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Your Reference:
Our Reference: L DE SOUZA-SPAGNOLETTI/hm/MOF 40 ; MOK110; MOL49

11 February 2019

TO: THE LEGAL PRACTICE COUNCIL

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Dear Sir(s) / Madam(s),

RE: CHALLENGE TO REGULATION 3 OF THE RAF REGULATIONS MADE UNDER GN770 OF 2008 AS AMENDED
RULE 16(A) NOTICE

The above matter has reference.

We advise that we are in the process of challenging the constitutionality of provisions of the RAF regulations, in particular the provisions of Regulation 3.

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BACKGROUND

We have found for some years now that the HPCSA has lacked both the expertise and the objectivity to make accurate findings on the seriousness of accident victim injuries within the context of Regulation 3.

The writer has on numerous occasions challenged incorrect findings made by the HPCSA. Our courts readily overturn such adverse findings but they have not been prepared to make a determination on seriousness itself. The result is that matters are referred back to the HPCSA who simply renders further adverse findings.

The procedure prescribed in Regulation 3 is cumbersome and the operation thereof ineffectual. We do not believe same to be constitutional.

CHALLENGE

We have and continue to launch various applications against the Minister of Transport, the HPCSA, the Chairperson of the HPCSA tribunal and the RAF.

Our challenges seek a finding on:-

- Whether the provisions of Regulation 3 are *ultra vires* Section 17(1) and Section 17(1A) of act 56 of 1996;
- Whether the impugned Regulations are unconstitutional in that they are inconsistent with Section 27(1)(c) and/or Section 34 of the Constitution;
- Whether a "*reading in*" of wording would cure the aforementioned unconstitutionality and if so what such wording should read;
- Whether Section 17(1A)(b) of the RAF Act is inconsistent with Section 27(1)(c) and/or Section 34 of the Constitution

For your records we attach hereto our notice in terms of Rule 16(A) which has been posted on the Court's notice Board designated for such purpose.

The issues raised are close to the hearts of many specialist personal injury attorneys. We believe that accident victims are being repeatedly prejudiced by the cumbersome, unwieldly and ineffectual operation of Regulation 3.

PROBLEMS WITH THE SYSTEM AND FEEDBACK FROM THE PROFESSION

We have encountered countless problems over the last few years including *inter alia*:-

1. Significant delays in:-

    1.1 The RAF making an election in terms of Regulation 3(3)(dA). Despite the peremptory language of the Regulation in relation to the 90 day period prescribed, the RAF can currently make its election at any time, even at the steps of court and on the day of trial. It is to be noted that the HPCSA has in the past required plaintiff attorneys to apply for condonation if their RAF5 dispute resolution documentation is submitted outside of the 90 day period prescribed in Regulation 3(4)(a). What is good for the goose however, is apparently not good for the gander and we have not once seen the HPCSA request condonation from the RAF on a late 3(3)(dA) election;

    1.2 The HPCSA acknowledging receipt of dispute resolution documentation;

    1.3 The HPCSA bringing disputes before an appeal tribunal. We have regularly launched applications to compel the HPCSA to fulfil its legislative obligations;

    1.4 The HPCSA notifying plaintiff attorneys of the outcome of disputes.

2. The constitution of the tribunals: We have noted problems across the board but in particular with the assessment of traumatic brain injuries. The outcome diagnosis of a traumatic brain injury is determined via assessment by a number of crucial

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medical and/or healthcare practitioners. These experts as a matter of course include clinical psychologists, speech/language audiologists and pathologists and psychiatrists. Despite repeated objection to the inappropriate constitution of HPCSA appeal tribunals, we see traumatic brain injuries regularly being assessed by a panel of a neurosurgeon and three orthopaedic surgeons.

3. Unjustified rejection of expert reports: We have seen unopposed expert reports rejected by tribunals who not only have inadequate/inappropriate expertise to assess outcome diagnosis, but also no reasonable or rational basis upon which to reject the findings made by such experts. We believe there to be a lack of objectivity on the part of the HPCSA in the assessment of all manner of injuries. In fact, we have encountered situations where experienced, knowledgeable defendant attorneys have managed to procure an instruction on general damages in circumstances where a non-serious finding has been handed down. These circumstances are however few and far between and the accident victim for the most part is left with no viable remedy to enforce his entitlement to general damages.

We would very much appreciate you canvassing the below mentioned issues with your members. We believe it essential for the Court to hear from both individual members as well as the various bodies within the profession.

Please would you circulate this request and thereafter provide us with formal feedback from both members as well as from your organisation.

We look forward to hearing from you.

Yours faithfully

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