costed via services rendered by a Government/State Hospital. On the facts, the Court found this tariff to be wholly inadequate and unsuited for paying compensation for the medical treatment of Road Accident victims in the Private Health Care Sector. On this basis the Court held that the tariff to which the claims were sought to be limited, is irrational because it is incapable of achieving the purpose intended to be achieved, namely to enable innocent Road Accident victims to obtain the health services they require. This regulation was accordingly declared unconstitutional and invalid and ordered the relevant Minister to make a fresh determination. The Court ordered that until the new tariff for Health Services was properly introduced, the existing rule, namely that the person who sustained injury be entitled to compensation for Health Services on a reasonable basis (including costs of Private Sector Care) would remain operational.

In short, and by way of summary, a person injured in a motor accident or motor related accident can claim against the Road Accident Fund only and then subject to the limitations of quantum contained in the Amendment Act. No claim would lie against a negligent wrongdoer or

delinquent driver for any claim beyond that, that can be claimed from the Road Accident Fund.

The question was then put, as to how this would impact on the need for **Passenger Liability Insurance**. As matters stand, most policies albeit in respect of the insurance of motor vehicle/s and/or other general policies contain Public Liability Insurance which would generally cover a person for claims by third parties occasioned by a delinquent driver occasioning damages liability to unknown third parties. This would usually have included claims against the delinquent driver in terms of the injured parties residual common law right to claim a shortfall which was not covered in terms of the Road Accident Fund Act. With the driver's liability now being excluded beyond the parameters which previously existed, obviously the exposure of such driver and his insurer would be curtailed. This would occasion a substantial underwriting exercise which might occasion a reduction in premium (although the Public Liability portion of the premiums are nominal anyway) and the rewording of certain Policy Conditions.

It is likely that another part of policy cover may develop, insofar as it does not already exist, namely to provide for independent passenger (and for that matter driver) insurance cover, to cover any shortfall in the actual cost of treatment and/or damages sustained flowing from a motor collision, which might not otherwise be covered by the Road Accident Fund. Clearly, the actual loss of income covered and/or the cost of Remedial Medical Services, as limited by the Act, may be insufficient to cover the actual loss sustained by the injured party and by its very nature thereby creating an issue potentially capable of insurance but subject to applicable insurable interest. This aspect is debatable and obviously policy wording and adjustments in the underwriting exposure and premiums will follow.

If a delinquent driver is not exposed to liability at law (as is provided by the Amendment Act) and the driver owes no duty of support to the injured passenger (as would be the case in respect of a family member etc.) then the question arises as to what insurable interest exists and whether the delinquent driver is in fact capable of insuring and/or enforcing such rights of cover as against the Insurance Company.

Clearly this aspect will, in the light of developments have to be addressed by Insurance Companies, taking into consideration the general principal that insurance cover cannot be enforced if there not be an insurable interest. It might well be that new types of insurance for this type of event may be taken by individual persons or groups of persons, coupled rather to their person than to, for example, a motor vehicle and its undisclosed occupants.