Is the Road Accident Fund's litigation in urgent need of review?

March 1st, 2019

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By Prof Hennie Klopper

The Road Accident Fund (RAF) regularly laments its precarious financial position and has consistently blamed legal practitioners for this. One of the RAF expenses that had alarmingly burgeoned, is the amount spent by the RAF on litigation. The following table based on RAF annual reports shows a phenomenal increase of 120% from 2005 to 2017.

Year	Number of claims	Legal costs
2005	185 773	R 941 million
2006	190 468	R 1,3 billion
2007	107 418	R 1,7 billion
2008	267 133	R 2,1 billion
2009	166 146	R 2,5 billion
2010	85 397	R 2,7 billion
2011	74 162	R 3,5 billion
2012	52 445	R 3,5 billion
2013	47 159	R 3,7 billion
2014	53 230	R 4,6 billion
2015	62 436	R 5,5 billion
2016	71 664	R 6,6 billion
2017	73 860	R 7,9 billion
2018	92 101	R 8,8 billion

In the same period claims lodged have decreased by 40% from 185 773 claims to 92 101 (2017/2018 RAF Annual Report). During this time the tariff of legal fees increased by 8% in 2015 and an approximate 11% from 1 November 2017. According to the RAF this extraordinary expenditure is caused by legal practitioners who are: 'dragging the claims process through court' (Bongani Fuzile 'RAF blames lawyers for leeching system' *Daily Despatch* 22-9-2018). Apart from some R 8 billion spent on litigation, the RAF's delayed claims payment scheme cost an approximate R 1,8 billion in 2017 (2017/2018 RAF Annual Report). The combined expenditure of approximately R 10 billion per annum represents about 25% of the RAF annual budget and translates to a fuel levy of 50 cents per litre.

Reasons

Quite clearly, blaming legal practitioners for the situation is an oversimplification. The question is far more complex and cannot possibly be due only to the actions of legal practitioners. One obvious fundamental issue is the unacceptably high incidents of motor vehicle accidents generating approximately 92 000 compensation claims per annum.

The 2017/2018 annual report of the RAF sheds little light on the problem. Meetings between regional managers and the Judge Presidents and Deputy Judge Presidents of the Eastern

provincial commissioners of the Eastern Cape and the Free State are mentioned as part of improved case and litigation management. Issues raised by Judge Presidents, included –

- continued last-minute settlements or using trial dates to trigger settlements;
- postponing of cases, not giving instructions to Senior Counsel; and
- defending cases without presenting evidence or calling own witnesses.

The RAF also needs to monitor court orders and adverse comments on the litigation process. These matters are similarly mirrored in recent case law, which is critical of RAF litigation and a governmental body with the constitutional duty of upholding: 'the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms' of road accident victims (*Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) at para 78; *Daniels and Others v Road Accident Fund and Others* (WCC) (unreported case no 8853/2010, 28-4-2011) (Binns-Ward J) at para 55).

RAF litigation judicially characterised: Cash flow management and 'tactical pleading'

In the *Daniels* case Binns-Ward J after reviewing some 17 cases where the RAF was rebuked by judges for their handling of claimants' claims and litigation states at para 23 and 58:

'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, 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 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

claims received efficiently, or for drawing out litigation and driving up legal costs by what is sometimes euphemistically described as "tactical pleading".'

Recent judicial comment

The RAF's approach to litigation appears from *Hlalele v Road Accident Fund* (FB) (unreported case no 5668/2016, 18-10-2017) (Daffue J) where it is said that the RAF's legal teams come to court, not to settle, but to throw in the proverbial towel. In most 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.

In *Friedemann v Road Accident Fund* (KZD) (unreported case no 2459/12, 13-12-2017) (Henriques J) Henriques J stated that the RAF constantly seeks additional funds from Parliament but nonetheless acts wastefully when litigating matters that could have been easily settled long before trial – the RAF remaining passive and failing to properly instruct its legal practitioners. The court warned RAF officials that they may be ordered to pay costs out of their own pockets.

RAF litigation was severely criticised by Legodi J's punitive cost order made in *Mathebula v Road Accident Fund* (Mpumalanga Circuit Court) (unreported case no 734/2016, 15-11-2017) (Legodi J). The Registrar was ordered to bring this matter under the attention of the RAF's Chief Executive Officer and the RAF officials requested to file reasons why they should not together with the RAF be ordered to pay the wasted costs.

In *Mashigo v Road Accident Fund* (GP) (unreported case no 2120/2014, 13-6-2018) (Davis J) the court held that:

'2.6 During court terms this division of the High Court entertains no less than between 45 and 60 pre-trial conferences per week dealing with claims against the Fund. In addition, the daily civil trial roll of this division carries on average no less than 100 trials relating to actions against the Fund. There is a disconcerting number of these trials where the facts pertaining to the merits are either common cause or undisputed but, in any event, would in all probability result in 100% liability of the Fund, yet the merits remain contested until the last moment. Many of these include claims on behalf of minor pedestrians or passengers. In an equally disconcerting number of these cases the answer to the question by the court as to

the Fund as being a lack of instructions from the Fund. Often, if a pre-trial is postponed for a week or two for the securing or obtaining of such instructions, merits are suddenly conceded, again routinely without explanation for why it had not been done earlier. I dealt with eight trials against the Fund in the same week as this trial and in one of [their] merits were only conceded a month prior to trial but some six years after the accident, again without explanation why this could not have taken place earlier.

...

2.8 The large number of applications to compel activity on the part of the Fund which also regularly feature in this division in unopposed motion court rolls is a further testimony of the difficulties experienced by Plaintiffs in having procedural matters timeously attended to. In many instances, it is only after the delivery of applications to compel that the Fund is spurred into action resulting in yet further unnecessary costs, fruitless expenditure and waste of court time.

2.9 It is a matter of public record that the Fund's liquidity is under constant threat and any attempts at curtailment of expenses should hardly expect opposition. In many if not all of the instances referred to above, the plaintiffs are fighting a faceless foe and an unidentified cause of their frustration and delay as their opposing counsel and attorneys are often equally embarrassed or find their hands bound by the lack of instructions from "the Fund".'

(See also *Nthabiseng and Others v Road Accident Fund* (GP) (unreported case no 3492/2016, 19-6-2018) (Legodi JP); *Topper v Road Accident Fund* (GP) (unreported case no 52212/2016, 17-5-2018) (Pretorius J) and *Kgasi v Road Accident Fund* (GP) (unreported case 4582/2016, 14-5-2018) (Davis J) where the RAF was criticised as litigant.)

Litigation settlements

Most cases are settled with the RAF and, therefore, the RAF has some control over settlement amounts. The question of settlements was highlighted in *Mzwakhe v Road Accident Fund* (GJ) (unreported case no 24460/2015, 26-10-2017) (Weiner J) the court held:

'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,

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.'

RAF v Other civil matters and RAF cases actually heard:								
Month	RAF cases	Other cases	Total civil cases	RAF %	Days	RAF per day	Heard	RAF on Roll %
January	299	60	359	83,29%	22	14	1	0,33%
February	2 414	451	2 865	84,26%	21	115	16	0,66%
March	1 898	389	2 287	82,99%	20	95	19	1,00%
April	1 477	192	1 669	88,50%	18	82	7	0,47%
May	3 092	397	3 489	88,62%	21	147	8	0,26%
June	2 197	283	2 480	88,59%	21	105	9	0,41%
July	563	111	674	83,53%	22	26	6	1,07%
August	3 461	431	3 892	88,93%	21	165	7	0,20%
September	1 340	242	1 582	84,70%	17	79	10	0,75%
October	1 584	265	1 849	85,67%	20	79	1	0,06%
November	3 280	420	3 700	88,65%	21	156	1	0,03%
December	761	123	884	86,09%	18	42	1	0,13%
Average	**1 864**	**280**	**2 144**	**86,15%**	**20**	**92**	**7,2**	**0,45%**

In *Vand der Hoeck and Another v Road Accident Fund* (GNP) (unreported case no 17884/07, 1-10-2010) (Mavundla J) at para 13 the court intervened in a settlement and reduced general damages (see also *Webb v Road Accident Fund* (GP) (unreported case no 2203/2014, 14-1-2016) (Mabuse J)).

Unwarranted RAF litigation has an exponential effect on quantum of damages and other litigants. In the *Mashigo* case, Davis J points out that:

'... a substantial portion of the plaintiff's damages related to the scarring and disfigurement suffered by her as a result of the [burn] wounds which she has sustained. The extended period which the plaintiff had to endure without the scarring receiving treatment or remedial medical intervention such as reconstructive surgery has increased her pain and suffering. This increase will also lead to an increase in the award for general damages for which the fund will be liable. By its own inaction the fund has therefore not only increased the pain and suffering of an innocent plaintiff but also increased the amount of public funds to be paid in respect thereof. In all probability this will be the same consequence in the other

overburdened by the total number of Road Accident Fund trials on its rolls, meritorious claims by plaintiffs and trials where merits are genuinely and on reasonable grounds in dispute or issues of apportionment or *locus standi* cannot be resolved other than by trial and a decision by a court should not be delayed or prejudiced by actions which could (and should) be resolved by responsible litigation and timeous consideration of the issues of merits.'

Litigation statistics

A study of the 2018 Gauteng Division of Pretoria's Court Roll, which is the largest court jurisdiction in our country reveals the information in the table above.

From the 2018 Gauteng Division of Pretoria's Court Roll, it is quite apparent that in 86% of cases on the roll the RAF is the defendant and that less than 1% of cases defended by the RAF ultimately proceed to trial. Stated differently, 99,56% of all cases defended by the RAF are settled and are probably capable of early settlement without litigation.

Conclusion

The RAF's legal bill emanates principally from the high number of annual claims and the RAF's litigation policy and practice. It is not simply the RAF being dragged to court by legal practitioners but based on recent judicial pronouncements, largely the RAF's approach to claims handling and litigation, which is and remains in urgent need of review because it is costing motorists and our country approximately R 10 billion per annum. The RAF can substantially curtail litigation (as is clearly intended by the Act) by astutely and effectively making use of s 17(3)(*b*) of the Road Accident Fund Act 56 of 1996, which reads: 'In issuing any order as to costs on making such award, the court may take into consideration any written offer, including a written offer without prejudice in the course of settlement negotiations, in settlement of the claim concerned, made by the Fund or an agent before the relevant summons was served.'

Should the RAF properly deal with claims and make reasonable offers within 120 days from date of lodging as determined by the Act, litigation will due to the consequences of s 17(3)(*b*) be so fraught with substantial adverse risk for lawyers that litigation will become unpalatable and reduced to acceptable levels with concomitant substantial cost saving. Not only will costs be reduced, but, as intended by the legislator, the interests of road crash victims will be

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This article was first published in *De Rebus* in 2019 (March) *DR* 10.