The White Paper on the Road Accident Fund

Comments of the General Council of the Bar of South Africa, issued during January 1998

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A Introductory comment

THE General Council of the Bar of South Africa ("the GCB") has previously commented on the various White Papers, including the third Draft which was issued in November 1997 and which largely reflects the same provisions as are contained in the present Draft.

In general, the approach of the GCB has been that, on the assumption that it is necessary to place the Fund on a sounder financial footing, there are far better and fairer ways of achieving this (by improving both the existing system and the manner in which it is implemented) than by the method proposed in the White Paper, which is an almost wholesale abandonment of the existing system in favour of an untested system of dubious value and which hinges on doubtful constitutionality.

The very fact that the White Paper proposes this adventurous leap into the unknown without any assurance of constitutionality and on the basis that the new system is in any event to be reconsidered by a commission is, it is respectfully submitted, indicative of the inadvisability of the White Paper itself.

The aforegoing is not to say that the White Paper contains nothing good. On the contrary, there are aspects which the GCB lauds, and which could form the basis of sensible adjustments to the existing system.

B Specific comments on the preface and chapter 1 of the White Paper

1 ***The issue of funding is fundamental.***

The GCB suggests that if the wider South African public were granted the informed choice between an increased levy and full cover on the one hand, and the system proposed in the White Paper on the other hand, they would opt overwhelmingly for the former.

2 ***Projections of a growing deficit are, of course, based upon road traffic collision projections.***

The figures in par 7.3 of Draft 5 (14 May 1996) show that collisions resulting in injury or death in 1994 (the last year shown in the figures) represented an increase of only 2,1% over those in 1990. Taking further into account the dramatic reduction in road traffic collisions over the recent festive season (for which it appears the Minister must largely receive the credit), one must seriously question whether these pessimistic projections are justified. Surely the starting point in placing the Fund on a sound financial footing is road traffic safety? The indications are that this starting point is bearing fruit. If it continues to do so – and one sees no reason why it should not – the rationale for wholesale abandonment of the existing system in favour of an untried new system falls away.

3 ***It is cause for concern that settlement costs represent 20,2% of the total amount paid out by the Fund to victims.***

However, there are a number of reasons why this is so, and there are constructive steps which can be taken to remedy this without infringing upon existing rights and without jettisoning so much of the present system that is good. In particular, training of the staff of the Fund and constructive changes to the existing procedure should by themselves result in a considerable saving.

It should also be pointed out that, by and large, the attorneys, the advocates and the specialists whose charges represent the aforesaid 20,2% give value to their clients. The attorney and the advocate advise the injured party and, where appropriate, his or her family, not only as to the legal aspects, but also on aspects of treatment. The medical specialists furnish reports which likewise advise the victim and, where appropriate, his or her family, as to diagnosis and prognosis and the best avenues for treatment. In itself, this benefits the victim. Sight should not be lost of this.

4 ***In par 8, Chapter 11, the proposed system is described as "Interim Proposals" pending reconsideration by a Road Accident Fund Commission.***

The proposals are so far-reaching that they cannot by any stretch of the imagination be described as "interim". They set the Fund on an uncharted road from which it will be difficult, if not impossible, to reverse.

5 ***The assumption that awards for general damages comprise 28% of claims paid is erroneous or misleading: in very many cases aspects of loss of income (lump sum for reduced earning capacity) and even medical expenditure are encompassed by an award for general damages.***

Thus the award for general damages can, and very often does, include compensation for financial loss. In any event, the very percentage (claims for general damages make out 28% of claims paid) quoted in the White Paper indicates what MVA practitioners could confirm: that general damages as such make out the only, or the major component of the claims of the vast majority of claimants (particularly amongst the poorer sections of our community).

With one stroke the White Paper renders those victims remediless. Reverting to the point made above: would the vast majority of South African citizens be satisfied both with the fact that the Fund is relieved of this liability and the fact that the wrongdoer is excused therefrom?

C Specific comments on Chapter 11 of the White Paper

1 It is suggested that the purported objectives of the White Paper are socially skewed. On p10 one finds the protection of negligent drivers against claims for compensation as an objective. In order to fund this questionable objective, the innocent dependants of motor vehicle >

collisions are to have their claims reduced on the basis of the extent to which their breadwinners were negligent. Thus the negligent are to be protected, but the innocent are to be punished for the negligence of another. Is this the product of careful thought?

2 The proposed 12-month prescription period is divorced from South African realities, grossly unfair and in all probability unconstitutional (see *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)).

3 The proposals as to merits being resolved first, the absence of formal pleadings or discovery, magistrates' courts being granted jurisdiction regardless of amount or location, obligatory pre-trial conferences.

A special RAF litigation tariff and disparity-based costs are interesting, and most certainly deserving of further attention. In this regard we comment as follows:

3.1 Compulsory resolution of the merits before resolution of quantum has its advantages, but the Fund must be aware of the likelihood that such a system will *lengthen,* rather than shorten, the time from lodgment to conclusion.

3.2 It is suggested that rather than do away entirely with formal pleadings and discovery, a much-abbreviated system would be appropriate.To a certain extent, pleadings serve to define issues and thus to limit litigation.Those who have experience of labour law would be able to confirm that the laxer attitude taken by the erstwhile Industrial Court to the definition of issues by way of pleadings resulted in lengthier trials. One must in this regard also bear in mind that pleadings in MVA matters are, in themselves, in any event generally simple and inexpensive.

3.3 The granting of unlimited jurisdiction to the magistrates' courts will require careful consideration. At present, those courts are overburdened. In addition, there might be a far greater disparity between attorney-and-own-client costs (i e the total charge to the client) and recoverable party-and-party costs (ie the costs payable by the Fund) which, whilst it will reduce the outgo of the Fund, would not necessarily be fair to the victims.

A wiser approach would perhaps be to allow claimants the option (subject to the risk of being mulcted in costs if they proceed in a court of too high jurisdiction) as to which court they wish to litigate in.Thus a claimant with a potentially small claim would effectively be limited to the magistrate's court, whilst one with a potentially large claim would have the option of proceeding in the High Court or in the magistrate's court. At present, because of the R100 000 jurisdictional limit of the magistrate's court, litigants who proceed in the High Court but achieve awards of less than R100 000 are often still granted High Court costs for the very valid reason that they could not at time of institution of action have been sure that the claim would ultimately be worth less than R100 000. A system which affords them the option would logically and by the same token, result in that argument falling away (at least to a large extent), with the result that the system would effectively encourage litigation in the magistrates' courts but would not bar the High Court to those litigants whose cases (because of the amounts involved) logically belong there.

Has this proposal and the effect it will have upon the already overburdened magistrates' courts, as also the implications of having magistrates determine cases involving potentially very large amounts been considered by the Minister of Justice?

3.4 A tariff tailored for RAF litigation could most certainly be considered on the basis that the aim should be fairness to both parties.

3.5 The making of costs orders on a so-called disparity basis is deserving of careful consideration. On the face of it the proposed system does more to force the claimant towards reasonableness than it does the Fund (the claimant is penalised for claiming too much, the Fund less so for offering too little), so that it would appear that a reverse formula should apply where the award is lower than the tender. A further reservation of the GCB is that it is very often difficult to gauge the true worth of a claim at time of lodging, with the result that awarding costs on the disparity basis might work unfairly upon victims, but in principle it is felt that the idea has merit *and, if carefully considered and sensibly implemented, could have the effect of forcing claimants to be reasonable from the outset and entitling the Fund to take claims as couched seriously from the outset. This would be in contrast with the present system which, if anything, encourages lack of reasonableness on the part of claimants until such time as the Fund makes an offer (which, in such a system, is invariably too low, with the result that the cycle of litigation continues).*

It is clear that this proposal requires careful thought before it is implemented. It will effectively require claimants from the outset to take account not only of all eventualities as to the injuries and their consequences, but also all eventualities as to a possible apportionment of blame. Even the most reasonable assumptions might transpire to be wrong with catastrophic consequences as far as costs are concerned if costs are to be awarded on the so-called disparity basis.

It is one thing to apply the disparity system in relatively straighforward areas such as expropriation. It is entirely another to apply it in the MVA arena where so much more uncertainty prevails.

It is the standpoint of the GCB that whilst the idea is deserving of careful consideration, it has patently not yet been given that consideration. It can and should not be implemented before it has been very carefully considered and debated and without the patent disadvantages and inequities of applying the so-called disparity system to costs orders in MVA matters being debated and eliminated.

4 It is apparent from the references to the AMA Guides on pages 33 and 34 of the White Paper that the proposed system will encourage sterile definition-based litigation.

The present system is based on legal principles that have survived over centuries precisely because they *work* and because they *reflect the ordinary person's sense of what is right and what is wrong and what is due and what is not due.* The proposed system will replace a debate as to the actual difference between that which would have been in the absence of the injury, and that which will now be, with a debate as to precisely which page and which sub-paragraph of a United States document one can best fit a victim and his/her injuries into.

5 As will be shown below, the deemed earnings provisions are unnecessarily and illogically rigid and can result in great unfairness.

Again, the point is made that the drafters of the White Paper propose jettisoning a system that, for all its faults, generally works and generally works fairly, in favour of a rigid system that would compensate fairly only by coincidence.

6 The deemed minimium earnings figure of R1 000 per month might be socially uplifting for those who benefit from it, but it ignores the economic reality that a very large percentage of South Africans are, and for the foreseeable future will be, unemployed and that many of those who are employed earn less (in some cases considerably less) than the deemed minimum (both in cash and in kind).

One can lament these facts, but facts they are, and the result of the proposed minimum will be that many injured parties will be placed in a *better* financial situation by their injuries than they would have been without them. Leaving aside the temptation that this perhaps offers for fraudulent claims, such a result is perhaps laudable *but not where it is achieved at the expense of others and within the context of a system which according to the authors of the White Paper is an unaffordable luxury.*

This illustrates the unfortunate rigidity of the proposed system and the poor contrast between that rigidity on the one hand, and the flexibility of the existing system, on the other hand.

7 The suggestion that children under the age of 14 cannot be at fault is inconsistent with reality which shows that children of and somewhat under that age very often are fully capable of fault.

The GCB submits that the present common law age threshold (children under the age of 7 are accepted to be incapable of negligence, children between 7 and 14 are rebuttably presumed to be incapable of negligence) is a far better system. Why tinker with it?

8 The constitutionality of Exclusion (d) (Illegal Residents) is perhaps debatable, but in general the GCB agrees with the proposed exclusions.

9 The suggested method of payment of compensation to minors is fully agreed with.

10 Clearly, the proposed abrogation of common law rights is controversial, to say the least.

It will be shown below how the proposed system can lead to under-compensation of tragic dimensions.

Clearly, if the proposed abrogation of common law rights is unconstitutional, then this will bring the socio-economic viability and validity of the entire scheme into question.

Surely the constitutionality or otherwise of the proposed abrogation should be decided *before*, rather than *after*, implementation of the scheme?

It is suggested that, with reference to the provisions of s167(4)(b) read together with s79(4)(b), if the Government is insistent upon proceeding with the proposed scheme, it does so on the basis of the National Assembly being asked to pass the Bill but to submit it to the President with the request that before it is passed into law it be referred to the Constitutional Court for a decision on its constitutionality.

One has only to apply one's mind to the practicalities to conclude that it is advisable for the question of constitutionality to be decided before implementation of the scheme: members of the public and of the insurance industry will have to regulate their affairs in accordance with the MVA system. Presently they can do so with certainty as to the circumstances in which they might be held liable, and the circumstances in which they cannot be held liable. The proposed new system carries no certainty with it. *It is surely not in the interests of the South African public for legislation to be implemented whilst its effect on the man in the street and on industry is so uncertain. Unnecessary risk, and unnecessary expense, are created thereby.* In addition, the following is suggested:

(a) The Minister has on a number of occasions indicated that he has an opinion or opinions to the effect that the proposed abrogation will pass constitutional muster.

No matter how highly placed the opinion or opinions might be, if the abrogation is not per se unconstitutional then the test is surely a comparison between that which is taken away and that which is given. On its face the White Paper proposes to take so much away, and to do so on a basis so divorced from the reality of the actual consequences of the injury or death, that (to put it lightly) it is hard to see how it could pass constitutional muster.

(b) The rationale for the abrogation (expressed under the heading "How appropriate is the right?") is contrived in the extreme: the principle of fault is, and should surely remain, fundamental to our society (Indeed, on pages 42 to 43 of the White Paper, the very idea that there can be fault in motor vehicle collisions is deplored, whilst on page 20 of the White Paper that very principle is extended to the dependants of deceased breadwinners. Does this not reveal the opportunism of the reasoning?) The principle of fault has served our society long and well in motor vehicle collision cases. Long should it do so.

(c) As the examples below will indicate, the proposed system could – and indeed will – have ruinous consequences for road accident victims.

This the drafters of the White Paper appear to view with equanimity. One cannot make an omelette without breaking the eggs. Yet on pages 43-45 of the White Paper one finds the deepest empathy expressed for the wrongdoer. Are these sentiments not entirely misplaced?

D Examples of under-compensation which would be effected if the White Paper is proceeded with

1 First example:

A 20-year old successful medical student is rendered quadriplegic in a collision for which he is 50% to blame.

The present system would allow that student to recover 50% of the totality of his damage, and would allow him to prove the full extent of that damage.

To the extent that in the present system the Fund would furnish the claimant with an undertaking in respect of future medical expenditure, this would, of course, only reimburse the student for 50% of the expenditure. This could be iniquitous to the extent that although the claimant has no money to fund the 50% not covered by the Fund, he would at least be receiving other areas of compensation which could be utilised to fund that 50%.

The proposed new system will, it would appear, result in the following:

(a) There will be a 50% undertaking to >

pay medical expenditure, and that will be limited to medical expenditure of a certain level.

(b) Notwithstanding the clear reality that the claimant was on the brink of a medical career and has been robbed thereof, he would receive a mere R562,50 per month (75% x R1 500,00 per month x 50% – see page 16 of the White Paper) for the rest of his working life.

These meagre earnings and a "catastrophic permanent impairment benefit" of R60 000,00(R120 000,00 x 50% – see page 19 of the White Paper) would be all the claimant would receive in addition to the 50% undertaking. In fact, he would have no choice but to try to fund the 50% of medical expenditure which he himself would have to meet out of these meagre amounts. He would be worse than destitute. *No matter how valid and vigorous the criticism which one can level at the existing system, it does not compare with the criticism which one can level at a system which would result in so iniquitous a level of compensation, and which would couple this with an abrogation of the right to recover from the guilty party.*

Note that the example is hardly an absurd or unlikely one.

*2 **Second example:***

It would appear that a person aged over 65 who is working because he or she must in order to survive will, if injured in a motor vehicle collision after 1 May 1998, fall foul of a system which assumes that no-one works beyond the age of 65.

The result will be that even though that person might be totally and permanently disabled, the system will pay no compensation in respect of that disability. The result could be catastrophic.

E Conclusion

There is an existing system which is aimed at nothing more than providing fair compensation:

- This system has its problems: although in many cases the delay is justified by the delay in stabilisation of the injuries, there is no doubting that there is often unacceptable delay, there is often abuse of the system, and the costs component is unacceptably high.
- These are problems which can be addressed sensibly without jettisoning the system of fair compensation.
- There is no need to jettison fair compensation in favour of a system which abandons equity in favour of rigidity, which to a large extent penalises the innocent and rewards the guilty and which will not reduce litigation or the costs thereof. If anything, the rigid system proposed in the White Paper will encourage litigation.