

RESPONSE TO PROFESSOR KLOPPER

“Understanding RAF Collapse and its Impact on Road Victims”

All information contained in this response must be attributed to the Road Accident Fund Chief Executive Officer, Collins Letsoalo

I have noted an article, in the Star Newspaper published on 15 October 2024, penned by Zelda Venter as “expert analysis”, quoting extensively from our most esteemed Emeritus Professor Hennie Klopper. I must at the outset state for the record that I respect the opinions of Prof. Klopper.

As a self-taught student of Law of Third-Party Compensation in South Africa, I have learned a lot from “the Prof”, as I would call him. A complimentary copy of his book “The Law of Third Party Compensation in South Africa” came in handy as one navigated legalese and tried to understand this complex terrain of “third-party compensation”. His seminal work on legal fees titled *Is the Road Accident Fund’s litigation in urgent need of review?* was, in fact, used as a basis for the current turnaround strategy of the RAF; it highlighted the need to change the litigious system for a settlement-driven processing of claims. He was invited to the RAF strategic planning session in 2020 to impart his knowledge and wisdom to the incoming leadership of the RAF, executives and the board.

I am, however, starting to be concerned that my mentor has derailed from his mission to impart knowledge and wisdom to us, his students in this field. He has comments that are misleading those that follow his thought leadership. The Prof. taught me that, for me to be successful, I must always be data led in whatever interventions I proposed to implement at the RAF; much expected from an academic. We, however, know, as students of economics, that *ceteris paribus* (all things remaining constant) does not exist in real-life situations. As an executive, I knew that the decisions I would take in my first 100 days in office would determine the success or failure of the turnaround mission, armed with the little data available.

In the article, the Prof. is quoted as saying, “While it is clear that RAF is experiencing financial problems, much attention is being devoted to the current management’s attempts to solve these issues. These range from the reclassification of the road collision compensation system as a social benefit scheme, to advocating for the restriction of medical costs payments funded by medical aid, compensation for foreigners and high-income earners and removal of attorneys from the claims process.”

It is further stated that “according to him three factors determine the fortunes of the RAF:

- The level of risk to which the Fund is exposed.
- The funding level.
- The efficiencies in the RAF’s execution of its statutory obligations to investigate and finalise claims.”

With all due respect to the Prof., he has not said anything new; all he is doing is to define the problem by aggregating the challenges here. He is telling us that we failed to define the problem, and the problem is a high crash rate in South Africa. It would seem to us since 1942, that was the problem. “The higher the incidence of road traffic collisions, the greater the RAF’s financial exposure.”

The questions to the Prof are: “What then?” Do you just identify the problem and end there? Are we not supposed to be problem solvers? Do you call for law enforcement and change in behaviour? How is that going to assist the RAF in the short term, at least not to collapse?

As RAF management, we are expected to turn this *inheritas demnosa* around as aptly described by Judge Bertelsmann in *Ketsekele vs RAF*. He calls it a cursed inheritance that is bound to fail eventually.

The RAF leadership had a mandate to not only define the problem statement and come with academic arguments but also had to develop measures to turn the Fund around. And, no, we did not reclassify the RAF into a social benefit scheme. You should know that this was the case at least since 1986, when for about three months South Africans did not have a third-party insurance scheme, as it had collapsed in the hands of the private sector. A new scheme was developed, which was to be funded using the fuel levy.

The South African Reserve Bank Institutional Sector classification Guide of 1998 classified the RAF as a Social Security Fund, the Constitutional Court in *LSSA vs Minister of Transport and Others* defines the RAF as “part of South Africa’s social security system”, the 2011 FSB Directive 1 issued in terms of Financial Supervision of the Road Accident Fund Act (FSRAF Act) classifies the RAF as “fundamentally a Social Security Fund”, and the Public Sector Classifications Committee (PSCC) reaffirmed this classification in November 2022. As you have taught us, Prof., that we must use evidence and data, where is this evidence of the RAF being an insurance scheme after 1986?

And, no, we are not advocating for restrictions of medical aid payments paid by medical aid schemes. We state that:

1. The RAF is not an insurer, and the subrogation principle does not apply to the Fund.
2. The RAF Act does not provide for claims by medical schemes; you will not find it anywhere in the RAF Act.

We are advocating for the exclusion of foreigners because South Africans also have no right to claim from other countries' social benefits, developed or first-world countries included. We have, nevertheless, continued to pay hefty sums to the foreign nationals that are or were in the country legally; the law expects us to do so. The highest ever paid out claim by the RAF was to a foreigner, a Swiss national.

We refuse to ignore the Immigration Act. Section 42 of the Act states unequivocally, "Subject to this Act, and save for necessary humanitarian assistance, no person shall aid, abet, assist, enable or in any manner help an illegal foreigner." Section 44 of the same Act goes further and says, "When possible, any organ of State shall endeavour to ascertain the status or citizenship of the persons receiving its services and shall report to the Department any illegal foreigner or any person whose status or citizenship could not be ascertained." The RAF respects the rule of law and shall continue to abide by it.

For the above reasons, the RAF insists that foreigners must provide their status when the accident happened. The RAF Act also expects the Fund to only compensate for accidents that happened "within the republic". We then must ensure that the claimant "third party" was within our borders when the accident happened.

More importantly, social benefits need to be progressive and equitable. This implies that the most vulnerable must be the only beneficiaries of a social benefit scheme of any type. We cannot have billionaires having "the right to claim from a social benefit scheme", it is just absurd to say the least. The scheme cannot also need litigation to solve it. Why does a claimant need to "prosecute" a claim? Why do you need to "sue" for you to get your benefits? Why do you need a lawyer to access your social benefits? Where in the world is that done? Litigation cannot be an efficient way to claim benefits.

You will then get RAF scapegoated for "clogging the courts"; the reality is that RAF is always a defendant or respondent in these matters. The issuer of summons is the plaintiff or claimant. The claimant is the dominus litis, at least from what the Prof taught us. The RAF is then expected to defend all these matters; another absurdity. In Daniels vs RAF, the court found this practice to be a dereliction of duty and a waste of state resources. Honorable Judge Bertelsmann also find this a dereliction of the Fund's constitutional duty, as a state entity. Since the new model the RAF has increased its settlements achieved through agreement to 81,9% from 56%, yet scapegoating continues.

When the legal fraternity is then faced with their "Frankenstein", they then do the inconceivable. They volunteer to be Acting Judges and preside over RAF matters. Yes, "they become referees in a league they participate in as players or coaches". We are then saddled with what The Star newspaper describes in the article - "As problems escalate at the RAF, legal experts call for urgent reform" - 16 October 2024, where "Leigh de Souza-Spagnoletti, an attorney, mediator and acting Judge" was interviewed. The very next week Ms. de Souza-Spagnoletti will be in the same court representing her clients against the RAF as a plaintiff attorney, in front of another Acting Judges who is also a plaintiff attorney in RAF matters,

who may also have been in front of Ms. Souza-Spagnoletti herself. We raised these as a conflicts of interest and this has fallen on deaf ears.

The legal fraternity is calling for “urgent reform”. It would seem we are in the arena of confabulations. We have been calling for reforms since 2019; in fact, since 2002 after the Satchwell Commission. It is the legal fraternity that wants the status quo to remain. They fought successfully the RABS Bill and now they are going for the RAF Amendment Bill and hoping to defeat it as well.

I probably will, later, have my tea session with the Prof to canvass his views and maybe also learn why he changed his views. It will be an interesting conversation and I’m looking forward to it. In the meantime, I remain convinced of his seminal work on reducing litigation and increasing settlements by agreement, no need to litigate unnecessarily.

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