DEFINING AND BRINGING CLARITY TO SUPPLIERS’ CLAIMS IN MVA MATTERS

1 Introduction

A supplier is referred to in section 17(5) of the Road Accident Fund Act 56 of 1996, (hereafter “Principal Act”) and the Road Accident Fund Amendment Act 19 of 2005 (hereafter “Amendment Act”) as, “the person who provides the accommodation or treatment or rendered the service or supplied the goods” to the injured or deceased road accident victim (third party). In practice the collective noun “suppliers” refers to, but is not limited to, medical professionals, hospitals and clinics. The supplier, as defined, could have already rendered medical services or would still in future render medical services to the injured third party, as section 17(4) of the Principal Act and the Amendment Act also provide for undertakings in respect of future medical services.

The provisions of section 17(5) of the Principal Act and the Amendment Act regulate suppliers’ claims. This provision not only provides the supplier with an optional, alternative procedural right to claim payment of its account “direct[ly] from the Fund or agent on a prescribed form”, but further states that such supplier’s claim “shall be subject mutatis mutandis to the provisions applicable to the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered”. Legal practitioners (in particular Klopper and Bobroff) have criticised the unsatisfactory interpretation of the above-mentioned two phrases by the courts in recent decisions.

In this note these two phrases are addressed in the hope of bringing some clarity among the confusion and uncertainty. The interpretation of the former phrase has resulted in uncertainty on the true nature of the supplier’s claim and cast doubt on whether a supplier has only an optional, alternative procedural right to claim its account from the RAF, or whether the supplier’s rights extend beyond this procedural right. Furthermore, the latter phrase is the mischief-maker in that it is vague and ambiguous, and the interpretation of these phrases in recent decisions (as illustrated in Van der Merwe v Road Accident Fund 2006 3 SA 88 (T); Van der Merwe v Road Accident Fund 2007 6 SA 283 (SCA); Road Accident Fund v Abdool-Carrim 2008 3 SA 579 (SCA) and Department of Health and Social Development, Limpopo v Road Accident Fund (unreported case no 16177/2008 (T))) has brought about distorted views on the legal nature and basis of suppliers’ claims, as well as inconsistent and diverging views on their rights, powers and entitlements.

The sole purpose of the enactment of the Principal Act was and still is for the benefit of the third party (see Aetna Insurance Co v Minister of Justice 1960 3 SA 273 (A); Klopper The law of third party compensation (2008) 14). Suppliers’
claims have increased recently and this is also evident from the increased litigation involving their claims. The RAF, unfortunately, has encouraged the practice of treating suppliers’ claims separately and independently. Klopper “Supplier’s claims in terms of section 17(5) of the Road Accident Fund Act 56 of 1996” 2007 THRHR 469–470 pointed out:

“Since 2000 supplier’s claims have increasingly become an integral part of the personal injury claims landscape. The volume and extent of these claims [were] highlighted by the Road Accident Fund Commission Report Vol 1 840 . . . [T]here 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 financially . . .[t]here 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 . . . [s]upplier’s claims must represent a substantial burden on the resources of the RAF.”

The legislature had the opportunity to clarify the true nature of suppliers’ claims and articulate their rights, powers and entitlements (in light of their substantial and ever-increasing claims) in the Amendment Act, but unfortunately did not consider it important to do so. The Amendment Act (as discussed below) has now subjected suppliers’ claims to two prescribed tariffs, which limit suppliers’ claims and will undoubtedly achieve the long-term goal of ensuring the future sustainability of the RAF. The courts in turn have recently dealt with suppliers’ claims piece-meal and have further confused and brought uncertainty to their claims. This situation forces us to reflect on the following pertinent questions: What is the legal nature of suppliers’ claims? What are suppliers’ rights, powers and entitlements? Do they have only a procedural right to claim from the RAF or do their rights extend beyond this procedural right? Which provisions relating to third parties apply mutatis mutandis to suppliers? Who should be entitled to enforce their rights and protect them and how has the Amendment Act affected their claims? By addressing these questions it is possible to define suppliers’ claims, bring clarity on their rights, powers and entitlements and perhaps provide a possible solution to the way in which they should be handled procedurally, in practice, thus avoiding unnecessary litigation and saving all parties involved in third party claims valuable time and money.

2 **The legal nature of suppliers’ claims**

A supplier’s claim is in actual fact a “personal claim” for professional medical services, goods or accommodation rendered to the third party and Klopper Third party compensation (2008) 38 (cf “Case note: Supplier’s claims against the Road Accident Fund” (Jan/Feb) 2008 De Rebus 53) correctly states:

“[T]he supplier cannot have an original direct and independent or even accessory claim in its own right for its costs against the RAF as substituted wrongdoer in terms of the Act. A supplier only has the statutory right created by section 17(5) to be directly paid by the amount of his account by the RAF from the proceeds of the third party claim provided it complies with all the requirements of section 17(5) and the regulations, and provided that the third party is entitled to compensation and to include the account as part of the compensation claimed by the third party from the RAF.”

In practice the merits and outcome of a third party’s claim are directly linked with the prospects of the supplier’s claim for compensation. For example, if the third party was found to be 30% negligent and the wrongdoer or insured driver
was found to be 70% negligent, the third party would only be entitled to 70% of his or her claim. If medical vouchers or documentation prove to support, for example, R 100 000 of the supplier’s claim, the supplier would only be able to recover R 70 000 thereof. Ideally the attorney handling the third party claim should include the claim of the supplier in such a third party claim.

A supplier is a party to three different legal relationships: the first and most important relationship is a contractual relationship between the supplier and the third party (idem 41). When a third party is injured or dies as a result of a motor vehicle accident, such third party in his or her personal capacity (or his or her personal estate, in case of death) has a legal obligation to pay the supplier for the accommodation, goods supplied or medical services rendered. This is based on our common law of contract.

The second relationship is a statutorily created relationship involving the third party, the supplier and the RAF (s 17(5) of the Principal and Amendment Acts). The third party who is injured or dies as a result of the unlawful negligent driving of a motor vehicle, and who uses the services of a supplier and in so doing incurs an expense, may include such expense in the claim for compensation (past medical or hospital expenses) from the RAF. Upon compensation of the claim the third party is legally obliged to pay the supplier (Klopper 2007 THRHR 481).

The third relationship is also a statutorily created relationship between the supplier and the RAF, where the supplier has a procedural right to claim payment of its account (where a third party incurred such account as a result of injury or death sustained from the negligent driving of a motor vehicle) directly from the RAF. Such a procedural right, however, may only be exercised if the third party is entitled to compensation in terms of section 17(5) of the Principal and Amendment Acts (idem 477) and provided further that such claim is timeously lodged in terms of the provisions of sections 17(5) and 24 of the Principal and Amendment Acts.

It is common practice for a supplier to ask for the payment of his or her fees upfront, before treatment is rendered. However, there would be cases where suppliers’ provide services either by agreement with the third party or in cases of emergency medical treatment wherein the supplier would have the option to claim their fees directly from the third party, have the claim included in the third party’s claim or claim directly from the RAF. In the end, even if the supplier does not claim from the RAF or is unsuccessful in obtaining the full amount of the claim from the RAF (as a result of apportionment of damages), the supplier still has a right of recourse against the third party in terms of common law (idem 477).

In recent decisions the courts have failed to effectively pronounce the true nature of a supplier’s claim as illustrated in the following cases:

In Van der Merwe v Road Accident Fund 2006 3 SA 88 (T) 88E–F, Hartzenberg J held that the wording of section 17(5) creates the right of a supplier to hold the RAF responsible and that there should be no reason why a supplier who has rendered services or who will do so in future “cannot institute an action” against the RAF “despite the fact that the third party has already instituted an action or plans to institute an action”.

Hartzenberg J further held (91A–B para 7) that “[t]he legislature statutorily ceded that portion of a third party’s claim for which he/she had or would have incurred liability to a supplier directly to the supplier. The cession only becomes effective when the supplier accepts it and lodges a claim”. Once again the true
nature of a supplier’s claim was not taken into account as Hartzenberg J implied that the supplier’s claim is divisible, independent and can be ceded. A third party claim cannot be ceded or transmitted before *litis contestatio* (see Klopper *Third party compensation* 38). Further on, however, Hartzenberg J (91F–G para 9) held (in answer to the appellant’s contention that s 17(5) confers on a supplier a separate right of action unrelated to the third party claim) that a supplier’s claim cannot be divorced from the third party’s claim. This confirms that a supplier does not have an independent claim separate from that of the third party claim.

On appeal, in *Van der Merwe v Road Accident Fund* 2007 6 SA 283 (SCA) 286–287G–I para 7 Cachalia JA made a remark which indicated even more clearly that the true nature of a supplier’s claim has been incorrectly interpreted by the courts:

> “Section 17(5) was enacted for the benefit of suppliers to ensure that they receive payments made to injured persons who incur hospital and medical expenses in respect of their injuries. But this right arises only if the third party is entitled to claim the amount as part of his or her compensation from the Fund. Put another way the right arises only if the third party has a valid and enforceable claim against the fund and has complied with the necessary formalities such as submitting a claim in compliance with the prescribed procedure. The supplier’s claim is therefore dependent upon the third party being able to establish his or her claim. In this sense it may aptly be described as an accessory claim.”

This particular section of the judgment is confusing in that, on the one hand, Cachalia JA submits that a supplier’s claim is dependent on a third party having a claim against the RAF, however, then adds that such a claim may be described as “an accessory claim”.

Cachalia JA, in the case of *Road Accident Fund v Abdool-Carrim* 2008 3 SA 579 (SCA) 583A para 8, once again held that section 17(5) confers on a supplier the statutory right to recover its costs directly from the RAF and that it is advantageous to third parties who are often indigent, in that they receive medical services comforted by the knowledge that their medical costs are covered and that they are less likely to be faced with a claim from the medical supplier before having been compensated by the RAF. Cachalia JA then held that “while this subsection was enacted for the benefit of suppliers, it sits neatly with the Act’s main purpose”. Here the judge’s reasoning is open to criticism as the main purpose of the Act is to benefit a third party not a supplier (see *Aetna Insurance Co v Minister of Justice* 1960 3 SA 273 (A); Klopper “Comprehending suppliers claims” August 2008 *De Rebus* 20) and in essence to provide for the establishment of the Fund, which substitutes itself for the wrongdoer to compensate a third party who has suffered loss or injury due to the unlawful negligent driving of a motor vehicle. Such compensation is aimed at putting the third party in the same position he or she would have been in if not for the collision. Furthermore, Cachalia JA submits that the third party is at an advantage in that he or she will not be faced with a claim by the supplier before finalisation of the claim. As mentioned above this is certainly not what happens in reality or practice. Suppliers usually request payment immediately after rendering their services to the third party, or request payment or a deposit upfront as they are entitled to in terms of their contractual common law right and need not wait for the RAF to finalise the claim or for the matter to be settled in court, possibly six to eight years later. Klopper (August 2008 *De Rebus* 18–21) referred to this judgment and was dissatisfied with Cachalia JA’s “lack of jurisprudential accuracy and fundamental appreciation of the true nature of third party claims”.
Klopper *Third party compensation* 45–46 correctly interprets section 17(5) as follows:

“The wording of section 17(5) contra-indicates the right of the supplier to sue the RAF. It does not have an independent, direct claim to enforce its right to receive direct payment 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 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 was not incorporated in the predecessors of and into the current section 17(5) . . . [T]he only direct 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 the third party has become entitled to compensation and pays the entire amount of the compensation including the account of the supplier to the third party . . . [S]uch claim would then not be based on section 17(5) but on non-compliance with a statutory duty by the RAF. This is the case as the claim of a supplier remains a contractual right against the third party and is not by virtue of section 17(5) converted to a delictual claim against the RAF but only grants the supplier the opportunity to receive direct payment of its account out of the proceeds of a road accident victim’s claim against the RAF.”

Klopper’s viewpoint (2007 *THRHR* 469; January/February 2008 *De Rebus* 52; August 2008 *De Rebus* 18–21; and case note on “Supplier’s entitlement to costs in terms of s 17(2) of the RAF Act” December 2008 *De Rebus* 36) on the legal nature of suppliers’ claims can be commended. He advocates that a supplier’s claim is “a personal claim for professional medical services, goods or accommodation rendered to a road accident victim” and consequently not independent, capable of being ceded, or accessory to the claim of a third party. The words “may claim payment of its account” in section 17(5) confers on a supplier merely an alternative, optional procedural right, thus suggesting that the right is not mandatory. Furthermore, section 17(5) also makes mention of the prescribed claim form, that is, Form 2 in respect of claims lodged according to the Principal Act and RAF 2 in respect of claims lodged according to the Amendment Act. By entertaining a view that suppliers have an independent and direct right to claim from the RAF, anomalies will arise (see *AA Mutual Insurance Association Ltd v Administrateur, Transvaal* 1961 2 SA 796 (A) 797F–G, where it was submitted that “if a supplier is entitled to a separate action, an insurance company may be vexed with a multiplicity of actions and anomalies arise”) such as suppliers not being subject to the same principles and constraints as third parties and suppliers’ claims being paid out 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 (see Klopper 2007 *THRHR* 469).

3 The provisions relating to third parties that apply *mutatis mutandis* to suppliers

In recent decisions the courts have tried to determine exactly which “provisions” relating to third parties apply *mutatis mutandis* to suppliers and have come up with diverging views as illustrated below.

In *Van der Merwe v Road Accident Fund* 2006 3 SA 88 (T) 90E–H para 7 Hartzenberg J held that, with the enactment of section 17(5), some of the provisions applying to third parties, which apply *mutatis mutandis* to suppliers’ claims are, the provisions of sections 18 and 19 of the Principal Act relating to the limitation of liability of the RAF, the provisions of section 23 relating to
prescription and section 24 relating to the regulation of the manner in which a claim is to be lodged. Section 24(3) of the Principal Act and Amendment Act specifically state that a claim by a supplier shall be in the prescribed form and that the provisions (of section 24) “shall apply mutatis mutandis in respect of completion of such form”. Klopper Third party compensation 46 confirms that the reference to mutatis mutandis in regard to the “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”.

The judgment in this case as well as the judgment of the appeal on this case are of particular importance in that an anomaly has been created, (as mentioned above) as a result of failing to take into account the true nature of a supplier’s claim. In order to show the anomaly created it is necessary briefly to relate the facts of these cases.

In the court a quo the following facts were established. The third party was involved in a motor vehicle accident, which occurred on 2 October 1998. The supplier treated the third party on 20 February 2002. The supplier submitted a claim on the prescribed form for R1 319 82 on 27 June 2002. It was found that the third party failed to lodge the claim within three years and the supplier had also failed to lodge her claim within the three years, and therefore both claims had become prescribed in terms of the provisions of section 23(1) of the Principal Act. On appeal new facts were brought to light, which had a material bearing on the matter. It transpired that the third party lodged a claim with the RAF on 1 September 2000. The supplier treated the third party on 20 February 2002, after the third party had lodged the claim. The supplier’s claim was not included in the third party’s claim. The supplier subsequently lodged her claim directly with the RAF on 27 June 2002. The RAF settled the third party’s claim on 27 November 2002.

It was held on appeal (287 para 8) that the third party had submitted his claim within the prescribed three year period (that is, before 1 October 2001) and furthermore that the claim could only have prescribed after a total period of five years (as the initial three year period of prescription is extended by a further two year period, provided the claim is lodged timeously within the initial three year period in cases of identified claims) from the date of the accident, being 1 October 2003. It was held that since the third party’s claim had not prescribed when the supplier had lodged her claim in terms of section 17(5), the supplier’s claim had also not prescribed. Herein lies the anomaly where the provisions which relate to the third party, have not been applied to the supplier. The claim of the supplier should have been lodged with the RAF within three years from the date of the accident (on or before 1 October 2001), but was lodged after such date (on 27 June 2002) and such claim against the RAF should thus have prescribed. The supplier would still, however, be able to claim its account from the third party as such claim against the third party according to the Prescription Act 68 of 1969, would only have prescribed three years from the date of treatment.

According to the judgment of Cachalia JA on appeal (paras 8–9), when a third party lodges a claim with the RAF, all medical expenses incurred up until the date of finalisation of the claim will be considered as past medical expenses. All valid claims made after finalisation of the third party’s claim will then be future medical expenses and paid out in terms of an undertaking provided by the RAF. What the courts have yet to determine, in light of the common practice of delayed payment by the RAF, is what happens with claims that arise during the
period when the claim is finalised in court or settled and when actual payment is received. Would the claim in practice fall under a past medical expense or a future medical expense?

What is also uncertain, even though the possibility may be remote, is what would be the case if the third party does not institute his or her claim even though he or she may have a valid and enforceable claim, within the prescribed period. How will this affect the position of the supplier? Obviously the supplier has a right of recourse against the third party in terms of common law, but what would be the case where the supplier provides emergency medical service to a third party who cannot afford the supplier’s fees? Since the courts have stated that the supplier does have a statutory right to claim from the RAF (Van der Merwe v Road Accident Fund 2006 3 SA 88 (T) 88E–F), what would the position of the supplier be in this case? Would the supplier write off his loss as a bad debt or would the RAF be forced to investigate the merits of the third party’s claim and make a ruling thereon, thereby creating an anomaly?

The recent case of Department of Health and Social Development, Limpopo v Road Accident Fund (unreported case no 16177/2008 (T)), is important in that Du Plessis J showed an understanding of the nature of suppliers’ claims and submitted that the particular section 17(2) of the Principal Act, which entitles a third party “upon acceptance of the amount offered as compensation” from the RAF “to the agreed party and party costs or taxed party and party costs” is not also an entitlement or provision which applies mutatis mutandis to the claim of a supplier.

It was held that an entitlement to legal costs is subject to a pre-existing cause of action such as a contract or delict where the creditor seeks to legally enforce his rights in terms of such an obligation or where there is a prior created obligation to pay legal costs. In this case the account of the supplier, the capital owing, was already paid and settled and no agreement was reached in regard to the legal costs, as a result of the submission of the claim in terms of section 17(5) of the Principal Act. The supplier’s attorneys subsequently issued a summons for the legal costs. It was held that section 17(2) of the Principal Act was enacted for the sole benefit of the third party claimant and that it is the claim of the supplier and not the supplier itself which is subject mutatis mutandis to the provisions relating to the third party. Furthermore, the supplier may be entitled to costs if summons is issued in regard to the full capital owing to a supplier and where the RAF agrees to pay legal costs. Klopper December 2008 De Rebus 36 has welcomed this judgment for displaying “accuracy and a grasp of jurisprudential principles applicable to suppliers claims, which is lacking from some other judgments on this topic” and reiterates (Third party compensation 46) that due to the fact that a supplier does not have an independent claim, he or she is not a third party, does not receive compensation and the provisions of section 17(2) do not apply to a claim submitted by a supplier.

If anything, this judgment serves as a warning to companies and attorneys acting on behalf of suppliers to ensure that an agreement is reached in regard to legal costs during settlement negotiations and to include such a claim for costs in the summons. It is important to take note though that this judgment relates to the Principal Act wherein a third party was entitled to recover their agreed or taxed party and party costs when such third party accepted an offer from the RAF. However, in terms of the Amendment Act, section 17(2) was omitted which means that a third party will only be entitled to agreed or taxed party and party costs if summons is issued or in terms of an order by court.
Road Accident Fund v Abdool-Carrim 2008 3 SA 579 (SCA) is important in that it shows the increasing claims of suppliers, the considerable financial and administrative burden these claims have on the RAF as well as how their claims are treated separately and independently from the main claim. This case interestingly involved respondents consisting of 1 240 parties, including predominantly suppliers as well as companies referred to as “A fact” and claims amounting to R284 million. In this case, the suppliers employed companies and not attorneys to submit their claims to the RAF (in terms of s 17(5) of the Principal Act). Over a period of approximately four years the RAF paid out the suppliers’ claims until 27 October 2006, when the RAF decided that section 19(d) of the Principal Act (a provision which renders the RAF not liable where the third party has entered into an agreement with any person other than “attorneys” or “any person who is in the service, or who is a government representative of the state or government or a provincial, territorial or local authority”) applied to these agreements. This then led to the ensuing litigation. “A Fact” companies on the other hand contended that section 19(d) did not apply to them as they were suppliers and not third parties and that the RAF had misinterpreted the above-mentioned provisions. Therefore their claim was enforceable against the RAF. The issue before the court was the statutory interpretation of section 17(5) of the Principal Act, read with section 19(d), and in essence whether section 19(d) applied mutatis mutandis to suppliers’ claims.

Cachalia JA (583 para 11) stated that the legislature in his view, by adding the conditional phrase “subject mutatis mutandis to the provisions applicable to those of the third party,” intended to make the supplier’s right to claim from the RAF conditional upon the validity and enforceability of the third party’s claim. Cachalia JA submitted that section 19(d) was aimed at protecting third parties many of whom are indigent, from entering champertuous agreements and was not intended to apply to suppliers, professional people who are capable of looking after themselves. Klopper Third party compensation 134–135 submits that the object of section 19(d) exclusion is to protect the third party from exploitation by unqualified persons and “[i]t also guards the possibility that third parties who recover their damages through unauthorised persons do not suffer damage and prejudice in instances where such unauthorised persons misappropriate the proceeds of their third party claims or are dishonest or become insolvent”. When a practising attorney deals with a claim, such attorney is firstly bound by a professional code to protect the third party and is furthermore backed by the Attorneys Fidelity Fund, who will protect the claimant in case of embezzlement or sequestration of the attorney.

This decision, although correct, has not been welcomed by legal practitioners who are of the opinion that they will continue to lose business flowing from supplier recoveries and that “BIG BUSINESS which is not subject to any form of regulation or control in this regard will continue to corner the market to an even greater extent” (Bobroff “Service providers claims in terms of 17(5)” August 2008 Society News 2).

4 The effect of the Amendment Act on suppliers’ claims

The Amendment Act as well as the Regulations thereto have subjected suppliers’ claims arising from motor vehicle accidents, which have occurred on or after 1 August 2008 (date of promulgation of the Amendment Act), to two different tariffs.
One of the tariffs applies to “emergency medical treatment”. The Amendment Act, as well as the regulations thereto, does not provide a definition for emergency medical treatment, but Regulation 5(2) states that private sector tariffs will apply “only in case of the immediate, appropriate and justifiable medical evaluation, treatment and care required in an emergency situation in order to preserve the person’s life or bodily functions, or both”. In terms of section 17(4B)(b)(i) and (ii) this tariff “for emergency medical treatment provided by a health care provider contemplated in the National Health Act, 2003” is negotiated between the RAF and such health care providers and should “be reasonable taking into account factors such as treatment and the liability of the Fund to pay”.

The tariffs for emergency medical expenses were published in Government Gazette 31249 with the Regulations on 21 July 2008. The tariffs include tariffs for ambulance services, clinical technologists, medical practitioners, occupational and art therapy, physiotherapy, private hospitals, radiography and radiology and are based on the National Health Reference Price List (NHRPL), which is determined by the Department of Health and is lower than the fees charged by private health care providers. The Law Society of South Africa and three other applicants are currently challenging the adoption of the NHRPL tariff. It is submitted that no meaningful negotiations took place with both public and private health care providers and further that the Amendment Act does not give the RAF the authority to promulgate the tariff, which the Minister is authorised to do under section 26 of the Amendment Act (Law Society of South Africa v Minister of Transport and the Road Accident Fund case no 10654/09 (T) 70).

In terms of section 17(4B)(c) of the Amendment Act “[i]n the absence of a tariff for emergency medical treatment” or where the treatment does not relate to emergency medical treatment the tariffs contemplated in section 17(4B)(a) shall apply, that is, the second tariff, the public sector tariff “based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 . . . and shall be prescribed after consultation with the Minister of Health”. This lower tariff based on the Uniform Patient Fee Schedule (UPFS) for fees payable to public health establishments by full-paying patients, and prescribed under section 90(1)(b) of the National Health Act of 2003, is revised from time to time. The Law Society of South Africa and others are challenging this particular tariff as being unreasonable and arbitrary in that it excludes payment for certain types of treatment which “accident victims will foreseeably need and for which the UPFS does not make provision”. It is submitted that the tariff also applies to long term future hospital and medical treatment of road accident victims, including victims rendered paraplegic or quadriplegic as a result of their injuries, who would require specialised treatment over a period of time, such as in-home care, specialised transportation for periodic treatment, installation and maintenance of expensive life sustaining equipment and so forth, which state hospitals and clinics do not provide (Law Society of South Africa v Minister of Transport and the Road Accident Fund 77).

Regulation 5(3) of the regulations relating to the Amendments provides that the costs of alterations to a building or premises, or a modification of a motor vehicle, shall be based on any reasonable quotation either submitted to or obtained by the RAF.

It is important to note that in terms of the Principal Act the third party claimant, whether his injuries were covered by medical aid or not, was able to recover reasonable medical costs incurred and had a legal duty to mitigate such
damage (Klopper Third party compensation 149). However, in practice the impression created was that all medical costs were recoverable on any tariff. This was a result of the RAF’s neglect to properly scrutinise these costs and also due to the poor and inadequate services offered in the national health system (see Revelas v Tobias 1999 2 SA 440 (W); Troos Transport t/a Ekoliner Luxury Coach Lines v Abrahams 1999 2 SA 142 (C)). In terms of the amendments, third party claimants will now only be able to recover the rate charged in terms of the UPFS as amended from time to time and will not be able to recover the full tariff on behalf of his or her medical aid. This means that the RAF will be indirectly subsidised by the medical aids of third party claimants and ultimately by the third party claimants themselves in the form of increased medical aid subscriptions. The same applies to future medical treatment. Should a third party claimant not be on medical aid and still opt to receive private medical treatment, such third party will have to pay the difference between the private and public hospital rate out of his or her own pocket as he or she cannot recover the shortfall from the wrongdoer as a result of the amendment of section 21 of the Principal Act which abolishes the common law residual right to claim from the wrongdoer (except in cases of secondary emotional shock).

The Law Society of South Africa and others have also challenged this aspect as unconstitutional as it “unreasonably impedes victims right of access to health care services”. Poor third party claimants will only be able to receive treatment at public hospitals and clinics “where treatment is either not available or of an unacceptably low standard”. Even if such third party received private medical treatment, the UPFS tariff would be inadequate and may not even make provision for such treatment (Law Society of South Africa v Minister of Transport and the Road Accident Fund supra). It was pointed out in the 2002 Satchwell Commission report (vol 2 847) that public clinics are not open 24 hours, and spinal and intensive care units have been closed. Provincial hospitals are understaffed, ambulances are unavailable and fail to provide emergency care. According to the affidavit of Riana Best, president of the Occupational Therapy Association of South Africa (OTASA) attached to the application of Law Society of South Africa v Minister of Transport and the Road Accident Fund supra 84 “the conditions described by the Satchwell Commission still persist in the public health system” and although in large urban areas basic rehabilitation therapy is available, it is non-existent in many other areas. It was submitted that for the above-mentioned reasons section 17(4B)(a) of the Amendment Act “unreasonably deprives road accident victims of the right of access to health care, in breach of their constitutional rights” and is therefore not justifiable in an open and democratic society based on human dignity, equality and freedom.

Section 17(4)(a) of the Amendment Act provides that the RAF may issue a third party with an undertaking in respect of future medical costs and that the RAF may now pay the compensation directly to the third party or supplier, subject to the tariffs mentioned above (s 17(4B)).

Section 17(6) of the Amendment Act, which entitles the RAF to make interim payments to a third party in respect of past medical costs (i.e. medical costs already incurred) is also subject to the tariffs mentioned above, however, only in cases where a third party claimant has lodged a claim and the question of liability of the RAF has been settled.

Furthermore, suppliers, such as medical practitioners who previously assessed third party claimants’ injuries and compiled medico-legal reports (which was
sufficient in certain cases, in terms of the Principal Act to claim medical costs from the RAF) may experience a decrease in business, in light of the new procedure of assessing “serious injuries” which can now only be assessed by the forty-five recommended doctors within South Africa. (Doctors listed on the RAF website www.raf.co.za last visited on 28 July 2009.). These recommended doctors, once they have done the required assessment may however, still require medico-legal reports by specialist doctors in order to address a claimant’s prognosis and give expert opinions on matters such as the sequelae of the third party claimant’s injury.

5 Conclusion
In conclusion, suppliers are no doubt important role players in third party matters and their claims may be classified as personal claims for professional medical services, goods or accommodation rendered to a third party. Even though suppliers only have a procedural right to claim their account from the RAF, they are arguably sufficiently protected by the safety net of common law. The provisions of sections 18, 19, 23 and 24, which apply to third parties, apply mutatis mutandis to suppliers’ claims. In the ideal world practising attorneys as mentioned in section 19 (c)(i) of the Principal Act and Amendment Act (“any person entitled to practise as an attorney within the Republic”) should be the only persons entitled to lodge the third party claim and include such suppliers’ claim therein. If such a practice was a reality it would bring an end to treating suppliers’ claims separately and independently, thereby solving the problem of duplication of claims. This will aid in saving money and ensuring that the funds available to the RAF are used for the purpose originally intended by the legislature. The Amendment Act, if found to be constitutionally valid and enforceable by the Constitutional Court, will undoubtedly have a negative impact on suppliers’ claims and there may be just as rapid a decline in their claims against the RAF as there was a rapid increase.

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