



Unit 3A, Lonsdale Building, Cnr Lonsdale Road & Gardener Way, Pinelands, 7405. P O Box 622, Howard Place, 7450
Tel (021) 5312922 / Fax (021) 5313714 Cell 082 806 8440

18 March 2011

Dear Sirs

**CONSTITUTIONAL COURT RULING ON AMENDED ROAD ACCIDENT FUND ACT -
EXECUTIVE SUMMARY**

1. We refer to the above matter and to our letter of 25 January 2011 as well as the previous discussions herein between the writer and your

2. Without derogating from the generality of the context of our letter dated 25 January 2011, we confirm that we are of the opinion that it would be prudent for Bus Companies to maintain insurance cover that responds to claims made against it by passengers that have been injured in motor vehicle accidents. We are of this opinion for *inter alia* the following reasons:
 - 2.1 Section 21(2)(a) of the Road Accident Fund Act (as amended – hereinafter referred to as “the Act”) provides that the protection afforded by Section 21(1) will not apply if the Fund is unable to pay any compensation. Whilst such a situation would appear unlikely, particularly when motorists are paying a levy on fuel, it is by no means impossible. The recent judgment of the Constitutional Court in the case of Mvumvu

& Two Others vs Minister of Transport & Another (case number 7490/08)

Constitutional Judge Jafta stated the following:

“In this case the Respondent has presented evidence which shows that some order of invalidity with unlimited retrospective effect will increase the Fund’s financial liability by approximately R3 billion. The Respondents argue that this will pose a serious threat to the substantial ability of the Fund whose deficit at present stands at over R40 billion. The Chief Executive Officer of the Fund has asserted that the Fund is “just barely able to cover its payment obligations on a day to day basis”.

- 2.2 Having regard to the foregoing and to the controversy that surrounds the financial administration of the RAF, there can be no guarantees that it will be able to meet its financial obligations in future.
- 2.3 Section 21(2)(b) provides that secondary victims can claim against the wrongdoer for emotional shock. It is important to know that a secondary victim is not the original road accident victim but rather another person such as a parent that suffers from emotional shock when they are informed of the bodily injury or death of a loved one. Whilst the highest award of which we are aware is R150 000.00 (together with an undertaking to pay all medical expenses) it is prudent to have regard to the following factors:
 - 2.3.1 A person’s emotional shock may be so severe that it impacts on the ability to earn a living. There could accordingly be claims for loss of future earnings as well as for future medical expenses. Consequently there is the potential for a substantial claim to arise in favour of a secondary emotional shock victim.
 - 2.3.2 It is furthermore important to note that our Courts have displayed an indication to increase awards for general damages over the past years. In this regard in the case of **BRIGHT vs MMF 1997 (4) C & B (N)** it was said that: *“One must recognise that there is a tendency for awards now to be higher than they were in the past”.*

3. The risk further remains that a South African bus company may have to meet a claim made against it by a foreign travel agent or tour organizer (hereinafter refer to as the tour organiser) that has been found liable in terms of European legislation. Injured European accident victims, will generally seek to recover their damages from the European tour organiser in terms of English Law and more particularly the Package Travel, Package Holidays and Package Tour Regulations of 1992 (*"the Package Regulations"*). One reason for this is that it will generally be simpler for them to recover in their home state (where their claims are not capped by the RAF Act) and the other is that awards for personal injury claims in European countries are far higher than in South Africa. The tour organiser will probably then look to recover from the insured bus company.

Whilst such claims are not common place we have had to deal with numerous such claims in recent years. We have further had instances where a motor vehicle accident occurs in South Africa (wherein passengers are injured) and the South African company (who employed the driver) is joined as a Third Party to legal proceedings in Europe.

Whether a foreign judgement is enforceable against a South African entity is an area of law that is not simple and been aptly described as follows on page 361 Private International Law :

"A Plaintiff may sue in one Country and hear with pleasure Judgment given in his favour; then he may discover, to his dismay, that the Defendant, with it's assets, has absconded to another Country. Plaintiff's Judgment has become bruten fulmen in the court which pronounced it.

Such a Plaintiff however, is not remediless, for it is widely accepted by the legal systems of the world that a Judgment rendered by the Courts of one Country may be enforced elsewhere, provided certain conditions are fulfilled.

.....

This is a difficult and uncertain area of the Law. It is uncertain and difficult, first, because the Common Law frequently provides no clear answer to many of the questions posed and the Judges sometimes have not distinguished

themselves in developing the Law. Secondly, the legislature has, with characteristic clumsiness, been attempting to swat flies in this area”.

5. We recently obtained an opinion from Senior Counsel (Adv E labuschagne S.C.) who stated the following regarding the risk of a foreign judgement:

“There are other risks to be considered as well. A South African tour operator may be sued by its

European counterpart, the latter having been sued by the passenger in terms of EU legislation and directives. Sec 17 of the RAF Act places a territorial limit on the application of the Act in that it only relates to claims caused by or arising from the driving of a motor vehicle within the Republic of South Africa. The need to retain passenger liability cover would therefore exist in respect of neighbouring countries. Sec 21 of the RAF Act will not provide a defence to claims by passengers against their tour operators in such countries.

European Consumer Protection Laws also have a bearing on the topic, e.g. the Package Travel, Package Holidays and Package Tours Regulations of 1992.

.....

The organiser and the retailer of package holidays are, by virtue of these regulations, obliged to include specific terms in a contract for a package. These include provisions pertaining to the liability of the organiser and/or retailer. The last element places strict liability on the organiser and/or retailer for the proper performance of all contractual obligations;

.....

Regulation 25 provides for the liability of a person other than the principal offender. Regulation 25(1) provides that, where the commission by any person of an offence

under Regulation 5, 7, 8, 16 or 22 is due to an act or default committed by some other person in the course of any business of his, the other person shall be guilty of the offence and may be proceeded against and punished by virtue of this paragraph whether or not proceedings are taken against the first mentioned person.

Regulation 19 requires insurance to be taken out to indemnify consumers in the event of the insolvency of the contractor. What one can therefore envisage is that a European operator is sued by a passenger for a breach of the regulations. That contractor goes insolvent. A claim is instituted against an insurer who has indemnified the consumer. That insurer may seek to recover whatever losses it has incurred from the wrongdoer. The wrongdoer might be the driver of the bus operated by a South African tour operator, which tour operator may be vicariously liable. Where the European contractor has a contract with a South African tour operator, the insurer may seek to exercise a contractual remedy against the South African tour operator. This will depend on the provisions of the contract in question.

.....

A foreign judgment or award may be enforced in South Africa by means of provisional sentence, by the Recognition and Enforcement of Foreign Arbitral Awards Act, No. 40 of 1977 or the provisions of the Mutual Recognition of Foreign Judgments Act, 32 of 1988. Regardless of the form in which a foreign judgment is placed before a South African Court, the enforcement of the foreign award or judgment could be resisted on the grounds that it would be contrary to public policy.

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In the aforesaid case of Society of Lloyd's v Price; Society of Lloyd's v Lee 2006(5) SA 393 SCA the defendants argued that the enforcement of the judgments would offend South African public policy. This was based thereon that the recognition and

enforcement of English default judgments against the defendants (Names in a Lloyd's syndicate) by a South African Court would be contrary to South African Public Policy.

In essence, it was alleged that the means used by Lloyd's to procure that all names (including names who had rejected the R & R settlement) were bound by the Equitas contract and thus liable to pay the Equitas premium to Lloyd's as the assignee of Equitas, offended against the basic principles of public policy underlying the Law of Contract in South Africa. The defendants argued that Lloyd's, by using its bylaw making powers to appoint AUA9 as substitute agent which then, in accordance with Lloyd's directives, entered into the reinsurance and run-off contract (R & R contract) with Equitas on behalf of each "non accepting name". Lloyds procured the conclusion of binding contracts in the defendants' names without their consent and on terms dictated entirely by itself. This modus operandi was alleged to be a flagrant disregard for the requirement of consensus underlying contractual liability in civilised legal systems worldwide and it was argued that it should not be countenanced by the South African Courts.

In the case of each of the defendants, the writ of summons in the English proceedings was not served on the defendant himself but was served on AUA9. The defendants argued that in this respect the basic rules of natural justice had not been complied with in that the defendants had not been given reasonable notice of the proceeding against them in the English Court and a reasonable opportunity to contest those proceedings. For this reason also, it was alleged that the enforcement of the judgment would be contrary to public policy in South Africa.

The SCA rejected the aforesaid contentions by the defendants. It was held that the R & R scheme, however extraordinary it might appear from a South African perspective, was a solution devised to resolve an extraordinary insurance industry related situation.¹ The SCA held that it was clear from the judgments of the English Courts that R & R was devised and implemented to deal with a market in a state of crisis and that one of the primary aims was to protect the names themselves from the risk of massive claims to which they would otherwise be totally exposed. All of the steps taken by Lloyds to implement this scheme had been thoroughly scrutinised by English Courts and were found to be legitimate. The SCA held that the recognition by a South African Court of an English judgment obtained against a name on the basis of the R & R scheme would not “be so repugnant to the values of our law that the lex cassia will be excluded on grounds of public policy”.²

This case demonstrates that predicting what a South African Court will make of the enforcement of a foreign judgment would be extremely risky.

Strange things have happened before and are bound to happen again in enforcing foreign judgments.

The enforcement of judgments obtained abroad on the grounds of tort (e.g. negligent driving) could probably be successfully prevented on public policy grounds due to the RAF Amendment Act. However, I do not anticipate that an argument based on the repugnance to South African public policy, in the enforcement of a

foreign judgment, would arise where the foreign judgment has been obtained on the grounds of a breach of:

22.1 Contract;

22.2 A Travel Package Regulation;

In the light thereof that the enforcement of every foreign judgment will be adjudicated on its own facts, I would not agree with a generalised notion that the enforcement of foreign judgments against a South African Tour Operator are unlikely. I would rather err on the side of caution and advise that the risk of such enforcement exists. It is correct that this risk has largely been minimised by numerous considerations but it is a risk nevertheless. “ (Our underlining).

6. While there are arguments to be made to the effect that the foreign judgments based on EU Package regulations will not be enforceable the risk of such a judgement being enforceable remains. We are of the view that passenger liability cover and the need for it has been reduced by the amendments to the RAF Act. However, it would be prudent for a bus company (and particularly one that conveys foreign passengers) to retain a degree of cover (not necessarily for passenger liability cover) to provide for the exceptions to Sec 21 of the RAF Act and the risk of liability arising from foreign jurisdictions. The latter includes:

6.1 passenger liability arising from neighbouring sub-Saharan jurisdictions;

6.2 general liability arising from contract with European contractors;

6.3 general liability arising from subrogation in the event of the insolvency of the European contractor;

6.4 general liability arising from EU Directives and Regulations, particularly the Package Travel Regulations;

6.5 liability in South Africa die to the enforcement for foreign judgments or arbitral awards.

7. Whilst we are of the opinion that insurance cover should be maintained, the insurers exposure would appear to be far less than it was in the past bearing in mind the amended RAF Act and Insurance Premiums should be reduced accordingly as to be commensurate with the insurer's exposure. It will furthermore be prudent to consider having the policy wording amended to cover for all such Situations and more specifically the risk of a foreign judgments.

8. We trust you find the forgoing to be assistance and look forward to discussing same with you. Please do not hesitate to contact us should you have any comments and/or suggestions.

Yours Faithfully



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Tel (021) 5312922 / Fax (021) 5313714 Cell 082 806 8440

Dear Sir/ Madam

25 January 2011

CONSTITUTIONAL COURT RULING ON ROAD ACCIDENT FUND AMENDMENT ACT

1. We refer to the above matter and confirm that we have been asked to comment Whether there is still a need for bus companies to have passenger liability Insurance cover in light of the recent Constitutional Court Judgment.
2. On 25 November 2010, the Constitutional Court of South Africa handed down Judgment in respect of the constitutional challenge against certain provisions of The 2005 amendment to the Road Accident Fund (the RAF Act). The Constitutional Court found the obligation of the accident victims' common law Right to claim damages for his/her personal injuries from a wrongdoer to be Constitutional. The Court however found that the limitation of claims for medical Treatment in accordance with the "Uniform Patient's Fee Schedule" (UPFS0, tariff Namely to enable Road Accident victims to obtain the health services they require. The Court ordered that until the minister of Transport prescribed a new tariff for

road victims, victims were entitled to compensation for health services as if he/she had been injured prior to the amendment.

3. Accordingly Section 21 (which removes the right to claim from the wrongdoer) of the RAF Act remains in force. Section 21 provides the following:

“Abolition of certain common law claims

21. (1) *No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie-*

- (a) against the owner or driver of a motor vehicle; or*
- (b) against the employer of the driver.*

(2) Subsection (1) does not apply-

- (a) if the Fund or an agent is unable to pay any compensation; or*
- (b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle.”*

4. Section 21 (as amended) accordingly (and save for the two instances referred to above), abolishes the accident victim’s common law right to sue the wrongdoer or his employer, or the owner of the vehicle. In light of the recent Constitutional Court judgement it is prudent to consider whether a bus company should maintain its passenger liability insurance cover.

5. As can be seen above, Section 21(as amended) does allow for the wrongdoer or his employer (or the owner of the vehicle) to be liable in two instances. The first instance is where the RAF is unable to pay any compensation. Whilst it is unlikely that the RAF will be unable to make payment, one can make no guarantees regarding the future solvency of a statutory entity such as the Road Accident Fund which many argue has not been well managed. The second instance is in respect of claims for compensation for emotional shock by third parties (for example where parents suffer from emotional shock on the

learning of the tragic death of their young children or where a husband witnesses the death of his wife). South African Law limits emotional shock claims to instances where the victim suffered emotional shock or distress that was so severe as to translate itself into a "recognised psychiatric illness" (**BARNARD VS SANTAM, 1991 (1) SA 202 (A)**). The following cases are examples of where secondary victims have successfully claimed for emotional shock as a result of motor vehicle accidents:

- 5.1 In the case of **MAJIET VS SANTAM CPD (C & B VOL. IV 1999)**, the claimant was a mother who lost her 9-year old son. The head note described her condition as follows:

"Emotional and psychogenic shock experienced by the mother (plaintiff) as a result of her coming upon the body of her 9-year old son lying in the road shortly after he had been struck and killed by a motor vehicle. Plaintiff having had uncommonly close relationship with deceased son. Plaintiff initially becoming hysterical and collapsing at the road side and shock causing a period of psychogenic amnesia to set in, followed by ongoing "major depressive disorder of moderate severity". This being a serious psychiatric illness still evident 6 years after the accident. Significant consequential changes in plaintiff's behaviour pattern such as neglect of personal appearance, refusing to eat (with the resultant weight loss), refusing to leave home or visit family and failing to respond to people addressing her. Also regular headaches (since accident) and insomnia. Treatment for a week at psychiatric hospital. Lengthy one and a half years, psychotherapy and medication required".

The Court awarded the plaintiff an amount of R35 000.00 for general damages, which amount (according to the Quantum Yearbook) is currently worth approximately R80 000.00.

- 5.2 In the case of **ALLIE VS ROAD ACCIDENT FUND CPD (C & B VOL. 5 2002)**, the plaintiff suffered a fracture of the C-vertebrae of the neck, which was united but left the plaintiff with neck pain and was aggravated by physical effort. He also suffered injuries to both knees, which required future surgery and which would continue to

cause mild to moderate pain permanently. He suffered injuries to his chest and right forearm.

The plaintiff also suffered from emotional shock and trauma, which was described as follows:

“Witnessing his pregnant wife being flung through the windscreen and watching her bleeding to death while the policeman on the scene refused to call an ambulance until his superior arrived, and being helpless to do anything to assist, and experiencing the loss of his wife and companion, the mother to his children and his unborn child, caused the plaintiff to suffer from major depressive disorder, which could be ameliorated by psycho-therapeutic intervention and medication, but the Court accepted that the psychological condition which could never be completely cured (“euthyeic”) and that the residual psychological impairment impacted negatively on the plaintiff’s ability to do the work he had performed pre-morbidly.

The combination of the physical injuries and psychological injuries forced the plaintiff to resign from a long outstanding job, which would preclude him from returning to it (or to do something similar).

The plaintiff was awarded an amount of R80 000.00 for general damages in 2002. This amount according to the Quantum Yearbook is now worth approximately R132 000.00.

It is interesting to note that in this case the plaintiff’s son and daughter, aged 8 and 3 years old respectively, were also injured in the collision. Claims were made by the children for psychological shock on behalf of the children, however, they were unable to discharge the onus of proving same. The son sustained injuries to his head, chest and knee and was awarded R20 000.00 (now approximately R27 000.00) for general damages. The daughter sustained injuries to the head, laceration of the lower lip and chin, swelling of the right eye and concussion. She was awarded an amount of R15 000.00 (now worth approximately R20 000.00) in respect of general damages.

5.3 In the case of KRITZINGER & KRITZINGER VS RAF, (2009 513 QOD 31 (ECD), the First Plaintiff was the father of two girls who were tragically killed in a motor vehicle accident. The one child was 24 years old at the time and the other was only 4 years old. The eldest child was carrying the youngest child home while walking home from a party. The First Plaintiff claimed an amount of R200 000.00 for the shock and trauma experienced by him as a result of the death of his two children. It was not disputed that he suffered severe emotional shock and trauma as a result whereof he suffered from chronic bereavement reaction with protracted grief. The court found that he was suffering from chronic post traumatic stress disorder and a chronic major depressive disorder. He had reoccurring memories, visual flashbacks and nightmares of the collision and the death of his deceased children. He avoided, as far as possible attending family functions and attending church (because it reminded him of the funeral service of his children), he furthermore suffered from a sleep disorder and headaches. The Plaintiff was 52 years old at the date of the incident and 58 at the time of the trial. Medical experts indicated that the First Plaintiff's psychiatric/psychological condition was chronic in nature and the medium to long term prognosis was very poor considering his co-morbid pathology. He would be on medication for the rest of his life. The Plaintiff was awarded an amount of R150 000.00 for general damages as well as an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act for the costs of future medical treatment.

According to the Quantum Yearbook, this amount for the general damages alone, is currently worth approximately R180 000.00

6. Awards for general damages for emotional shock claims in today's values are seldom more than R180 000.00 (depending on the nature of severity of the condition). It must however be noted that the possibility exists that in certain cases of severe emotional shock there could be large claims for loss of earnings/earning capacity and medical treatment. As can be seen in the Kritzinger case, the Defendant was liable for both the First Plaintiff's general damages as well as his future medical and hospital expenses. It is accordingly possible that a claim for emotional shock could be substantial.

7. Section 17 of the RAF Act provides that the Road Accident Fund is liable for claims “*caused by or arising from the driving of a motor vehicle by any person at any place within the Republic*”. Accordingly, if one of your insured vehicles is involved in a motor vehicle accident in one of our neighbouring countries, or in a country other than South Africa, your insured will not have the protection of Section 21 of the RAF Act.

As the motor vehicle accident legislation in many of neighbouring countries does not prohibit claims against the wrongdoer, or his employer (or the owner of the vehicle), the insured could well be exposed to claims in circumstances where there has been a motor vehicle accident outside our country’s borders.

8. It is further prudent to have regard to the possibility that a foreign accident victim that is injured in an accident in South Africa (as a result of the insured’s negligence), may institute a claim and obtain a large award against your insured overseas. The risks of a foreign judgement are exacerbated by the European consumer protection laws such as The Package Travel, Package Holidays and Package Tours Regulations of 1992, which *inter alia* provide that in certain circumstances, persons that were injured in South Africa (whilst on a “*package holiday*”), can claim directly in Europe from the European Tour Organiser/Retailer based on the negligence of the South African operator (or its employees).

Whilst foreign accident victims may not be able to claim directly against the South African insured (for their accident related personal injuries), they are free to proceed in Europe against the European tour organiser, where they are likely to receive a higher award than in South Africa (and where their retailer claims will not be subject to the limitations such as are imposed by the RAF Act). This is likely to lead to claims being made against South African operators by European tour organisers/retailers (or their insurers) endeavouring to recover payments they have made or are called upon to make to motor vehicle accident victims in Europe. We are already involved in numerous matters where claims have been made against South African entities and tour operators by the European tour organisers/retailers who are exposed or who have made payments.

The question of whether these claims or a foreign judgement will be enforceable in South Africa or not and whether a foreign tour organiser/retailer can recover from a South African entity in South Africa, is complex and will depend on a variety of factors.

9. Whilst the South African insured's potential exposure to claims by foreign travel agents, tour organisers and retailers (whose clients have been injured in motor vehicle accidents in South Africa) will depend on a variety of factors (such as the nature of the arrangement between the parties and the agreements in place etc), it cannot be said at this stage that your insured bus companies have no risk or exposure in respect of motor vehicle accidents and should simply cancel their passenger liability cover. Bearing in mind the potential exposure (albeit it far less than it was before the Constitutional Courts judgement), we are of the opinion that it would be prudent to maintain some form of passenger liability cover going forward, but that such cover should be sold for a reduced premium that is commensurate with the risk.

10. We trust you find the foregoing to be in order. If you require any further information or would like to discuss the matter further, please do not hesitate to contact the writer.

Yours Faithfully,