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PRESCRIPTION OF OBLIGATIONS ARISING FROM UNDERTAKINGS ISSUED BY THE ROAD ACCIDENT FUND IN PURSUANCE OF SECTION 17(4)(a) OF THE ROAD ACCIDENT FUND ACT 56 OF 1996

1 Introduction

Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (RAF Act) provides:

> "Where a claim for compensation under subsection (1)—
>
> (a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate—
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> (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or
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> (ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d),
>
> in accordance with the tariff contemplated in subsection (4B)."

Before dealing with the import of the particular provision, it has to be noted that the tariff referred to in the last sentence of the section does not have any current force or effect as this tariff was held to be unconstitutional (see *Law Society of South Africa v Minister of Transport* 2010 11 BCLR 1140 (GNP)).

The meaning and import of the similar article 43 of the Multilateral Motor Vehicle Fund Act 93 of 1989 governing undertakings have been previously canvassed. Article 43 is *in pari materia* with section 17(4)(a) and I do not propose to duplicate a full discussion of this particular section here (see Klopper *Undertakings* 1996 *De Rebus* 94) apart from those aspects which are relevant for purposes of this note. Readers are in this regard referred to this article as well as the exposition of section 17(4)(a) in Klopper *The law of third party compensation* (2012) (hereafter Klopper) 169 if they require more clarity in this regard.

Recently undertakings have become a bone of contention between the Road Accident Fund and claimants inasmuch as the Road Accident Fund regularly contends that it is not liable for medical accounts submitted more than three years after the incurring of the particular medical expense, as such claim has prescribed in terms of the Prescription Act 68 of 1969. One such matter was *E Niemann v Road Accident Fund* unreported case no 1549/2007 (NGHC). This case dealt with an undertaking that was concluded in terms of article 43 of the MMF Act of 1989 and augmented by contractual provisions (see in this regard *Marine & Trade Insurance Co Ltd v* Katz 1979 4 SA 961 (A) 971A). The court

held that the Prescription Act of 1969 was applicable to the facts of the case and that the Road Accident Fund had admitted liability, thereby interrupting prescription. The court found, therefore, that the Road Accident Fund was liable. Paragraph 20.6 of De Klerk AJ's judgment states that

> "an argument that each new service rendered to the applicant at the time it was rendered has its own prescriptive period, is perhaps in consonance with the prevailing principles but cannot be applied to the present application, for the reasons in the previous paragraphs".

This has the effect of rendering the judgment distinguishable where a purely statutory undertaking (ie an undertaking worded as in the section without any contractual terms added) was given by the RAF. The question remains: Does a claim for medical services incurred entirely in terms of an undertaking issued in pursuance of section 17(4)(a) prescribe and, if so, when? In answering this question the following aspects need to be analysed:

(a) Is a claim for payment of medical accounts incurred in consequence of an undertaking a claim that is susceptible to prescription?

(b) Which prescription regime governs the prescription of claims that may arise in consequence of section 17(4)(a) and does such regime provide for prescription of obligations arising from section 17(4)(a)? and

(c) If not, what is the function of a section 17(4)(a) undertaking?

2 Susceptible to prescription?

The point of view that a claim for medical services incurred as future medical expenses in terms of an undertaking creates a new and distinct claim against the Road Accident Fund is based on the proposition that each service rendered is a consequence of an undertaking (see eg para 20.6 of the *Niemann* judgment).

This notion is contradicted by the wording of section 17(4)(a) itself that provides that the issuing of an undertaking is only authorised

> "[w]here a *claim for compensation under subsection (17)(1)*(a) includes a *claim for the costs of the future* accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her" (my italics).

From a proper reading of this section, which empowers the issuing of an undertaking, it is abundantly clear an undertaking can only be issued if and when future medical expenses have been claimed and proven in terms of section 17(1) and are therefore an integral part of the section 17(1) claim and are not separate claims.

Furthermore, the view that future medical expenses claimed in consequence of an undertaking are separate claims is not only in conflict with the wording of the relevant section of the Road Accident Fund Act, but is also contrary to current law. As previously shown, section 17(4)(a) explicitly refers to the claim for future medical expenses as part of the claim in terms of section 17(1) of the Road Accident Fund Act. A claim in terms of section 17(1) is a common law delictual claim for damages for personal injury and death arising out of the unlawful and negligent driving of a motor vehicle which, in terms of section 21 of the Road Accident Fund Act, has to be instituted against the RAF. This is the direct consequence of section 19(a) which provides that:

> "The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage – (a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21."

(See Suzman and Gordon *The law of compulsory motor vehicle insurance* (1970) 100; Suzman, Gordon and Hodes *The law of compulsory motor vehicle insurance in South Africa* (1982) 93; Klopper 24; *Rose's Car Hire v Grant* 1948 2 SA 466 (A); *Workmen's Compensation Commissioner v SANTAM* 1949 4 SA 732 (C); *Da Silva v Coutinho* 1971 3 SA 123 (A)).

Although a third party claim is comprised of a variety of patrimonial and non-patrimonial heads of damages (such as loss of income, loss of earning capacity, pain and suffering, loss of amenities of life, etc), the claim against the Road Accident Fund in terms of section 17(1) is a unitary and indivisible common law delictual claim. As a direct consequence of this accepted principle of law a third party claim cannot be ceded nor is it passively transmissible before *litis contestatio* (see the previous paragraph regarding the delictual nature of the section 17(1) claim and *Regering van die Republiek van Suid-Afrika v SANTAM* 1970 2 SA 41 (NC); *Potgieter v Sustein* 1990 2 SA 15 (T); *Road Accident Fund v Mothupi* [2000] 3 All SA 181 (SCA) and Klopper 29 30).

A further consequence of the unitary nature of a section 17(1) claim against the Road Accident Fund is that the various heads of damages do not constitute individual and separate claims. For this reason a separate claim for past and future medical expenses (or for that matter any of the other heads of damages) cannot and does not exist (see *Regering*; *Sustein*; *Mothupi; Duduzile v Road Accident* Fund [2007] 4 All SA 1241 (W)*; Mntambo v Road Accident Fund* 2008 1 SA 313 (W) 318I–319D; *Nonkwali v Road Accident* Fund [2008] 2 All SA 503 (SCA), 2009 (4) SA 333 (SCA); *Van Zyl v Road Accident Fund* (34299/2009) [2012] ZAGPJHC 118). It follows that medical costs (and also future medical costs) in relation to a section 17(1) third party claim does not constitute a separate distinguishable claim, but is an integral and indivisible part of a third party claim for damages suffered as a result of personal injury (see *Klaas v UNISWA Insurance Co Ltd* 1981 4 SA 562 (A) 477D–H) resulting from a motor vehicle accident and brought against the Road Accident Fund in terms of section 17(1) of the Road Accident Fund Act of 1996. In addition, a third party claim which includes medical costs is (viewed from the perspective of the third party claimant) a claim based in delict against a delictual wrongdoer (see *Marais v Loutit* 1911 TPD 307*; Letzner v Friedman* 1919 OPD 20; *Selikman v London Assurance* 1959 1 SA 523 (W); AA *Mutual Insurance v Administrateur, Transvaal* 1961 2 SA 796 (A); *Free State Consolidated Gold Mines t/a Ernest Oppenheimer Hospital v MMF* 1997 4 SA 930 (O); *Van der Merwe v Road Accident Fund* 2006 3 SA 88 (T)). Within the context of third party compensation, the wrongdoer/defendant is almost always the Road Accident Fund (see ss 21 and 17(1) of the Act).

It follows that a claim for past and future medical expenses clearly does not constitute a separate and distinct claim against the Road Accident Fund and consequently such a claim is incapable of prescribing separately from the section 17(1) claim against the Road Accident Fund.

3 Function of undertaking

The fact that a claim against the Road Accident Fund in terms of section 17(1) is a unitary, indivisible common law claim has the effect that all common law principles governing the recovery of damages apply to such a claim. The most important of these common law rules for purposes of this discussion are the once-

and-for-all rule (see *Cape Town Council v Jacobs* 1917 AD 615; *Oslo Land Co Ltd v Union Government* 1938 AD 584; *Slomowitz v Vereeniging Town Council* 1966 3 SA 317 (A); *Marine and Trade Insurance v Katz* 1979 4 SA 961 (A); *Evins v Shield Insurance* 1980 2 SA 814 (A)) and the rule that damages have to be expressed in current currency and be paid in a lump sum (see Erasmus and Gauntlett "Damages" 7 *LAWSA* par 16; *Anthony v Cape Town Municipality* 1967 1 SA 445 (A); *Mouton v Mynwerkersunie* 1977 1 SA 119 (A); *Levison v Batten and Co Ltd* 1940 TPD 41; *Bank of Lisbon v Optichem Kunsmis (Edms) Bpk* 1970 1 SA 447 (W)).

The common law rules highlighted in the previous paragraph apply undiminished to all section 17(1) claims against the Road Accident Fund (see *Rose's Car Hire (Pty) Ltd v Grant* 1948 2 SA 466 (A); *Da Silva v Coutinho* 1971 3 SA 123 (A); *Conradie v Erasmus and Son* 1951 4 SA 29 (T)). A claimant is obliged to claim all damages from the Road Accident Fund in one action (*Evins v Shield*; s 17(4)(a) also does not revoke the once-and-for-all rule – see *Marine and Trade Insurance v Katz* 1979 4 SA 961 (A) 970G)). Furthermore, the Road Accident Fund is in principle obliged to compensate such damage with a lump sum payment in current currency (see authority in the preceding paragraph). In view of the aforegoing, section 17(4)(a) does no more than authorise a deviation from one of these common law principles – that is, the Road Accident Fund's obligation to pay in a lump sum. The claim for future medical expenses brought against the Road Accident Fund remains (as a consequence of the once-and-for-all rule) part of the unitary claim in terms of section 17(1) (see the initial wording of section 17(4)(a): "Where a claim for compensation under subsection (17)(1)").

An undertaking issued in terms of the strict wording of section 17(4)(a) also does not create a contractual relationship between the claimant and the Road Accident Fund (rights contractually created can be susceptible to prescription as being a debt (see section 10 of the Prescription Act 68 of 1969 and *Evins v Shield* 838). It has a wider meaning when used in this Act and relates more to a claim than a cause of action (see *Drennan Maud & Partners v Town Board of the Township of Pennington* [1998] 2 All SA 571 (SCA)). A careful reading of the section shows that the section merely empowers the Road Accident Fund to issue an undertaking for future medical expenses for which it has been proven to be liable and to pay such damages as and when they are incurred. An undertaking of this nature is for the exclusive benefit of the Road Accident Fund (see *Coetzee v Guardian National Insurance* 1993 3 SA 388 (W)). The claimant in reality has no option but to accept an undertaking when offered by the Road Accident Fund (see *Marine and Trade Insurance v Katz* 1979 4 SA 961 (A) 971A) and consequently no consensus is required for the issuing of a section 17(4)(a) undertaking. Due to the lack of a requirement of consensus between the parties for the issuing of an undertaking, the undertaking cannot create a contract of which the ensuing rights can be subject to prescription.

Ultimately, section 17(4)(a) simply statutorily authorises delayed payment of damages (ie future medical costs) proven to be payable by the Road Accident Fund in terms of section 17(1) of the Act to as and when such costs are incurred and is designed to ameliorate uncertainties that may arise when future damages are assessed (see *Marine and Trade Insurance v Katz* 970G). Based on the legal nature of section 17(1) and the wording and operation of section 17(4)(a), this section of the Road Accident Fund Act clearly does not create any new and

independent contractual or other obligation and/or debt independent of section 17(1) that may be susceptible to prescription.

4 Prescription regime

Two possible prescription regimes can be postulated. A claim may prescribe according to the Prescription Act 68 of 1969 or the provisions of the Road Accident Fund Act 56 of 1996. The determination of the prescription regime applicable to obligations arising out of a section 17(4)(a) undertaking is of particular importance.

Section 12(1) of the Prescription Act of 1969 provides that prescription commences when a debt is due and section 12(3) provides that a debt is not due until "the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care". On the other hand, section 23(1) of the RAF Act provides that a claim in terms of section 17(1) prescribes "upon the expiry of a period of three years from the date upon which the cause of action arose". This clearly creates two distinct dates regarding the inception of prescription and consequently when an obligation becomes prescribed**.**

Certain judgments have held that claims instituted in terms of the Road Accident Fund Act are governed by the Prescription Act 68 of 1969 (see *Solomons v MMF* 1999 4 SA 237 (C); *De Lange v MMF* 2000 1 SA 921 (T); *Smith v MMF* 1999 1 SA 92 (SCA); see also *Niemann* where the court in its judgment relied on *Solomons*). These judgments were handed down despite the explicit wording of section 23(1) of the Road Accident Fund Act 1996 (and its similarly-worded predecessors): "Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3)" (see in this regard the observations made by Klopper 256).

The whole matter is now beyond doubt as the Constitutional Court in *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC) held that claims in terms of section 17(1) are exclusively governed by the Road Accident Fund Act.

As indicated above, a claim against the Road Accident Fund in consequence of which a section 17(4)(a) undertaking is issued, is a claim in terms of section 17(1). Clearly a proper reading of the Road Accident Fund Act does not allow for any other conclusion than that the section 17(1) claim is the *only* claim against the RAF. It is no surprise that section 23(1) of the Road Accident Fund Act which governs prescription within the Act, specifically refers to the claim against the Road Accident Fund as "the right to claim compensation under section 17". The consequence of this is that the claim of a third party against the Road Accident Fund exclusively prescribes as determined by section 23 of the Road Accident Fund Act (see *Mdeyide* above). As the claim for future medical expenses is merely a head of damage under the unitary section 17(1) claim and not a separate and distinct claim, it cannot prescribe separately. More so, if from a practical point of view one considers that an undertaking can only be issued in pursuance of the establishment of liability of the Road Accident Fund for damages (ie future medical expenses), either by virtue of settlement or by judgment. At the stage that an undertaking is issued, the unitary common law right of recourse against the Road Accident Fund created by section 17(1) and existing in favour of the claimant has been fully exercised by the claimant and it is virtually impossible that it can prescribe in terms of section 23(1). It follows that the

liability of the Road Accident Fund to pay medical accounts in terms of section 17(4)(a) is not susceptible to prescription as in essence a request for payment of medical expenses in terms of an undertaking simply constitutes a request for delayed payment of damages by the Road Accident Fund for which damages the Road Accident Fund previously has been found to be liable and which damages it would have been obliged to pay the claimant in a lump sum were it not for the provisions of section 17(4)(a) of the Road Accident Fund Act. This conclusion is also indicated by the wording of section 23(1) which makes no reference whatsoever to a claim in terms of section 17(4)(a). The reference in section 23(3) which states that "[n]otwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose" (the reference to section 17(4)(a) was introduced by the Road Accident Fund Amendment Act 19 of 2005 with effect 1 August 2008 and is applicable to claims that arose after 1 August 2008. The introduction of the particular wording is an example of some ill-considered, inaccurate and indifferent drafting) is of no consequence as the Road Accident Fund Act does not recognise any claim other than the unitary common law claim in terms of section 17(1) and practically has no effect as the cause of action remains the motor vehicle accident and not the issuing of the undertaking nor the incurring of the costs. Any other interpretation would be in conflict with the introductory words of section 17(4)(a) (which clearly identifies future damages as part of a section 17(1) claim), falls foul of the once-and-for all rule (see *Evins v Shield Insurance* 1980 2 SA 814 (A)), is contrary to the recognised presumption in the interpretation of statutes that the legislator does not intend to alter the current law (see Steyn *Uitleg van wette* (1981) 97 153), and will deny the claimant compensation to which a claimant has proven that he/she is rightfully entitled. The latter is contrary to the object of the Road Accident Fund Act (which is to protect the third party from loss of damages to which she is entitled – see *Aetna Insurance Co v Minister of Justice* 1960 3 SA 273 (A) 285 and more recently *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC); *Mvumvu v Minister of Transport* 2010 12 BCLR 1324 (WCC); 2011 5 BCLR 488 (CC), 2011 2 SA 473 (CC)).

5 Conclusion

Where future medical expenses are claimed by a road accident victim, it has in practice become the rule rather than the exception for the Road Accident Fund to issue an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act. When claimants fail to submit claims based on such an undertaking within 3 years from the date of the rendering of the service, the Road Accident Fund is inclined to repudiate such claims contending that the claim has become prescribed in terms of section 12 the Prescription Act 68 of 1969. This contention is invalid legally as the claim for future medical expenses is neither a distinct claim created by section 17(4)(a) which is susceptible to prescription, nor is the Prescription Act of 1969 applicable to third party claims in terms of the Road Accident Fund Act of 1996. The claim for medical expenses (both past and future), due to unitary common law nature of claims brought by road accident victims against the Road Accident Fund in terms of section 17(1) of the Act and the once-and-for-all rule, is an integral part of the section 17(1) claim and not separate or distinct therefrom. The wording of section 17(4)(a) clearly indicates that the undertaking to pay future medical costs is indisputably in respect of future medical costs claimed in terms of section 17(1) of the Act. The prescription of

the unitary common law claim created by section 17(1) is solely governed by section 23(1). This means that a claim for future medical expenses can only prescribe with the section 17(1) claim three years after the cause of action arose. An analysis of the import of section 17(4)(a) shows that the section does not alter the common law but, at most, postpones the date for payment of the future medical expenses part of the proven damages claimed from the Road Accident Fund in terms of section 17(1) of the Act. The relationship(s) arising from section 17(4)(a) is not consensual because the right to offer an undertaking is for the exclusive benefit of the Road Accident Fund, can be unilaterally invoked by the RAF, and the claimant has little other option than to accept the undertaking when offered.

Because an undertaking is offered when the rights in terms of section 17(1) have been fully exercised and because the future medical expenses are an indivisible and integral part of the section 17(1) right, medical expenses incurred in terms of section 17(4)(a) are not new or separate claims and cannot prescribe. The submission of a claimant of medical accounts for payment in terms of section 17(4)(a) is simply a request to pay the damages due to him/her which damages were previously proven and accepted by the Road Accident Fund and payment of which by virtue of the undertaking has been postponed until the costs were incurred. To adopt the attitude that such a request for payment is subject to prescription is to deny the claimant damages to which he/she is rightfully entitled and which the Road Accident Fund would have been legally obliged to pay the claimant in a lump sum had section 17(4)(a) not existed. The only possible basis on which the Road Accident Fund can refuse to pay is when an expense in respect of future medical treatment is incurred for which the claimant did not claim before the issue of the section 17(4)(a) undertaking (see the wording "[w]here a claim for compensation under subsection (1) – (a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her"). In this regard the claimant is under a duty to prove the reasonable likelihood of all accident-related future medical expenses on a balance of probabilities (see Visser and Potgieter "Law of damages" (2012) 456; *Cape Town Town Council v Jacobs* 1917 AD 615; *Evins v Shield Insurance* 1980 2 SA 814 (A) 835; *Coetzee v SAR & H* 1933 CPD 565 574) prior the issue of the undertaking before he or she can insist on payment of accounts incurred in pursuance of a section 17(4)(a) undertaking.

It follows that, although the outcome of *Niemann*'s case (see above) was correct, the basis of the judgment was not sound on two counts: First, the Prescription Act of 1969 is not applicable to claims in terms of the Road Accident Fund Act and second, a request for payment in terms of section 17(4)(a) cannot be subject to prescription because such request simply constitutes a request for delayed payment of already proven compensation claimed and proven in terms of the unitary common law claim of section 17(1) of the Act and cannot under any circumstances be a new and independent claim which is susceptible to prescription. Any other interpretation would deny a third party claimant compensation to which he or she is legally entitled to and will consequently be contrary to the object of the RAF which essentially is to protect the third party from loss of compensation.

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