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THE INTERPRETATION OF THE AMENDED RAF ACT 56 OF 1996 AND THE REGULATIONS THERETO BY THE COURTS WITH REGARD TO “SERIOUS INJURY” CLAIMS

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1. Introduction

The RAF Amendment Act 19 of 2005 (hereinafter referred to as the “Amendment Act”) amended the RAF Act 56 of 1996 (hereinafter referred to as the “RAF Act”) and came into effect on 1 August 2008.¹ The application of the Amendment Act together with the regulations thereto has severely curtailed claims for non-patrimonial loss² as a result of the drastic rules and procedures applicable to the qualification and assessment of such claims. The Amendment Act introduced the concept of “serious injury”, in that should a claimant wish to claim for non-patrimonial loss suffered, his or her injury must be considered “serious” in order to qualify for compensation. If the claimant’s injury is not considered “serious” such a claimant will not be entitled to any compensation from the Road Accident Fund (hereinafter referred to as the RAF) for the non-patrimonial loss suffered and, furthermore, the claimant will also not be entitled to claim any compensation from the wrongdoer in terms of common law,³ except for secondary emotional shock suffered due to the motor-vehicle accident.⁴ Claimants, legal practitioners and the RAF have grappled with the interpretation of

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1 The Act and the regulations thereto came into effect on 1 August 2008 pursuant to proclamation R 29 of 2008 published in Government Gazette 31249 dated 21 July 2008.

2 Also called non-pecuniary loss – s 17 of the RAF Act refers to non-pecuniary loss.

3 As per s 21(1) of the RAF Act (substituted by s 9 of the Amendment Act):
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.

4 As per s 21(2)(b) of the RAF Act (substituted by s 9 of the Amendment Act):
Subsection (1) does not apply-

(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.

the Amendment Act as well as the regulations thereto with regard to claims for non-patrimonial loss, but the courts have recently given guidelines which clarified some of the uncertainties regarding the application of the Amendment Act. In this note we will give reasons for the amendments made to section 17 of the RAF Act, list the new procedures to be followed in a claim for non-patrimonial loss against the RAF, and attempt to explain the practical implementation of these amendments in the light of some of the recent decisions by the courts.

2. Reasons for the amendments to the RAF Act

The reasons for the amendments to the RAF Act were no doubt primarily directed at putting the RAF on a more financially sound footing, ensuring its sustainability, reducing costs with respect to paying out legal fees, and addressing inequality. The Ministry of Transport issued a statement⁵ conveying that the amendments “will replace the compensation system that promoted inequality and threatened the sustainability of the fund, with a system that is more equitable, fair and transparent for the victims of road accidents”. With regard to inequality, the Ministry referred to certain passengers⁶ whose claims were excluded or limited to R25 000. In terms of the Amendment Act these claims are no longer limited or excluded and thus the potential discrimination is no longer at issue.⁷ With regard to the sustainability of the RAF, the Minister referred to caps that were “introduced for loss of earnings and support as well as general damages”. It was stated that “the amendments will go a long way towards stabilising the RAF, will reduce the possibility of fraudulent claims and will enhance the Fund’s goal of long term sustainability. The amendments to the Act are primarily aimed at benefiting the road users of South Africa”. Referring to the omission of section 17(2) from the RAF Act,⁸ the Ministry stated that it was not their intention to oust legal representatives from the claiming process but to remove “the incentive for legal representatives to run up costs beyond the amount claimed”. Yet

5 Dated 31 July 2008, see <http://www.info.gov.za/speeches/2008> last visited on 2012/01/24.

6 Affected by ss 18 and 19 of the RAF Act.

7 See *Mvumvu and Others v Minister of Transport and Another* 2011 2 SA 473 (CC) and the Road Accident Fund Transitional Provisions Bill 2012. The focus of this note is, however, not on these claims but on the claims for general damages.

8 The omission of s 17(2) in effect provides that the RAF is not entitled to pay legal costs unless an action is instituted.

from the RAF's intended "direct payment system" (which it was interdicted from implementing)⁹ it seemed as if the RAF was intent on ousting legal representatives from the claiming process. A study of the cases referred to below shows that it is in actual fact mainly the RAF itself, and not the claimant's legal representatives, who waste time, frustrate the court proceedings and ultimately are responsible for the increased wastage of funds. Indeed Kgomo J in *Mngomezulu v RAF*¹⁰ held that the aim of the amendments to the RAF Act "was to shorten the time of settlement or finalisation of claims rather than to further delay them".

3. Claiming non-patrimonial loss in terms of the RAF Act (as amended by the Amendment Act) and its regulations

The following applicable provisions were inserted into the RAF Act and withstood a constitutional challenge:¹¹

Section 17(1) of the RAF Act provides that "...the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a *serious injury* as contemplated in subsection (1A) and shall be paid by way of a lump sum" (our emphasis). Section 17(1A) provides that the assessment of a "serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party". Section 26 of the RAF Act authorises the Minister¹² to make regulations regarding the method of assessment of "serious" and "non-serious" injuries as well as the resolution of any disputes arising from the assessment thereto.

9 *Law Society of South Africa and Others v RAF and Another* 2009 1 SA 206 (C).

10 (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 122.

11 See *Law Society of South Africa and Others v RAF and Minister of Transport and Another* 2011 1 SA 400 (CC).

12 of Transport.

Regulation 3 relating to the assessment of a serious injury¹³ provides for the following procedure:

(a) A claimant intending to claim non-patrimonial loss must submit himself or herself to an assessment by a medical practitioner, registered under the Health Professions Act.¹⁴ The Minister may approve, for this purpose, a training course for medical practitioners in the application of the American Medical Association (AMA) Guides by giving notice in the Government Gazette, but has not done so yet and until such time as a training course has been approved, any registered medical practitioner may complete the assessment.¹⁵

(b) The medical practitioner must first assess if the injuries sustained by the claimant fall within the list of “non-serious injuries”. The Minister is entitled to publish in the Gazette, after consultation with the Minister of Health, a list of injuries not to be regarded as serious. If the claimant’s injuries fall within this list, it is possible that compensation for non-patrimonial loss will not be awarded. The Minister of Transport has to date not yet published a list of non-serious injuries and medical practitioners performing the serious-injury assessment must disregard this step¹⁶ when performing the assessment until the list is published.¹⁷

(c) If the injury is not on the list of non-serious injuries, the medical practitioner may assess the injuries according to the “AMA Impairment Rating”.¹⁸ If the injuries result in 30 per cent or more of whole-person impairment (hereinafter referred to as “WPI”) in terms of the 6th edition of the American Medical Association Guides¹⁹ (hereinafter referred to as the “AMA Guides”) non-patrimonial loss may be awarded. Alternatively if the injury is not on the list of non-serious injuries and did not result in 30 per cent or

13 In terms of s 17(1A) of the RAF Act. See also Visser *et al Law of Damages* 331.

14 56 of 1974; reg 3(1)(a). In *Mokoena v RAF* (Unpublished Judgement with Case number 38170/2010 delivered in the South Gauteng Provincial Division of the High Court) pars 9-17 the court held that “assessment” does not necessarily mean that the claimant had to be physically examined by the medical practitioner.

15 Reg 3(1)(b)(vi); see <http://www.aiif.co.za/index.php/the-news> - "Claims for General Damages for Serious Injuries under the Amended Act" last visited on 2012/05/31.

16 As stipulated in reg 3(1)(b)(i).

17 See www.raf.co.za/legislation/Pages/AmendmentAct.aspx last visited 2012/01/24; see also par 3 of RAF 4 (form for claiming non-patrimonial loss).

18 See par 4 of RAF 4.

19 Reg 1(ii) sv “Definitions”.

more of WPI, then non-patrimonial loss may still be claimed if the injuries fall within the following “narrative test”:²⁰

(aa) they resulted in a serious long-term impairment or the loss of a body function;

(bb) they constitute permanent serious disfigurement;

(cc) they resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or

(dd) they resulted in the loss of a foetus.

(d) The claimant must obtain a serious-injury assessment report from the medical practitioner (RAF 4). The report may be submitted separately after the submission of the claim (RAF 1) in accordance with the Act and regulations thereto²¹ adhering to the prescription periods stated in section 23 of the RAF Act. With regard to the AMA impairment rating, if “maximum medical improvement” (hereinafter referred to as “MMI”) is not reached²² before the lapse of the prescription periods the claimant must submit him- or herself to an assessment and ensure that the claim and the serious-injury assessment report are lodged timeously before prescription.²³

20 As per reg 3(1)(b)(iii); see par 5 of RAF 4.

21 Reg 3(3)(a)-(b).

22 *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 54: “The point in time when patients are as good as they are to be from the medical and surgical point of treatment available to them”, being a date from which further recovery or deterioration is not anticipated.

23 Reg 3(3)(b)(ii) refers to the initial prescription period, before the period is extended by two years in respect of an identified claim and three years in respect of an unidentified claim. This provision forces a claimant to submit to a serious-injury assessment even before MMI has been reached and the courts have noted this when the RAF rejects a serious-injury assessment report based on MMI having not been reached. See *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 54; *Akaai v RAF* (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the South Gauteng Provincial Division of the High Court) par 9; *Mokoena v RAF* (Unpublished Judgement with Case number 38170/2010 delivered in the South Gauteng Provincial Division of the High Court) pars 19-20. Klopper Oct 2011 *De Rebus* 34 points out that reg 3(3)(b)(i) which states that the RAF 4 can be lodged at any time before a claim has prescribed (thus incorporating the extended periods that follow upon lodgement of the claim as prescribed) and reg 3(3)(b)(ii) which implies that the RAF 4 must be lodged within the initial periods of prescription and not the extended periods are in conflict with each other and ss 23 and 24. He submits that an interpretation with the “least onerous effect” should be followed, allowing for lodgement of the RAF 4 before the extended period of prescription (five years). He does, however, advise caution and submission of the RAF 4 before the initial two or three year prescription period has lapsed, as recommended by the Attorneys Fidelity Fund and the

The costs of an assessment, which is currently approximately R 7 000,²⁴ will be borne by the RAF only if the injuries are assessed as serious and if the RAF is overall liable in terms of the Act.²⁵ If the claimant lacks sufficient funds and the RAF decides that it is probable that the claimant's injuries may be assessed as serious, the RAF may at its expense refer the claimant to a medical practitioner for the purpose of an assessment and to a health-care provider for the purpose of collecting and collating information to facilitate such an assessment.²⁶

In *Daniels v RAF*²⁷ the third applicant in the matter alleged that her injuries sustained in a motor-vehicle accident were serious, in that they resulted in a serious long-term impairment or loss of a bodily function, thus falling within the ambit of the "narrative test" qualifying her for compensation in respect of general damages.²⁸ She was unable to pay for the costs of an assessment and requested financial assistance from the RAF in respect of the serious-injury assessment. The RAF refused the request stating that such a request would be considered only if her injuries resulted in 30% or more of WPI. The RAF's representative did not consider whether or not her injuries could qualify as serious by falling within "the narrative test"²⁹ as the representative did not consider the WPI-rating test and the "narrative test" as a collective test. It was stated by the RAF's representative that it will provide financial assistance "where there is *prima facie*, an indication that the injury is serious".³⁰ The court held that the RAF, when deciding on whether or not to pay for the costs of the assessment, must act reasonably.³¹ The court found that although the applicant had not provided adequate information in support of her allegations and request, the RAF denied the request before further information could be requested and thereafter

Attorneys Insurance Indemnity Fund. See also *Van Zyl v RAF* (Unpublished Judgement with Case number 34299/2009 delivered on 11 June 2012 in the South Gauteng Provincial Division of the High Court) par 70-80 where Satchwell J agreed with Klopper.

24 See *Daniels v RAF* (Unpublished Judgement with Case number 8853/2010 delivered on 28 April 2011 in the Western Cape Provincial Division of the High Court) par 87.

25 Reg 3(2)(a).

26 Reg 3(2)(b).

27 (Unpublished Judgement with Case number 8853/2010 delivered on 28 April 2011 in the Western Cape Provincial Division of the High Court).

28 *Supra* par 81.

29 *Supra* par 90.

30 *Supra* par 94.

31 *Supra* par 87.

provided.³² The decision by the RAF to decline the request³³ was set aside and was referred back to the RAF for reconsideration with proper regard to the provisions of regulation 3.³⁴

The RAF will be obliged to compensate a claimant for non-patrimonial loss only if a completed RAF 4 is submitted and if the injury has been correctly assessed as “serious” in terms of the regulations.³⁵ If the RAF is not satisfied that the injury has been correctly assessed the RAF must:³⁶

- (i) **reject** the serious-injury assessment report and furnish the third party with reasons for the rejection; or
- (ii) direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a **further assessment** to ascertain whether the injury is serious, in terms of the method set out in these regulations, by a medical practitioner designated by the Fund or an agent (our emphasis).³⁷

Thereafter the RAF “must either **accept** the further assessment or **dispute** the further assessment in the manner provided for in these regulations” (our emphasis).³⁸

If the claimant wishes to dispute the rejection of the serious-injury assessment report **or** if the RAF disputes the finding of the further assessment³⁹ the disputant must in terms of regulation 3(4):

- (a) within 90 days of being informed of the rejection or the assessment, notify the Registrar [of the Health Professions Council of South Africa] that the rejection or the assessment is disputed by lodging a dispute resolution form with the Registrar; [an RAF 5 form “Notice of Dispute”]

32 *Supra* par 95.

33 In terms of reg 3(2)(b).

34 *Supra* par 97.

35 Reg 3(3)(c).

36 See further *infra* par 5.

37 Reg 3(3)(d).

38 Reg 3(3)(e).

39 Mentioned in reg 3(3)(d)(i) and (ii) above in terms of reg 3(3)(e).

(b) in such notification set out the grounds upon which the rejection or the assessment is disputed and include such submissions, medical reports and opinions as the disputant wishes to rely upon.

If the Registrar is not notified that the rejection or the assessment is in dispute within the 90 days, the rejection or assessment will become final and binding, unless an application for condonation is lodged.⁴⁰ A written response to the application for condonation may be submitted to the Registrar within 15 days and a reply thereto must be lodged within 10 days.⁴¹ The Registrar must then refer the application for condonation together with any response and reply to the "Appeal Tribunal".⁴² The Appeal Tribunal, consisting of three independent medical practitioners⁴³ (one of whom will be appointed by the Registrar as the presiding officer of the Tribunal) in considering the application for condonation may request further information or additional documentation, whereafter they must decide whether or not to condone the late notification of a dispute. Should the Tribunal not condone the late notification, the rejection or assessment will become final and binding.⁴⁴

The Registrar shall within 15 days of having been notified of a dispute or where condonation is granted to a disputant inform the other party of the dispute and provide all submissions, medical reports and opinions the disputant relies upon to the other party.⁴⁵ Once informed, the other party to the dispute must within 60 days⁴⁶ notify the Registrar which submissions, medical reports and opinions are placed in dispute and provide the submissions, medical reports and opinions the other party relies upon.⁴⁷ Upon receipt of notification from the other party or upon the expiry of 60 days the Registrar shall refer the dispute for consideration to the Appeal Tribunal.⁴⁸ Additional independent health practitioners may be appointed by the

40 In terms of reg 3(5).

41 In compliance with reg 3(5)(c).

42 Reg 3(5)(d). See further below par 4.1 with regard to confirmation of the existence of the Appeal Tribunal.

43 With expertise in the appropriate areas of medicine.

44 Reg 3(5)(g)-(h).

45 Reg 3(6).

46 In writing.

47 Reg 3(7).

48 Expenses to be paid by the RAF; reg 3(8).

Registrar to assist the Tribunal in an advisory capacity.⁴⁹ Provision is made if any party is aggrieved by one or more of the appointments made.⁵⁰ If it appears to the majority of the members of the Tribunal that legal arguments may be warranted, the presiding officer of the Appeal Tribunal shall notify the Registrar, who in turn shall request the chairperson of the Bar Council or chairperson of the Law Society of the jurisdictional area concerned to appoint an advocate of the High Court of South Africa, or an attorney with a minimum of five years experience, who must within 10 days of his or her appointment make a recommendation whether or not a hearing is warranted.⁵¹ The Appeal Tribunal must consider the recommendations and then determine if the nature of the dispute warrants a hearing for the purpose of considering legal arguments. If the Appeal Tribunal determines that a hearing is warranted, the appointed legal practitioner shall preside at the hearing and shall upon conclusion of the hearing make written recommendations within 10 days in relation to the legal issues arising from the hearing.⁵² The Appeal Tribunal shall then consider the recommendations with regard to the legal issues⁵³ and shall thereafter exercise any of the following powers.⁵⁴ The Appeal Tribunal may:

- (a) Direct the claimant to submit him- or herself at the expense of the RAF to a further assessment by a medical practitioner appointed by the Appeal Tribunal to ascertain if the injury is serious.
- (b) Direct, on no less than 5 days written notice, that the claimant present him- or herself to the Appeal Tribunal at a place and time stated in the said notice for assessment of whether or not the injury is serious.
- (c) Direct further medical reports to be obtained for consideration by the Appeal Tribunal by one or more of the parties.
- (d) Direct that relevant pre- and post-accidental medical, health and treatment records pertaining to the claimant be made available to the Appeal Tribunal.

49 Reg 3(8).

50 See reg 3(9).

51 Reg 3(10)(c).

52 Reg 3(10)(e)-(f).

53 Reg 3(10)(g).

54 In terms of reg 3(11)(a)-(i).

(e) Direct further submissions to be made by one or more parties and stipulate the time frame within which such further submissions must be placed before the Appeal Tribunal.

(f) Refuse to decide a dispute until a party has complied with any of the directions.

(g) Determine, according to the majority of the Appeal Tribunal, if the injury is serious.

(h) Confirm the assessment of a medical practitioner or substitute its own assessment for the disputed assessment performed by a medical practitioner, if the majority of the members of the Appeal Tribunal consider it appropriate to do so.

(j) Confirm the rejection of the serious-injury assessment report by the RAF or accept the report if the majority of the members of the Appeal Tribunal consider it appropriate to do so.

The Appeal Tribunal shall notify the Registrar of its findings within 90 days after the referral of the dispute or such additional period as the Registrar may on application from the Appeal Tribunal authorise in writing.⁵⁵ The Registrar shall inform the parties of the findings of the Appeal Tribunal which shall be final and binding.⁵⁶

4. Interpretation and guidelines given by the courts with regard to the application of section 17 and regulation 3 of the Amendment Act

These provisions of the amended RAF Act and its regulations are interpreted and their application explained by way of answering the following two questions.

55 Reg 3(12).

56 Reg 3(13).

4.1. Do the courts have the jurisdiction to rule on whether or not a claimant's injuries are regarded as serious for the purposes of claiming non-patrimonial loss?

The courts have stated that they are indeed entitled to rule on whether or not a claimant is entitled to general damages.⁵⁷

The RAF's legal representatives have adopted a trend by raising a special plea and stating that in terms of the Amendment Act the plaintiff (claimant) has "failed or neglected" to comply with regulation 3 and therefore such a claim "under the circumstances is unenforceable"⁵⁸ or that due to the RAF's objection to the RAF 4, the courts do not have the jurisdiction to deal with general damages.⁵⁹

In *Makhombothi v RAF*⁶⁰ Claasen J held that such special plea does not disclose a defence and it is enforceable, if not in court, then in the Appeal Tribunal provided for in terms of the Amendment Act. He furthermore reasoned that the RAF's admission of liability in terms of section 17(1)(a) but denial of knowledge of the balance of the obligations contained in the pleadings, putting the claimant to the proof thereof, "constitutes an admission that the [claimant] is entitled to seek compensation in Court and that jurisdiction of court is not ousted".⁶¹ The special plea was dismissed with costs. In *Nhambe v RAF*⁶² Tuchten J held that the RAF by conceding the merits of the claimants claim were not entitled to raise any procedural objection to the

57 See cases discussed below.

58 See *Louw v RAF* (Unpublished Judgement with Case number 49084/2009 delivered on 12 August 2011 in the South Gauteng Provincial Division of the High Court) par 71; *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 23; *Makhombothi v RAF* (Unpublished Judgement with Case number 46854/2009 delivered on 29 April 2011 in the South Gauteng Provincial Division of the High Court) par 1; *Akaai v RAF* (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the South Gauteng Provincial Division of the High Court) par 2; *Mokoena v RAF* (Unpublished Judgement with Case number 38170/2010 delivered in the South Gauteng Provincial Division of the High Court) pars 5-7.

59 See *Smith v RAF* (Unpublished Judgement with Case number 47697/2009 delivered on 29 April 2011 in the South Gauteng Provincial Division of the High Court) par 2.

60 (Unpublished Judgement with Case number 46854/2009 delivered on 29 April 2011 in the South Gauteng Provincial Division of the High Court) par 2.

61 *Supra* par 11.

62 (Unpublished Judgement with Case number 70721/2009 delivered on 10 November 2010 in the North Gauteng Provincial Division of the High Court) par 21.

claimant's claim for general damages and should have continued to assess the claim for general damages "untrammelled by any restrictions imposed by the amended Act and the Regulations". In *Mngomezulu v RAF*⁶³ the same special plea was raised as that raised in *Makhombothi v RAF* and the court dismissed the special plea with the award of a punitive costs order as requested by the claimant's representatives. Kgomo J approved of Claassen J's finding that the court was entitled to rule on whether or not the claimant was entitled to general damages⁶⁴ and further stated that the issue of jurisdiction is directly related to the issue of referral to a tribunal.⁶⁵ Issues that have to do with jurisdiction should be raised by a special plea.⁶⁶ In *Smith v RAF*⁶⁷ Claassen J held that the court did have jurisdiction to rule on whether the claimant was entitled to general damages or not, due to the RAF's failure to raise a "genuine dispute" which had a "medical or legal basis". Thus if there was a genuine dispute the matter should be referred to a "medical tribunal". In *Akaai v RAF*,⁶⁸ Kathree-Setloane J also held that the RAF had not provided sound and valid reasons (supported by "submissions, medical reports and opinions") justifying the rejection of the serious-injury assessment reports of two medical practitioners.⁶⁹ He further held that since both the claimant's and defendant's medical experts confirmed the claimant's injuries as being serious (as per the narrative test) there was in actual fact no dispute. Referral of the matter to the Appeal Tribunal would be unnecessary and "will delay the finalisation of the plaintiff's damages claim for non-pecuniary loss".⁷⁰

Kgomo J (in *Mngomezulu v RAF*⁷¹) enquired as to the existence and operation of the Appeal Tribunal and was not given a clear answer by the RAF's legal representatives. He therefore assumed that no such Appeal Tribunal was operational

63 (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court).

64 See *supra* pars 56-63.

65 In terms of reg 3(4).

66 See *supra* par 64. See also Ahmed 2011 (Nov) *Risk Alert Bulletin* 6.

67 (Unpublished Judgement with Case number 47697/2009 delivered on 29 April 2011 in the South Gauteng Provincial Division of the High Court) pars 4-5.

68 (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the South Gauteng Provincial Division of the High Court).

69 *Supra* par 9.

70 *Supra* pars 17-18.

71 (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court).

and any directive referring the matter to an Appeal Tribunal was impossible and as such “tantamount to a delaying tactic or waste of time”.⁷² He described the Appeal Tribunal as a “phantom body...not been proven as already existing”. To refer the issue to a mystical Appeal Tribunal in his view would amount to an “unnecessary or unjustifiable delay of the case finalisation”,⁷³ no doubt defeating the aim of the amendments to the RAF Act.

In *Akaai v RAF*⁷⁴ it was contended on behalf of the RAF that the Appeal Tribunal as provided for in regulation 3(8)(a) “is to be convened by the Registrar following procedural compliance by the claimant after rejection by the Fund, of his or her serious injury assessment report”. Kathree-Setilonae J pointed out that we have yet to hear from the RAF whether such an Appeal Tribunal has been constituted and established “to consider the disputes which have already been referred to it”.⁷⁵ At the time of writing this note it has been confirmed that the Appeal Tribunal has been permanently established and resides with the Health Professions Council of South Africa as a Council Committee.⁷⁶ It will be interesting to see now if the courts’ jurisdiction would be ousted in instances where the RAF objects to the RAF 4 or alleges non-compliance by the claimant with regard to regulation 3.

72 *Supra* par 42. See Ahmed Nov 2011 *Risk Alert Bulletin* 6.

73 See *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 50.

74 (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the South Gauteng Provincial Division of the High Court) par 16.

75 See *supra* par 16.

76 As per an e-mail received from Mr MC Lamola (Legal Advisor, Health Professions Council of South Africa) on 17 January 2012. Mr MC Lamola advised that appeals were lodged against the decisions of *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court), *Smith v RAF* (Unpublished Judgement with Case number 47697/2009 delivered on 29 April 2011 in the South Gauteng Provincial Division of the High Court).

4.2 Should the “AMA Impairment Rating” be determined before the “narrative test” with regard to the determination of serious injury and are they alternative tests?

To this the courts have answered that either a 30 percent or more of WPI or a finding that the injury falls within the “narrative test” could lead to a claim for non-patrimonial damages.

These two tests are fundamentally different.⁷⁷ The “AMA Impairment Rating” conforms to an objective evaluation and seeks to assess the injury and assign a WPI rating when MMI has been reached. MMI is usually reached between one to two years from the date of the accident but may even be reached at 6 months from the date of the accident.⁷⁸ The AMA Guides are clear with regard to the definition of MMI and do not permit the rating of future impairment. The “narrative test” takes the subjective circumstances of the claimant into account and is a safety net providing an alternative assessment where the AMA Guides would not result in a finding of serious injury.⁷⁹ The “narrative test” calls for an enquiry into various components of the *persona* including the physical, bodily, mental, psychological and even aesthetic features of an injured claimant, and may also take into consideration the likelihood of further surgery, lengthy rehabilitation treatment, future deterioration and complications as well as the risk of relapse.⁸⁰ Various medical specialists would be required to assess various injuries in terms of the “narrative test”, for example: “serious long-term impairment or loss of a body function” would include the inability to walk or use one’s right shoulder properly resulting in being unemployed;⁸¹ or a

77 Much could be written about this but, for the purposes of this note, only a brief reference will be provided. See Klopper Nov 2011 *De Rebus* 29-31; Klopper Oct 2011 *De Rebus* 32-34; Koch Oct 2010 *De Rebus* 33-35.

78 See *Smith v RAF* (Unpublished Judgement with Case number 47697/2009 delivered on 29 April 2011 in the South Gauteng Provincial Division of the High Court).

79 *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) pars 28, 54; *Daniels v RAF* (Unpublished Judgement with Case number 8853/2010 delivered on 28 April 2011 in the Western Cape Provincial Division of the High Court) par 88.

80 *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 33.

81 See *Louw v RAF* (Unpublished Judgement with Case number 49084/2009 delivered on 12 August 2011 in the South Gauteng Provincial Division of the High Court) par 84.

right hip fracture dislocation⁸² identified in regulation 3(1)(b)(iii)(aa) could be assessed by an orthopaedic surgeon or occupational therapist; “permanent serious disfigurement” identified in regulation 3(1)(b)(iii)(bb) by a plastic surgeon; “severe long-term mental or severe long-term behavioural disturbance or disorder” identified in regulation 3(1)(b)(iii)(bb)⁸³ by a psychiatrist, a psychologist or a neurologist;⁸⁴ and “loss of a foetus” identified in regulation 3(1)(b)(iii)(dd) by an obstetrician gynaecologist.

In *Mngomezulu v RAF*,⁸⁵ where the claimant’s claim for non-patrimonial loss was based solely on the “narrative test”, various reports and RAF 4 forms by medical specialists were submitted and filed confirming that the injuries sustained by the claimant were serious, falling within the ambit of the “narrative test”. The RAF objected to various of the reports. With regard to one of the reports, that “(MMI) had not been reached at the time of completion of the RAF 4”,⁸⁶ Kgomo J correctly pointed out that the concept of MMI is relevant to AMA impairment rating and not to the “narrative test”.⁸⁷ With regard to the objection to other reports, the RAF stated that the medical practitioners “failed to complete the RAF 4 correctly by failing to evaluate the percentage of the WPI and instead chose to rely on the narrative test”.⁸⁸ Kgomo J held that this objection would *inter alia* fail for the following reasons: that

82 See *Akaai v RAF* (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the South Gauteng Provincial Division of the High Court) par 11.

83 In *Louw v RAF* (Unpublished Judgement with Case number 49084/2009 delivered on 12 August 2011 in the South Gauteng Provincial Division of the High Court) par 84 Bekker AJ gave as an example for “severe long-term mental or severe long-term behavioural disturbance or disorder”, the tragic loss of one’s child or one’s angst of travelling in vehicles.

84 *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 34; cf *Akaai v RAF* (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the South Gauteng Provincial Division of the High Court) par 12.

85 (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 35.

86 *Supra* par 38.

87 *Supra* par 54; cf *Akaai v RAF* (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the South Gauteng Provincial Division of the High Court) par 9; *Mokoena v RAF* (Unpublished Judgement with Case number 38170/2010 delivered in the South Gauteng Provincial Division of the High Court) par 20. See also *Louw v RAF* (Unpublished Judgement with Case number 49084/2009 delivered on 12 August 2011 in the South Gauteng Provincial Division of the High Court) par 83 where Bekker AJ also incorrectly referred to the concept of MMI when dealing with the “narrative test”.

88 *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 39.

the claimant's claim for non-patrimonial loss was based on the "narrative test" and not on the proving of 30 per cent or more of WPI, and furthermore that "there is nothing in the Regulations which prevent the [claimant] from being assessed in terms of the narrative test as opposed to WPI".⁸⁹ In *Nhambe v RAF*,⁹⁰ where the claimant's claim lay in the "narrative test" and not on the proving of 30 per cent or more of WPI, the court accepted the alternative narrative evaluation and awarded compensation for general damage. In *Daniels v RAF*⁹¹ the RAF's representative was under the impression that serious injury is to be determined only upon a finding of a 30 per cent or more of WPI and did not consider the alternative "narrative test". The court correctly held that the so-called "narrative test" and the WPI test are part of a collective test. The "narrative test" is an integral part of the "serious injury assessment" as confirmed by paragraph 5 of the RAF 4. "There is nothing in Regulation 3(1)(b) which suggests that the 'narrative test' should be applied in rare and isolated cases".⁹² In *Louw v RAF*⁹³ and *Mokoena v RAF*⁹⁴ the court accepted that if the injuries are not assessed according to the WPI rating, but are assessed as serious in terms of the "narrative test", compensation for general damage must be awarded to the claimant. Thus a plaintiff may use either of the two tests to establish serious injury and in such manner qualify for compensation for non-patrimonial loss.⁹⁵

89 *Supra* par 51.

90 (Unpublished Judgement with Case number 70721/2009 delivered on 10 November 2010 in the North Gauteng Provincial Division of the High Court) pars 23-24.

91 (Unpublished Judgement with Case number 8853/2010 delivered on 28 April 2011 in the Western Cape Provincial Division of the High Court).

92 *Supra* par 96; see Ahmed Nov 2011 *Risk Alert Bulletin* 6.

93 (Unpublished Judgement with Case number 49084/2009 delivered on 12 August 2011 in the South Gauteng Provincial Division of the High Court) pars 75-76, 84.

94 (Unpublished Judgement with Case number 38170/2010 delivered in the South Gauteng Provincial Division of the High Court) pars 22-24.

95 See also Kloppe Nov 2011 *De Rebus* 29-30; Koch Oct 2010 *De Rebus* 33.

5. Guidelines where the RAF is not satisfied with the assessment of the serious-injury assessment report (RAF 4)

In *Mngomezulu v RAF*⁹⁶ the reports of two medical practitioners were rejected on the basis that the injury had not been satisfactorily assessed in the RAF 4 and the RAF requested the claimant to avail himself for assessment by their designated medical practitioners.⁹⁷ Kgomo J held that the RAF did not comply with the regulations “in the prescribed manner” and provided the following guidelines:⁹⁸

As previously stated,⁹⁹ if the RAF is not satisfied that the injury has been correctly assessed, the RAF must either **(a) reject** the serious-injury assessment report and furnish the claimant with reasons¹⁰⁰ or **(b) request** the claimant to submit him- or herself to a **further assessment** by their own appointed medical practitioner at the RAF’s cost.¹⁰¹

(a) Mere objections are not good enough to qualify as a rejection and sufficient reasons must be provided. The RAF should provide relevant, rational and substantial reasons why it is of the view that the injury was not correctly assessed. Such objection must be genuine, rational and logical, not arbitrary or without any medical legal basis. For example, in *Mngomezulu v RAF*¹⁰² and *Smith v RAF*¹⁰³ Claasen J found the RAF’s blanket objection to all claims on the basis that MMI had not yet been reached, where the assessment of serious injuries was conducted before a period of two years had lapsed from the date of the accident, to be arbitrary. The RAF also did not provide any medical opinion supporting its objection.¹⁰⁴

96 (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court).

97 *Supra* par 39.

98 *Supra* par 50.

99 *Supra* par 3.

100 In terms of reg 3(3)(d)(i).

101 In terms of reg 3(3)(d)(ii).

102 (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 43.

103 (Unpublished Judgement with Case number 47697/2009 delivered on 29 April 2011 in the South Gauteng Provincial Division of the High Court) pars 3, 5.

104 See also *Mokoena v RAF* (Unpublished Judgement with Case number 38170/2010 delivered in the South Gauteng Provincial Division of the High Court) pars 38-40, and in particular par 41: “[T]he defendant has attempted to reject the plaintiff’s RAF4 form without any real medical

In *Akaai v RAF*¹⁰⁵ the RAF also rejected the serious-injury assessment report on the basis of its being “incomplete”. Kathree-Setloane J held that “not applicable” inserted in blank spaces did not constitute a failure to properly complete the RAF 4. Furthermore, according to the courts, this option of rejection is applicable only with regard to procedural aspects of the assessment, for example: where the report has been completed by a person not qualified to do so; the assessment has not been conducted according to the prescribed method; the impairment evaluation reports for a specific body part were not attached as required; or the report has not been completed in all particularity.¹⁰⁶

(b) Dissenting medical opinion must be furnished for the RAF to succeed with this option of submission to further assessment by a medical practitioner. In *Akaai v RAF*¹⁰⁷ the claimant submitted himself to a further assessment as directed by the RAF and the RAF’s experts agreed with the claimant’s expert confirming the severity of the plaintiff’s injuries. No dissenting medical opinion was provided. According to the regulations the RAF must either reject or accept this further assessment. In *Akaai v RAF*¹⁰⁸ the claimant did not dispute the further assessment because such assessment confirmed his own medical practitioners’ assessment. Since all of the experts agreed that the claimant’s injuries were “serious” the court correctly concluded that the claimant is entitled to claim general damages.

The court in *Mngomezulu v RAF*¹⁰⁹ held that only when the measures set out in the two alternatives above have been exhausted can the matter be referred to the Appeal Tribunal mentioned in regulation 3(4).¹¹⁰

evidence whatsoever. Indeed, the defendant has not provided one iota of medical evidence to contradict the viewpoint of Dr Braude in any way. Instead, the defendant simply rejected the RAF4 form in a conclusory manner”.

105 (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the Gauteng Provincial Division of the High Court) par 10.

106 *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 49; see Ahmed Nov 2011 *Risk Alert Bulletin* 7.

107 (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the Gauteng Provincial Division of the High Court) par 11.

108 *Supra* par 14.

109 *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 55.

In *Mngomezulu v RAF*¹¹¹ Kgomo J found that the RAF had incorrectly opted to use the procedure laid out in **(a)**, and further that it had failed to supply “*sufficient reasons*”, which did not amount to a proper objection or rejection “*in the prescribed manner*”. The RAF should have rather used the procedure laid out in **(b)** above. He held that the RAF’s failure to reject or object to the serious-injury assessment report in the *prescribed manner* and its admittance to the truth and correctness of the submitted medico-legal reports confirming the seriousness of the claimant’s injuries rendered the RAF liable to compensate the claimant for general damages.¹¹²

The courts have held that if the RAF does not object to one of the serious-injury assessment reports (where more than one has been submitted) then failure to reject even one of the reports will result in the report(s) being accepted. This could lead to the fulfilment of the requirements according to the narrative test resulting in the claimant being entitled to general damages.¹¹³

The regulations do not provide a specific time limit within which the RAF may use option **(a)** or **(b)** above, but in *Louw v RAF*¹¹⁴ and in *Mokoena v RAF*¹¹⁵ the court held that the 60-day period referred to in section 24(5) of the RAF Act relating to the submission of the RAF 1 should also be applicable to the submission of the RAF 4. Therefore the RAF has 60 days within which to make use of the options mentioned above in respect of the serious-injury assessment report, failing which the RAF 4 is deemed to be valid in law in all respects.¹¹⁶ It should be noted though that the 60-day

110 See Ahmed Nov 2011 *Risk Alert Bulletin* 7.

111 (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 53.

112 *Supra* par 54; Ahmed Nov 2011 *Risk Alert Bulletin* 7.

113 See *Akaai v RAF* (Unpublished Judgement with Case number 4245/2010 delivered on 13 October 2011 in the South Gauteng Provincial Division of the High Court) pars 12-13; *Mngomezulu v RAF* (Unpublished Judgement with Case number 4643/2010 delivered on 8 September 2011 in the South Gauteng Provincial Division of the High Court) par 46.

114 (Unpublished Judgement with Case number 49084/2009 delivered on 12 August 2011 in the South Gauteng Provincial Division of the High Court) par 83.

115 (Unpublished Judgement with Case number 38170/2010 delivered in the South Gauteng Provincial Division of the High Court) pars 32-36.

116 *Supra* pars 77-82.

period applies to formal aspects of the claim and not substantial material deficiencies.¹¹⁷

6. Conclusion

The Amendment Act's introduction of the concept "serious injury" and the procedure for claiming non-patrimonial loss suffered is new, complicated, costly and cumbersome. This makes one wonder if the aims and objectives of the Amendment Act of 2005 are actually being achieved. On the face of it, it looks as if only the RAF has benefitted from the amendments by complicating the whole procedure in such a manner that even "qualifying" claimants find it near impossible to settle a claim out of court. One gets the impression from studying recent unreported case law that the RAF's directive is to give blanket objections to or rejections of medico-legal reports. Such a *modus operandi* prolongs the procedure and can only be to the disadvantage of the whole system in the long run. Unfortunately this is also not the end of the matter as we have yet to see the role of the Appeal Tribunal and the effect of its decisions with regard to "serious injury claims". Hopefully as more cases come to the courts and are referred to the Appeal Tribunal we will be enlightened on the practical implementation of the procedures of the Appeal Tribunal, and perhaps further guidelines will even be supplied with regard to "serious injury claims" against the RAF.

117 Klopper *Third Party Compensation* 303. See also Klopper Nov 2011 *De Rebus* 29-30, who refers to the RAF's internal directive of 31 May 2011, whereby the claims handlers are required to respond to the RAF 4 within 120 days from the date of lodgement. See also *Van Zyl v RAF* (Unpublished Judgement with Case number 34299/2009 delivered on 11 June 2012 in the South Gauteng Provincial Division of the High Court) par 43.

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Abbreviations

RAF	Road Accident Fund
WPI	whole-person impairment
AMA	American Medical Association
MMI	maximum medical improvement