

## MEDIA REPORTS ON THE PROGRESS OF THE CHALLENGE BY THE LAW SOCIETY AND OTHERS ON THE ROAD ACCIDENT FUND AMENDMENT ACT

2 MARCH 2010

New Road Accident Fund legislation places victims of road accidents at the mercy of the fund, which has required "a deserved reputation of unsympathetic and unreasonable treatment of victims", the Pretoria High Court heard on Monday.

Counsel for the Law Society of South Africa (LSSA) Jeremy Gauntlett SC, argued before Acting Judge Hans Fabricius that certain provisions of the RAF Amendment Act, which came into effect in August 2008, should be struck down as unconstitutional and irregular.

The LSSA, which represents South Africa's 18 600 attorneys, joined forces with the South African Association of Personal Injury Lawyers, the Quadpara Association, National Council for Persons with Disabilities and seven road accident victims against the transport minister and RAF.

Judge Fabricius refused to permit the finance and health ministers to join the proceedings in support of the respondents, but allowed their affidavits to serve as evidence.

The LSSA welcomed the ruling, as well as the fact that the health minister indicated in court the method of assessment used in the RAF Amendment Act - the American Medical Association Guides - for the measurement of serious injury in road accident victims, was not an appropriate long-term method of assessment.

The minister also indicated that the state health tariff was inappropriate for the reimbursement of road accident victims' medical costs.

The LSSA contended the Act and regulations seriously prejudiced thousands of road accident victims.

Gauntlett, in strongly-worded heads of argument, described the scheme - which government insisted was merely temporary - as incoherent, discriminatory and irrational.

"Not only is it by clear design not comprehensive, but also fails to introduce new benefits to compensate appropriately for abolishing pre-existing rights. The scheme is thus inherently flawed."

Gauntlett argued the scheme's avowed rationale was "to protect the wrongdoer, in preference to the victim".

Parliament's protection of perpetrators of often devastating harm was "astonishing".

The scheme's affordability could not be used to justify abolishing the right of recourse against others.

"It can never constitute a valid defence that the cost of giving effect to constitutionally entrenched right is 'beyond the public purse', as the minister of finance seeks to contend on behalf of the true respondents."

He severely criticised the transport minister's argument that would-be victims could insure themselves against losses beyond the present R160 000 per annum limit to claims for loss of income or support.

The application continues. - Sapa

3 MARCH 2010

There is a real risk that the Road Accident Fund (RAF) could collapse and its R40-billion deficit transferred to the public if sections of the RAF Amendment Act were to be declared invalid, the Pretoria High Court heard on Wednesday.

Any immediate declaration of invalidity of portions of the Act would have disastrous effects, argued Steven Budlender, appearing for the RAF.

Budlender joined lawyers for the transport minister in urging the court to dismiss outright the application by the South African Law Society, Association for Personal Injury Lawyers and others, to declare certain sections of the Act and regulations unconstitutional and unlawful.

He however said if the court granted any order of invalidity, it should be suspended for two years to ensure that government entities remained functional and to give Parliament time to correct any defects.

The applicants maintained that certain changes in the Act were irrational, unconstitutional and unlawfully prejudiced road users, especially vulnerable victims such as the indigent and children.

The new legislation does away with the R25 000 limitation on passenger claims, but puts a cap on how much can be claimed for loss of earnings or support, limits claims for pain and suffering to very serious injuries and limits tariffs for medical care.

It also abolishes an injured driver's right to claim compensation from the guilty party for costs not covered by the RAF.

The RAF said in court papers there was a real risk the entire fund would collapse and be unable to pay any compensation if sections of the Act were immediately declared invalid. This would have the effect of transferring the RAF's accumulated R40-billion deficit to the South African public, the RAF said.

"The possibility of being left with no claim against the RAF at all is infinitely more damaging than being left with a limited claim in terms of the Amendment Act," The RAF said.

Budlender said the applicants seemed to be suggesting the government should have made arrangements from a budgetary point of view by, for example, further raising the fuel levy or minimising the purchase of defence equipment.

He argued the limitation of claims against the RAF was perfectly rational if one took into account the limited resources available to the RAF system, and the government's duty to ensure the state's limited resources were spent on ensuring everyone had access to some accident cover.

The application continues. - Sapa  
4 MARCH 2010

Judgment has been reserved in the High Court in Pretoria in the Law Society's constitutional challenge to controversial amendments to Road Accident Fund (RAF) legislation.

The Law Society of SA (LSSA), SA Association of Personal Injury Lawyers, Quadpara Association of SA, National Council for Persons with Physical Disabilities and seven road accident victims are challenging the constitutionality and legality of the RAF Amendment Act and some of its regulations, which came into effect in August 2008.

The LSSA argued that the act unconstitutionally curtailed the rights of many thousands of accident victims and their dependants in the case of death.

The act not only severely limits claims against the fund, but also for the first time in South Africa's legal history stops victims from suing wrongdoers for damages not covered by the act.

The LSSA submitted in its founding papers that it was inexplicable and unjustifiable that, at the very time that the legislature had substantially reduced (and in some instances entirely removed) the right to statutory compensation, it also deprived injured parties of the right which they have always had to seek compensation from the wrongdoer.

The LSSA also attacked stipulations in the act that only persons who suffer "serious" injuries were entitled to claim general damages from the RAF.

It also criticised the limitation of claims for past and future loss of income or support to R160,000 per year and the limiting of claims for hospital and medical care to provincial hospital tariffs.

The minister of transport and RAF have opposed the application, saying there was no merit in any of the applicants' legal arguments and that the limitation of rights was justified in light of the RAF's serious financial crisis. - Sapa

31 MARCH 2010 – 18:37

RAF Act lawful, court rules

2010-03-31 18:37

Johannesburg - An application to deem the Road Accident Fund Amendment Act unconstitutional and unlawful was dismissed in the North Gauteng High Court in Pretoria on Wednesday, the fund said.

"Today's judgment is an important milestone in the journey... to ensure that South Africa has a sustainable and fair scheme to look after the health, rehabilitation and long-term needs of those persons who are either injured in traffic accidents or lose a breadwinner," said RAF chief executive

Jacob Modise in a statement welcoming the ruling.

The accident fund legislation was challenged in court by the Law Society of SA, the SA Association of Personal Injury Lawyers and others.

Acting Judge Hans Fabricius ruled the Road Accident Fund Amendment Act, 2005 (Act 19 of 2005) and its regulations, which simultaneously came into effect on August 1 2008, were constitutional and lawful.

According to the RAF, key amendments to the RAF Act included removing discrimination against passengers whose claims were limited to R25 000 and introducing an emergency medical tariff set at private sector rates.

It also included measures to curb abuse and fraud by removing claims for emotional shock, and limiting payment for general damages to those seriously injured.

- SAPA
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31 MARCH 2010-03-31 :20:33

Johannesburg - Wednesday's judgment deeming the Road Accident Fund Amendment Act constitutional and lawful was "most unfortunate", the SA Association of Personal Injury Lawyers (SAAPIL) said.

"It means that every road accident victim injured after August 1 2008 and those yet to be injured will continue, as a result of the judgement, to be deprived of private health care for life," said SAAPIL president Ronald Bobroff.

The application by the Legal Society of SA, SAAPIL and others to declare the Act unconstitutional and unlawful was dismissed by Acting Judge Hans Fabricius in the North Gauteng High Court in Pretoria.

"Even seriously injured victims will be deprived of any compensation... if you break both arms and both legs in terms of the amendment you are not seriously injured," he said.

Bobroff was studying the judgment, of some 200 pages, and would decide on a way forward thereafter.

"We believe there are many grounds for appeal," he said, adding that it may be a matter to eventually go before the Constitutional Court.

He said the application was "not a lawyers' battle".

R7bn in legal fees

"There was a whole host of applicants with major organisations representing disabled persons."

Applicants included the Quadpara Association of SA and the National Council for Persons with

Physical Disabilities in SA.

The LSSA was still studying the judgment and could not immediately comment.

The RAF welcomed the judgement saying at stake was the R7bn in legal fees the legal profession took out of the R11bn compensation paid by the RAF road accident victims each year.

"The legal profession has been exceptionally greedy, robbing ordinary South Africans of benefits they pay for through the fuel levy every time they fill up their cars or pay for taxi and bus fare," said RAF chief executive [Jacob Modise](#) in a statement.

According to the RAF, key amendments to the RAF Act included removing discrimination against passengers whose claims were limited to R25 000 and introducing an emergency medical tariff set at private sector rates.

It also included measures to curb abuse and fraud by removing claims for emotional shock, and limiting payment for general damages to those seriously injured.

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25 November 2010

On the 25th of November 2010 the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the North Gauteng High Court. The High Court dismissed a constitutional challenge to certain provisions of the 2005 amendment to the Road Accident Fund Act (Act).

In this Court, the Law Society of South Africa, the South African Association of Personal Injury Lawyers, the QuadPara Association of South Africa, the National Council for Persons with Physical Disabilities in South Africa and various persons with actionable claims affected by the amendment mounted a constitutional challenge impugning two provisions of the amendment and a regulation made under the Act. They challenged a provision abolishing road accident victims' residual common law right to claim losses which are not compensable under the Act; another provision limiting the amount of compensation that the Road Accident Fund (Fund) is obliged to pay for claims of loss of income or a dependent's loss of support arising from the bodily injury or death of a motor accident victim; and a regulation in which the Minister for Transport (Minister) has prescribed medical tariffs for health services which are to be provided to accident victims by public health establishments.

The core of the constitutional challenge was that the impugned provisions did not comply with the constitutional principle of rationality; and that each of the provisions unjustifiably limits one or more fundamental rights. The specific fundamental rights the applicants sought to enforce were the right to the security of the person, the right not to be arbitrarily deprived of property, the right of access to health care and the right to adequate remedy. The application was opposed by the Minister and the Fund.

In their contentions on rationality, the applicants sought to persuade the Court to apply a “true rationality test” that would render unconstitutional a legislative measure that unfairly deprives people of constitutional protection or is substantively unjust. The Court declined the request to adapt the rationality standard developed and recognised in this Court’s jurisprudence. In applying the established standard, the Court found the abolition of a claimant’s residual common law claim a necessary and rational part of an interim legislative scheme whose primary thrust is to achieve financial viability and a more effective and equitable platform for the delivery of social security services. The court found that, in this instance, the state indeed incurs obligations to realize the right to the security of the person of road accident victims. However, the court found that the abolition of the common law residual claim is a justifiable limitation of that right. Furthermore, the Court found that the cap on compensation for the loss of income or of dependents’ support 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 had not been infringed. Accordingly, the application for leave to appeal was dismissed in as far as these constitutional attacks were concerned.

The applicants’ attack on the constitutional validity of the medical tariff for health services prescribed by the Minister was, however, successful. On the facts, the Court found the tariff to be wholly inadequate and unsuited for paying compensation for the medical treatment of road accident victims in the private health care sector. Accordingly, the Court found that the tariff is irrational because it is incapable of achieving the purpose which the Minister was seeking to achieve, namely to enable innocent road accident victims to obtain the health services they require.

The Court declared that the regulation is inconsistent with the Constitution and invalid and made an order obliging the Minister to make a fresh determination. The Court ordered that until the Minister prescribes a new tariff for health services for road accident victims a third party who has sustained bodily injury and the Fund is obliged to compensate is entitled to compensation or health services as if he or she had been injured before the amendment came into operation.