FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A47/07

In the appeal between:-

FREE STATE PROVINCIAL ADMINISTRATION **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

CORAM: RAMPAI, J et CJ MUSI, J

HEARD ON: 7 December 2009

JUDGMENT BY: CJ MUSI, J

DELIVERED ON: 21 January 2010

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[1] This is an appeal against a judgment of the magistrate: Bloemfontein. The magistrate found that, even though the respondent (Road Accident Fund (the Fund)) admits liability to compensate a third party[1], Section 17 (5) read with Section 24 (3) of the Road Accident Fund Act 56 of 1996 (the Act) does not give the appellant (supplier) a cause of action

[1] In terms of section 17 (1) of the Act the Fund or an agent shall be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee.

to claim its costs, for services rendered to such third party, directly from the Fund. Consequently, so reasoned the magistrate, a court may not make a costs order in favour of a supplier that has instituted such an action. That decision is the subject of this appeal.

[2] The facts of this matter are either common cause or agreed upon by the parties.

[3] On 10 June 2004 a collision occurred between a motor vehicle with registration numbers and letters BNJ 031 FS driven by a certain G E Visser (the insured driver) and a motor vehicle with registration numbers and letters BYB 189 FS driven by a certain T J Sonjica (the third party). The third party sustained injuries as a result of the collision.

[4] The supplier provided hospital accommodation to the third party during which period the supplier rendered certain health services and supplied goods to the third party. The total costs of the accommodation and treatment amounted to R 268.00.

[5] On 9 February 2007 the supplier lodged a claim for the aforesaid amount at the Fund. It also complied with the provisions of section 24 (1), 24 (3) and 24 (6) of the Act[2].

[2] Section 24(1), 24(3) and 24(6) reads:
Procedure. - (1) A claim for compensation and accompanying medical report under section 17 (1) shall –

(a) be set out in the prescribed form , which shall be completed in all its particulars;
(b) be sent by registered post or delivered by hand to the Fund at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing...

(3) A claim by a supplier for the payment of expenses in terms of section 17 (5) shall be in the prescribed form, and the provisions of this section shall apply *mutatis mutandis* in respect of the completion of such form.

(6) No claim shall be enforceable by legal proceedings commenced by a summons served on the fund or an agent –

[6] Having heard nothing from the Fund, the supplier issued summons, on 19 June 2007, for the recovery of the R 286.00. On 21 November 2007 the said amount was paid into the supplier's attorney's account. The Fund did not indicate why it paid the amount. On 26 November 2007 the said attorneys wrote to the Fund informing it that the amount will not be accepted as full and final payment in respect of the supplier's claim. They insisted that the Fund pay the legal costs because the money was paid after summons was properly issued and served.

[7] The Fund refused to pay the legal costs. The parties agreed to argue the costs issue before a magistrate. The parties informed the magistrate that the third party's claim has successfully been finalised, i.e. it was determined that he was entitled to be compensated by the Fund.

[8] The supplier requested the magistrate to order the Fund to pay its taxed party and party costs. The Fund opposed the request and argued that the supplier does not have a right to enforce its claim against it. As authority for this proposition the Fund referred the magistrate to an article by Prof. Hennie Klopper (Klopper) which appeared in the De Rebus[3].

[9] The magistrate dismissed the supplier's claim for costs, with costs. He referred the parties to another matter wherein he was confronted with a similar claim and requested that his

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(a) before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund or the agent as contemplated in subsection (1); and

(b) before all requirements contemplated in section 19 (f) have been complied with.

[3] See De Rebus: August 2008 No 478 at page 18

reasons in that matter be considered as his reasons for dismissing this claim[4].

[10] In his judgment the magistrate surveyed, without analysing, the relevant authorities including **Van der Merwe v Road Accident Fund**[5] and **Road Accident Fund v Abdool – Carrim and Others**[6]. He quoted extensively from Klopper's article and incorrectly but unsurprisingly came to the following conclusion:

"By die beoordeling van die argument voor die hof neem die hof (inag) dat die verskaffer nie 'n oorspronklike direkte eis teen die Padongelukfonds het nie. Die reg om betaling direk van die Fonds te ontvang van bedrae wat kontraktueel aan die verskaffer deur die derde party verskuldig is, word ontleen van die bestaan en regsgeldigheid van die derde party se eis teen die Fonds en die derde party se bewese geregtigheid van vergoeding ingevolge artikel 17(1) van die Wet. Die verskaffer se eis om direkte betaling vanaf die Fonds te ontvang is verdermeer onderworpe aan die volle nakoming van artikel 17(5) en artikel 24(3) van die Wet.

Die enigste reg wat die verskaffer teen die Fonds het is die reg wat geskep was ingevolge artikel 17(5). Hierdie reg behels die bevoegheid om sonder die samewerking van die derde party, betaling van die Fonds te ontvang vir die dienste gelewer, verblyf en goedere gelewer aan die derde party. Hierdie reg het reeds onstaan gegewe die feit dat die meriete nie meer in geskil was nie. Die argument dat die Fonds in wese slegs met een eis te make het, oortuig in die omstandigheid in die mate dat die eis van die derde persoon die eis vir vergoeding of verlies is ingevolge artikel 17(1) van die Wet. Die rekening van die verskaffers vorm dus 'n integrale en ondeelbare gedeelte van die eis en kan nie as afskeibare aparte eise teen die Fonds beskou word nie.

Die Wet het verder ten doel om die wydste moontlike beskerming te verleen wat betref die derde party se onvermoë om vergoeding te eis van 'n aanspreeklike maar platsak bestuurder of eienaar. Dit beteken egter nie dat die derde party eiser in alle gevalle geregtig is op oorhoofse voordeel van gunstige interpretasie of behandeling nie. Die Wet het nie ten doel om verskaffers se belange te bevoordeel nie. Die verskaffer word nie benadeel

4 Case no 786/07
5 2007 (6) SA 283 (SCA)
6 2008 (3) SA 579 (SCA)

met die uitleg nie dat sy eis afhanklik is van die derde party nie. Die verskaffer kan die derde party op grond van die kontraktuele gelewerde dienste aanspreek.

Die hof is by gevolg oortuig dat die eiser nie in die geval onder bespreking enige reg op 'n oorwig van waarskynlikhede bewys het om die koste van die Fonds te eis nie. Hierdie benadering blyk verder in ooreenstemming te wees met die Appelhof se bespreking en bevinding in **MUTUAL INSURANCE v ADMINISTRATUER, TRANSVAAL 1961(2) SA 796(A)** waarin artikel 12 van Wet 29 van 1949 ontleed was wat in *pari materia* ooreenstem met die bepalings van artikel 17(5). In die lig van die nuwe argumente wat aangevoer was is die hof genoop om af te wyk van my vorige beslissings op die punt.

In die omstandighede bevind die hof dat die eis om die betaling van die koste van die hand gewys word met koste. Dieselfde uitspraak sal volg in sake 6967/07 en 8450/07." (My underlining)

[11] It is clear from the magistrate's reasons that this issue arose in numerous cases that he dealt with. Klopper's article seemingly caused great confusion in the minds of the magistrate and some practitioners. Mr Snellenberg, on behalf of the supplier, limited his argument to the doctrine of precedent. Mr Zietsman, on behalf of the Fund, supported Klopper and the magistrate in his heads of argument. During argument he was constrained to concede that the magistrate was wrong.

[12] The magistrate found Klopper's arguments so attractive and piquant to the extent that he exalted it to a level that supersedes the pronouncements of the Supreme Court of Appeal on this issue. The Supreme Court of Appeal has definitively stated that section 17(5) of the Act confers on a supplier a statutory right to recover, directly from the Fund, the costs of accommodation, treatment, services or goods instead of claiming such costs from the third party. And that

the supplier's right to claim directly from the Fund is an accessory claim because it arises only if the third party is entitled to claim the amount as part of his or her compensation from the Fund.[7]

[13] The magistrate decided, without justification, not to follow **Van der Merwe** and **Abdool – Carrim**. He unusually and undeservedly embraced Klopper's view and in the process jettisoned an important doctrine of our law: the doctrine of precedent. The importance of this doctrine was emphasized recently by the Supreme Court of Appeal in **TRUE MOTIVES 84 (PTY) LTD v MAHDI & OTHERS**[8] where Cameron JA, as he then was, said the following:

> "[100] The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions.
> [101] However, it is well established that precedent is limited to the binding basis (or *ratio decidendi*) of previous decisions. The doctrine obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision. Anything in a judgement that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (obiter dictum), and is not binding on subsequent courts."

[14] In **Collett v Priest**[9] it was said: "whatever the reasons for a decision may be, it is the principle to be extracted from the case, the *ratio decidendi*, which is binding and not necessarily the reason given for it". It is clear that **Van der Merwe** and **Abdool – Carrim** lay down a principle

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7 See Van der Merwe supra at paragraph 7 and Abdool-Carrim at paragraph 8
8 2009 ZASCA 4 judgment delivered on 3 March 2009 at paragraphs 100 and 101
9 1931 AD 290 at 302

in relation to the interpretation of section 17(5) of the Act. The magistrate is bound by what was said in those cases, about the principle, and he had to follow them. He could not whimsically or willy-nilly decide not to follow the principle laid down in those cases.

[15] On the facts of this case the magistrate ought to have found that the supplier had a right to sue the Fund directly for the recovery of the costs of the services that it rendered to the third party. That being the case, it follows that the magistrate had discretion to make an order as to costs.

[16] This would ordinarily be the end of this matter. Implicit, however, in the magistrate's reasoning and his acceptance of Klopper's views is a finding that **Van der Merwe** and **Abdool- Carrim** were either wrongly decided or that they did not lay down a principle and that he could therefore deviate therefrom. Seeing that the magistrate accepted Klopper's arguments hook, line and sinker the option of not examining some of Klopper's assertions is unavailable to us.[10]

[17] Section 17(5) of the Act reads as follows:

> "Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any services rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may, notwithstanding section 19(c) or (d), claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and such claim shall be subject, *mutatis mutandis,* to the provisions applicable to

[10] Only those assertions relevant for the adjudication of this case will be examined.

the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered."[11]

[18] Klopper correctly asserts that a third party's claim against the Fund for compensation is a single, indivisible claim which is incapable of being split into different claims for loss of earnings, post medical costs, future medical costs etc. In **Nokwali v Road Accident Fund**[12], Maya JA summed it up as follows:

"Authorities are Legion to the effect that a plaintiff who claimed compensation for damages sustained as a result of wrongful and negligent driving under the Act's predecessors had but a single, indivisible cause of action and that the various items constituting the claim were thus not separate claims or separate causes of action. This interpretation, in my view, necessarily extends to claims brought under the Act as it has the same objective and effect as these previous statutes."

[19] Klopper argues that the accounts of suppliers are usually an integral and indivisible part of such claim and are not distinguishable separate claims against the Fund. He refuses to accept that section 17(5) gives a supplier the right to claim directly from the Fund because the supplier's claim is based on a contract for professional services rendered to the third party. That agreement, so he argues, cannot create delictual liability between the supplier and the Fund.

[20] The argument is strictly speaking correct but it unfortunately does not recognise the fact that the Legislature has deliberately created a statutory exception. The argument is therefore devoid of context. If section 17 (5) is examined in its proper context, it becomes clear that the Legislature has

[11] It is common cause, in this case, that the third party is entitled to compensation.
[12] (2008) ZASCA 3 judgement delivered 6 March 2008 at paragraph 8.

deliberately created a statutory exception by giving a supplier a statutory right to enforce its claim against the Fund even though the Fund has not committed a delict against it.

[21] Klopper contends that **Van der Merwe** and **Abdool – Carrim** do not accurately reflect the true intention of the Legislature when it enacted section 17 (5). He further argues that the Act was not enacted to advance the interest of suppliers.[13]

[22] The doubt created by Klopper as to the interpretation and scope of section 17 (5) should be addressed by considering

(i) what the law was before the measure was passed,
(ii) what the mischief or defect was, for which the law did not provide,
(iii) what remedy the Legislature appointed,
(iv) and the reason for the remedy.

After considering these factors I am enjoined to make such construction of the section as shall suppress the mischief and advance the remedy.[14] An examination of the evolution of the section clearly, in my view, shows the intention of the Legislature and the scope of the section. It is therefore apposite to examine the successive changes to the legislation before considering the four factors mentioned above.

[23] Section 12 of Act 29 of 1942[15] read as follows:

"If the costs of the accommodation of any person in a hospital or nursing home or of any treatment of or service rendered or goods supplied to any person is included in any compensation for which a registered company is liable under *Section Eleven* the company shall pay that cost direct to the

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[13] Page 20 column 2
[14] See Olley v Maasdorp and Another 1948 (4) SA 657 (AD) at 666,Hleka v Johannesburg City Council 1949 (1) SA 842 (AD) at 852 to 853, S v Conifer (Pty) Ltd 1974 (1) SA 651 (AD) at 655 D-E
[15] The Motor Vehicle Insurance Act.

person who is entitled to payment therefore, unless it has already been paid."[16]

This section authorised the registered company[17] to pay the costs of the supplier directly to it, only if such cost was included in the compensation of the third party, and it was not yet paid to the third party.

[24] Section 12 of Act 29 of 1942 was subsequently amended by section 4 of Act 27 0f 1952 to read as follows:

"If the costs of the accommodation of any person in a hospital or nursing home or of any treatment of or service rendered or goods supplied to any person is included in any compensation for which a registered company is liable under *section eleven* the company shall unless that cost has already been paid, pay that cost direct to the person who is entitled to payment therefore and the said person shall be entitled to recover that cost from the company without any cession of action". (my underlining)

The only difference between the original section 12 and the amended version is that the supplier is now expressly given a statutory right to recover its cost from the registered company without any cession of action.

[25] It is the amended version of section 12 that enjoyed the court's consideration in **AA Mutual Insurance Association Ltd v Administrateur, TVL.**[18] In that case the supplier instituted an action for payment of two hundred pounds against the insurer for service rendered to the third party. The insurer argued that the costs in section 12 is costs that is included in a fixed and determined amount as determined by a judgment or agreement which the insurer is liable to pay

[16] The relevant part of section 11 reads as follows:
"Section 11 authorizes registered company to compensate a third party suffered as a result of bodily injury to himself or herself or the death or bodily injury to any person caused by or arising out of negligent driving of the insured driver"

[17] Registered company was defined as an insurance company which has been named by the Minister or acting Minister of Finance which was willing to undertake the Insurance of motor vehicles.

[18] 1961(2) SA 796 (AA)

the third party in terms of section 11. It was common cause that the costs of the supplier was not included in any compensation. The court had to determine what was meant with the words "is included in any compensation for which a registered company is liable under section 11". The court came to the conclusion that the section is aimed at the actual disposition of a part of the compensation or damages. The court found that the claim should be dismissed because there was no fixed, due and payable amount of compensation or damages which included the supplier's cost.

[27] In **AA Mutual v Administrateur TVL** the court expressly refrained from considering the provisions of section 7 of Act 31 of 1959 which substituted section 12 of Act 29 of 1942 as amended.[19]

[28] Section 7 of Act 31 of 1959 read as follows:
"The following section is hereby substituted for section twelve of the principal Act:

12. (1) Where –

(a) The compensation for which a registered company is liable under section eleven, includes the amount of any costs incurred in respect of the accommodation of any person in a hospital or nursing home or of any treatment of or service rendered or goods supplied to any person; or

(b) A registered company has agreed to make any payment in settlement of a claim for compensation under the section, and the compensation claimed could, if the company were liable for the payment thereof, have included such costs, the registered company shall, subject to the provisions of sub-sections (2) and (3), pay any amount which may be due in respect of such costs

[19] See page 802 F

direct to the person to whom that amount is due, and that person shall be entitled to recover such costs from the company without any cession of action: Provided that the total amount payable in respect of such costs under the circumstances described in paragraph (b) shall not in any case exceed one hundred pounds.

[29] This section broadened the scope to include settlement agreements. All it said was that if the registered company settles a claim and the compensation claimed could, if the company was liable, include the payment of the supplier's costs such costs shall be paid directly to the supplier provided that the supplier's claim does not exceed one hundred pounds. The right of the supplier to sue without cession of action is retained. There had to be a determined amount of compensation.

[30] The next step of the evolution is section 26(1) of Act 56 of 1972.[20] The section read as follows:

"26. (1) Where the obligation of an authorized insurer to compensate any third party under section 21, includes a liability for costs which have been incurred in respect of the accommodation of any person in hospital or nursing home or the treatment of or any service rendered or goods supplied to any person –

(a) the authorised insurer shall, if the amount of the compensation payable by it has been determined in any manner, pay such part of that amount as represents such costs due to the person who provided the accommodation or treatment or rendered the service or supplied the goods (in this section referred the service or supplier), direct to the supplier who shall be entitled to recover the said part from the authorized insurer without any cession of action:

(b) the supplier shall, if the said amount has not been

[20] Compulsory Motor Vehicle Insurance Act

> determined and the authorized insurer has not in terms of any agreement been released from its obligation to compensate the third party in respect of such cost, be entitled without any cession of action to recover from the authorized insurer so much of the said costs so due as the third party is entitled to recover from it.
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> (2) The right of action conferred by subsection (1) (b) may be exercised by the supplier by intervening in any legal proceedings instituted and subject *mutatis mutandis* to the provision of section 25, by instituting legal proceedings at any time at which such proceeding may be instituted by the third party, and shall not, after it has been so exercised, be affected by any agreement whereby the authorized insurer is released from its obligation to compensate the third party in respect of such costs.

[31] In terms of this section the amount payable to the third party had to be determined in any manner and that part which had to be paid to the supplier must be paid directly. If the amount has not been determined and the authorized insurer has not in terms of any agreement been released from its obligation to compensate the third party in respect of such costs, the supplier may sue the insurer for its costs, limited to what the third party is entitled to recover from the insurer. This is a clear break from the decision in **AA Mutual v Administrateur TVL**. Aware of the judicial interpretation in **AA Mutual v Administrateur TVL** the Legislature changed the wording of the new section in order to address the effects of the aforementioned judgment. The supplier was given a right to institute action irrespective of whether the compensation amount has been determined by judgment or agreement. Subsection 2 sets out how the right of action may be exercised.

[32] Act 56 of 1972 was repealed by Act 84 of 1986.[21] Section 8(6) of this Act read as follows:

[21] The Motor Vehicle Accident Act

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

[32] Act 84 of 1986 was repealed by Act 56 of 1996. Section 17(5) of the Act, before being substituted by section 6 of Act 19 of 2005, was in all material respects the same as section 8(6) of Act 84 of 1986. Section17 (5) however went further and stated that the amount that the supplier claims may not exceed the amount that the third party could have recovered from the Fund. The only difference between the previous and current section 17 (5) is that the words (notwithstanding *section 19 (c) or (d)… an in accordance with the tariff contemplated in subsection (4b))* were inserted.[22]

[33] I have set out the history of this section to illustrate that it (the history) destroys the whole foundation on which Klopper's argument is based. I now revert to the factors mentioned in paragraph 22 above.

[34] This section was obviously enacted to prevent the mischief mentioned in **AA Mutual v Administateur TVL**, i.e. to prevent the compensated third party, where such compensation includes the costs of the supplier, from using that portion of the compensation for purposes other than paying the supplier that is entitled to it.[23] The remedy that

[22] See AA Mutual v Administrateur TVL at 805 A-B
[23] See AA Mutual v Dministrateur TVL at 805 A-B.

the Legislature appointed changed progressively over the years from obliging the company to pay the supplier directly; to giving the supplier the right to recover its costs from the company without any cession of action if such cost was included in the compensation of the third party and it has not yet been paid to such third party; to giving the supplier the right to intervene in legal proceedings instituted by the third party against the insurer or to institute legal proceedings on its own against the insurer at anytime before the third party's claim prescribes. The current section 17(5) gives the supplier the right to claim its costs from the Fund subject, with the necessary changes, to the provisions applicable to the claim of the third party concerned.[24] The reason for the remedy is aptly stated by Cachalia JA in **Abdool-Carrim**[25] where he stated that:

> "The benefit to the supplier is that the Fund guarantees payment subject only to the condition that the third party must be entitled to claim the amount as part of his or her compensation and that the amount that the supplier may recover may not exceed the amount which the third party is entitled to recover. The advantage to third parties, who are often indigent, is that they receive medical services comforted by the knowledge that their medical cost are covered and that they are less likely to be faced with a claim before having been paid."

[35] In **Free State Consolidated Gold Mines v Multilateral MVA Fund**[26]. Lombard J discussed section 44 of the Multilateral Motor Vehicles Accident Fund Act (MMF)[27], which

[24] Provided of course, the third party is entitled to claim the costs as part of his/her to compensation and from the Fund, the supplier has complied with the other prescripts of the Act.

[25] At paragraph 8

[26] 1997 (4) SA 930(0)

[27] Act 93 of 1989. Section 44 read as follows: "Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or any other person in a hospital or nursing home or the treatment of any service rendered or goods supplied to himself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods(in this case called the supplier) may claim the amount direct from the MMF or the appointed agent, as the case may be, on a prescribed form, and such a claim shall be subject, *mutatis mutandis*, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for the provisions of this Article, have recovered ."

is in all material respects the same as section 17(5) before the 2005 substitution. He said the following about that section:

> "It is accepted that the said article was promulgated in the interests of suppliers of medical treatment and to grant them an independent right to recover from the defendant what the third party could have recovered in respect of such treatment. The purpose of article 44 is to afford the supplier a choice between stepping into the shoes of the third party in respect of that part of his claim so that it can control the speed and efficiency of the process itself or to leave it in the hands of the third party to recover it as part of his claim for general damages, etc, a process over which it has very little, if any, control. The advantages of the former and potential disadvantages of the latter are self-evident. Article 44 provides a ready remedy for the supplier and prevents him from being kept waiting for his money for years, a situation which is easy to understand if regard is had to the well-known fact that many third parties are indigent in the sense that they cannot afford to pay for such treatment out of their own pockets and furthermore because their accounts are generally not seriously disputed insofar as their correctness and/or reasonableness is concerned and are mostly accepted without insisting on proving every injection or tablet.[28]

Free State Consolidated Gold Mines was decided on 5 February 1996. The Road Accident Fund Act was assented on 24 October 1996 and commenced on 1 May 1997. It must be presumed that the Legislature was aware of Lombard J's interpretation when it enacted section 17(5) of the Act.[29] Devenish says the following in relation to Legislative 'omniscience':

> "If two statutes are in *pari materia*, any judicial decision as to the construction of one 'is a sound rule of construction for the other'. In another English case it is stated:
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> > "…When a particular form of Legislative enactment which has received authoritative interpretation whether by judicial decision or by

[28] At 946 G to 947 A

[29] In **Terblanche v SA Eagle Insurance Co Ltd** 1983 (2) SA 501(N) at 504 F Friedman J stated that "It is a rule of statutory interpretation that the Legislature is presumed to be acquainted with the state of the law"

> a long course of practice, is adopted in the framing of a later statutes, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which had been so put upon them"
>
> This means, in effect, that the Legislature is presumed to know the state of the law at the time of the passing of any Act and to know the interpretation which has been placed upon words and expressions in prior Acts. Thus when a particular provision has received a judicial interpretation and the Legislature has then re-enacted it or included it in a statute in *pari materia*, the court can validly assume that the Legislature intends the provision to bear the judicial interpretation previously placed on it."[30]

After the MMF was repealed the Legislature retained the words used in that Act in the current Road Accident Fund Act and its subsequent amendments.

[36] The Legislature kept the supplier's right to institute action against the company, insurer or Fund intact since 1952. There is no indication since 1952 that the Legislature wanted to take away that right. If anything that right has been refined over the years to give suppliers more protection by making it easier for them to claim their costs. The metamorphosis of section 17(5) clearly shows that it was primarily enacted for the benefit of suppliers. The construction of section 17(5) in **Van der Merwe** and **Abdool – Carrim** suppresses the mischief and advances the appointed remedy. The mischief of misappropriation is suppressed and the appointed remedy of giving the supplier a claim against the Fund for services rendered to a third party where such third party is entitled to compensation is advanced for the reasons mentioned in paragraphs 34 and 35 above.

[37] Klopper's reliance on **AA Mutual v Administrateur TVL** is clearly misplaced and devoid of context. A careful reading of

[30] Interpretation of Statutes 1st Ed Juta 1992 at page 134 to 135. footnotes omitted

that case repays attention with understanding. The court had to decide a specific issue in the context of a particular provision[31]. The supplier's right to claim its costs directly from the company was expressly recognised and accepted by the court.[32] **AA Mutual v Administrateur TVL** is also not authority for the proposition that section 17(5) of the Act simply or only empowers the Fund to pay the amount owed to a supplier out of the compensation which has accrued to a third party in terms of section 17(1) of the Act. **AA Mutual v Administrateur TVL** clearly states that the supplier's claim against the registered company is subject to the third party having instituted a claim and an award for compensation, which includes the costs of the supplier, having been made in favour of such third party. If those factors are present and the third party has complied with all the other requirements for lodging its claim it then acquired the right to sue for the recovery of its costs.[33]

[37] Klopper asserts that a supplier's right in terms of section 17(5) is strictly speaking not a claim against the Fund.[34] He unfortunately does not tell us what it is. The Act refers to a third party's claim and a supplier's claim. The supplier is given a right to claim the amount of the service, treatment or accommodation directly from the Fund. Klopper does not explain why the word claim is used by the Legislature if the intention was only to empower the Fund to pay the amount owed by the third party to a supplier out of the compensation which has accrued to the third party. In my view the supplier

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[31] See paragraph 25 above

[32] At 804 D-E where the court said "Daarvoor word uitdruklik voorsiening gemaak deur die verskaffer 'n reg op verhaal teen die maatskappy sonder sessie van aksie te verleen."

[33] At 805 B-C.

[34] At page 21 column 1.

is given a claimable right.[35] Elsewhere in his article Klopper laments the fact that Cachalia JA's interpretation of section17 (5) is in direct conflict with the actual wording of the section.[36] He does not explain why he chooses to deviate from the actual wording of the section.

[38] It just does not make sense to give the third party an enforceable claim but deny the supplier the right to enforce its claim. This anomaly is clearly demonstrated in **Abdool – Carrim**, where it was said that:

"For if a third party's claim is valid and enforceable and the supplier's is not, the Fund would still be liable to compensate the third party who in turn remains contractually liable to the supplier. The consequence is that a third party may be faced with a claim from a supplier without having been paid and would be denied the benefits of section 17(5) without any fault on his or her part. This result could hardly have been what the draftsman intended moreover, it is illogical for the third party's claim to be valid and enforceable but the supplier's accessory claim not (except where the supplier has not complied with the prescribed formalities)".[37]

[39] Klopper's assertion that section 17(5) read with section 24(3) does not give a supplier the right to issue summons for the recovery of its costs is wrong. The magistrate's reliance on Kloppers article was therefore totally misplaced.

[40] Mr Zietsman argued that if we find that the supplier has a right to claim directly from the Fund we should dispose of the matter by making the appropriate costs order that the magistrate should have made. He urged as to find as a matter of policy, that costs orders should not be made in

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[35] In **Avondson Trust (Pty) Ltd. v Wouda** 1975 (2) SA 444 (TPD) at 450 H to 451 A, F.S Steyn J albeit in another context said that the definition of the noun "claim" by the leading dictionaries confirm the essential nature of a claim to be, in contrast to a right against another person in general, the assertable nature of the right.

[36] Page 20 column 1.

[37] Paragraph 12

favour of suppliers that institute action before the third party's claim has been finalised or before the third party has submitted a claim and complied with the prescribed procedure. As authority for this proposition he relied on the remark by Cachalia JA where he said:

> "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 prescribed as an accessory claim."[38] (My underlining)

[41] Cachalia JA was not stating a principle. It was an obiter remark. The supplier may, in my view, independently without waiting for the third party to submit his/her claim, claim its costs directly from the Fund. The accessory nature of the supplier's claim lies not in its dependence on the third party actually submitting or prosecuting his/her claim but in it establishing that the third party is entitled to claim the costs as part of his/her compensation from the Fund. In essence what the supplier will have to prove is that the third party would have been successful (totally or partially) if the latter instituted a claim against the fund which included the supplier's costs.

[42] In order to be successful the supplier will have to prove that the third party is (at date of summons) entitled to claim the costs as part of his/her compensation (whether or not she/he has submitted a claim); that it rendered medical services goods or accommodation to the third party; that it complied with all the formalities in the Act and that its claim does not

[38] See **Van der Merwe v RAF** at pargraph 7

exceed the amount which the third party could, but for section 17(5), have recovered from the Fund.

[43] If the supplier's claim is made subject to the third party actually submitting a claim it would defeat the purpose of the section. Many people who sustain injuries caused by the negligent driving of an insured driver as a result of which they receive accommodation or other medical services from suppliers do not submit third party claims, for whatever reason, even though they are entitled to. It would be absurd to negate a supplier's right to claim its costs where a third party who is entitled to compensation which includes the supplier's costs does not claim from the Fund.

[44] I do not consider it wise to make such a policy pronouncement in view of the supplier's right to independently claim its costs from the Fund. In any event, Mr Zietsman could not tell us why the Fund did not pay the R280.00 after it received the supplier's claim on the prescribed form before summons was issued. Mr Snellenberg was not in a better position; he too did not have all the details at hand. The magistrate's finding robbed the parties of the opportunity to address these and other issues. In my view the issue of costs should be argued before the same or another magistrate. The magistrate should then apply his/her mind to the arguments and exercise his/her discretion judicially.

[45] There is no reason why the costs of the appeal should not follow the success.

[46] I accordingly make the following order:

a) The appeal is upheld with costs.

b) The magistrate's order is set aside and substituted by an order that the appellant (supplier) is entitled to claim its costs directly from the respondent (Fund).

c) The matter is remitted to the court a quo to hear argument in respect of costs and to make an appropriate costs order.

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C.J. MUSI, J

I concur

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M. H. RAMPAI, J

On behalf of the appellant:	Adv N Snellenberg
Instructed by:	Podbielski Mhlambi Inc. WELKOM
On behalf of the respondents:	Adv PJJ Zietsman
Instructed by:	Neumann Van Rooyen Sesele. WELKOM

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