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CONTENTS · INHOUD*No.**Page
No. Gazette
No.***GENERAL NOTICE****Transport, Department of***General Notice*

487	Road Accident Fund (Transitional Provisions) Bill, 2012: Notice of Intention to Introduce the Bill	3	35426
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GENERAL NOTICE

NOTICE 487 OF 2012

DEPARTMENT OF TRANSPORT

NOTICE OF INTENTION TO INTRODUCE THE ROAD ACCIDENT FUND (TRANSITIONAL PROVISIONS) BILL, 2012

The Minister of Transport intends introducing the Road Accident Fund (Transitional Provisions) Bill, 2012 in Parliament during the year 2012. An explanatory summary of the Bill is hereby published in accordance with Rule 241 (1) (c) of the Rules of the National Assembly and Rule 186 (1) (b) of the Rules of the National Council of Provinces.

The aim of the Bill is to:

- (a) Provide for transitional measures in respect of certain categories of third parties whose claims were limited under the Road Accident Fund Act, 1996 (Act No. 56 of 1996); prior to 1st August 2008 and ;
- (b) to provide for matters connected therewith.

Copies of the Bill can be obtained from Adv Masombuka at the Department of Transport, Forum Building, Conner Struben and Bosman Street, Pretoria. Tel (012) 309 3888, Email address masombuA@dot.gov.za

MEMORANDUM ON THE OBJECTS OF THE ROAD ACCIDENT FUND (TRANSITIONAL PROVISIONS) BILL, 2012

1. BACKGROUND

1.1 Prior to 1 August 2008, the (the old Act), provided that most categories of road accident victims could claim full compensation from the Road Accident Fund (“the Fund”), however, certain categories of claimants had their claims limited by section 18 of the old Act, for example passengers conveyed in a taxi were limited to claiming a maximum of R25 000 from the Fund, where their driver’s negligence was solely responsible for the accident in question.

1.2 In enacting the Road Accident Fund Amendment Act, 2005 (Act No.19 of 2005) (Amendment Act), Parliament recognised that these limits which applied only to certain categories of passengers were inequitable, unfair and discriminatory. Parliament therefore abolished those provisions and replaced them with provisions that have a far more generous limit on claims, and which limits apply to all claimants. The constitutionality of this new approach was upheld by the Constitutional Court.

1.3 The Amendment Act however, applies only to causes of action arising after its commencement on 1 August 2008. As a result, claimants whose claims were limited (or capped) by section 18 of the old Act and whose causes of action arose prior to 1 August 2008 derived no benefit from the regime created by the Amendment Act. These

claimants are still subject to the unfair, inequitable and discriminatory limitations to their claims under section 18 of the old Act.

1.4 On 17 February 2011, the Constitutional Court in *Mvumvu v Minister of Transport and another* CCT 67/10 [2011] ZA CC 1 concluded that limitations or certain provisions in section 18 of the old Act were unconstitutional and invalid to the extent in that they constituted unfair discrimination. This finding was correctly not opposed by the Minister of Transport (the Minister) or the Road Accident Fund (the Fund).

1.5 The Constitutional Court agreed with the Minister and the Fund that it would not be appropriate to declare the sections invalid with immediate or retrospective effect. Instead the Constitutional Court held that "Parliament is best suited to determine the extent of compensation to which the applicants are entitled". The Constitutional Court accordingly suspended the declaration of invalidity for 18 months. The Constitutional Court also added that while its judgment only concerned three of the caps created by section 18 of the old Act, there were three other caps created by the same section which had not been before the Constitutional Court. It held that "it is desirable that Parliament address the plight of those affected by these subsections as well."

1.6 It is therefore clear from the judgement of the Constitutional Court that –

- Parliament must devise a new regime applicable to a discrete category of road accident victims – that is those who were involved in accidents prior to 1 August 2008 and whose claims are capped by section 18 of the old Act.

- The legislation concerned should propose some middle ground which increases the compensation available to the victims but does not amount to full compensation; and
- The legislation should not have the effect of forcing all road accident victims affected to be subject to the Road Accident Fund Act, 1996 (Act No. 56 of 1996), as it stood after 1 August 2008 as this would retrospectively remove the rights that they had under the old Act.

2. OBJECTS OF BILL

2.1 The Road Accident Fund (Transitional Provisions) Bill, 2012 (Bill) seeks to provide for transitional measures in respect of certain categories of third parties whose claims were limited under old Act, and give effect to the Constitutional Court judgement of *Mvumvu v Minister of Transport*.

2.2 The proposed clause 1 defines the words "new Act" and "old Act". Clause 1 also defines "third party" as a person who has a right to claim in terms of section 17 of the old Act and whose claims have not prescribed or been finally determined when the Bill commences operation. This is necessary both for the purposes of certainty and to avoid the undesirable consequences of re-opening finalised cases. The Constitutional Court has repeatedly held that this is a permissible approach and has indeed adopted this approach in its own remedial orders.

2.3 The proposed clause 2(1) affords a choice to road accident victims whose cause of action arose prior to the Amendment Act coming into operation. While the default position is that they will become subject to a version of the new Act, they can elect if they prefer to remain subject to the old Act. Thus a victim who wished to be subject to the new Act, will get all the benefits of the new Act, including an entitlement to claim up to R25 000 in general damages even if not seriously injured. This is in addition to claims for medical expenses, loss of income and support and, if the claimant is seriously injured, uncapped general damages.

2.4 Clause 2(1)(c) and (d) makes it clear that a victim obtaining the benefits of the new Act cannot claim double compensation from the Fund in respect of a motor vehicle accident. For instance, if they have obtained compensation from the private wrongdoer, this must be disclosed and deducted from the amount claimed from the Fund.

2.5 Clause 2(1)(f) provides that where a victim chooses to have his or her claim governed by the new Act, he or she is no longer entitled to sue the owner, driver or employer of the driver of the motor vehicle concerned for damages. This is consistent with the scheme of the new Act and was found to be constitutionally permissible by the Constitutional Court.

2.6 The proposed clause 2 deals with all six discriminatory caps under the old Act.

4. CONSULTATION

The draft Bill was published for public comments in *Government Gazette* No.34530.

Comments were received from various stake holders and where necessary, they have been incorporated in the Bill.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Transport are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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