

## SUPPLIER'S CLAIMS IN TERMS OF SECTION 17(5) OF THE ROAD ACCIDENT FUND ACT 56 OF 1996

### 1 Introduction

Section 17(5) of the Road Accident Fund Act 56 of 1996 (RAF Act) provides as follows:

“Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may claim the amount direct from the Fund or an agent on a prescribed form, and such claim shall be subject, *mutatis mutandis*, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.”

A supplier's claim may therefore be defined as a claim against the Road Accident Fund (RAF) by any person or institution that has at the special instance and request of an injured (also deceased) person who was injured (killed) by the unlawful and negligent driving of a motor vehicle, rendered any service or provided goods or accommodation in a hospital or nursing home, such claim being regulated by section 17(5) of the RAF Act.

Since 2000 suppliers' claims have increasingly become an integral part of the personal injury claims landscape. The volume and extent of these claims was highlighted by the Road Accident Fund Commission Report Vol 1 840. The Commission reports that as at July 2001 the RAF were dealing with 31 318 supplier claims lodged by 1 327 claimants. The amount claimed by suppliers at this particular date was estimated at approximately R124 million (an average of approximately R4 000 per claim). There was a 186% increase in suppliers' claims between 2000 and 2001. These claims are dealt with by the RAF as separate claims, distinct from the main claim of the injured party, causing an additional burden on the already overburdened compensation system – not only administratively but also financially. Administratively, because scarce staff resources have been diverted to deal with what is essentially the payment of medical accounts, and financially, as there is a considerable duplication of claims which in addition causes the diversion of limited financial resources. The RAF has dedicated whole sections of staff to supplier's claims consisting of managers,

seniors, claims handlers and assistants (in Pretoria alone the staff of the supplier's branch totals 26 (information obtained telephonically from RAF)). The cost to the RAF of these specialised sections is unknown, but it is clear in view of the upward tendency of supplier's claims that supplier's claims must represent a substantial burden on the resources of the RAF. At the end of June 2006 there were a total of approximately 42 000 outstanding supplier's claims (information telephonically supplied by the RAF). Each supplier represented by an attorney is currently paid an amount of R800 towards its costs in terms of section 17(2) of the Act. This means the RAF currently faces a supplier's claim bill of approximately R168 million plus (based on an average of approximately R4 000 per claim – see above) a legal costs bill for supplier's claims of approximately R34 million (R800 per claim). This does not take into account new supplier's claims that are lodged daily, or the fact that the legal costs burden is further exacerbated by suppliers who litigate against the RAF and writs of execution.

This situation raises the question as to whether section 17(5) affords suppliers the right to claim directly from the RAF, independently from the claim of the injured party for services rendered or goods and accommodation provided. If so, does the section really serve the direct interests of the road accident victim? The answers to these questions are of importance as the answers may lead to savings in resources and expenditure within the RAF which in turn is to the advantage of the primary beneficiary of the Act – the third party claimant.

The solution to this question can best be found by considering the following pertinent aspects:

- Legal nature of a third party claim;
- legal basis of a supplier's claim;
- historical development of supplier's claims; and
- analysis of section 17(5).

## 2 Legal nature of third party claim

A third party claim 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 is governed by the provisions of the RAF Act and is in terms of this Act instituted against the RAF (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 *Law of third party compensation* (2000) p 21; *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 presents different distinguishable facets and/or dimensions such as merits (negligence), quantum and patrimonial and non-patrimonial loss, a third party claim is an unitary, indivisible claim encompassing these facets and/or dimensions and is incapable of being separated into its separate distinguishable facets and/or dimensions (see *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)). A third party claim cannot be ceded nor is it passively transmissible before *litis contestatio* (see Klopper 33 34).

Because of this basic principle, the loss of earnings portion of a third party claim cannot be claimed separately, nor does a concession of negligence without

quantum being determined, constitute an acknowledgement of liability by the RAF for a third party claim (see *Regering; Sustein; and Mothupi*). It follows that medical costs in relation to a third party claim do 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). 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 brought 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 is almost always the RAF (see s 21 of the Act).

### 3 Legal nature of supplier's claim

Legally a supplier's claim is based in contract. The content of the contract is the supply of professional services and/or medical accommodation and/or goods at the special instance and request of the injured third party (see *Administrator, Transvaal v AA Mutual Insurance* 1960 4 SA 525 (T)). It is clear that as of a right, the supplier possesses no direct right of recourse for services rendered or goods or accommodation supplied against the wrongdoer who gave rise to the need for it to supply goods, render services or provide accommodation. The supplier only has its contractual claim against the injured third party (see Suzman, Gordon and Hodes 175). The contractual nature of the supplier's claim is further implied by the wording of section 17(5), where it provides, as a prerequisite to a claim in terms of the section that "the person . . . provided the accommodation or treatment or rendered the service or supplied the goods".

Finally, a supplier's claim does not qualify as a claim by a third party as it is not a claim instituted by a third party as defined by section 1 of the RAF Act of 1996 (a "third party" is defined as "the third party referred to in section 17(1)").

Furthermore, section 17(5) does not negate or substitute the supplier's contractual claim against the injured third party but offers the supplier an additional or supplementary right of recourse against the RAF, provided that the requirements of this section have been complied with (see Suzman, Gordon and Hodes 175).

### 4 Historical background

#### 4.1 *Motor Vehicle Insurance Act of 1942 and Compulsory Motor Vehicle Insurance Act of 1972*

The first precursor of section 17(5) was section 12 of the Motor Vehicle Insurance Act 29 of 1942 (MVA Act of 1942) which was introduced by section 3(c) of Act 27 of 1952. This section provided as follows:

"12.(1) Where the obligation of a registered company to compensate any third party under section eleven includes a liability for costs which have been incurred in respect of the accommodation of any person in a hospital or nursing home or of any treatment of or service rendered or goods supplied to any person –

- (a) the registered company shall, if the amount of the compensation payable by it has been determined in any manner, pay such part of that amount as represents such costs due to the person who provided the accommodation or treatment or rendered the service or supplied the goods (in this section referred to as the

supplier), direct to the supplier who shall be entitled to recover the said part from the company without any cession of action,

- (b) the supplier shall, if the said amount has not been determined and the registered company has not in terms of any agreement been released from its obligation to compensate the third party in respect of such costs, be entitled without any cession of action to recover from the registered company so much of the said costs so due as the third party is entitled to recover from it.
- (2) The right of action conferred by paragraph (b) of sub-section (1) may be exercised by the supplier by intervening in any legal proceedings instituted by the third party or, if no such proceedings have been instituted and subject *mutatis mutandis* to the provisions of section eleven *bis*, by instituting legal proceedings at any time at which such proceedings may be instituted by the third party, and shall not, after it has been so exercised, be affected by any agreement whereby the registered company is released from its obligation to compensate the third party in respect of such costs.
- (3) Where—
  - (a) any person has claimed compensation under section eleven from a registered company, and
  - (b) the compensation claimed could, if the company were liable for the payment thereof, have included any costs referred to in sub-section (1), and
  - (c) the company has, without admitting any obligation to compensate such person under that section, entered into an agreement to make any payment in respect of such claim whereby it has been released from any such obligation, and
  - (d) the supplier has not, at the date of such agreement, exercised his right in respect of such costs in the manner prescribed by sub-section (2),
  - (e) the registered company shall, subject to the provisions of sub-sections (4) and (5), pay to the supplier the amount of such costs incurred prior to the said date and due to the supplier or the amount of two hundred rand, whichever is the lesser.
- (4) If the registered company has in such manner as may be prescribed by regulation given notice that it has entered into the agreement referred to in subsection (3), it shall not in terms of that sub-section be obliged to pay any amount in respect of such costs to any supplier who has not lodged a claim in writing with the registered company prior to the expiration of a period of sixty days after the date of the notice.
- (5) If claims whereof the amounts are not in dispute and exceed in the aggregate the sum of two hundred rand, have been lodged with the company as contemplated in sub-section (4) by two or more suppliers, the company shall pay to each claimant an amount which bears the same ratio to the sum of two hundred rand as the amount of his claim bears to the amount representing the aggregate of the amounts of all such claims.”

Section 12 was replaced by section 26 of the Compulsory Motor Vehicle Insurance Act 56 of 1972 (CMVI Act). Section 26 differs from section 12 of the MVA Act of 1942 in only one respect. The word “obligation” in subsection 3(c) was changed to “liability”. It is significant that in terms of section 26(1)(a) the right of a supplier to be paid directly only arose after the amount of compensation was determined either by agreement or judgment (see Suzman, Gordon and Hodes 175). Where the amount of compensation was not determined, the supplier was given the right to recover its claim directly from the relevant insurance company by section 26(1)(b) (previously, section 12(1)(b)). This right to institute action was specifically sanctioned by section 26(1)(b) and existed independently from that of the third party. Certain suppliers who had relationships with hospitals were excluded from lodging supplier’s claims (see Suzman, Gordon and Hodes 176–178).

#### 4.2 *Motor Vehicle Accidents Act 84 of 1986, Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 and the Road Accident Fund Act 56 of 1996*

The repeal of the CMVI Act of 1972 and the promulgation of the MVA Act 84 of 1986 (MVA Act of 1986) changed the position relating to supplier's claims. Supplier's claims were now governed by section 8(6) of the MVA Act of 1986 which provided as follows:

"Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation for himself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (in this case called the supplier) may claim the amount direct from the MVA Fund or the appointed agent, as the case may be, on a prescribed form, and such a claim shall be subject, *mutatis mutandis*, to the provisions applicable to the claim of the third party concerned."

The statutory right of action by a supplier that was previously specifically sanctioned by section 26(1)(b) of the CMVI Act of 1972 was omitted from section 8(6) of the MVA Act of 1986.

The Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (MMF Act) replaced the MVA Act of 1986 and deals with supplier's claims in Article 44 of the Agreement which is incorporated into the Act. Article 44 is identical to section 8(6) of the MVA of 1986.

The RAF Act of 1996 which replaced the MMF Act deals with supplier's claims in section 17(5). Section 17(5) is identical to its predecessors (s 8(6) of the MVA Act of 1986 and a 44 of the MMF Act).

### 5 Analysis of section 17(5) of the RAF Act

#### 5.1 Introduction

From what has been stated above it is apparent that the regime relating to supplier's claims was changed by the repeal of the CMVI Act and the promulgation of the MVA Act of 1986. Significantly, the specially sanctioned right of a supplier to institute an action against the MVA Fund or its appointed agents contained in section 26(1)(b) as well as other related ancillary provisions of section 26 of the CMVI Act of 1986, was omitted from section 8(6) of the MVA Act of 1986 and its wording comprehensively changed. The wording of section 8(6) was subsequently used in article 44 of the MMF Act of 1989. Section 17(5) follows the wording of its predecessors (s 8(6) of the MVA Act of 1986 and a 44 of the MMF Act). This raises the question as to what the legislator intended when it

- repealed the prior provisions governing supplier's claims and omitted the right to enforce supplier's claims independently;
- reworded the particular section; and
- introduced the requirements of a supplier's claim as reflected in section 17(5).

#### 5.2 Interpretation

##### 5.2.1 Intention

The intention of the legislator is paramount when interpreting a statutory provision (see Steyn *Uitleg van wette* (1981) 2). The purpose of the RAF Act and its predecessors is to afford the victim of a road accident (the third party) the widest possible protection against the danger of not being able to recover his/her

damages from the wrongdoer due to the wrongdoer being unable to pay such damages (see *Aetna Insurance Co v Minister of Justice* 1960 3 SA 273 (A)). The intention of the legislator in enacting provisions regulating claims of suppliers has to be viewed from this perspective.

Indirectly it may be in the interests of the third party claimant that suppliers are paid directly to ensure the goodwill of suppliers when treating road accident victims. This is especially the case where road accident victims are in fact compensated in terms of the Act but thereafter fail to pay their suppliers (see Suzman, Gordon & Hodes 175; *AA Mutual Insurance v Administrateur, Transvaal* 1961 2 SA 796 (A) at 805A–G). It is submitted that this is an ancillary consideration which does not clearly fall within the ambit of the stated objective of the RAF Act. Where there is a provision not indirectly favouring the third party and thus not strictly reconcilable with the stated intention of the legislator, a restrictive interpretation is called for (see Steyn 25).

### 5 2 2 Repeal of earlier provision

Section 19 of the MVA Act of 1986 repealed the CMVI Act in its entirety (see the Schedule to the MVA Act of 1986). This aspect together with a complete change in the wording of the section in the new MVA Act of 1986 which replaced section 26 of the repealed CMVI Act, indicates a clear intention on the part of the legislator to change the previous regime relating to supplier's claims (see Steyn 175).

### 5 2 3 Independent claim?

#### (a) Wording

As was indicated above the legal basis of a supplier's claim is based in contract. A supplier has no right to claim directly from the wrongdoer (the RAF in terms of s 21 of the RAF Act) if he/she renders service or provides goods and/or accommodation to a road accident fund victim. The only way in which a supplier can obtain an independent direct right to sue the wrongdoer is if such action is sanctioned by statute. The supplier's right independently and directly to hold the then authorised insurance company and now the RAF liable was affected by the repeal of the CMVI Act and the introduction of a newly worded provision governing supplier's claims. A careful reading of the current section 17(5) does not seem to indicate such an independent right. The right of a supplier to claim from the RAF only arises if and when "a third party is *entitled to compensation*" in terms of section 17(1)(a) and "*has incurred costs* in respect of accommodation . . . or the treatment or any service rendered or goods supplied". Furthermore, the section states that a supplier's claim is subject "*mutatis mutandis*, to the provisions applicable to the claim of the third party" (see in this regard *Van der Merwe v Road Accident Fund* 2006 3 SA 88 (T) 90E). This means that the supplier's claim is not converted into a delictual claim against the RAF by virtue of section 17(5). A supplier's claim remains contractual in nature. Thus the effect of section 17(5) is that when a third party becomes entitled to compensation, the costs envisioned by section 17(5) were incurred and a supplier has lodged its claim "on the prescribed form", the RAF is obliged to pay the supplier directly (out of the third party compensation proven to be due to a third party and on behalf of the third party claimant).

(b) Placement of section

The view that a supplier's claim is not an independent claim is further supported by the placement of section 17(5). It is a subsection of a section which authorises a claim by road accident victim and is preceded by section 17(4) dealing with future loss (see *Van der Merwe v RAF* 90B and Steyn 137) and followed by subsection 6 which authorised the RAF to make interim payments to a third party claimant for past losses signalling an intention that the only claim involved is that of the third party.

(c) Form 2 claim form

Apart from the wording of section 17(5), perusal of the form prescribed for supplier's claims (Form 2) indicates that the information sought is not as comprehensive as that required in Form 1. Form 2 essentially identifies the supplier and the third party claimant implying an intention that the claim of a supplier is part of the claim of the third party claimant. The information supplied in Form 2 does not readily facilitate a conclusion that a third party is "entitled to compensation".

(d) Case law

The question as to whether a supplier's claim is an independent claim from that of the third party claimant was considered in *Free State Consolidated Gold Mines t/a Ernest Oppenheimer Hospital v MMF* 1997 4 SA 930 (O) and *Van der Merwe v Road Accident Fund* 2006 3 SA 88 (T). In *Free State Consolidated Gold Mines*, Lombard J in the court *a quo* held that a supplier's claim was that of the third party claimant and that a supplier's claim is dependent on the third party having incurred the costs envisaged by article 44 of the MMF Act of 1989 and being entitled to compensation (947A–947F). As the claimant had failed to prove that the third party had incurred costs, the supplier's claim was dismissed with costs. On appeal (*Free State Consolidated Gold Mines t/a Ernest Oppenheimer Hospital v MMF* 1998 3 SA 213 (SCA)), the Supreme Court of Appeal accepted that on the evidence the third party and supplier did not contemplate free treatment and that costs were incurred as required by article 44 of the MMF Act. In *Van der Merwe v RAF*, the supplier argued that a supplier's claim was an independent claim and therefore not subject to the prescription provisions of the RAF Act. Hartzenberg J held that the claim of a supplier cannot be divorced from that of the third party (91F).

(e) Critical assessment of case law

In *Free State Consolidated Gold Mines t/a Ernest Oppenheimer Hospital v MMF* 1998 3 SA 213 (SCA) the Supreme Court of Appeal apparently did not pay any attention to the requirement of "entitled to". On further reflection it becomes clear that on the facts which the court held proven, the court held that both requirements (ie "costs incurred" and "entitled to") had been met. The pertinent facts were whether the injured was treated *ex gratia* as part of his conditions of service or not. Had he been treated *ex gratia* it would have meant that both the "costs incurred" and the "entitled to" requirements set by the court *a quo* could not have been complied with. The "costs incurred" requirement could not have been complied with because the third party had received free treatment. The "entitled to" requirement could not have been complied with because in terms of the collateral benefits rule such costs could only have been recovered by a third party from a wrongdoer if the hospital rendering the service was not legally obliged to so by virtue of the fact that the free medical treatment received by the

injured was not a right (benefit) which accrued to the third party as part of his conditions of service. It was on the facts ostensibly not necessary for the Supreme Court of Appeal to specifically and fully deal with the “entitled to” requirement. This is unfortunate because guidance by the Supreme Court of Appeal on the full and correct interpretation of “entitled to” would have been invaluable. In my view the concept “entitled to” encompasses far more than the mere consideration of whether the collateral benefit rule (*res inter alios acta*) is applicable (see para 5 4 2 below). However, it is significant that the Supreme Court of Appeal did not have any quarrel with the conclusion of the court *a quo* that article 44 of the MMF Act (which is identical to s 17(5)) stipulates two requirements for the MMF to be liable to a supplier, that is, “entitled to” and “costs incurred”.

The view of the court in *Van der Merwe v RAF* 91B that there is a statutory cession of that portion of a third party claim claimed by the supplier, cannot be supported. Such an interpretation conflicts with the wording of the section which makes the third party’s prior entitlement to compensation a precondition to a supplier’s claim against the RAF. It also militates against the common-law principle that a third party claim is not actively or passively transmissible, and the concomitant principle of interpretation that there is a presumption that the legislator does not intend to alter common-law principles unnecessarily (see Steyn 97). Utilising the jurisprudential construction of “statutory cession” does not contribute to clarity. The construction of the legislator imposing an obligation on the RAF to pay the supplier directly has the same result and is for the reasons stated jurisprudentially more sound. This view is supported by the fact that section 26(1)(a) contained the words “without cession of action” which also indicates that the payment was to be made (and in terms of s 17(5), is to be made) out of the compensation proved to be due to a third party.

(f) Conclusion

The repeal of Act 56 of 1972 and the introduction of the differently worded predecessors to section 17(5) (s 8(6) of the MVA Act of 1986 and a 44 of the MMF Act – s 17(5) being identical to these sections) without reintroducing similar rights to those contained in section 26 of the repealed Act, indicates a clear intention on the part of the legislator to not afford the supplier the right to claim from the RAF independently and directly. In my view the only right that is created by section 17(5) is the right of a supplier to be paid directly by the RAF on behalf of a third party out of the compensation to which a third party is entitled once the requirements for the vesting of such right have been fully complied with (see in this respect the judgment of Steyn CJ in *AA Mutual Insurance v Administrateur, Transvaal* 1961 2 SA 796 (A) 804D 805G in respect of the nature of a supplier’s claim in terms of s 12 of the MVA Act of 1942).

The adoption of a contrary interpretation causes a multiplicity of actions (see the statistics quoted in para 1. An example of the consequence of multiplicity of an interpretation favouring the supplier with an independent claim is where all the medical and hospital accounts pertaining to one third party claim are lodged with the RAF as separate supplier’s claims. Only after completion and payment of the suppliers’ claims, the claim on behalf of the third party for general damages is proceeded with.) Such an interpretation also creates anomalies and absurdities such as:

- supplier’s claims not being subject to the same principles and constraints as a third party claim (see *Free State Consolidated Gold Mines t/a Ernest Oppenheimer Hospital v MMF* 1997 4 SA 930 (O) 947B–948C);

- supplier's claims being paid in full when there was no entitlement to compensation by the third party or where the claim should have been subjected to the provisions of the Apportionment of Damages Act 34 of 1956 (I have encountered a claim where a supplier's claim was paid in full and the personal claim of a third party was subsequently repudiated); and
- supplier's claims being lodged for less than R800 and costs of R800 being paid by the RAF in respect of such claim.

An interpretation not causing anomalies or absurdities is to be preferred to an interpretation having the opposite result (see Steyn 103).

It may be argued that such an interpretation stripping a supplier of his independent right to claim directly from the RAF diminishes the rights of a supplier. The supplier has a contractual claim against the wrongdoer. By not allowing a supplier an independent, direct claim against the RAF, a supplier is no worse off. It can hardly be argued in order to possibly justify a direct and independent claim by a supplier against the RAF that a professional practitioner or medical institution would render service or provide goods or accommodation only if he/she had the reasonable expectation of being paid directly by the RAF (see *AA Mutual Insurance v Administrateur, Transvaal* 1961 2 SA 796 (A) 805C).

## 5 4 Requirements for supplier's claim

### 5 4 1 Introduction

Based on the wording of section 17(5) of the Act and the judgment of Lombard J in *Free State Consolidated Gold Mines* the following substantive requirements must be proved before a valid supplier's claim can exist, namely, the third party:

- must be "entitled to compensation" in terms of section 17(1);
- must have incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person;
- must claim the amount directly from the Fund on the prescribed form; and
- the amount must not be more than that to which the third party claimant would have been entitled to.

The latter two requirements need no further comment but the preceding requirements are considered below.

### 5 4 2 "Entitled to compensation"

#### (a) Introduction

The wording of the section constitutes a precondition for a supplier to be able to claim directly from the RAF in that the relevant third party must be "entitled to compensation in terms of this section" ("this section" refers to s 17(1) of the Act and it is clear that the compensation entitled to is compensation claimed from the RAF by the third party). This raises the question: what was the intention of the legislator when it required that the third party should be entitled to compensation? Two key concepts are in need of clarification, that is, firstly, the word "entitled" and, secondly, the concept of "compensation".

#### (b) "Entitled to" defined

The concept of "entitled to" is not defined in section 1 of the Act. This means that the intention of the legislator as well as the ordinary meaning of the word

“entitled” has to be considered when interpreting the meaning of “entitled” (see Steyn 2ff).

The intention of the legislator was considered in paragraph 5 4 2(a) above. If the intention of the legislator is taken into account, it is submitted that the word “entitled” must be interpreted restrictively as it does not directly relate to or affect the rights of a third party.

The ordinary grammatical meaning of “entitle” according to the *Concise Oxford dictionary* is: “1 a give (a person etc) a just claim. b give (a person etc) a right.” *The living Webster encyclopaedic dictionary of the English language* defines “entitle” as: “To furnish with a right title or claim”. *Black’s law dictionary* describes “entitle” as: 1. To grant a legal right to or qualify for”. It is significant that the tense used by the legislator indicates a completed condition and not merely an entitlement to rights or compensation.

Case law in respect of the phrase can be used as a guide to determine the meaning of “entitled to” (see the judgment of Hofmeyr JA in *IGI v Reynecke* 1976 1 SA 591 (A) 599H in respect of the use of prior cases to determine the meaning of “household”). In *CIR v Pretorius* 1986 1 SA 238 (A) it was held that “entitled to” within the context of section 9(4)(b) of the Transfer Duty Act 40 of 1949 means “having a rightful claim thereto”.

#### (c) “Compensation” defined

“Compensation” in the context of section 17(1) of the RAF Act relates to the compensation of all damage or loss suffered by the third party as a consequence of bodily injury or death in respect of the unitary claim for damages instituted by such third party. Due to the operation of the “once and for all rule” it means that all damages must have been settled (see *Evins v Shield* 1980 2 SA 814 (A)). In this context the provisions of the old section 26(1)(b) of Act 56 of 1972 may be referred to. This section provided that a supplier’s claim was available “if the amount of the compensation payable by it has been determined in any manner”. It is submitted that the words “entitled to compensation” are intended to have a similar meaning.

#### 5 4 3 “Incurred costs”

Section 17(5) provides further that the third party must have incurred costs “in respect of accommodation for himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person”. This means that there must be an existing enforceable (contractual) obligation between the third party and the person who rendered the goods, supplied the service or accommodation. A supplier whose claim has been extinguished in whatever manner (eg by payment by a medical aid or even prescription – see *Van der Merwe v RAF*) will therefore have no claim in terms of section 17(5) (see in this respect the principle established in *AA Mutual Insurance v Administrateur, Transvaal* 1961 2 SA 796 (A) in respect of supplier’s claims in terms of s 12 of the MVA Act of 1942).

#### 5 4 4 Compliance

In view of the above it is submitted that there will be compliance with the requirements of section 17(5) only if and when a third party has on a balance of probabilities proven that:

- a third party has been injured or his/her breadwinner injured or killed by the unlawful and negligent driving of a motor vehicle;

- the third party has complied with all the relevant provisions of the RAF Act of 1996 (in particular s 24 relating to the completion and lodging of the prescribed claim form (Form 1); see *Nkisimane v Santam Insurance* 1978 2 SA 430 (A));
- he/she has in fact suffered damages and the damages claimed constitutes proper recompense for his loss (see Corbett, Buchanan and Guantlett *Quantum of damages in bodily and fatal injury cases* Vol I (1985) 98);
- such damages are not precluded from being legally recovered (eg by virtue of a statutory exclusion such as s 19 of the Act or a particular legal principle such as prescription (s 23) or the collateral benefit rule (see *Free State Consolidated Gold Mines*); and
- a supplier has a valid and legally enforceable (contractual) claim against a third party for costs incurred as envisaged by this section.

#### 5 4 5 Litigation and legal costs

##### (a) Right of supplier to sue RAF

The wording of section 17(5) contra-indicates the right of a supplier to sue the RAF. It does not have an independent, direct claim to enforce its claim as supplier. A supplier's right to receive payment directly from the RAF only arises when the third party is entitled to compensation and after the costs as mentioned in section 17(5) have been incurred. This interpretation is based on the fact that the direct, independent action of suppliers found in the predecessors of section 17(5) of the Act (s 12 of the MVA Act of 1942 and s 26 of the CMVI Act) was not incorporated in the predecessors of and into the current section 17(5). Instead the section provides that the only course of action open to the supplier's is to

“claim the amount direct from the Fund or an agent on a prescribed form, and such claim shall be subject, *mutatis mutandis*, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered”.

Section 24(3) provides that the provisions of section 24 apply *mutatis mutandis* to the Form 2 claim form. As indicated by the court in *Van der Merwe v RAF* 90E, the words “and such claim shall be subject, *mutatis mutandis*, to the provisions applicable to the claim of the third party concerned” refer to those provisions of the RAF which exclude and restrict claims by a third party and regulate prescription of such claims.

The only direct right of action that a supplier may possibly have against the RAF would be where a supplier lodged a valid claim in terms of section 17(5) and the RAF fails, refuses or neglects to pay it after a third party has become entitled to compensation. Practically, a third party would become entitled to compensation as soon as his/her claim has been validly lodged, negligence has been conceded, no exclusions are applicable to his/her claim and his/her damages have been agreed upon after settlement negotiations or where a third party has issued summons and judgment has been given in his favour. Such claim would then not be based on section 17(5) but on non-compliance with a statutory duty by the RAF (see Neethling, Potgieter and Visser *Law of delict* (2006) 73) and if successful, the supplier would be entitled to legal costs (although, not in terms of s 17(2)). This is the case as the claim of a supplier remains a contractual right against the injured third party and is not by virtue of section 17(5) converted to a delictual claim against the RAF and cannot validly be based on a “statutory cession”.

(b) Entitlement to party and party costs

Section 17(2) entitles a third party to his/her agreed or taxed party and party costs in respect of the claim concerned as soon as a third party has accepted an amount offered as compensation. Due to the fact that a supplier does not have an independent claim and is not a third party, the provisions of section 17(2) do not apply to a claim submitted by a supplier. The recovery of costs by a third party is dependent on the *third party* (who is in terms of s 1 of the Act defined as the third party referred to in s 17(1)) accepting the amount offered as compensation in terms of section 17(1). No reference is made to any claim in terms of section 17(5). As stated above, the reference to *mutatis mutandis* applicability of the provisions relating to a third party claim in section 17(5) does not seem to extend much further than sections 18, 19, 23 and 24 of the RAF Act (see *Van der Merwe v RAF* 90E).

## 6 Conclusion

Suppliers' claims have become a substantial part of the expenditure of the RAF and due to the current interpretation of section 17(5) and 17(2) of the RAF Act governing suppliers' claims and legal costs, have exposed the RAF to substantial additional risk over and above its primary obligation to compensate road accident victims. The question is whether a supplier is entitled to an independent, direct claim against the RAF in terms of section 17(5) of the RAF Act. When the rights of a supplier and a third party are typified, a clear difference is distinguished. A supplier's claim is a contractual claim against the third party and a third party claim is (by virtue of s 21 of the RAF Act) a delictual claim against the RAF. Although a third party claim is constituted by different facets such as medical costs, general damages and loss of earnings, a third party claim is an indivisible and unitary concept and is not actively or passively transmissible before *litis contestatio*. A survey of all legislation dealing with suppliers' claims since the first introduction thereof shows that, initially, a supplier was afforded a right to be paid directly once the claim of a third party to receive compensation was established. A supplier was also authorised to sue an authorised insurer independently where the right to compensation was not established. These particular suppliers' rights existed in terms of section 26 of the CMVI Act. The CMVI Act was repealed by the MVA Act of 1986. Section 8(6) of the latter Act dealt with suppliers' claims. The wording of section 8(6) differed from that of its predecessor and omitted the right of a supplier to sue an appointed agent or the MVA Fund which was previously contained in section 26(1)(b). The wording of section 8(6) was followed in article 44 of the subsequent MMF Act and section 17(5) of the RAF Act. An analysis of the wording of the current section 17(5) governing suppliers' claims indicates that there are two main requirements for a supplier to be entitled to claim against the RAF. These are that the third party must be entitled to compensation in terms of section 17(1) of the RAF Act and that costs as envisioned by section 17(5) must have been incurred. If these requirements are closely scrutinised and the intention of the legislator taken into account, it becomes clear that the legislator did not intend a supplier to have an independent, direct claim against the RAF. Nor did the legislator envisage that a supplier would be entitled to sue the RAF. This is because a supplier's claim is a contractual claim against the injured party for professional services rendered and accommodation and goods supplied and the claim by a third party is a delictual claim in which the contractual claim of a supplier is usually incorporated. Once a supplier has complied with section 17(5), the only right that accrues is the right

of a supplier to be paid directly out of the compensation to which a third party is entitled in terms of section 17(1). Based on the repeal of the previous sections authorising independent and direct action by a supplier against the then authorised insurer, the current wording of section 17(5) and relevant case law, a supplier does not have a right to claim directly and independently from the RAF. The mischief that section 17(5) intends to prevent is where a third party receives compensation (which includes his indebtedness to a supplier) and after receipt thereof pockets the money without paying the supplier. The only right that a supplier may have to sue the RAF will be where a supplier has complied with section 17(5) and the RAF fails, neglects or refuses to pay a supplier. Such an action is not based on section 17(5) but is based in delict – being a non-compliance with a statutory duty. A supplier is also not entitled to party and party costs in terms of section 17(2). Only a third party is entitled to these costs once the compensation accruing to a third party has been settled.

An interpretation which affords a supplier an independent, direct claim against the RAF leads to a multiplicity of claims and actions, anomalies and absurdity and burdens the RAF with additional expenditure which was never intended by the legislator. It may be argued that the interpretation of section 17(5) in this manner prejudices suppliers. The truth of the matter is that a supplier without a claim against the RAF is no worse off as its contractual claim against the injured third party remains intact. A direct, independent supplier's claim against the RAF cannot, either legally or ethically, be justified purely based on the argument that suppliers only contract with injured third parties in the reasonable expectation of recovering their costs from the RAF. In addition, although direct payment of independent supplier's claims by the RAF may from a policy point of view be perceived to be to the advantage of third parties, the consequence of a multiplicity of actions as well as the anomalies and absurdities which such an independent direct action creates, by far outweighs any perceived advantage. In law, an interpretation following the intention of the legislator, the wording of the Act, which does not create anomalies and absurdities and does not place an additional burden on the compensation system has to be preferred to a contrary interpretation – more so, where the RAF is faced with serious financial challenges. The long-term sustainability of the RAF and ultimately the interests of the third party claimant may be at stake.

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