

# **OPINION**

***EX PARTE:***

**CHRISTOPHER FINANCE**

**IN RE:**

**CLAIMS AGAINST ROAD ACCIDENT FUND**

**A C OOSTHUIZEN S.C.**

611 Huguenot Chambers

40 Queen Victoria Street

CAPE TOWN, 8001

1 November 2019

A. **INTRODUCTION**

1 Consultant is **CHRISTOPHER FINANCE (PTY) LTD.**

2 Several of Consultant's clients have claims against the Road Accident Fund ("*the RAF*"). Over the past months the media has, from time to time, reported that the RAF does not have the financial resources to pay the various claims pending against it, and there has been media-driven speculation that the entire RAF structure is on the point of collapsing.

3 I have been asked to furnish an opinion on:

3.1 Whether it is possible for the RAF to be liquidated;

3.2 If not, can the RAF be dissolved by Act of Parliament;

3.3 In either circumstance, if the RAF is terminated, would the National Government be liable for unpaid claims against the RAF?

B. **THE ROAD ACCIDENT FUND ACT**

4 The RAF was established in terms of the Road Accident Fund Act, No 56 of 1996 ("*the Act*"). Section 2(1) of the Act provides that "*there is hereby established a juristic person to be known as to the Road Accident Fund*". Section 4(1) of the Act provides that the powers of the RAF shall include *inter alia*: **(a)** regulating the terms and conditions on which claims for compensation shall be administered; **(b)** investigating and settling claims arising from loss or damage caused by the driving of a motor vehicle; **(c)** the management and utilisation of the Fund's money for purposes connected with or resulting from the exercise of the RAF's powers and duties.

- 5 The object of the RAF, expressed in Section 3 of the Act, is “*the payment of compensation in accordance with this Act for loss and damage wrongfully caused by the driving of motor vehicles*”.
- 6 Section 5 of the Act provides that the RAF shall procure funds to perform its functions:
- 6.1 By way of a Road Accident Fund levy as contemplated in the Customs & Excise Act;
- 6.2 By raising loans.
- 7 The Road Accident Fund Levy contemplated in the Customs & Excise Act, No 91 of 1964, is the duty levied by the Minister of Transport in terms of Part 5B of Schedule 1 to the Customs & Excise Act. The greater part of that levy consists of a fuel levy which is paid on all motor fuels sold in South Africa.
- 8 Pertinent information concerning the financial affairs of the RAF, including the annual financial statements of the RAF for the past three years, can be obtained from the 2018/19 Road Accident Fund Annual Report, found at <https://www.raf.co.za/Media-Center/Pages/Annual-Reports.aspx>, which information shows that the RAF has been actuarially insolvent for over three decades. According to various RAF media statements found at the Media-Center pages of the RAF website, the Fund continues to honour obligations to claimants.
- 9 Section 15(1) of the Act provides that the RAF may institute and defend legal proceedings and commence or conduct, defend or abandon legal proceedings in relation to claims investigated and settled by it. Section 21 of the Act provides that no claim for compensation in respect of loss or damage resulting from bodily injury to, or the death of any person caused by the driving of a motor vehicle as against the owner or driver of a motor vehicle, or

the employer of such driver. Section 21(2) states that the aforesaid Section 21(1) will not apply *inter alia* if the fund is unable to pay any compensation.

- 10 A consequence of Sections 15 and 21 referred to above, is that parties with personal injury claims arising from the driving of a motor vehicle are statutorily obliged to claim such compensation from the RAF. The reasoning adopted in **Aetna Insurance Co v Minister of Justice 1960 (3) SA 273 (A)** at 285, in relation to one of the forerunners of the current Act 56 of 1996, remains valid in this regard.

C. **DISESTABLISHMENT OF THE RAF**

- 11 Neither the Act nor the Regulations promulgated thereunder in Government Notice R770 dated 21 July 2008 (“*the RAF Regulations*”) provide for the disestablishment of the RAF or the transfer of its rights and obligations to any other body. As with any other statutory body, the RAF exists and functions in accordance with the prescripts and dictates of legislation under which it is constituted (**Baxter, “Administrative Law”, pp 301 – 303**). The RAF continues to exist to perform its functions, for as long as the Act under which it was created remained in force. The principle governing the revocation of the RAF Act and, indeed, all other legislation, is that legislation is revoked, is only where a hierarchically equal or superior legislative body passes legislation which expressly or by necessary implication revokes the prior legislation.
- 12 In short, the RAF cannot be wound up by court order, nor can it simply cease to exist. It can only be disbanded by Act of Parliament.

- 13 Until the Act is thus repealed, the RAF is obliged to comply with its statutory obligations. These include the obligation to pay claims validly brought against it.
- 14 For as long as the RAF remains in existence, it is unlikely that the RAF will refuse to pay a claim arising from a court order, or a settlement agreement which it concluded with a claimant. As pointed out above, the RAF has been technically insolvent for three decades, but has continued to honour its obligations. Should it fail to do so, the aggrieved claimant could apply to Court for a *mandamus*, compelling the RAF to comply with its statutory obligations. (See Section 8(1)(a)(ii) of the Promotion of Administrative Justice Act, No 3 of 2000; **Ruyobeza & Another v Minister of Home Affairs & Others 2000 (5) SA 51 (C); University of the Western Cape & Others v MEC for Health and Social Services & Others 1998 (3) SA 124 (C) at 131A – 132F).**
- 15 Given the important socio-economic role which the RAF performs, in relation to victims of road accidents, it is obviously incumbent on the Minister of Transport to ensure that the Road Accident Fund Levy, being the primary source from which the RAF procures funds, is sufficient to meet the RAF's obligations. If the Minister fails in that duty, then it would be open to any aggrieved party to institute proceedings against the Minister for review of his actions or for a *mandamus* compelling him to properly determine the amount of such levy to ensure that the RAF is able to meet its obligations.
- 16 The remaining issue to be considered is whether Parliament can pass legislation repealing the Road Accident Fund Act, and disestablishing the RAF, without making provision for claims against the RAF which arose before the date of any such disestablishment.
- 17 Section 25 of the Constitution of the Republic of South Africa stipulates that no one may be deprived of property except in terms of the law of general application and that no law may permit

arbitrary deprivation of property. In **National Credit Regulator v Opperman 2013 (2) SA 1 (CC)** the Constitutional Court was required to pronounce on the constitutional validity of Section 89(5)(c) of the National Credit Act, which required a court to order that all purported rights enjoyed by a credit provider under a credit agreement not in compliance with the National Credit Act cancelled or forfeited to the State. The Constitutional Court held, at **paras 57 – 71** of the judgment that the rights which the credit provider statutorily forfeited constituted property within the meaning of Section 25 of the Constitution, that Section 89(5)(c) of the National Credit Act resulted in credit providers being arbitrarily deprived of their property, and that such deprivation was unconstitutional.

- 18 A legislative provision which arbitrarily deprives a party of a legally valid right therefore offends against Section 25 of the Constitution and the party thus deprived can challenge the constitutional validity of such legislation in court. If, therefore, Parliament were to enact legislation purporting to disband the RAF without making adequate provision for claims pending against the RAF, at the date of disestablishment, any person with a valid claim pending against the RAF could challenge the constitutional validity of such legislation and ask the Court to set it aside.

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