

Road Accident Fund (RAF)

Extracts from the annual report by JPJ du Plessis SC, Pretoria Bar, chairman of the GCB's Road Accident Fund Committee.

The LSSA application

The application of the *Law Society of South Africa ('LSSA')*, *South African Association of Personal Injury Lawyers ('SAAPIL')* and *Nine Other Applicants v The Minister of Transport (First Respondent) and The Road Accident Fund (Second Respondent)* ('the LSSA application') was heard by Fabricius AJ in the North Gauteng High Court, Pretoria, from 1 to 3 March 2010 and judgment was delivered on 31 March 2010. The purpose of the application was to have certain sections of the Road Accident Fund Act 56 of 1996 as amended by the Road Accident Fund Amendment Act 19 of 2005, declared inconsistent with the Constitution and invalid, as well as to declare certain regulations of the Road Accident Fund Regulations 2008 invalid. The application as a whole was dismissed but no costs order was made.

An application for leave to appeal directly to the Constitutional Court was subsequently filed. The application has been set down for hearing in the Constitutional Court on 12 August 2010. If the application is granted, the appeal will be heard immediately thereafter. An application for leave to appeal to the Supreme Court of Appeal was originally set down for hearing in the North Gauteng High Court on 27 May 2010, but by agreement between the parties this application has been postponed to after 12 August 2010.

SAAPIL request for assistance

During October 2009 SAAPIL, through the RAF Committee, requested assistance from the GCB in the challenge to the Road Accident Fund Amendment Act 2005 and the regulations thereto. It was proposed that the GCB delegate from within its membership ten counsel, comprising five seniors and five juniors who do Road Accident Fund work and amongst whom some should be experts in constitutional law. These counsel were to assist some of the applicants who were granted leave by the North Gauteng High Court to intervene and be joined as co-applicants in the LSSA Application during 2009. The request was referred to the Exco meeting of the GCB held on 7 November 2009 and was turned down.

Direct Payment System

On 4 June 2009 the RAF published a notice in the media informing the public that the previous notice published by the RAF on 21 July 2008, which informed the public that the Direct Payment System would be introduced with effect from 1 August 2008, was withdrawn. This happened after the LSSA and SAAPIL obtained an interim interdict against the RAF in the Western Cape High Court, pending review of the decision to implement the Direct Payment System.

The Direct Payment saga was finally concluded when the Cape High Court on 11 June 2009 granted an order setting aside the decision by the Road Accident Fund to adopt the Direct Payment System as well as its decision to implement same, with a final interdict restraining the RAF from implementing and enforcing the decision, together with a punitive costs order.

Attempted meeting with RAF

In an attempt to resolve inter alia the issues raised by De Jager SC in his report dated 19 June 2009, various attempts were made during the past year to arrange a meeting between the CEO of the RAF, Mr Modise, the chairman of the GCB, PM Mtshaulana SC, and the GCB Committee on RAF matters. Meetings were scheduled for 22 July 2009, 22 September 2009 and 22 October 2009. With the exception of the meeting in July 2009, all the other meetings were cancelled by Mr Modise's office on short notice. The ongoing agenda for these meetings included inter alia the following issues:

- The RAF's failure to settle matters timeously and to give instructions timeously regarding cases on the court rolls;
- clogging of the court rolls by RAF matters;
- increase in tariffs payable to counsel as well as the pattern of late payments.

Before the meeting scheduled for 22 October 2009, the RAF Committee requested that the following further issues should be added to the agenda:

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- The RAF's briefing patterns in respect of juniors;
- the timeframe wherein counsel for the defendant is briefed before commencement of the trial and in particular whether such timeframe affords sufficient time for preparation for trial to such counsel;
- payment of fees of counsel acting on behalf of the RAF.

Reducing of waiting period for trial dates in RAF matters in the North Gauteng High Court

In the North Gauteng High Court the number of RAF matters on the daily trial roll has increased substantially with effect from the beginning of the third term of 2009 in terms of a Revised Practice Directive issued on 21 November 2008 by the then Deputy Judge President, JW Shongwe J. The purpose was to increase the number of cases to be dealt with per day, which in turn would reduce the waiting period for a court date.

The new Practice Directive regarding an increased number of RAF matters on the trial roll, has now been implemented for almost a year. It has indeed achieved the intended objective in that many plaintiffs in RAF cases have received the compensation at least six to twelve months earlier than would have been the case if the new system had not been implemented.

Clogging of court rolls and other problems

Although the objective of reducing the waiting period for a trial date, particularly in RAF matters, was indeed obtained (at least to a certain extent), the new system created numerous new practical problems for practitioners and their clients and exacerbated existing problems in respect of RAF matters. The problems experienced during the past year in the North Gauteng High Court in RAF matters, which were at least partially caused by the increased number of RAF matters on the trial roll (though some existed before the implementation of the new system) are, inter alia, the following :

- Attorneys, acting not only on behalf of the RAF, but also on behalf of plaintiffs, who already had a full trial schedule for the year, were flooded with a substantial volume of further RAF matters on the trial roll which then had to be attended to on short notice;
- in the majority of RAF matters, the RAF only commences its preparation a few days (at most a week) prior to the trial date. As a result attorneys acting for the RAF usually do not get instructions to brief counsel until a day or two (at most) before the trial date, in most cases only the day before the trial, and in some cases even on the morning of the trial;
- attorneys acting for the RAF attend pre-trial conferences alone because they do not get an instruction from the RAF to brief counsel to attend the pre-trial conference, and these attorneys are in most of the cases unprepared, due, inter alia, to the increased workload they have to handle.;
- consequently, pre-trial conferences usually do not serve the intended purpose (to limit issues and costs) and concessions or admissions are rarely made by the RAF in pre-trial minutes. Although the attorneys are often prepared to make the relevant concessions, they are not entitled to do so without a mandate from the RAF, and should they do so without a mandate, they are at risk of not getting paid or they are even threatened that they will be held liable for the costs of the matter;
- as a matter of course, although approximately 90% of all RAF matters settle out of court, settlements are not reached prior to the trial date, in many cases not even on the first day that a matter is on the roll but only after matters have been standing down for anything from a day to four days, clogging the court roll. It often

happens that although the legal representatives on both sides are in agreement (sometimes already at the pre-trial conference) how the matter should be resolved, the attorneys acting for the RAF struggle to get a mandate to settle in accordance with their advice to the RAF. This results in the matter standing down for a number of days;

- it also happens quite often that the legal representatives acting on behalf of the RAF do not succeed at all in obtaining a mandate to settle, even though the RAF does not have any expert witnesses (or even lay witnesses in respect of the merits), forcing the plaintiff to proceed to lead the evidence of his/her own witnesses for a day or three in court in order to obtain fair and reasonable compensation by means of a court order;
- the RAF also persists with its "policy" of refusing a separation of the issues of liability and quantum even in cases where no preparation on quantum has been done, and refusing to concede liability even in clear cases. Consequently, plaintiffs often have to bring a substantive application for separation of issues which is argued on the day of the trial, usually with success, whereafter liability is only then conceded, a process which inevitably results in additional costs for the RAF. This unnecessarily takes up court time and contributes to the clogging of court rolls.

To the best of my knowledge these problems as outlined above, are encountered not only in the North Gauteng Division, but also in other divisions.

Meeting with Department of Justice

During April 2010 the Law Society of South Africa informed the GCB that the LSSA and the GCB were requested to submit at the Heads of Court meeting a combined proposal on how the issue of clogging of the court rolls with RAF matters could be addressed. The LSSA further informed the GCB that it intended conducting a survey of all courts. A meeting was arranged with the Department of Justice on 26 May 2010, attended by representatives of the LSSA, the Department of Justice, the GCB and the RAF Committee of the GCB. - Diedericks SC (representing the GCB-RAF Committee) outlined the problems experienced in the NorthGauteng Division as set out above. Ntsebeza SC (representing the GCB) outlined the problems experienced in the South Gauteng Division (similar to those experienced by the North Gauteng Division). Adv P du Rand (representing the office of the Minister of Justice) stressed that the problems seem to be an institutional problem in that the RAF should attempt to get its administrative processes in order. The clogging of the court rolls is being attended to and should be referred to the next Heads of Court meeting to be dealt with at that level.

Failure by RAF to make timeous payment

The failure of the RAF to pay their own attorneys within a reasonable time, and also to pay out the capital amount of the claim and costs to the plaintiffs' attorneys on or before the due date, persists. In many cases, payment is only obtained by plaintiffs after serving a writ of execution on the RAF, first in respect of the capital amount, and later in respect of costs.

Comments on draft policy on restructuring the RAF

On 12 February 2010 the Minister of Transport published the Draft Policy on the Restructuring of the Road Accident Fund as Compulsory Social Insurance in relation to the Comprehensive Social Security System ("the Draft Policy") and invited comments. Depending on the outcome of the appeal in the LSSA application, it might become necessary to revisit the Draft Policy and to provide input to the Minister. 