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MVA PRACTICE

UNDER THE

MOTOR VEHICLE ACCIDENTS ACT, 1986

by

DUDLEY PERCIVAL HONEY

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P R E F A C E

Certain portions of this work were completed some time ago and, with the permission of the University of the Orange Free State, were incorporated in the MVA Handbook which was published and distributed under the auspices of the Association of Law Societies of South Africa ("the Association") as part of their Consulta series. The work could not thereafter be completed because it became known that South Africa would be converting to a fuel levy system, which would require the preparation and promulgation of a new Act.

In my capacity as Chairman of the Association's Standing Committee on MVA matters I was privileged enough to be intimately involved with not only the evidence submitted to the Grosskopf Commission of Enquiry, but also the negotiations which followed after the Commissions's Report was tabled in Parliament. I have learnt much from my involvement in this development process. I have leart even more in the researching and writing of this book. It gives me great pleasure, and I deem it an honour, to be able to share this knowledge with my colleagues.

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For not only patiently and courteously discussing the innovations contained in the new Act with me, and explaining the motives and the objectives which were sought to be achieved, but more particularly for lending an unruffled and co-operative ear to my sometimes explosive responses to indicate my views regarding the measure of success in the attainment of those objectives.

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CHAPTER 1

INTRODUCTION

1.1 LAPSING OF THE THIRD PARTY SCHEME BASED ON INSURANCE

At midnight on the 30th of April 1986 the so-called Third Party scheme based on principles of insurance lapsed. Insurance tokens which had been sold for the insurance year ending on that date expired, as did the Agreement between the MVA Fund and its fourteen consortium members. The whole scheme jolted to a stop - and there was nothing to replace it, no act, no regulations, no new agreements. In short, apart from uncertainty - of which there was an ample supply - there was nothing.

This lacuna lasted from the 1st of May 1986 until the 10th of September 1986 when the new Act, the Motor Vehicle Accidents Act, No 84 of 1986, was promulgated in Government Gazette no 10419. This was followed two days later by the publication of the Regulations which appeared in Government Gazette no 10430 dated the 12th of September 1986. On the same date a Notice (no 1869) appeared in the same Gazette announcing the appointment of twelve so-called Appointed Agents who would under Section 6 (1)(a) of the new Act "handle" certain claims for bodily injury or death caused by

or arising out of motor accidents within the Republic of South Africa. The Notice in question also contained, as Schedule B, the so-called Date Schedule according to which claims arising from the driving of tokenless vehicles would in future be distributed among the twelve participating Appointed Agents according to the date on which the accident occurs which gave rise to the claim.

1.2 The promulgation of the Act and Regulations so long after the demise of the Scheme conducted under Act 56 of 1972 immediately gave rise to a need for an interpretative - but practically orientated - Guide for use by practitioners. Not only have all available handbooks on the MVA legislation become obsolete to a very large extent; the new Act and Regulations contain a number of innovative concepts which introduce radical changes to the Scheme as it was understood under earlier MVA legislation.

* The principle of insurance has been entirely excised from the Scheme and replaced with a fuel levy system.

* The token of identification - and particularly the absence of such token on a vehicle - has undergone a radical change of character.

* Agricultural (and other) implements, caravans and trailers are now included in the definition of "motor

vehicle", with the result that a large number of "vehicles" are now "covered" under the Scheme which were excluded under its predecessor.

* An Advisory Committee has been created on which the private sector has formidable representation, to participate in the implementation of the Scheme.

* The MVA Fund as well as the Appointed Agent are now enjoined to "handle" claims "subject to the provisions of the Regulations", and the traditional wide liability resting on them under Section 8 (1) of the Act may only be implemented "on the prescribed conditions".

* A system of interim advance payments has been introduced.

* The provisions placing a quantitative limitation on compensation payable to passengers have been rearranged and streamlined, and the ceiling of the compensation has been raised.

* Subtle but far-reaching innovations have been introduced with regard to the exclusion of liability under the Act, and a new category of persons is now hit.

* Two important aspects traditionally forming part of the MVA legislation have been removed from the Act, but re-inserted in the Regulations.

* An attempt has been made to avoid earlier loopholes in the provisions reserving MVA work largely to the attorneys' profession.

* Provisions have been introduced which seek to achieve an early exchange of evidence on the merits.

* To avoid collusion between certain parties (bearing in mind that Appointed Agents will be paid R450 for each claim handled), penalties have been imposed with regard to the furnishing of false information relating to tokens on vehicles involved in accidents.

* Sweeping changes have been made to the whole concept of suspension of prescription.

* Important amendments have been effected (albeit perhaps inadvertently) to the circumstances under which an Appointed Agent may enforce a right of recourse.

* A last-minute bid to salvage and re-introduce elements akin to the old self-insurer has resulted in a

somewhat inadequate and unsatisfactory end-result.

* Confusion has been created regarding a claim arising from the death of a breadwinner after the commencement of the Act (1st May 1986) as a result of injuries sustained in an accident which occurred prior to such commencement.

* With the demise of the uninsured vehicle, the MVA Fund will henceforth handle only claims relating to so-called unidentified vehicles.

* Some inexcusably inept - but venomous in effect - regulations have been promulgated enabling the Appointed Agent to thwart the claimant's right to issue summons and to insist, under penalty of repudiation, on the furnishing of evidence - and yet more evidence - on the merits, and these Regulations become more ominous against the background of liability under the Act being overridden by the draconian Regulations in question.

* A further amendment to the Regulations authorises the statutory medical form being substituted, in the case of instant death, by a copy of "the relevant charge sheet", but only "in the case of a prosecution of the person who caused the deceased's death", thus raising the question as to whether such charge sheet is

admissible where the person charged was acquitted.

* The claimant's traditional right to demand that the owner furnish documents whereby the Appointed Agent may be identified have been scrapped, thus leaving the claimant to "beg, borrow or steal" the required information from other sources.

* Significant amendments have been made to the various forms used in the implementation of the Scheme, including the consolidation of the claim form and the amplification of the accident report form.

* Annual renewal of tokens has been discontinued.

* The disposal of settled claims has been simplified.

All of these, and other innovations have necessitated a measure of interpretative analysis and original thought not normally appropriate in a practical guide-book, but the circumstances naturally rendered this imperative. In addition the authorities in other handbooks available to practitioners required updating.

1.3 And still the already staggering practitioner has not reached the end of the road of innovation. Even before he had an opportunity to acquaint himself with the new concepts and procedures introduced by Act 84 of 1986, the

establishment of the "Commission of Inquiry into the handling of litigation in terms of the Motor Vehicle Accidents Act, 1986", (the Vivier Commission) was announced by Proclamation in Regulation Gazette No 4003 dated 19th September 1986. At the time of completion of this work the Vivier Commission had concluded its Inquiry but the Report was not yet available. The main enquiry which the Commission had to address was the possible establishment of a Special MVA Court with its own rules and procedures specifically designed for the processing of MVA claims and litigation. No doubt the Commission's recommendations will again result in dramatic inroads into the traditional claims procedures known to practitioners.

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CHAPTER 2

HISTORICAL BACKGROUND AND THE LEAD-UP TO ACT NR 84 OF 1986

2.1 MVA legislation has been on our statute books since the promulgation of the Motor Vehicle Assurance Act, Nr 29 of 1942. This was followed by the Compulsory Motor Vehicle Insurance Act, Nr 56 of 1972, and finally by the Motor Vehicle Accidents Act, Nr 84 of 1986.

2.2 In recent years two Commissions of Enquiry have been appointed to consider, inter alia, the abolishment of the requirement of fault and the introduction of a no-fault insurance Scheme. In 1974 Commission of Inquiry into certain aspects of compulsory motor vehicle insurance ("Wessels Commission") rejected such a Scheme, but stated that the concept of no-fault insurance was so complex that its consideration required a judicial Commission of Enquiry. (The Wessels Commission was headed by the then Chief Magistrate of Pretoria.) See paragraph 2.8.1. of the Report.

2.3 The subsequent Commission of Inquiry into certain aspects of compulsory motor vehicle insurance (1981)("The Grosskopf Commission") was given a mandate to enquire into and make recommendations in connection with the following aspects:

2.3.1 The desirability or otherwise of introducing a system of no-fault insurance;

2.3.2 The desirability or otherwise of making balance of third party insurance compulsory;

2.3.3 The desirability or otherwise of increasing the membership of the Consortium of Companies authorised to undertake third party insurance;

2.3.4 The desirability or otherwise of imposing a levy on fuel to finance the MVA Scheme.

2.4 The Commission was headed by Mr Justice E H Grosskopf and its Report was tabled during May 1985. It revealed that there had been a Majority Report as well as a Minority Report, the first-mentioned Report being submitted by six of the seven members of the Commission, and the latter Report being submitted by the single remaining commissioner, Mr J Keyser, who was then Manager of the MVA Fund.

2.5 The Commission unanimously rejected the concept of no-fault insurance and also unanimously rejected the idea of making balance of third party insurance compulsory. The Majority of the Commission also rejected the idea of a levy on fuel and furthermore proposed that all insurance companies be

allowed to participate in the MVA Scheme.

2.6 The Minority Report recommended:

2.6.1 That a levy be imposed on petrol and that the collection of funds and the handling of claims be assigned to the MVA Fund, which in effect would have amounted to nationalisation of the Scheme by excluding the private companies from it.

2.6.2 That an insurance premium be imposed on all vehicles not driven by petrol.

2.6.3 That all vehicles not self-propelled, such as trailers and caravans, be exempt from insurance.

2.7 It should be explained here that the idea of a fuel levy was motivated by the consequential nationalisation of the Scheme, it being submitted by the proponents of a fuel levy (the MVA Fund) that once the system was financed through a fuel levy, the need to retain the private companies in the Scheme fell away, and a State Corporation (the MVA Fund) could administer the entire Scheme and handle all claims.

2.8 The Majority Report rejected the idea of a fuel levy because it was not persuaded that a central State body could administer the Scheme more efficiently or more cost-

effectively than the private sector. In particular the Majority Report stated the following:

> "... we feel that at least it cannot be said that the proposed State Corporation would be cheaper or more effective in the long run than the present system. In this connection it must borne in mind that the members of the Consortium already have an existing widely spread network of branch offices ... throughout the country to satisfy the needs of the public, and that a State Corporation would suffer a loss in effectiveness without a similar infrastructure. If the State Corporation should create a similar network, the costs connected with its establishment and maintenance cannot be determined but would obviously be considerable. Besides which, the public would forfeit the advantages of competition between the various companies, especially as regards the rendering of service."

2.9 After the Commission had completed its investigations and hearings, but before the Report was tabled in Parliament, a significant new development intervened: the annual accounts of the MVA Fund were published during October 1984 which revealed that the Fund's expenditure had exceeded its annual income by some R82,6 million for the year 1982/83 and by no less than R217 million for the year 1983/84. The reasons for this were, briefly, the impact of inflation, increased awards to compensate for the erosion in the value of money, and the Government's refusal to increase the premiums which were still being maintained at the 1964 level. The publication of these accounts revealed a position of crisis proportions, and it was immediately apparent that the Scheme could not be saved from financial disaster unless premiums

were increased immediately by some 200 % or even 300 %. Such a step was politically unacceptable, and the result was that a levy on fuel presented itself as an easy way out of the predicament.

2.10 By the time the Grosskopf Commission Report was tabled in Parliament on the 7th May 1985 a confidential Report prepared by the Department of Transport had already been made available to the Minister of that Department. In its report the Department once agained pressed for a levy on fuel, with nationalisation of the Scheme in the hands of the MVA Fund as a necessary consequence.

2.11 About the time when the report was tabled in Parliament, information reached the Association of Law Societies of South Africa ("the Association") that the Government was considering acceptance of the Minority Report. The Association made enquiries and discovered that the nationalisation of the Scheme in the hands of the MVA Fund was indeed on the point of becoming a fait accompli. During an urgent interview with the Minister of Transport Affairs it was made clear to the Association that the question of a levy on fuel was not negotiable; there was no way the Cabinet could be persuaded to accept the vast premium increases called for by the retention of the existing insurance system. Nevertheless, the Association's representatives were able to persuade the Minister:

2.11.1 That a levy on fuel need not necessarily result in the nationalisation of the Scheme in the hands of the MVA Fund;

2.11.2 That such a step would be diametrically opposed to the Government's declared policy of privatisation;

2.11.3 The the role of the private companies could still be retained in the system.

Pursuant to this meeting the Minister instructed his Department to convene a meeting of all interested parties with the specific view to working out the mechanics of a Scheme representing a marriage between the current system and a fuel levy.

2.12 A series of meetings and protracted negotiations followed. These eventually culminated in an agreement which provided that the new Scheme should embrace the following elements:

2.12.1 The companies would remain in the Scheme to receive notification of accidents and to handle claims. (The MVA Fund had previously proposed that all claims be lodged with and handled by the Fund.)

2.12.2 Companies would be paid a global amount of R450 for each

claim handled.

2.12.3 As from the 1st of May 1986 motorists could obtain permanent tokens for each of their vehicles free of charge from any participating company. (The MVA Fund and the Insurance Association had proposed that all tokens be scrapped and that all claims be sent to the MVA Fund who would distribute such claims amongst the various insurance companies pro rata to existing market share-holding.)

2.12.4 The display of the permanent token would be obligatory as in the past, but in respect of any vehicle not displaying a token at the time of any accident, claims arising from such accident would be distributed amongst the participating companies in relation to existing market share-holding. For this purpose the 365 days of the year would be allocated to the various companies in such a manner that each company would receive its pro rata share of all claims arising from accidents which occurred during each calendar month.

2.12.5 Since there would no longer be "uninsured vehicles", the MVA Fund would henceforth handle only claims relating to so-called unidentified vehicles.

2.12.6 An agreement for the handling of claims would be entered

into with a number of insurance companies for a period of two years.

2.12.7 A joint proposal incorporating the aforementioned elements would be submitted to and considered by the Cabinet early in 1986.

2.13 It so happened that Parliament had many other more pressing matters to consider during the early part of 1986, and the new Act was not promulgated before the 10th of September 1986. The void which had existed from the 1st of May 1986 was remedied by the fact that the new Act was given retrospective effect as from the said date.

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CHAPTER 3

COMMENTARY ON THE ACT AND ITS PRINCIPLES

MOTOR VEHICLE ACCIDENTS ACT, NO 84 OF 1986

TO PROVIDE FOR THE PAYMENT OF COMPENSATION FOR CERTAIN LOSS OR DAMAGE UNLAWFULLY CAUSED BY THE DRIVING OF CERTAIN MOTOR VEHICLES; AND TO PROVIDE FOR INCIDENTAL MATTERS

(ENGLISH TEXT SIGNED BY THE STATE PRESIDENT)

DATE OF COMMENCEMENT: 1ST OF MAY 1986

DATE ASSENTED TO: 29TH AUGUST 1986

DATE OF PROMULGATION: 10TH OF SEPTEMBER 1986

Be it enacted by the State President and the Parliament of the Republic of South Africa, as follows:

Definitions.

1. In this Act, unless the context indicates otherwise—

(i) "appointed agent" means an agent appointed under section 6 (1) *(a)*; (i)

(ii) "Black authority" means—

(a) the government of any territory which by or under any law has been or is declared to be a self-governing territory within the Republic;

(b) the government of any area for which a legislative assembly has been or is established under the National States Constitution Act, 1971 (Act No. 21 of 1971); (xiii)

(iii) "business" does not include any unlawful business; (ii)

(iv) "convey", in relation to the conveyance of a person in a motor vehicle, includes—

(a) entering or mounting the motor vehicle in question for the purpose of being so conveyed; and

(b) alighting from the motor vehicle in question after having been so conveyed; (xv)

(v) "Director-General" means the Director-General: Transport; (iii)

(vi) "lift club" means ~~any~~ club of which—

(a) every member shall have a turn to convey or cause to be conveyed by means of a motor car the members of such club or other persons designated by such members to or from a specified place for a specified purpose; or

(b) every member is the owner of a motor car and of which one or some of its members shall by means of a motor car of which he is the owner or they are the owners, as the case may be, convey or cause to be conveyed the members of such club or other persons designated by such members to or from a specific place for a specific purpose; (xi)

(vii) "local authority" means any institution or body contemplated in section 84 (1) *(f)* of the Provincial Government Act, 1961 (Act No. 32 of 1961); (ix)

(viii) "Minister" means the Minister of Transport Affairs; (v)

(ix) "motor car" means a motor vehicle designed or adapted for the conveyance of not more than ten persons (including the driver); (vi)

(x) "motor vehicle" means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel or electricity and includes a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle; (vii)

(xi) "MVA Fund" means the Motor Vehicle Accident Fund mentioned in section 3; (viii)

(xii) "owner", in relation to—

(a) a motor vehicle which a motor dealer has in his possession during the course of his business and which may in terms of any law relating to the licensing of motor vehicles not be driven or used on a public road except under the authority of a motor dealer's licence of which the motor dealer concerned is the holder, means that motor dealer;

(b) a motor vehicle which has been received for delivery by a motor transport licence holder in the course of his business of delivering new motor vehicles and which has not yet been delivered by him, means that motor transport licence holder;

(c) a motor vehicle which is the subject of a hire purchase agreement, means the purchaser under the hire purchase agreement concerned;

(d) a motor vehicle under an agreement of lease for a period of at least 12 months, means the lessee concerned; (iv)

(xiii) "prescribe" means prescribe by regulation; (xvi)

(xiv) "regulation" means a regulation made under section 17; (x)

(xv) "reward", with reference to the conveyance of any person in or upon a motor vehicle, does not include any reward rendering such conveyance illegal in terms of any provision of the Road Transportation Act, 1977 (Act No. 74 of 1977); (xiv)

(xvi) "special circumstances" does not include any neglect, omission or ignorance. (xii)

COMMENTARY

3.1.1 APPOINTED AGENT

3.1.1.1 The Appointed Agent has now taken over the role of what was termed the "authorised insurer" under the 1972 Act. Whereas the latter Act dealt with an insurance scheme under which the authorised insurer was required inter alia to "sell" tokens of insurance, the role of the Appointed Agent is limited mainly to receiving notification of accidents and to the handling of claims. He derives his name from Section 6 (1)(a)(i) of the Act which requires the MVA Fund to "appoint .... agents .... to investigate or settle ... claims referred to in Section 8 arising from the driving of a motor vehicle in the case where the identity of either the owner or driver thereof has been established ...".

3.1.1.2 There are at present twelve such Appointed Agents and their identities appear from the Notice published in Government Gazette No 10430 dated 12th September 1986. (See Appendix III.)

3.1.1.3 Although the Appointed Agent acts on behalf of the MVA Fund in the investigation and disposal of claims, and therefore obtains reimbursement from the Fund of all amounts expended in terms of the provisions of the Act, it is the Appointed Agent and not the MVA Fund who must

be sued for payment of compensation in all claims other than those referred to

(a) In Section 6(1)(b) of the Act, i.e. claims arising from the driving of so-called unidentified vehicles, which lie against the MVA Fund; and

(b) In Section 5 (2)(b) of the Act, (read together with Regulation 5), which lie against the so-called Depositor.

3.1.2 BLACK AUTHORITY

Although the new definitions speaks largely for itself, it should be noted that it is not identical to its predecessor contained in Section 1 of the 1972 Act.

3.1.3 BUSINESS

3.1.3.1 It is to be noted that "business" does not include any unlawful business; it is identical to its predecessor under the 1972 Act.

3.1.3.2 The term relates to the provisions of Section 9 (1)(a)(ii), which in turn corresponds with the provisions of Section 22 (1)(a)(ii) of the 1972 Act.

3.1.3.3 This definition was introduced into the 1972 Act by Act

23 of 1980 after the Appeal Court had ruled, in Santam Insurance Company vs Tshiva and Maxanti vs Protea Assurance Company Limited, 1979 (3) SA 73 A at page 82 C, that in the absence of such a definition, a passenger conveyed in a so-called "pirate taxi" in the course of the business of the owner thereof, was not debarred from recovering compensation under the 1972 Act from the insurer of the vehicle in question. Since the business of a "pirate taxi" is an "unlawful business" the introduction of the definition had the effect of excluding such a passenger from compensation under Section 22 (1)(a)(ii) of the 1972 Act, but at the same time such passengers became entitled to compensation in respect of special damages only, by virtue of the provisions of Section 22 (1)(d) of the 1972 Act, i.e. Section 9 (1)(b) of the new Act.

3.1.3.4 But the lawfulness or otherwise of the owner's business is not the only element of the word "business" which has received the attention of our Courts. On the contrary, as to what constitutes the owner's business, there are a number of interesting reported cases, inter alia: Standard General Insurance Company Limited vs Hennop, 1954 (4) SA 560 A; Van Blerk vs African Guarantee and Indemnity Company Limited, 1964 (1) SA 336 A; Michaels vs AA Mutual Insurance Association Limited, 1970 (1) SA 570 C; AA Mutual Insurance

Association Limited vs Biddulph, 1976 (1) SA 725 A; Du Plessis vs Sentrale Raad vir Koöp Assuransie Beperk, 1976 (2) SA 492 T; Dlamini vs Southern Insurance Association Limited, 1980 (3) SA 533 Tk; Southern Insurance Association Limited vs Khumalo, 1981 (3) SA 1 A; Kunene vs Santam Insurance Company Limited, 1982 (1) SA 252 T; Mohan vs Santam Insurance Company Limited, 1983 (4) SA 221 N. More about this aspect will be set below in the commentary on Section 9 (1)(a)(ii).

3.1.4 CONVEY

3.1.4.1 Although no similar definition was contained in the 1972 Act, the gist of the new definition simply comprises the words previously contained in Sub Sections (b) and (c) of Section 22 (1) of the 1972 Act and which have consequently not reappeared in Section 9 (1) of the new Act. The transfer of the relevant words into the Definitions contained in Section 1 of the Act simply represents an attempt to abbreviate and streamline the provisions of Section 9 (1) of the new Act and to render these provisions more palatable to our Courts. This exercise in articulation follows upon the Appellate Division's stringent attack on the legislature's grammatical ineptitude in the case of Santam Insurance Company Limited vs Taylor, 1985 (1) SA

514 A at page 524 C.

3.1.4.2 It will be noted that the purpose with which a person enters or mounts a motor vehilce is important. This aspect receives more detailed attention in paragraph 3.9.13 below.

3.1.5 LIFT CLUB

3.1.5.1 The only references to lift clubs are contained in this definition and in Section 9 (1)(a)(iv) of the Act. Nowhere else, not even in the Regulations or in the Forms, are there any other provisions regarding lift clubs.

3.1.5.2 Under the 1972 Act a lift club could be "registered" simply by its members purchasing special tokens at an increased premium. Under the new Act there is of course no premium payable at all, let alone any increased premium. Moreover, there is no special token; members of lift clubs are simply subject to the same requirements regarding the display of tokens as laid down for all motorist by Section 2 of the Act.

3.1.5.3 Whether a lift club existed and whether an injured or deceased person was conveyed for the purposes of such lift club are questions of fact depending on the

circumstances of each case.

3.1.5.4 The definition is identical to its predecessor. Indeed, it is identical to the provisions introduced into the Definitions of the 1972 Act by Act Nr 23 of 1980 with effect from the 11th of April 1980.

3.1.5.5 Since the deletion (by G N R 337 in Government Gazette Nr 6826 of 22nd February 1980) of Sub-Regulations 10 (1)(b) and (c) of the Regulations promulgated under the 1972 Act, it has not been necessary for details to be furnished (to the authorised insurer) in respect of the members and vehicles in a lift club. Similarly, Regulation 10 A promulgated under the 1972 Act, relating to vehicles being required to be insured "for a specific purpose of use in terms of the Act", has no counterpart in the new Regulations. It is submitted that applicants for tokens are no longer required to advise the Appointed Agent of their intention of using their vehicles for purposes of a lift club. In the old application form (MVA 1) the applicant was specifically required to indicate the purpose of use of the vehicle in question; indeed, he was specifically required to indicate whether the vehicle was to be used for purposes of a lift club. The new application form (MV 1) requires nothing of the sort. (In fact, it requires no more than the name and address of the owner, the

make and type of the body of the vehicle, its registration number, and the number of the token issued in respect of it; it does not even require the applicant's signature. All of which explains why such a chaotic scramble by Appointed Agents to get their free tokens onto motor vehicles was possible.)

3.1.5.6 Consequently, other than organising themselves into a lift club upon terms which include all the essential elements set out in the definition, the members of such a club are not required to comply with any prescribed formalities.

3.1.5.7 Hodes (page 250) says the following about lift clubs:

> "The definition of "lift club" embraces two types of lift clubs. In the first type the members take turns to convey one another or cause the others to be conveyed. The members need not take exactly the same number of turns as long as every member does take a turn. Each member need not be the owner of a motor car. A member may designate persons to be conveyed other than members, for example his children, and may designate other persons to do the conveying on his behalf.
>
> In the second type of lift club every member must be the owner of a motor vehicle but every member's vehicle need not be used for the purposes of the club. As in the first type, other people's children for example may also be conveyed or be caused to be conveyed. All the members are not required to take turns and only the vehicles regularly provided for the use of the club need to be insured for the purposes of a lift club."

As already noted, the last-mentioned requirement no longer exists. In its place it could merely be stated what is self-evident from the definition itself, namely that the conveyance must be to or from a specific place for a specific purpose. It should be noted also that only a "motor car", as defined, may be used for purposes of a lift club. See paragraph 3.1.7 below.

3.1.5.8 For a full discussion of the historical development of MVA lift clubs see Hodes at pages 241 to 251; Maree vs AA Mutual Insurance Association Limited, 1970 (4) SA 717 T; Kruger vs Santam Versekeringsmaatskappy Beperk, 1983 (4) SA 445 O.

3.1.6 LOCAL AUTHORITY

3.1.6.1 It has been noted that "local authority" means any institution or body contemplated in Section 84 (1)(f) of the Provincial Government Act, Nr 32 of 1961.

3.1.6.2 Section 84 (1)(f) of the said Act refers to "Municipal Institutions, Divisional Councils and other Local Institutions of similar nature".

3.1.6.3 The only reference to a "local authority" in the Act itself is to be found Section 2 (2)(a) which deals with motor vehicles owned by certain bodies which are exempt

from displaying tokens of identification.

3.1.6.4 It is interesting to note that the new Regulations also refer to a local authority, namely in Regulation 8 (1)(c), but here the reference is to "any local authority mentioned in Section 70 of the Workmen's Compensation Act, 1941". Section 70 (1)(a) (ii) of the latter Act refers to "a local authority employing 500 or more European workmen ...".

3.1.7 MOTOR CAR

3.1.7.1 It has been noted that "motor car" means a motor vehicle designed or adapted for the conveyance of not more than ten persons (including the driver).

3.1.7.2 It should also be noted that the term "motor car" appears nowhere in the Act, except in the definition of "lift club" which was discussed in paragraph 3.1.5 above.

3.1.7.3 There is a subtle difference between this new definition and its predecessor. "Motor car" was previously defined as meaning "a motor car as defined in Section (1) of the Road Transportation Act, 1977 (Act Nr 74 of 1977)." The latter Section in turn defined "motor car" as meaning "a motor vehicle designed or adapted for the conveyance of not more than

nine persons (including the driver)." In effect therefore a "motor car" is now a motor vehicle designed or adapted for the conveyance of not more than ten persons (including the driver) instead of the nine persons previously provided for.

3.1.8 MOTOR VEHICLE

3.1.8.1 It has already been noted that "motor vehicle" means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel or electricity and includes a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle.

3.1.8.2 This is an extremely important definition since it specifies the type of vehicle contemplated by the legislature as giving rise to claims under Section 8 of the Act.

3.1.8.3 The new definition differs in significant respects from its predecessor which, for easy comparative reference, read as follows:

> "'Motor vehicle' means any vehicle designed or adapted for propulsion or haulage on a road by means of any power (not being exclusively human or animal power) without

> the aid of rails, and includes any trailer of such a vehicle, but does not include a vehicle weighing not more than 230 kg, which is specially constructed for the use of a person who suffers from a physical defect of disability, and which is designated to carry only one person."

It is also important to note that Section 1 of the 1972 Act contained a separate definition of "trailer" as follows:

> "'Trailer' does not include an agricultural implement not designed or adapted for the conveyance of persons or goods."

The new Act contains no separate definition of "trailer", the only reference to a "trailer" being found in the definition of "motor vehicle".

3.1.8.4 The following important differences between the former definition and the new one are to be noted:

(a) Whilst formerly a "motor vehicle" was described as any vehicle designed or adapted for propulsion or haulage on a road by means of any power not being exclusively human or animal power, and without the aid of rails, the new requirement is that the motor vehicle should simply be designed or adapted for propulsion or haulage on a road by means of fuel or electricity.

(b) The reference to a vehicle weighing less than 230 kg and which is specially constructed for the use of a single disabled person has been scrapped.

(c) Trailers, caravans and agricultural or any other implements designed or adapted to be drawn "by such motor vehicle" are now specifically included in the definition of "motor vehicle" whereas "an agricultural implement not designed or adapted for the conveyance of persons and goods" was formally specifically excluded from the definition.

(d) Insofar as agricultural implements, as such, are concerned, those "not designed or adapted for the conveyance of persons or goods" were therefore previously excluded from the definition of "trailer" and consequently also from the definition of "motor vehicle"; the new reference is simply to "an agricultural or any other implement designed or adapted to be drawn by" a motor vehicle. Thus, as long as the agricultural (or other) implement is designed or adapted to be drawn by a motor vehicle, it no longer makes any difference whether or not such implement was designed or adapted for the conveyance of persons or goods.

3.1.8.5 The important feature of the new definition is that trailers, caravans and implements (agricultural or otherwise) designed or adapted to be drawn by motor vehicles are now themselves classified as "motor vehicles". In terms of Section 2 (1)(a) of the Act no person shall drive a motor vehicle unless it displays a token of identification, but in terms of Section 2 (2)(f) trailers, caravans and implements (agricultural or otherwise) designed or adapted to be drawn by a motor vehicle are exempt from the requirement of displaying tokens of identification, whilst nevertheless remaining "covered" by the Scheme. (In terms of Sectin 2 (1) of the 1972 Act there was a prohibition against the driving of a "motor vehicle" unless such motor vehicle was insured, and Section 16 (4) provided that if a motor vehicle did not bear a token of insurance, it would be deemed not to have been insured. Under the new Act vehicles not carrying tokens are nevertheless "covered" by the Scheme, including the previously excluded agricultural (or other) implements designed or adapted to be drawn by a motor vehicle.

3.1.8.6 An interesting question which arises from the new definition is whether an implement without wheels, such as an agricultural harrow, classifies as a "motor vehicle" and is therefore "covered" in the new MVA Scheme? Where such an implement has, for example, been left on or near a road or at some other place where a

motorist has collided with it and sustained bodily injuries, does the motorist recover his damages from an Appointed Agent under the Act or does he institute action against the owner of the implement under common law without fear of being met by the disqualifying provisions of Section 12 of the Act? It is submitted that the implement in question should clearly be regarded as a "motor vehicle" under the definition of that term. The counter-argument relates to the phrase: "on a road" with reference to the propulsion or haulage of a motor vehicle, the suggestion being that an implement without wheels was not designed or adapted for propulsion or haulage on a road. The fallacy of this argument lies therein that the phrase "on a road" relates, in the context of the definition, to a motor vehicle per se and the phrase is not repeated in the latter part of the definition which deals a the separate group of vehicles namely trailers, caravans and implements. In other words, it is submitted that the towing vehicle should be designed or adapted for propulsion or haulage on a road, but the towed "motor vehicle" (trailer, caravan or implement) is not hit by any such qualification; the towed vehicle must simply be designed or adapted to be drawn by "a motor vehicle". It is obviously unlikely that a tractor would ever be found towing a harrow "on a road" but it would be commonplace to find this combination operating on a

farmer's lands; the qualification relates exclusively to the design or adaptation of the motor vehicle in question, not to the manner in which it is functioning at any given moment. The qualification in respect of the "motor vehicle" itself requires that it should be designed or adapted for propulsion or haulage "on a road" which does not mean that it will necessarily be functioning "on a road" at any given moment. The qualification relating to trailers, caravans and implements requires only that they be designed or adapted to be drawn by the first-mentioned "motor vehicle", not that they should be designed or adapted to be so drawn "on a road". The fact that trailers, caravans and implements are included in the definition of "motor vehicle" does not, it is submitted, detract from the argument that a fundamental difference is retained in the definition between a "motor vehicle" as such and the other group of towed or drawn "motor vehicles".

3.1.8.7 For a fuller discussion and an historical overview of the terms "motor vehicle" and "trailer", see Hodes at pages 22 to 25.

3.1.9 MVA FUND

Apart from the fact that "MVA Fund" previously referred to the

Motor Vehicle Assurance Fund whereas the new term refers to the Motor Vehicle Accident Fund, this definition requires no further comment, except that reference should be made to Section 3 of the Act.

3.1.10 OWNER

3.1.10.1 This definition is identical in all respects to its immediate predecessor.

3.1.10.2 It will be noted that the definition relates only to four classes of persons, namely:

(a) A motor dealer;

(b) A motor transport licence holder;

(c) The purchaser of a motor vehicle subject to an hire-purchase agreement; and

(d) The lessee of a motor vehicle leased for a period of at least twelve months.

The definition is therefore clearly not exhaustive, and apart from the four categories of persons mentioned above, the word "owner" must also be given its ordinary grammatical and common law meaning. In Nkosana vs Rondalia Assurance Corporation of SA and Others, 1976 (4) SA 67 T it was stated as follows:

"It is to be observed that the definition of

> 'owner' in the Act deals with four sets of specific circumstances under which a meaning is assigned to the word. It does not purport to deal in general with the meaning of the word 'owner' as used in the Act, apart from the particular contexts dealt with in Section 1. On that basis, approaching the matter in accordance with trite rules of interpretation, I consider that the word 'owner' must in general, and apart from the particular contexts mentioned, be given its ordinary meaning in the Act."

3.1.10.3 Insofar as the first three classes of persons mentioned in the definition are concerned, the provisions of the definitions do not appear to have caused concern in our Courts in recent years, but the last category merits consideration, in particular the case where a vehicle has been hired for a period of less than twelve months. Where the lease is for a period of twelve months or more, the definition stipulates the lessee concerned as the "owner". Where the lease is for less than twelve months, the true common law owner, i.e. the lessor, is clearly to be regarded as the "owner" of the motor vehicle for purposes of the Act. In the case of S A Railways & Harbours vs Commercial Union Assurance Company of SA Limited, 1984 (3) SA 240 N there was an arrangement in terms of which a dealer (the lessor) was obliged, for a period of twelve months, to make available one or more vehicles to the lessee, only if requested by the latter to do so. The period of the lease would be determined by the lessee but would not exceed twelve months. Pursuant to this scheme the

motor vehicle in question had been delivered to the lessee on the 7th of November 1987 and the arrangement between the parties would not extend beyond the 24th of October 1979. The accident which gave rise to the action occurred on the 28th of March 1979. In these circumstances the Court rejected the contention that the lessee was the "owner" of the motor vehicle concerned. Although the arrangement between the parties (in terms of which one or more vehicles could be requisitioned by the lessee) was for a period of twelve months, the lease in respect of the vehicle in question extended for less than twelve months, hence the fact that the lessee did not qualify as "owner" of the motor vehicle in question.

3.1.10.4 For a fuller discussion of the word "owner" see Nathan, pages 20 and 21; Hodes, pages 84 to 88.

3.1.11 REWARD

3.1.11.1 As has been noted, "reward", with reference to the conveyance of any person in or upon a motor vehicle, does not include any reward rendering such conveyance illegal in terms of any provision of the Road Transportation Act, Nr 74 of 1977.

3.1.11.2 The definition is identical to the one which was contained in the 1972 Act, and since Section 22 (1) of the 1972 Act has been re-enacted in substantially similar terms in Section 9 (1) of the new Act, the legal position does not appear to have been substantially affected, and certainly not with regard to conveyance for reward.

3.1.11.3 In former years the definition of "reward" gave rise to numerous interpretational problems, which led to a number of reported cases. See for instance Ndhlovu vs Mathega, 1960 (2) SA 618 A; Rossouw vs South British Insurance Company Limited, 1962 (3) SA 847 T; Pillai vs Auto Protection Insurance Company Limited, 1964 (1) SA 113 D; Hladhla vs President Insurance Company Limited, 1965 (1) SA 614 A; Parity Insurance Company Limited vs Marescia, 1965 (3) SA 430 A; Maree vs AA Mutual Insurance Association Limited, 1970 (4) SA 717 W; Tladi vs Santam Insurance Company Limited, 1972 (2) SA 736 W; Martin and Others vs Marine and Trade Insurance Company Limited, 1978 (3) SA 640 A.

3.1.11.4 After the present definition was introduced into Section 1 of the 1972 Act by Act 69 of 1978 (i.e. as from the 1st of September 1978) the matter obviously became more settled and gave rise to fewer problems. However, reference may fruitfully be made to the following cases which involve the definition in its

current form: Ntuli vs S A Eagle Insurance Company Limited, 1984 (4) SA 922 N; Mali vs Shield Insurance Company Limited, 1984 (2) SA 791 SECLD; Memani vs Santam Insurance Company Limited, 1986 (1) SA 657 ECD. See also the commentary on Section 9 (1)(a)(i) in paragraph 3.9.8 below, and Masombuka vs Constantia Versekeringsmaatskappy Beperk (to be reported 1987 (1) February).

3.1.12 SPECIAL CIRCUMSTANCES

3.1.12.1 This definition is identical to its predecessor under the 1972 Act.

3.1.12.2 As has already been noted, "special circumstances" does not include any neglect, omission or ignorance.

3.1.12.3 The term "special circumstances" relates exclusively to applications under Section 14 (3) of the Act for so-called condonation of prescription. In the circumstances further comment on this definition and its implications is reserved for the Commentary on Section 14 (3) in paragraph 3.14.4 below.

Tokens of identification.

2. (1) *(a)* Subject to the provisions of subsection (2), no person shall drive a motor vehicle in any place unless one token of identification only in the prescribed form is attached to that vehicle in the prescribed manner.

(b) Application for a token of identification referred to in paragraph *(a)* shall be made on the prescribed form to the appointed agent concerned, who shall supply such token, duly completed, free of charge to the applicant.

(c) The cost of printing the said tokens of identification and the forms of application therefor shall be defrayed by the MVA Fund.

(2) The provisions of subsection (1) shall not apply in relation to a motor vehicle—

(a) of which any state or government or a provincial administration or the Administration of the territory of South West Africa or the National Transport Commission or a local authority or a Black authority or the South African Development Trust or the State President is the owner; or

(b) which is registered at a place in a territory outside the Republic, but subject to the provisions of paragraph *(c)*; or

(c) which is registered at a place in Botswana, Lesotho, Swaziland or in any territory which formerly formed part of the Republic and subsequently became independent and is insured in terms of any law relating to the compulsory insurance of motor vehicles in force at any such place and in respect of which a prescribed undertaking has been furnished to pay compensation for any such loss or damage as is mentioned in section 8 (1) which may be caused by or arises out of the driving of the insured motor vehicle in the Republic; or

(d) which is used in accordance with a motor dealer's licence or a motor transport licence, as defined in any law relating to the licensing of motor vehicles;

(e) which is not required to be licensed in terms of any such law;

(f) which is a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by a motor vehicle; or

(g) referred to in section 5 (2) *(b)*.

(3) Any person who contravenes subsection (1) *(a)* shall be guilty of an offence and on conviction liable to a fine not exceeding R100.

3.2 SECTION 2

COMMENTARY

3.2.1 TOKENS OF IDENTIFICATION

3.2.1.1 Section 2 (1) places a prohibition on the driving of a motor vehicle "in any place" if such vehicle does not display "one token of identification" in the prescribed manner. (Regulation 3 describes exactly how the token should be affixed to the motor vehicle and adds that such token shall remain attached to such vehicle until the vehicle becomes permanently unfit for use.) The Sub Section further provides that the Appointed Agent

shall supply a token of identification free of charge to the applicant. The applicant need not be the owner of the vehicle, and the application form (MV 1) makes no provision for signature by the applicant. Section 2 (3) provides for a fine not exceeding R100 for driving a vehicle which does not display the prescribed token, but this of course applies only to vehicles which are not exempt from the obligation of displaying tokens. Regulation 3 provides that an Appointed Agent shall be obliged, on request, to replace an existing, damaged or lost token without charge.

3.2.1.2 Section 2 (2) exempts certain vehicles from displaying the prescribed tokens of identification. Amongst the exempt vehicles are trailers, caravans and implements (agricultural or otherwise) designed or adapted to be drawn by a motor vehicle. See in this regard paragraph 3.1.8 above. Also now exempt, contrary to the position under the 1972 Act, are vehicles used in accordance with a motor dealer's licence or a motor transport licence. The same applies to vehicles owned by a so-called Depositor to whom reference is made in Section 5 (2)(b) of the Act. Vehicles belonging to any State or Government (including of course vehicles belonging to the SA Police, SA Defence Force, the SA Transport Services and other Government vehicles) are also not

required to display tokens, although they have the choice to do so, as have Provincial Administrations, local authorities and certain other bodies listed in Section 2 (2)(a). Other exempt vehicles include vehicles registered in a territory outside the Republic or in Botswana, Lesotho, Swaziland or in any territory which formerly formed part of the Republic prior to becoming independent and which are insured in terms of any law relating to the compulsory insurance of motor vehicles in force at any such place and in respect of which a prescribed undertaking has been furnished to pay compensation as envisaged in Section 8 (1) of the Act which may be caused by or which arises out of the driving of the insured vehicle in the Republic. See in this regard Chapter 5. Lastly, vehicles not required to be licenced in terms of any law relating to the licencing of motor vehicles, need also not display a token of identification.

3.2.1.3 It bears repeating that vehicles not required to display tokens are not thereby excluded from the Scheme. Indeed, even tokenless vehicles not exempt under Section 2 (2) of the Act are nevertheless included in the Scheme, as long as they are "motor vehicles" as defined. Where a vehicle which inflicted bodily

injury bore no token the claimant nevertheless has a claim against an Appointed Agent, as long as either the owner or the driver has been identified. A State-owned vehicle may or may not in a particular instance bear a token; some government departments may decide to put tokens on their vehicles, others not. If a token is displayed the claim lies against the Appointed Agent which issued it. If a token is not displayed the claim does not lie against the State or department (or provincial or local authority) concerned; it lies against the Appointed Agent designated by the so-called Date Schedule (see below) to handle claims arising from the driving of the vehicle concerned. This is so even where a vehicle ought to have displayed a token (because it was not exempt under Section 2 (2) of the Act) but failed to do so. There simply is no "uninsured" motor vehicle. Regulation 7 (1) provides that an Appointed Agent will be liable to pay compensation for damages arising out of the driving of "motor vehicles":

(a) To which a token of identification referred to in Section 2 (1)(a) of the Act is attached and which was issued by such Appointed Agent; and

(b) To which a token of identification is not attached but of which the identity of the owner or driver is known, in which event the claim will be handled by that Appointed Agent indicated in Schedule B contained in Government Notice, No 1869 published in Government Gazette No 10430 dated 12th September 1986. For easy reference this Schedule ("the Date Schedule") is printed below:

SCHEDULE B

CLAIMS MUST BE SERVED ON THE AGENTS CONCERNED IN ACCORDANCE WITH THE ACCIDENT DATES INDICATED HEREUNDER

Appointed agent	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	Total
Sentraboer	1	1	1–2	1	1	1	1	1–2	1	1	1–2	1	**15**
Commercial Union	2–3	2–3	3	2–4	2–3	2	2–3	3–4	2–3	2–3	3–4	2	**22**
President	4–6	4–6	4–6	5–7	4–6	3–6	4–6	5–7	4–6	4–6	5–7	3–5	**37**
Santam	7–15	7–15	7–15	8–16	7–15	7–15	7–15	8–16	7–15	7–14	8–16	6–14	**107**
Mutual & Federal	16–18	16–18	16–18	17–19	16–17	16–18	16–18	17–19	16–18	15–16	17–19	15–17	**34**
General Accident	19–20	19–20	19–20	20–21	18–19	19–20	19–20	20–21	19–20	17	20–21	18–19	**23**
Guardian Nat.	21–22	21–22	21–23	22–23	20–21	21–23	21–23	22–23	21–22	18–20	22–23	20–22	**29**
Federated	23	—	24	24	22	24	—	24	23	21	24	23	**10**
Allianz	24–25	23–24	25–26	25	23–24	25–26	24–25	25	24–25	22–23	25–26	24	**21**
National Employers'	26–28	25–26	27–28	26–27	25–27	27–28	26–27	26–27	26–28	24–25	27–28	25–26	**27**
Standard Gen.	—	27	—	28	—	29	—	28	—	26	—	27	**6**
S.A. Eagle	29–31	28–30	29–31	29–31	28–30	30–31	28–30	29–31	29–31	27–29	29–31	28–30	**35**
													366

It is to be noted that this Date Schedule relates only to claims arising from the driving of the vehicles referred to in Regulation 7(1)(b), i.e. vehicles not displaying tokens but of which the identity of the owner or the driver is known.

3.2.1.4 In the said Date Schedule each day of the year has been allocated a certain Appointed Agent on a basis which represents that Appointed Agent's pro rata shareholding of the MVA market.

3.2.1.5 What should also be appreciated about this Date Schedule is that it refers to the date of the accident, not to the date on which any specific claim arose. The Date Schedule's sole purpose is to identify, with reference to the date of the accident in question, the Appointed Agent against whom the claim arising from

such accident must be instituted. Accidents shortly before or after midnight frequently involve uncertainty regarding the correct date of the accident. In the case of tokenless vehicles this could lead to difficulties in identifying the correct Appointed Agent to be sued. In such a case it is submitted that if the two possible dates have been allocated by the Date Schedule to two different Appointed Agents, both such Agents should be sued jointly and severally. However, after receipt of the claim documents the two Appointed Agents will probably come to an agreement whereby one of them accepts responsibility to handle the claim. The MVA fund claim to have instructed the twelve participating Appointed Agents not to take the point that the wrong Agent has been cited where uncertainty exists regarding the date of the accident. In any event the Date Schedule in many instances nominates the same Appointed Agent to handle claims which occur on several consecutive days of a particular month, and the problem may therefore not necessarily arise. Nevertheless the legislature should rectify this aspect.

3.2.1.6 If it is remembered that the Date Schedule relates only to claims arising out of the driving of tokenless vehicles (of which the owner or the driver have been identified) it becomes clear that the Date Schedule has

no application to accidents which occurred prior to the 1st of May 1986. Up to the 30th of April 1986 Section 16 (4) of the 1972 Act still applied, which provided that a vehicle not bearing a token would be deemed to be uninsured and an accident involving such vehicle would give rise to a claim under common law against the owner or the driver, with the MVA Fund becoming liable if the provisions of the old Regulation 5 were complied with. The promulgation of the new Act does not affect this claimant's claim in any way. (The anomalous situation relating to a claim for loss of support arising from an accident which occurred prior to the 1st of May 1986, but where the deceased only died on or after the said date, will be discussed in the Commentary on Section 20 of the Act, for which see paragraph 3.20 below.)

3.2.1.7 See also paragraphs 3.6.3 and 3.6.4 below.

Establishment of MVA Fund.

3. (1) There is hereby established a juristic person to be known as the Motor Vehicle Accident Fund.

(2) The income of the MVA Fund, including income from investments, shall be exempt from income tax.

(3) As from the commencement of this Act the Motor Vehicle Assurance Fund mentioned in section 5 of the Compulsory Motor Vehicle Insurance Act, 1972 (Act No. 56 of 1972), shall cease to exist, all amounts credited to that fund immediately before such commencement shall vest in the MVA Fund and all liabilities and rights, existing as well as accruing, of the said Motor Vehicle Assurance Fund shall devolve upon the MVA Fund.

3.3 SECTION 3

COMMENTARY

This Section simply provides for the establishment of the Motor Vehicle Accident Fund, the demise of its predecessor, and the transfer from the latter to the former of existing funds and all liabilities and rights. This aspect is of little practical significance with regard to claims and therefore merits no further comment.

Manager, assistant manager and staff of MVA Fund.

4. (1) *(a)* Subject to the laws governing the public service, the Minister may from time to time—

(i) appoint a person to be the manager of the MVA Fund, who, under the control of the Director-General and subject to such general or special directions as the Director-General may give from time to time, shall manage the affairs of the MVA Fund and, for that purpose, may exercise the powers and shall perform the duties of the MVA Fund;

(ii) appoint a person to be the assistant manager of the MVA Fund, who may perform such of the functions of the manager as may be assigned to the assistant manager by the Director-General or by the manager acting with the concurrence of the Director-General.

(b) When the manager is for any reason absent or unable to perform his functions, the assistant manager shall act in the place of the manager, and when both the manager and the assistant manager are absent or unable to perform their functions, the Director-General may in writing designate a member of his staff to act in the place of the manager for a specified period not exceeding 30 days.

(2) Subject to the laws governing the public service, the Director-General may appoint such persons as are in his opinion necessary to enable the manager to manage the MVA Fund: Provided that the Director-General may, with the approval of the Minister and with the concurrence of the Minister of Finance, enter into an agreement with any person for the rendering of any particular service.

(3) Such amounts in respect of expenses incurred by the Director-General under this section as may be determined by him from time to time with the concurrence of the Secretary to the Treasury, shall be paid out of the funds of the MVA Fund to the State at such times as may be so determined, and shall be paid into the State Revenue Fund.

3.4 SECTION 4

COMMENTARY

Here again the Section is of no practical significance with regard to claims. It deals with purely administrative matters which do not call for comment in a work of this nature.

Moneys in MVA Fund.

5. (1) There shall be paid into the MVA Fund quarterly all moneys received by that fund by virtue of the provisions of section 1 (2) *(a)* (ii) of the Central Energy Fund Act, 1977 (Act No. 38 of 1977), and section 25 (2) of the National Road Safety Act, 1972 (Act No. 9 of 1972), for the latest quarter for which such sum can be calculated.

(2) The moneys in the MVA Fund shall, subject to the provisions of subsection (3) of section 3, subsection (3) of this section and section 20, be utilized to defray the expenses incurred by the manager of that fund in the exercise of his powers and the performance of his duties in terms of this Act, except in the case of claims for compensation contemplated in section 8 arising out of the driving in the Republic of motor vehicles—

(a) registered in Bophuthatswana, Botswana, Ciskei, Lesotho, Swaziland, Transkei and any other territory which formerly formed part of the Republic and subsequently became independent, and insured under the provisions of any law relating to the compulsory insurance of motor vehicles in force in those territories and in respect of which prescribed provision has been made for payment of the said compensation; or

(b) which are the property of any owner who has made the prescribed provision for the payment of compensation provided for in section 8.

(3) The manager of the MVA Fund shall cause the amount contemplated in section 25 (1) of the National Road Safety Act, 1972, to be paid over once every month from the MVA Fund to the National Road Safety Council established by section 2 of that Act.

3.5 SECTION 5

COMMENTARY

3.5.1 Section 5 (1) constitutes the enabling legislation for

the new MVA Scheme to be funded by a levy on fuel.

3.5.2 Section 5 (2)(a) simply authorises the MVA Fund to utilise its funds "to defray the expenses incurred by the Manager of that fund in the exercise of his powers and the performance of his duties in terms of this Act", but it then immediately goes on to say that such funds may not be used for claims for compensation under Section 8 of the Act arising out of the driving in the Republic of motor vehicles registered in Bophuthatswana, Botswana, Ciskei, Lesotho, Swaziland, Transkei and any other territory which formerly formed part of the Republic and subsequently became independent, and which vehicles are insured under the provisions of any law relating to the compulsory insurance of motor vehicles in force in those territories and in respect of which the prescribed provision has been made for payment of the said compensation. This latter aspect is discussed in paragraph 3.5.3 below.

3.5.3 THE DEPOSITOR

3.5.3.1 Section 5 (2)(b) states that the moneys in the MVA Fund may also not be used with regard to claims for compensation under Section 8 of the Act arising out of the driving in the Republic of motor vehicles which are the property of any owner who has made the prescribed

provision for the payment of such compensation. The prescribed provisions are to be found in Regulations 5 and 6, and owners who have made these provisions are termed Depositors.

3.5.3.2 In terms of Regulation 5 (1) (compare Regulation 5 with Section 29 of the 1972 Act) the Depositor is required to deposit with the MVA Fund a sum of R500 000 (or any security approved by the MVA Fund valued at not less than the said amount) or any sum of money and such security which together are in the opinion of the MVA Fund valued at not less than the said amount, whereupon the Depositor shall attach to vehicles owned by him a special token of exemption called Form MV 2A. These tokens are obtained free of charge from the MVA Fund (Regulation 5 (2)) and shall be removed and destroyed by the Depositor before he alienates or abandons any vehicle to which such token is attached (Regulation 5 (3)). Failure to display such token or to remove and destroy it as aforesaid renders the Depositor liable on conviction to a fine not exceeding R100 (Regulation 5 (4)). There are further provisions for the increase or decrease of the deposit or for the substitution of any security (or any part thereof, if this is warranted in the opinion of the MVA Fund) (Sub-Regulations (5), (6) and (7)). The deposit may also under certain circumstances be returned to the Depositor (Sub

Regulation (8)) but the MVA Fund may also hold such deposit as security for the payment of compensation for which the Depositor may become liable and for any costs incurred in connection with the recovery of such compensation, and a deposit thus held may not be used for payment of any claim other than a claim for such compensation and such costs except insofar as the value of the deposit exceeds the required value (Sub Regulation (9)). In terms of Sub-Regulation (10), if after payment of a claim out of the deposit, the value of such deposit is less than the required value, the Depositor's right to claim a refund from the MVA Fund in respect of fuel levies already paid by him shall lapse and the balance of the deposit shall be refunded unless the MVA Fund has reason to believe that there are outstanding unsatisfied claims against the Depositor, or that any person still intends preferring a claim against him. If the MVA Fund is satisfied that the Depositor has failed to meet his liabilities under Section 8 of the Act, the security concerned shall vest in the MVA Fund for the purpose of meeting the liabilities of the Depositor under the Act. If the deposit was in the form of security, it shall be realised to an extent equal to the amount of the compensation and costs for which the Depositor is still liable, and the security shall be deemed to have been reduced accordingly (Sub-Regulation (11)). When the deposit is insufficient to meet in full all claims for

compensation and costs, the value of the deposit shall be apportioned between the different persons entitled to such compensation and costs in proportion to their respective claims (Sub-Regulation (12)). According to Sub Regulation (13), when a Depositor's right under Section 5 (2)(b) of the Act has lapsed, the MVA Fund shall direct that he return to it all tokens of exemption in his possession, failing which he may expose himself to a fine not exceeding R100,00 (Sub Regulation (14)). Moneys deposited by the Depositor shall be invested by the MVA Fund in a specified manner and the interest derived from such investment (including interest earned by any security other than money) shall be paid over to the Depositor concerned.

3.5.3.3 Since the Depositor's vehicles are subjected to the same levy on fuel as other motorists, Regulation 6 creates the administrative machinery by which the Depositor may re-claim from the MVA Fund fuel levies already paid.

3.5.3.4 The provisions relating to the rights and obligations of the Depositor as contained in Section 5 (2)(b) read together with Regulations 5 and 6 render the Depositor's position somewhat akin to that of the self-insurer under Sections 3 and 29 of the 1972 Act. Unfortunately these new provisions have been rather inelegantly worded and it is a pity that the whole concept of the Depositor

was created in an obscure little sub-section tucked away in Section 5 of the Act which was principally devised to provide for the funding of the new Scheme and the utilisation of those funds. The creation of the Depositor certainly merits its own separate section of the Act. Admittedly the idea of the Depositor was introduced into the new Scheme by the Standing Committee on Transport Affairs at a very late stage (the Bill and the original Draft Regulations contained no such provisions), but the result is simply not satisfactory; add-on provisions seldom are.

3.5.3.5 In the first place one searches in vain for any provision in either the Act or the Regulations which specifically state in express terms that the Depositor shall be liable, mutatis mutandis, for the payment of compensation as envisaged in Section 8 of the Act; this deduction must be made from certain oblique references to such liability which appear in various Sub-Regulations such as Sub-Regulations (8), (9), (10) and (11).

3.5.3.6 Secondly, the circumstances under which the Depositor's rights under Section 5 (2)(b) of the Act may be terminated, should be scrutinised:

(a) According to Regulation 5 such termination may be effected in one of the following ways:

(i) Sub-Regulation 5 (5) provides that if in the opinion of the MVA Fund the value of the deposit has fallen below R500 000, the MVA Fund shall call on the Depositor to make up the deficiency within fourteen days, failing which "the provision to act in terms of Section 5 (2)(b) of the Act shall lapse", and every token of exemption issued to the Depositor shall become void.

(ii) Sub-Regulation 5 (8) envisages that the Depositor may give notice to the MVA Fund "that he is stopping payment of compensation in terms of Section 5 (2)(b) of the Act ...", and once the Depositor has returned all the tokens of exemption which were in his possession, the MVA Fund shall return his deposit to him (unless the MVA Fund has reason to believe that any bona fide claim against the Depositor has not been satisfied or that any person intends to prefer a claim against the Depositor), "and upon the return of the deposit to the Depositor the provisions of Section 5 (2)(b) of the Act shall lapse and every token of exemption which was furnished to him shall become void."

These are the only two provisions which specifically deal with the lapsing or termination of the Depositor's right under Section 5 (2)(b) of the Act and only the first-mentioned provisions (Sub-Regulation 5 (5) deal with the MVA Fund's own right to cancel.

(b) The question now arises as to whether the provisions of Sub-Regulation 5 (5) were intended to apply to the circumstances envisaged in Sub-Regulations 5 (10), 5 (11) or 5 (12)? In other words, can the MVA Fund send a notice to the Depositor under Regulation 5 (5) calling upon him to make up the deficiency in the deposit if such deficiency has been brought about by payment out of the deposit of a claim, as envisaged by Sub-Regulation 5 (10), or if the Depositor has failed (as envisaged in Sub-Regulation 5 (11))to meet in full his liabilities under Section 8 of the Act and the deposit is found, (as envisaged in Sub-Regulation 5 (12)) to be insufficient to satisfy such claims? It seems not. Where payment of a claim out of the deposit has had the effect of reducing the deposit below the required value, (so that the position envisaged in Sub-Regulation 5 (5) exists) the only consequences stipulated by Sub-

Regulation 5 (10) are firstly that the Depositor's right to reclaim fuel levies under Regulation 6 shall lapse and secondly that the MVA Fund shall return the balance of the deposit, if any, to the Depositor unless the MVA Fund has reason to believe that any person has preferred a claim under Section 8 against the Depositor which has not been satisfied or that any person intends to prefer such a claim against the Depositor. If the legislature now intended that the MVA Fund could, in the circumstances envisaged in Sub-Regulation 5 (10), employ the Notice mentioned in Sub-Regulation 5 (5), the situation would be nonsensical because the MVA Fund would on the one hand be required to return the balance of the deposit by virtue of Sub-Regulation 5 (10), while it would under Sub-Regulation 5 (5) be demanding an increase in the deposit. Sub-Regulation 5 (5) can also not interact with Sub-Regulation 5 (12); they are also mutually destructive.

(c) Sub-Regulation 5 (10) does not only envisage payments out of the deposit which have the effect of reducing the value of the deposit below the required level; by necessary implication the Sub-Regulation also envisages payments out of the deposit which do <u>not</u> have the effect of reducing the value of the deposit below the required value,

and in such cases there would certainly be nothing in Sub-Regulation 5 (5) to assist the MVA Fund in forcing termination of the Depositor's operations under Section 5 (2)(b) of the Act, even if the Depositor has failed to meet in full his liabilities under Section 8 of the Act (as envisaged by Sub-Regulation 5 (11)), and the deposit vests in the MVA Fund. Where a payment out of the deposit has not reduced the deposit below the required level, the right to reclaim fuel levies does not lapse, despite the fact that such payment (out of the deposit) can only be made when the Depositor has already shown himself to be unable to satisfy his liabilities under Section 8 in full. The right to reclaim fuel levies lapses only if a payment out of the deposit reduces such deposit below the required level. In neither case does the MVA Fund appear to have the right to cancel the Depositor's rights under Section 5 (2)(b).

(d) Where the deposit is found to be insufficient to meet in full all claims for compensation and costs, Sub-Regulation 5 (12) specifies only one consequence, namely that the deposit shall be apportioned between the different persons entitled to compensation and costs in proportion to their

respective claims; it again does not refer back to any rights which the MVA Fund may have under Sub-Regulation 5 (5). (Indeed, as already stated, the two Sub-Regulations are mutually destructive.) And in any event, the latter Sub-Regulation only applies where the deposit has fallen below the required value, whereas the apportionment envisaged by Sub-Regulation 5 (12) may even be put into effect where the full deposit is still intact but is nevertheless insufficient to meet in full all the Depositor's liabilities.

(e) It is submitted that when the legislature referred in Sub-Regulation 5 (5) to the deposit falling below the required value, it contemplated reasons other than the payment of claims out of the deposit, for instance the erosion of the value of the security as a result of inflation. One is driven to the conclusion that the provisions relating to termination of the Depositor's right under Section 5 (2)(b) of the Act are inadequate, and that the MVA Fund might well find itself unable, in given circumstances to rid itself of a particular Depositor.

3.5.3.7 A third aspect which gives cause for concern relates to the security of the accident victim whose claim lies against a Depositor. The moneys in the MVA Fund may

not, as we have seen, be used for claims contemplated in Section 8 of the Act arising out of the driving of motor vehicles which are the property of a Depositor. The Depositor derives his funds from only two sources namely fuel levies reclaimed under Regulation 6 and interest on the deposit under Sub-Regulation 5 (15). At the currently low rates of interest the interest earned would constitute a relatively insignificant amount. If a large claim is lodged with a Depositor shortly after he has made the prescribed provision in terms of Section 5 (2)(b) of the Act, he will hardly have had sufficient time to build up an adequate reserve of funds for purposes of paying compensation under Section 8 of the Act. He may consequently be unable to meet his liabilities in full. The deposit then vests in the MVA Fund, but the deposit itself may conceivably be inadequate, and claimants will have to be satisfied with pro rata portions of the deposit. It is unfortunate that the MVA Fund does not underwrite the claimant's full damages as it did with regard to claims arising from the driving of uninsured vehicles under the 1972 Act. The fact that the Depositor makes no contribution to the coffers of the MVA Fund is not necessarily conclusive, since the uninsured motorist also made no contribution under the 1972 Act. And just as the uninsured motorist could be excussed under the old Scheme, so also can the Depositor's assets be excussed

beyond the funds derived from repayment of fuel levies and from interest.

3.5.3.8 Yet another problem stemming from the hasty last-minute introduction into the Act of the Depositor is the fact that the legislature has overlooked the necessity to give him a right of recourse corresponding with Section 28 (4) of the 1972 Act. See in this regard paragraph 3.16.1.10.

Powers and duties of MVA Fund.

6. (1) The MVA Fund—

(a) (i) shall, subject to the Minister's approval, appoint as many agents as may apply for appointment and comply with the requirements determined by the advisory committee in terms of section 7 (1) *(d)*, on conditions agreed upon, to investigate or settle, subject to the provisions of the regulations, on its behalf claims referred to in section 8 arising from the driving of a motor vehicle in the case where the identity of either the owner or driver thereof has been established or to commence, conduct, defend or abandon legal proceedings in connection with such claims; and

(ii) shall, after approval by the Minister, cause the names of the said agents and the claims in respect of which those agents shall be liable, to be published in the *Gazette*;

(b) shall, subject to the provisions of the regulations, investigate or settle claims referred to in section 8 arising from the driving of a motor vehicle in the case where the identity of neither the owner nor driver thereof can be established or to commence, conduct, defend or abandon legal proceedings in connection with such claims;

(c) may, subject to the Minister's approval in every case, purchase or otherwise acquire goods, equipment, land, buildings, shares, debentures, stock, securities and all other kinds of movable or immovable property;

(d) may, subject to the Minister's approval in every case, sell, lease, mortgage, encumber, dispose of, exchange, work, develop, build upon, improve or in any other way deal with its property;

(e) may invest any moneys not immediately required for the conduct of its business, in such manner as may from time to time be determined by the Minister, and realize, alter or reinvest such investments or otherwise deal with such moneys or investments in such manner

as may from time to time be determined by the Minister;

(f) may, subject to the Minister's approval in every case, borrow money and secure the payment thereof in such manner as it may deem fit;

(g) may, subject to the Minister's approval, make donations for research in connection with any matter relating to injuries sustained in motor vehicle accidents, on such conditions as it may deem advisable;

(h) may draw, draft, accept, endorse, discount, sign and issue promissory notes, bills and other negotiable or transferable instruments, with the exception of share certificates;

(i) shall utilize its funds for any purpose connected with or resulting from the exercise of its powers or the performance of its duties;

(j) shall reimburse the State for services rendered to the MVA Fund by persons in the service of the State;

(k) may do all such other things as are incidental or conducive to the exercise of its powers or the performance of its duties;

(l) may accept liability towards any other government for payment of compensation in terms of any law relating to the compulsory insurance of motor vehicles in force in such government's territory caused by or arising out of the driving in that territory of any motor vehicle registered in the Republic.

(2) The MVA Fund shall—

(a) keep proper records of all its financial transactions and its assets and liabilities;

(b) as soon as may be after each audit in terms of subsection (3), submit to the Minister audited balance sheets and the report of the Auditor-General in respect of such audit together with a report on the MVA Fund's activities during the year to which the audit relates.

(3) The accounts of the MVA Fund shall be audited annually by the Auditor-General.

(4) The Minister shall lay upon the Table copies of the reports submitted to him in terms of subsection (2) in Parliament within 30 days after receipt thereof if Parliament is then in session or, if Parliament is not then in session, within 30 days after the commencement of its next ensuing session.

3.6 SECTION 6

COMMENTARY

3.6.1 Sub Sections 6 (1)(c) to (k) are no more than empowering administrative provisions and they consequently require no comment. The same applies to Sub-Sections (2), (3) and (4). Sub-Section 6 (1)(l) is dealt with in Chapter 5. Comments are therefore required only with regard to Sub-Section 6 (1)(a) and 6 (1)(b).

3.6.2 The Grosskopf Commission recommended (paragraph 2.1.1, Chapter 2) that all short-term insurers be allowed to participate in the MVA Scheme. In accordance with this recommendation Section 6 (1)(a)(i) provides that the MVA Fund shall, subject to the Minister's approval, appoint as many agents as may apply for appointment and comply with the requirements laid down by the Advisory Committee under Section 7 (i)(d). At this stage however there are still only twelve participants to the Scheme.

3.6.3 The function of such Appointed Agents is to investigate or settle, on behalf of the MVA Fund and subject to the provisions of the Regulations, those claims under Section 8 which arise from the driving of motor vehicles in cases where the identity of either the owner or the driver of the vehicle has been established, or to commence, conduct, defend or abandon legal proceedings in connection with such claims. In other words, where the identity of either the owner or the driver of the motor vehicle concerned has been established, the claim under Section 8 arising from the driving of that motor vehicle must be handled by an Appointed Agent and not by the MVA Fund itself. Which of the twelve Appointed Agents participating in the Scheme must handle the claim? The answer to this question is to be found Regulation 7 (1) which provides that an Appointed Agent shall be liable to handle two types of claims under Section 8 of the Act:

(a) Firstly those claims which arise out of the driving of motor vehicles to which tokens of identification are attached and which were issued by such Appointed Agent; and

(b) Secondly those claims arising out of the driving of motor vehicles to which tokens of identification are not attached but of which the identity of the owner or driver is known, in which event the Appointed Agent which is to handle a specific claim is indicated in the Date Schedule published on the 12th of September 1986 in Government Notice, Nr 1869, contained in Government Gazette Nr 10430. A copy of this Date Schedule, and an explanation thereof appears in paragraph 3.2.1.3 - 3.2.1.6 above. For the sake of completeness it may be repeated that each day of the year has been allocated to a specific Appointed Agent, so that the Appointed Agent who will handle a given claim is determined by the date of the accident in question. Publication of this Schedule is authorised by the provisions of Section 6 (1)(a)(ii).

3.6.4 Even a cursory glance at the provisions of Regulation 7 (1) will reveal that it does not list all the types of claims which Appointed Agents were intended to handle:

3.6.4.1 In the first place it overlooks and omits a claim arising from the driving of a motor vehicle (of which either the driver or the owner has been identified) to which a token of identification was, as a fact, attached at the time of the accident but such token was destroyed in the accident or lost as a result thereof, so that the claimant is unable to identify the Appointed Agent whose token it was, and against whom the claim must be lodged. The claimant cannot resort to the aforementioned Date Schedule, since that Date Schedule clearly relates only to the case where, as a fact, the vehicle concerned bore no token of identification at the time of the accident. Consequently, where the token has been either destroyed or lost as a result of the accident and the claimant is unable to identify the Appointed Agent whose token it was, the claimant must surely be without remedy if he has identified either the driver or the owner. The identity of the true defendant is neither known nor ascertainable (assuming the owner and driver to be unable to recall the Appointed Agent concerned); the claimant cannot look to the MVA Fund because the latter only handles those claims envisaged by Section 6 (1)(b) i.e. claims arising from the driving of motor vehicles of which neither the owner nor the driver can be established; and lastly the claimant cannot even sue the owner or driver under Common Law because he is

debarred from doing so by virtue of the provisions of Section 12 of the Act. (The claimant is after all entitled under Section 8 of the Act to claim his damages from an Appointed Agent; he is simply unable to identify the Appointed Agent responsible for those damages.) This omission from the provisions of Regulation 7 (1) has been brought to the attention of the MVA Fund and the latter has given an undertaking to review the situation with a view to remedying the matter. Hopefully this will be done with retrospective effect, otherwise quite a number of claimants are going to be seriously prejudiced, because the destruction or loss of tokens as a result of accidents occurs quite frequently, and the owner no longer holds any document such as the Declaration of Insurance which was issued to him under the 1972 Act.

3.6.4.2 Where the token was damaged beyond legible recognition as a result of the accident, (the vehicle having been found), and neither the owner nor the driver can be identified, the claimant may again be without remedy because although Section 6 (1)(b) states that the MVA Fund shall handle those claims where neither the driver nor the owner can be identified, Regulation 7 (1) makes it clear that it is the Appointed Agent who is liable where the vehicle concerned carried a token. On the other hand, Section 6 (1)(b) does state that it is the MVA Fund which must handle claims where neither the

driver nor the owner can be identified and it is not expressly qualified as to whether the vehicle bore a token or not, and an argument can certainly be made out that the MVA Fund would also be liable (apart from the Appointed Agent whose identity cannot be established because the token is not legible) in such circumstances. It is difficult to establish the legislature's intention. This situation, as well as the one considered in the preceding sub-paragraph, simply appears not to have been contemplated. And admittedly this situation is an unlikely one because the owner can normally be identified through the vehicle's registration number, but stolen vehicles seldom display correct number plates and the suggestion is certainly justified that the legislature must take another look at the relevant provisions.

3.6.4.3 Regulation 7 (1) creates another category of claimants who may experience difficulties in bringing a claim under the Act. Let us assume that a motor vehicle bore a token of identification at the time of an accident. The driver has fled the scene and the vehicle again turns out to be a stolen vehicle with false number plates. The identity of the owner cannot be established. (The disorderly and somewhat chaotic issuing of free tokens makes it questionable whether all companies have proper records which will enable

them to indicate the name and address of the person to whom a specific token was issued.) The claimant now knows that the vehicle in question bore a valid token and he knows which company issued that token, but he cannot sue that Appointed Agent because Section 6 (1)(a)(i) authorises him to do so only where the identity of either the owner or the driver has been established. Admittedly Section 6 (1)(b) states that the MVA Fund shall itself be liable to handle claims arising from the driving of motor vehicles of which neither the owner nor the driver have been identified, but according to Regulation 7 (1)(a) claims arising from the driving of vehicles to which tokens of identification were attached must be handled by an Appointed Agent, not by the MVA Fund. Perhaps the claimant finding himself in these circumstances may in the end succeed against the Appointed Agent whose token was on the vehicle at the time of the accident, but certainly not before he has loudly decried "The glorious uncertainty of the Law". The inter-action between Section 6 and Regulation 7 (1) is surely an aspect which will have to be urgently reviewed by the authorities.

3.6.5 In considering the provisions of Section 6 (1)(a)(i) of the Act above, consideration has also been given in passing to the provisions of Section 6 (1)(b). This Sub-Section identifies the only type of claim which the MVA

Fund will itself handle under the new Act, namely claims which arise from the driving of motor vehicles where the identity of neither the owner nor the driver thereof can be established. The provisions of Section 6 (1)(b) should be read in conjunction with the provisions of Regulation 8, and this category of claims is dealt with comprehensively in Chapter 8.

Advisory committee.

7. (1) The Minister shall establish an advisory committee to advise him in regard to—

(a) the financial position of the MVA Fund;
(b) the financing of the MVA Fund;
(c) the investment of the moneys of the MVA Fund;
(d) the conditions under which agents of the MVA Fund should be appointed;
(e) disciplinary steps to be taken against appointed agents who do not comply with the provisions of the Act or the conditions of any agreement concluded with the MVA Fund;
(f) any amount which shall be required to be deposited as security with the MVA Fund by an owner of a motor vehicle referred to in section 5 (2) *(b)*; and
(g) any matter from time to time referred to the advisory committee by the Minister.

(2) The members of the advisory committee shall be appointed by the Minister, and the committee shall consist of—

(a) one officer of the Department of Transport, who shall be chairman of the committee;
(b) one officer of the Department of Finance;
(c) one officer of the Central Statistical Services;
(d) one officer of the Department of Mineral and Energy Affairs;
(e) one person to represent the Actuarial Society of South Africa;
(f) one person to represent the Automobile Association of South Africa;
(g) one person to represent the Association of Law Societies of South Africa;
(h) one person to represent the Southern African Bus Operators Association, the Public Carriers Association, the National Association for Private Transport Operators and the Passenger Transport Association; and
(i) the manager of the MVA Fund.

(3) A member of the advisory committee shall be appointed for a period of two years and on such conditions (including conditions relating to the allowances, if any, payable to him in respect of services rendered by him as such a member) as the Minister may determine with the concurrence of the Minister of Finance.

(4) The advisory committee may demand the production to it of statistics, books, accounts or other documents of the MVA Fund for the purpose of examination or making extracts therefrom or copies thereof.

(5) The advisory committee shall after the thirtieth day of April in each year prepare a report on all matters dealt with during the preceding year and submit it to the Minister, who shall lay it upon the Table in Parliament.

(6) The manager of the MVA Fund shall provide all such persons as may be necessary to undertake all secretarial and administrative work arising out of the performance of the functions of the advisory committee.

3.7 SECTION 7

COMMENTARY

3.7.1 The Grosskopf Commission recommended (paragraph 11.6 of the Report) that a Standing Advisory Committee replace two earlier Committees, namely the Advisory Committee and the Premium Committee. The Commission felt that this new Committee should "assume the duties of the present two Committees and will make recommendations about the requirements for admission with which insurers should comply to be admitted to the Consortium, requirements for the appointment of agents, the provision of information by insurers and in general the effective functioning of the system and the continual revision of the Act and the Regulations published in terms of it."

3.7.2 The Advisory Committee created by Section 7 of the Act has a larger and more varied membership than that envisaged by the Grosskopf Commission. Whereas the Commission recommended a Committee consisting of a maximum of seven members (paragraph 11.6.2 of the Report), the Advisory

Committee consists of nine members. Apart from the duties foreseen by the Commission, Section 7 (1) lists various additional duties, such as that the Advisory Committee shall advise the Minister on disciplinary steps to be taken against Appointed Agents who do not comply with the provisions of the Act or the conditions of any agreement concluded with the MVA Fund, and on the amount which shall be required to be deposited as security with the MVA Fund by a Depositor in terms of Section 5 (2)(b) of the Act.

3.7.3 The appointment of four representatives from the private sector is to be welcomed as a healthy step and it is hoped that the new Advisory Committee will make a meaningful contribution towards the running of the MVA Fund.

3.7.4 For the rest the provisions of Section 7 are of a purely administrative nature, requiring no further comment.

Liability of MVA Fund and appointed agent.

8. (1) The MVA Fund or its appointed agent, as the case may be, shall, subject to the provisions of this Act and on the prescribed conditions, be obliged to compensate any person whomsoever (in this Act called the third party) for any loss or damage which the third party has suffered as a result of—

(a) any bodily injury to himself;

(b) the death of or any bodily injury to any person,

in either case caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place in the Republic, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Act called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty.

(2) The provisions of subsection (1) also apply in respect of loss or damage resulting from or arising out of the driving of a motor vehicle in a territory which formed part of the Republic and became an independent state in terms of a law passed by Parliament, if an agreement has been or is entered into between the Government of the Republic and the government of the state concerned, in accordance with which the MVA Fund or its appointed agent accepts liability to apply the provisions of subsection (1) in that territory for a period as agreed upon.

(3) No interest shall be payable on the amount of any compensation which a court awards to any third party by virtue of the provisions of subsection (1), unless 14 days have elapsed from the date of the court's relevant order.

(4) In issuing any order as to costs on making such award, the court may take into consideration any written offer in settlement of the claim concerned against it or him, made by the MVA Fund or its appointed agent before the relevant summons was served on it or him.

(5) Where a claim for compensation under subsection (1)—

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, the MVA Fund or its appointed agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the MVA Fund or its appointed agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof;

(b) includes a claim for future loss of income or support, the MVA Fund or its appointed agent shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed the MVA Fund or its appointed agent to furnish such undertaking, to pay the amount payable by it or him in respect of the said loss, by instalments as agreed upon.

(6) 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 or 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.

(7) The MVA Fund or its appointed agent with the approval of the MVA Fund may make an advance payment to the claimant out of the amount to be awarded in terms of subsection (1) to the claimant in respect of medical costs and loss of income.

3.8 SECTION 8

COMMENTARY

3.8.1 With regard to Section 8 (1) it is to be noted that it re-

enacts in substantially similar terms the provisions of Section 21 of the 1972 Act. However, there are certain differences to which attention should be drawn:

3.8.1.1 It goes without saying that all the references to insurance have been deleted.

3.8.1.2 The earlier requirement that the driving of the motor vehicle concerned should have occurred "during the period over which the insurance extends" has likewise been deleted, there being no reference to any period during which the driving must have occurred;

3.8.1.3 The liability of the MVA Fund has been brought into the new Section, along with the liability of the Appointed Agent, which means that the words "The MVA Fund or its Appointed Agent, as the case may be" are to be read in conjunction with Sections 6 (1)(a)(i) and 6 (1)(b) as well as Regulation 7 (1) in order to determine in which cases liability rests on the MVA Fund and in which cases it rests on an Appointed Agent;

3.8.1.4 The new Section stipulates that the obligation to compensate is now no longer dependent on the wording of the Section itself; it is now dependent also "on the prescribed conditions".

3.8.2 LEGISLATION BY REGULATION

The introduction into Section 8 (1) of the words "on the prescribed conditions, represents an innovation which, though subtle in its terminology, is alarming to an extent of virtual disbelief. A scrutiny of the provisions of Sections 6 (1)(a) (i) and 6 (1)(b) reveals that both the Appointed Agents as well as the MVA Fund shall handle the claims referred to in Section 8 "subject to the provisions of the Regulations". Section 17 of the Act authorises the Minister to make Regulations with regard to the objects of the Act. Such Regulations are of course neither made nor considered nor even seen by Parliament. It is therefore incomprehensible that an Act passed by consensus in Parliament can be fundamentally affected, even negatived, by a set of Regulations made (with the rubber stamp of the Minister) by a State Department. Enquiries made in order to establish why it was deemed necessary to render the provisions of the Act subject to the provisions of the Regulations, received the response that this would be the tendancy in future legislation. This is indeed a frightening prospect. It is inconceivable that an Act can be put together in Parliament after intensive deliberations which have had the benefit of expert input on behalf of all parties concerned, only to be materially interfered with at the whim of the State Department concerned. The entire concept of legislation by Regulation is in principle unsound and dangerous, and the Regulations promulgated in this instance provide several classic examples as to why this is so.

3.8.3 Having now noted that the traditional liability of the Appointed Agent can only be enforced "on the prescribed conditions", it is necessary to take a closer look at the prescribed conditions in question, namely those contained in Regulation 7 (2) and more particularly in Regulation 7 (2)(b) which provides that an Appointed Agent shall <u>not</u> be obliged to compensate:

> "(b) Any person in terms of Section 8 of the Act for any loss or damage if the claimant concerned refuses or fails -
>
> (i) to submit to the Appointed Agent, together with his MV 3 claim form or within fourteen days after being in a position to do so, an affidavit in which particulars of the occurrence that gave rise to the claim concerned are fully set out;
>
> (ii) to furnish the Appointed Agent with copies of all statements and documents relating to the occurrence that gave rise to the claim concerned, within fourteen days after having come into possession thereof; or
>
> (iii) To furnish in writing such further particulars of the said occurence as the Appointed Agent may require."

To borrow from the informal remarks of an advocate commenting on the provisions of Regulation 7 (2)(b), the repugnance of these provisions is hydra-headed: as one considers but one of the objectionable features, another grows in its place.

3.8.4 The implications of Regulation 7 (2)(b) are more

appropriately dealt with in Chapter 7, but it is appropriate at this point simply to point out that comliance with the Regulations's provisions is in some instances impossible (the dependants of a deceased breadwinner will only rarely be able to state under oath how the accident in question occurred); in other instances quite ludicrous (Regulation 7 (2)(b)(ii) is clearly wide enough to require the claimant to start furnishing the defendant with copies of statements and other documents relating to the merits long before he has even lodged his claim); in fact the same comment applies to Regulation 7 (2)(b)(i); and in some instances unfair and potentially prjudicial to the claimant. (The oblication to furnish particulars in terms of Regulation 7 (2)(b)(iii) is ongoing and indefinite, and it is unfairly unequal in relation to the Appointed Agent's "reciprocal" obligation under Section 13 (3); its interrelationship with the provisions relating to prescription is considered in paragraphs 3.14.1.3 and 3.14.1.7 below. If it is remembered that non-compliance with the provisions concerned, even where compliance is impossible, can result in repudiation of the claim, then it becomes clear why the tendency towards legislation by Regulation should be vigorously resisted.

3.8.5 IS COMPLIANCE WITH THE REGULATIONS STILL MERELY DIRECTORY OR IS IT NOW MANDATORY?

3.8.5.1 The principle of "substantial compliance" has become

firmly entrenched in our MVA Case Law, mainly in relation to the claims procedure laid down in Section 25 of the 1972 Act. The rendering of the Appointed Agent's traditional liability subject to the provisions of the Regulations, and the manner in which this has been done, decidedly places an intimidating questionmark behind the basic enforcement of liability under the Act. The statement contained in Section 8 (1) to the effect that the MVA Fund or its Appointed Agent shall be obliged to compensate (accident victims) "on the prescribed conditions", seems to be the equivalent to saying that the MVA Fund or its Appointed Agent shall only be obliged to compensate (accident victims) <u>on condition</u> that the claimants comply with the requirements of the prescribed Regulations. This construction has ominous mandatory undertones. If this is so, strict compliance with the Regulations would be a pre-requisite for liability under the Act, and decisions which have held that substantial compliance with the Regulations is sufficent would no longer be good law. The consequences of such a construction being found to be correct are too devastating to contemplate. Nevertheless, whichever way one looks at the words "on the prescribed conditions" in Section 8 (1), the argument remains looming in the background that they were intended to mean that a claimant will be compensated only on condition that he complies with the provisions of those regulations which

contain "conditions". Why else did the legislature deliberately insert the words "on the prescribed conditions" ("Afrikaans: op die voorgeskrewe voorwaardes") into Section 8 (1)? After all, they were not there in Section 21 of the 1972 Act; indeed they constitute the only significant amendment to that Section. Moreover, they were not necessary if they were intended to indicate merely that claims should be conducted in accordance with the provisions of the Regulations; that was already the position under the old Act. But the provisions in question had been interpreted by our Courts to mean that "substantial compliance" would suffice despite seemingly imperative language. In fact, the series of judicial pronouncements in our case law favouring indulgence rather than peremptoriness has given added impetus to the often-expressed complaint that the Courts lean over backwards, even "bend the law", to come to a claimant's assistance. The unsoundness of such complaints becomes immediately evident if regard is had to the purpose of the legislation and the fact that its general object is to afford to third parties the widest possible protection by way of compensation. (Aetna Insurance Company vs Minister of Justice, 1960 (3) SA 273 A at 286) It is therefore against this background that both the 1942 and the 1972 Acts have been interpreted and implemented. How will the addition of the words "on the prescribed

conditions" affect the pre-existing situation? To answer this question it is necessary to establish their meaning, which in turn involves three enquiries:

(a) What is a "condition"? and

(b) What did the legislature seek to achieve?

(c) What measure of compliance with the "conditions" is required?

What is a "condition"?

Vol I of The Shorter Oxford English Dictionary on Historical Principles lists the following six meanings in the chronology of earliest occurrence of the term "condition":

(i) Something demanded or required as a prerequisite to the granting or performance of something else; a provision; a stipulation.

(ii) In a legal instrument, a provision on which its legal force or effect is made to depend.

(iii) Covenant, contract, treaty.

(iv) Something that must exist or be present if something else is to be or take place; a

prerequisite.

(v) A restriction or qualification.

(vi) A clause expressing a condition in the sense indicated in (iv) above.

The New Webster's Dictionary (College Edition) defines "condition" as "something demanded as an essential part of an agreement; a stipulation; a circumstance indispensable to some result; a prerequisite; that on which something else is contingent; .... a restricting, limiting or modifying circumstance ...".

Kritzinger, Labuschagne and Pienaar, "Verklarende Afrikaanse Woordeboek", refers to "voorwaarde" simply as "bedinging, voorbehoud, kondisie".

It is submitted that "condition" in the context of Sectin 8 (1) connotes that something is required, i.e. compliance with any "conditions" in the regulations, as a prerequisite to the obligation (to compensate) resting on the Appointed Agent and/or the MVA Fund. Stated differently, those provisions in the regulations which are "conditions" are required by the legislature to be implemented before liability on the part of the Appointed Agent or the MVA Fund will be established.

Admittedly "condition" can notionally also signify a "provision", a "stipulation", or simply a term, all of which connote a somewhat wider meaning of "condition". (See S vs H Friedman Motors (Pty) Limited and Another, 1972 (3) SA 421 A at 425 H - 426 A; Design and Planning Service vs Kruger, 1974 (1) SA 689 A at 695 B - F) But it would unjustifiably strain the legislature's words ("on the prescribed conditions") to submit that this wider meaning was contemplated.

Having thus determined the general meaning intended by the legislature with regard to "conditions", it becomes necessary to address the second enquiry posed above.

What did the legislature seek to achieve by the introduction of the words "on the prescribed conditions"?

To answer this question it is necessary to review the juggling and re-locating of certain provisions of the 1972 Act and its regulations:

* Section 23 (3) of the 1972 Act has now been taken out of the Act itself, but re-inserted in the regulations, more particularly in Regulation 7 (2). (It deals with the right of the Appointed Agent and the MVA Fund to repudiate liability if the claimant fails or refuses to co-operate with regard to

medical examinations and the making available of medical reports and records.)

* Sections 28 (2), (3), (4) and (5) have similarly been taken out of the Act and the bulk of these provisions (with the notable exception of Sub-Section (4), which was an inadvertent omission) have been re-inserted in the regulations, more particularly in Regulation 11. (These provisions deal with the circumstances under which the Appointed Agent may exercise its right of recourse against the owner or the driver of a vehicle.)

* The traditional wide liability created by Section 8 (1) has been re-enacted practically verbatim, save only for the insertion of the words "on the prescribed conditions".

There must be some "method (purpose?) in this madness", and the answer readily comes to mind: the legislature intended that certain aspects of the scheme should be regulated by the regulations rather than by the Act itself. Hence: legislation by regulation. Inevitably this places far-reaching powers in the hands of the Department of Transport Affairs (in effect, in the hands of the MVA Fund itself) to guide or manipulate the Lilliputian strings relating to the aspects concerned.

In effect a government department gains control over the aspects in question; and this is precisely what the draftsman intended to achieve. Which are these aspects? They are primarily, though perhaps not exclusively, those which are evidenced by the innovative juggling exercise, namely those which circumscribe and govern the circumstances under which liability may be excluded, and those which circumscribe and govern the circumstances under which the Fund's agents may recover moneys (for the Fund) disbursed by them in respect of compensation. While both these aspects go to the very root of the entire scheme, it is the right to exclude liability for compensation which causes more distress, more particularly in a reading of Regulation 7 (2)(b) whose provisions crop up throughout this work. The outcry against the innovations presently being considered is directed not only against the whole principle itself of legislation by regulation, but also by the irresponsible manner in which this principle has been implemented. (See paragraphs 3.3.8, 3.13.2, and 7.1.3) Indeed, the manner in which it has been implemented is illustrative of the submission that the principle is itself repugnant, being exposed to abuse in the form of irresponsible or ill-conceived decrees not instigated, evaluated or even seen by Parliament. The fact that the amending procedures relating to regulations are easier and quicker does not detract from these propositions.

Section 10 of the new Act reveals that certain grounds for repudiation of liability have still been retained in the Act itself, but these appear to be more in the nature of principial matters, whereas the exclusions of liability as contained in Regulation 7 (2) and Regulation 11 are more in the nature of penalties for certain acts or omissions on the part of the claimant (Regulation 7 (2)) and the owner or driver (Regulation 11); they are generally orientated towards procedural aspects and the penalties flowing therefrom.

TO SUMMARISE: the intention was to achieve a system of legislation by regulation in respect of the aspects mentioned above. Control over these aspects had to be given to the department concerned rather than to Parliament. If the provisions in question had merely been taken out of the Act and re-inserted in the regulations, they would have been ultra vires the Act. To avoid this it was necessary to create the requisite enabling provisions in the new Act. This was done firstly by providing in Section 17 (1)(b) that the Minister shall be authorised to make regulations as to "any matter which in terms of this Act is required or permitted to be prescribed by regulation"; and secondly by inserting the words "on the prescribed conditions" in Section 8 (1). "And thus the evil deed was done!"

What measure of compliance with the "prescribed conditions" is required?

We have seen that the legislature's intention with the insertion of the words "on the prescribed conditions" in Section 8 (1) was to achieve authority for a system of legislation by regulation with regard to certain aspects of the scheme. The intention was therefore not to interfere with existing principles of substantial compliance known by the legislature to exist.

In determining the measure of compliance with "the prescribed conditions" contained in Regulation 7 (2)(b) we fortunately have available a judicial pronouncement by the Appellate Division as regards Regulation 7 (2)(a). Since both these sub-regulations govern repudiation of liability in cases where the claimant refuses or fails to furnish certain information, the case of Union and South West Africa Insurance Company Limited vs Fantiso, 1981 (3) SA 293 A must be equally applicable to both. The case dealt with the requirements now contained in Regulation 7 (2)(a), but contained at that stage in Section 23 (c) of Act 56 of 1972. The defendant had pleaded that it was entitled to repudiate liability because of the plaintiff's "refusal or failure to furnish defendant at its request with a copy of a certain medical report which had been withheld. Rumpff C J, who found himself equally as

aghast as the present author at the prospect of a claimant being totally non-suited for even a non-culpable "failure or refusal" to furnish information, commented as follows at page 301 B - F:

> "Having regard to the context of the Act and of Section 23 itself, the word 'fails' in (c)(ii) implies more than the mere omission to furnish copies of reports. To hold otherwise would create an injustice which the legislature could not have intended. In view of the severity of the penalty, a final loss of claim, one has to consider the failure to furnish copies of reports in a restrictive manner, restrictive in the sense that a court will not deprive the plaintiff of his right to claim compensation unless he can be said to have obstructed the insurer from getting the information which he is entitled to. As the object of the section is to allow the insurer to get information, forfeiture of the plaintiff's claim will only be allowed, in my view, if the information is wilfully withheld after a request is made or if the request is deliberately ignored .... There must be a consideration of elasticity and reasonableness in the application of Section 23 (c)(ii) and (iii), although the word "unreasonably" has been specifically mentioned only in (c)(i)."

This accords with authority to the effect that words in the Act which purport to limit, reduce or negate "the widest possible protection" intended for third parties, must be restrictively interpreted. (Aetna Insurance Company vs Minister of Justice, 1960 (3) SA 273 A at 286; Rondalia Versekeringskorporasie Beperk vs Lemmer, 1966 (2) SA 245 A at 255 H.) The provisions of Regulation 7 (2)(b) also deal with the furnishing of information; they are similarly worded in the sense

that they also seek to non-suit a claimant who "fails or refuses" to furnish an affidavit on the merits (Regulation 7 (2)(b)(i)) and copies of all his witness statements and other evidence on the merits (Regulation 7 (2)(b)(ii)) within certain specified time-limits, as well as such further particulars concerning the merits as the Appointed Agent may require (Regulation 7 (2)(b)(iii)). These requirements find themselved ensconsed in the same sub-regulation, namely Regulation 7 (2) as the requirements commented upon by Rumpff C J in Fantiso's case; they will surely be similarly interpreted and implemented. It is submitted that although the element of reasonableness has not expressly been built into Regulation 7 (2)(b), our Courts will not hesitate to read it into those provisions, as was done in Fantiso's case with regard to what is now Regulation 7 (2)(a). The severity of the penalty is such that strict and precise compliance is too repugnant to have been contemplated, and on the basis of reasonableness it is therefore submitted that our courts will opt for "elasticity" rather than strict enforcement.

With regard to Regulation 9 it is submitted that the principles of substantial compliance with its provisions are again in no way affected by the insertion of the words "on the prescribed conditions" in Section 8 (1). This simply was not the object of the exercise. Despite "some injunctions couched in imperative terms" said

Trollip J A in Nkisimane and Others vs Santam Insurance Company Limited, 1978 (2) SA 430 A at 436 P - "all those injunctions must also be regarded as merely directory", including the provision in the counterpart to the present Regulation 9 (3) (which provided that "any form provided for in this Regulation and not completed as prescribed shall not be acceptable as a claim under the Act.") The legislature must here again be taken to have been aware of this and numerous other similar pronouncements. If it wished to effect a radical change, it would have done so in clear and unequivocal language. Whether or not Regulation 9 can be regarded as containing "conditions" as envisaged in Section 8 (1) (which it is submitted is not the case), the result is the same: substantial compliance will suffice. Nevertheless, as urged in Nkisimane's case at page 436 D, claimants are "well-advised to try to comply with them as fully as possible."

The same applies, it is submitted, to the words: "subject to the provisions of the regulations" which appear in Sections 6 (1)(a)(i) and 6 (1)(b).

The measure of compliance with "the prescribed conditions" may also be approached from a different angle. In Nkisimane's case (Supra) Trollip J A had to consider peremptory and directory statutory requirements

and insofar as the provisions of Regulation 7(2)(b) may be procedural in nature it is appropriate to consider the learned Judge's remarks at page 433 - 434:

> "Preliminarily I should say that statutory requirements are often categorised as 'peremptory' or 'directory'. They are well-known, concise and convenient lables to use for the purpose of differentiating between the two categories. But the earlier clearcut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such lables what degree of compliance is necessary and what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirements in particular. ..... Thus, on the one hand a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity ... On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non- or defective compliance therewith may not have any legal consequences ... In between those two kinds of statutory requirements it seems that there may now be another kind which while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective ... It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirements which need only be substantially complied with to have full legal effect."

The learned Judge also pointed out (at page 434 H) that

a decisive factor in rendering an enactment peremptory is whether or not the enactment contains an effective sanction for non-compliance, and against this background he proceeded to hold that the lodgment of a claim form was peremptory but the requirements relating to the contents of the claim form were merely directory, "for a statutory provision may be peremptory as to one of its requirements, but directory as to another", (at page 435 A). By a parity of reasoning, even if the requirements concerning the furnishing of the documents listed in Regulation 7 (2)(b) are interpreted to be peremptory, the express or implied provisions relating to the contents of such documents require only substantial compliance. Nevertheless, no compliance at all can never amount to "substantial compliance"; practitioners are accordingly urged to carry out the injunctions in Regulation 7 (2)(b), and to do so as fully and precisely as possible. But, most importantly the legislature must attend immediately to the elimination of provisions which are patently incapable of compliance, unreasonable in extent, and unfair and unequal in relation to reciprocal obligations resting on the Appointed Agent.

3.8.5.2 For the rest, Section 8 (1) is substantially similar to its predecessors under the 1972 and even the 1942 Acts. As such, these provisions have, so to speak, been through the mill. Our Courts have had many

opportunities of interpreting almost every facet of the Section, and explanatory decisions are abundant. Consequently only a few of the most important provisions need be specially highlighted.

3.8.6 THE MVA FUND OR ITS APPOINTED AGENT, AS THE CASE MAY BE, SHALL ... BE OBLIGED TO COMPENSATE

3.8.6.1 It is to be noted that the MVA Fund or the Appointed Agent (as the case may be) are substituted for the ordinary common law defendant.

3.8.6.2 Such substitution however only applies to the extent of the liability created by the Act; beyond the limits of the statutory liability the claimant remains at large to look to the ordinary common law defendant for the balance of his damages. Only to the extent that the statutory liability of the MVA Fund or the Appointed Agent exists, is the third party debarred by Section 12 of the Act from taking action against the common law defendant. (Rose's Car Hire (Pty) Limited vs Grant, 1948 (2) SA 466 A).

3.8.7 ANY PERSON WHOMSOEVER (i.e. "THE THIRD PARTY")

3.8.7.1 This phrase has very wide connotations, as will appear from the discussions of Hodes (pages 96 to 99) and Nathan (pages 57 to 59).

3.8.7.2 A topical question which will hopefully shortly be resolved by the Appeal Court is whether the words "any person whatsoever" (in the new Act "any person whomsoever") are wide enough to enable an owner to recover damages under the 1972 Act from the authorised insurer of his own vehicle driven by someone other than the owner himself. This could involve the situation where such owner was conveyed as a passenger in his own vehicle which was negligently driven by someone else, thus giving rise to a claim by the passenger/owner against the insurer (under the 1972 Act) of his own vehicle; or it could involve the situation where the owner is conveyed in vehicle A which is struck by vehicle B (which also belongs to him), thus giving rise to a claim by the passenger/owner against the insurer (referring again to the 1972 Act) of vehicle B. In Stegen and Others vs Shield Insurance Company Limited 1976 (2) SA 175 N, the plaintiff travelled in vehicle A which collided with vehicle B of which he was the owner. The plaintiff's claim under the Act against the insurers of vehicle B succeeded. In two subsequent cases the plaintiff-owner failed: Mohan and Others vs Santam Insurance Company Limited, 1983 (4) SA 221 N, and Mthombeni vs AA Mutual Insurance Association Limited, 1985 (2) SA 716 W. In these two cases the plaintiff-owners were passengers in their own vehicles seeking to recover damages under the Act from the insurers of their

vehicles, the allegation being that they were conveyed on the vehicles concerned in the course of the business of the owner thereof. In each of the two cases it was held that the Act necessarily contemplated the plaintiff being some person other than the owner of the vehicle. Under common law there was nothing stopping the owner-passenger from instituting action against the negligent driver of the vehicle in which he was conveyed. The 1942 Act was promulgated partly for the protection of the claimant, i.e. to ensure that he recovers the damages awarded to him and that he is not left with a hollow unenforceable judgment against an impecunious wrongdoer. Thus the common law claim became entrenced and the damages secured. Against this background it seems strange that an owner-passenger should be non-suited under the Act in respect of a claim for damages caused by the same wrongdoer, i.e. the driver. This point will hopefully be resolved by the Appeal Court in the course of 1987.

3.8.8 ANY LOSS OR DAMAGE WHICH THE THIRD PARTY SUFFERED AS A RESULT OF ANY BODILY INJURY TO HIMSELF OR THE DEATH OF OR ANY BODILY INJURY TO ANY PERSON

3.8.8.1 Only damages resulting from bodily injury are recoverable, with the result that material damage to property (such as a motor vehicle, clothing, radios or other items of personal effects) cannot be recovered

under the Act and must be separately claimed under Common Law. So for instance the cost of replacement of dentures broken as a result of an accident is not recoverable as damages under the Act (Oberholzer vs Santam Insurance Company Limited, 1970 (1) SA 337 N), but if the claimant's natural teeth were damaged in the collision and dentures prescribed, the costs would indeed be recoverable, these being classified as damages resulting from bodily injury. It is submitted that the same would clearly apply to similar items such as spectacles or artificial limbs. Obviously, if the claimant's vision was impaired to such an extent by the injuries sustained in the collision that spectacles are prescribed, or if the claimant's leg were amputated as a result of the accident and an artificial limb was purchased, such costs would be recoverable under the Act. The term "bodily injury" is wide enough to include "mental injury" with the result that damages for shock or psychiatric injury resulting in significant indisposition, are recoverable. (Bester vs Commercial Union Versekeringsmaatskappy Beperk, 1973 (1) SA 769 A)

3.8.8.2 A more detailed discussion of the damages recoverable under the Act is contained in Chapter 9.

3.8.9 CAUSED BY OR ARISING OUT OF THE DRIVING OF A MOTOR VEHICLE

3.8.9.1 "Arising out of" is not synonymous with "caused by".

(Barkett vs SA National Trust and Assurance Company Limited, 1951 (2) SA 353 A)

3.8.9.2 Whereas the term "caused by" is self-explanatory, the term "arising out of" has been the subject of much dispute. The most definitive judgment dealing with these two phrases is Wells vs Shield Insurance Company Limited, 1965 (2) SA 865 C. Hodes (page 117) sums the position up as follows:

> "If the injury or death would have resulted irrespective of whether the driving had occurred, then such injury or death cannot be said to have arisen out of the driving."

In the case of Nkhala vs Mutual & Federale Versekeringsmaatskappy Beperk, 1985 (1) SA 824 O, L C Steyn J said the following at page 833 E:

> "Om te besluit of die beserings in die saak onder oorweging veroorsaak is deur of voortgevloei het uit die bestuur van die tenkwa-kombinasie, is die basiese vraag of daar 'n kousale verband tussen die 'bestuur', in gewone of uitgebreide statutêre betekenis, en die beserings is. As die beserings derhalwe sou gevolg het, of die betrokke voertuig bestuur was of nie, kan daar nie sprake wees daarvan dat die beserings veroorsaak is of voortgevloei het uit die bestuur nie."

For a number of examples of cases wherein the Courts were required to decide whether the injuries in question were caused by or arose out of the driving of the motor

vehicle concerned, see MVA Handbook, page 10 and Hodes pages 118 - 120.

3.8.9.3 It must be noted also that the word "driving" is used in two senses, firstly in its ordinary sense which implies that the vehicle is in motion and which has been defined as "the urging on and directing of the course of the vehicle while it is in motion". (Peterson vs Santam Insurance Company Limited, 1961 (1) SA 205 C, at 209) In this (ordinary) sense driving also includes "all other acts reasonably or necessarily incidental thereto". (Wells vs Shield Insurance Company Limited, 1965 (2) SA 865 C). Secondly there is the extended meaning of "driving" as created by Sub-Sections (1), (2) and (3) of Section 11 of the Act. (Sub-Sections (2), (3) and (4) of Section 1 of the 1972 Act.) For a discussion of the meaning of "driving" in the extended sense, see Hodes, page 121 - 124.

3.8.10 BY ANY PERSON WHOMSOEVER

3.8.10.1 The wording of the Section makes it clear that the driving of the vehicle need not have occurred by the owner or by a person having the owner's consent; liability remains unaffected, even if the motor vehicle concerned was driven by any unauthorised driver including a thief. (Workmen's Compensation Commissioner vs Norwich Union Fire Insurance Society

Limited, 1953 (2) SA 546 A).

3.8.10.2 The words "by any person whomsoever" should not be regarded as being qualified or affected in any way by the words "or his servant in the execution of his duty" which appear at the end of the Section, and which are discussed below (see paragraph 3.8.12).

3.8.11 AT ANY PLACE IN THE REPUBLIC

3.8.11.1 Section 2 (1) of the 1972 Act prohibited the driving of a motor vehicle "on a public road or street or in any other place to which the public has access", unless such motor vehicle was insured under the Act. The reference to a public road or street or any other place to which the public has access was however not contained in Section 21 of that Act, which made it clear that liability could arise from the driving of a motor vehicle "at any place in the Republic". Likewise, Section 8 (1) of the new Act also refers to "at any place in the Republic". It is clear therefore that the driving may occur literally at any place in the Republic, even on private property, farm lands, pavements, beaches, etc.

3.8.11.2 Section 18 of the Act provides that the Act and any amendment thereof shall apply also in the territory of South West Africa, including the eastern Caprivi Zipfel.

3.8.12 IF THE INJURY OR DEATH IS DUE TO THE NEGLIGENCE OR OTHER UNLAWFUL ACT OF THE PERSON WHO DROVE THE MOTOR VEHICLE OR OF THE OWNER OF THE MOTOR VEHICLE OR HIS SERVANT IN THE EXECUTION OF HIS DUTY

3.8.12.1 Both the Wessels Commission as well as the Grosskopf Commission rejected the concept of no-fault insurance, with the result that fault or blame must still be proved before the claimant can succeed. In order to succeed, the claimant must prove what the Section requires, namely that the injury or death was due:

(a) To the negligence or other unlawful act of the driver (whether he was the owner or not); or

(b) To the negligence or other unlawful act of the owner (whether he was driving or not); or

(c) To the negligence or other unlawful act of the owner's servant in the execution of his duty.

The reference to the negligence or other unlawful act of the owner's servant in the execution of his duty relates only to an act or omission otherwise than in the driving of the vehicle.

3.8.12.2 From the aforegoing it is clear that damages suffered by a third party can, under certain circumstances, be

said to have been caused by or to have arisen out of the driving of a motor vehicle even though no fault could be found with the manner in which the vehicle was being driven at the time when the third party was injured. (See Protea Assurance Company Limited vs Matinise, 1978 (1) SA 963 A.) The "other unlawful act" on the part of the owner who was not the driver may relate to his failure to maintain the vehicle properly or to his allowing the vehicle to be driven by a child or driver known to be unskillful, or in his failure to provide adequate fire-fighting equipment in a van. (Ngedle vs Marine & Trade Insurance Company Limited, 1969 (4) SA 19 W). The "other unlawful act" of the owner's servant in the execution of his duty may relate, for example, to the servant's negligence in the repair or maintenance of the vehicle or to his failure to carry out instructions to this effect. Another example of the negligence or other unlawful act of the owner's servant in the execution of his duty is the bus conductor who negligently causes the bus to pull away before a passenger has had sufficient time to alight. See also Pillay vs Santam Insurance Company Limited, 1978 (3) SA 43 D.

3.8.13 SECTION 8 (3)

This Section is a verbatim repeat of Section 21 (1A) of the 1972

Act. The effect seems to be that interest on compensation awarded by the Court is waived if payment of the compensation is effected within fourteen days from the date of the award. If this interpretation is correct, then it follows that where payment of the compensation is effected after the lapse of a period of fourteen days from the date of the award, interest is recoverable from the date of the award. The Section does not appear to prohibit the payment of interest from the date of the claim in those cases where interest is recoverable. The simple explanation as to why this Section was introduced into the 1972 Act (by Section 8 of Act 69 of 1978) appears to have been that a reasonable time should be allowed to the Appointed Agent to have the cheque processed by its Head Office, mailed to its attorneys and thereafter transferred to the claimant's attorneys. It was intended to put a stop to an endless number of cases where the claimant's attorneys, upon receipt of the cheque for the amount awarded, notify the company that a further amount is required because interest has accrued between date of judgment and date of receipt.

3.8.14 SUB-SECTION (4)

3.8.14.1 The effect of this Section is somewhat in the nature of a payment into Court. It is intended to oblige the claimant to give careful consideration of any pre-summons offer of settlement. Such consideration must be given with the full knowledge that if the Court

subsequently awards the same or a lesser amount of damages, the claimant runs a real risk of having to pay all the defendant's costs from the time that the offer was first refused.

3.8.14.2 Ordinarily a bona fide settlement offer is privileged, with the result that a letter of this nature would be inadmissible as evidence in Court, but the provisions of this Section cut across the principle of privilege, thus rendering the production of the letter containing the pre-summons offer admissible.

3.8.14.3 The Section unfortunately does not address the vexed question of whether the claimant is entitled to his taxed or agreed party and party costs up to the date of the pre-summons offer of settlement. This is currently, and has been for many years, a source of much friction between on the one hand attorneys representing claimants and on the other hand the Appointed Agents or more particularly the MVA Fund. Pre-summons offers have for many years gone no further than a nominal contribution towards the claimant's costs. Acceptance of such nominal contribution towards costs necessarily has the effect that the claimant must pay (usually out of the compensation received) not only his attorney and client costs, but also the balance of his party and party costs. It is submitted that it could never have been the intention for the claimant to

use his compensation to defray his party and party costs.

The problem regarding recovery of a party's pre-summons costs stems from the dictum by Innes C J, in the matter of Brits and Others vs Engelbrecht & Others, 1907 TS 876 at 884:

> "It is a sound rule that, as an action only begins with the summons, so party and party costs should, as a general rule, only commence then."

See also Verwoerd vs Toubkin, 1948 (4) SA 245 E; Openshaw vs Russel, 1967 (4) SA 344 E. But in Hastings vs The Taxing Master and Another, 1962 (3) SA 789 N, which was an MVA case, Milne J P said the following at page 794 A - C:

> "To put it at its lowest it was, in my view eminently reasonable, in the circumstances, that the applicant should, at once set about collecting the available evidence upon the question of negligence, and assessing its value, for the purpose of establishing the cause of the accident, as well as upon the question of the quantum of damages. There was a real risk that the witnesses, approached for the first time long after the accident, might well be far less able to give reliable testimony than they would if their statements were taken as soon as reasonably practicable after the events."

This was followed by Meer vs Taxing Master and Another,

1967 (4) SA 652 D, where Miller J (as he then was) said the following at page 654 H - 655 B:

> "I might add that delay in making full investigation of the circumstances of the accident might result in failure to locate or identify material witnesses. In my view an attorney would be failing in his duty if, having been instructed by his client in a matter of this nature to act for him in regard to a proposed claim for damages, he did not at once advise his client of the advisability, if not the necessity, of investigating, with the least possible delay, all the relevant facts and circumstances relating to the accident and the evidence which might be available to support the claim."

A refreshingly positive approach to the taxation of attorneys' party and party costs was also taken by M T Steyn J in the case of Van Rooyen vs Commercial Union Assurance Company, 1983 (2) SA 465 O. The learned Judge first defines the taxable party and party costs as follows at page 468 D:

> "As officer of the Court the attorney is enjoined to act responsibly and to draw his party and party bill of costs so as to include therein only what is permissible to recover from the party condemned in such costs. What is permissible is, to my mind, those costs which an honest, experienced and capable practitioner would consider reasonable in relation to the particular claim or defence, bearing in mind the requirements of efficient practice and the exigencies of litigation."

After warning of "the danger lurking in antiquated

authorities" (page 469 H) he then describes (at page 474 C) the judgments in the cases of Hastings vs The Taxing Master, Supra, and Meer vs Taxing Master, Supra as "this new and more realistic approach" and welcomes it as "a healthy and timeous development." He points out that "the private sector affairs of the modern post World War II urbanised, Techno-Industrial Community ... have become much more complicated and pressing than those of earlier, more leisurely times, and now require a far greater degree of expedition and innovation in their handling than was the case in the past. He then adds (at page 474 D):

> "Litigation has inevitably been affected likewise, the exigencies of modern practice demanding a very high degree of prompt, alert and well-informed preparation and action at a much earlier stage than was the case four or five decades ago. The recent great and rapid advances in science and technology, especially in the medical, electronic and mechanical fields, have opened up new and very wide possibilities of proof and disproof in many areas of litigation, including MVA matters, thereby greatly increasing the burden and scope of research and preparation which litigants and their legal representatives have to bear and handle. The experienced, diligent and efficient attorney is well aware of this, and acts accordingly."

The way has therefore clearly been opened for the allowance of pre-summons charges on a party and party basis in MVA matters. Indeed, there is yet another compelling reason why MVA matters should be distinguished from other types of cases insofar as pre-

summons costs are concerned, and that is that the MVA claimant is obliged by the Act itself to make use of the services of an attorney in the processing of his claim before the stage of summons has been reached. (The rare case where the claimant processes the claim himself can be virtually discounted in this regard.) The Act requires that the summons be preceded by the lodgment of a prescribed claim form and this necessarily involves the employment of an attorney in almost all cases. Thus, where the claimant is virtually obliged to incur legal charges long before summons may be issued, the defendant can hardly be heard to argue, on the strength of authorities which have already been described as antiquated, that the claimant's pre-summons costs are not recoverable.

The recoverability of the pre-summons costs is however complicated in those instances where the claim is settled before summons is actually issued. The fact that pre-summons costs may under the "new" approach be included in a claimant's party and party bill of costs in a matter where settlement is achieved only after summons has been served, is one thing; having a party and party bill taxed in a matter wherein settlement was achieved without the necessity of a summons, is something else. Supreme Court Rule 70 (3) states that "the party who has been awarded an order for costs",

should be aforded a full indemnity for all costs reasonably incurred by him. This clearly envisages an order of Court, although Rule 70 (1) makes no mention of such order where settlement is achieved before summons. Claimants are therefore left dependent, for the question whether such a party and party bill can be taxed, on the whim of the Taxing Master operating for the time being at the seat of the Court where summons would have been issued if a pre-summons settlement had not been achieved. Enquiries throughout the Republic have revealed that some Taxing Masters will indeed tax such bills whilst others will not; some even claim that the problem has never arisen in their divisions and they consequently could not say whether they would be prepared to tax such bills if the occasion arose.

Against this background of uncertainty there is an understandable disparity in practice. In most cases the claimant is unhappy with the contribution offered towards his taxable party and party costs. Some attorneys simply reject the settlement offer, despite the fact that the capital amount offered is acceptable, and issue summons. They feel that once summons has been issued there will be no difficulty in recovering the claimant's full taxed or agreed party and party costs, and very often these cases are settled immediately after the issue of summons on the basis of the same capital amount of damages as was offered prior

to the summons being issued. The MVA Fund objects to this practice, claiming that it is improper and merely done to increase costs. The attorney denies this by pointing out that he would never have issued summons if his client's full party and party costs had been offered simultaneously with the offer in respect of the damages. In the absence of clear-cut authority enabling a Taxing Master to tax the party and party bill in a matter wherein summons has not been issued, there is presently a most unsatisfactory stalemate position. Many attorneys believe that failure on the part of the defendant to offer the claimant his full taxed or agreed party and party costs up to the date of the settlement, renders the offer made under Section 8 (4) of the Act inadequate even if the capital sum offered is reasonable. But this point has never been resolved by our courts. The MVA Fund continues to offer only nominal contributions towards the claimant's costs and they constantly complain about the behaviour of attorneys who reject such contributions and issue summons. They argue further that if they had to pay each claimant his full taxed (or taxable) party and party costs a substantially higher portion of their annual budget will have to be applied to legal costs and they point out that such legal costs already take up too large a portion of the scheme's available funds. The legislature will simply have to resolve this

problem.

3.8.15 SECTION 8 (5)

3.8.15.1 Except for a subtle (but significant) ommission from the new Section 8 (5)(b) of the last five words of the old Section 21 (1C)(b), namely "or directed by the court", the provisions of Section 8 (5) simply re-enact the provisions of Section 21 (1C) of the 1972 Act. The impact of the deletion of those five words is explained in Chapter 9, paragraph 9.2.6.2.

3.8.15.2 The locus classicus on the topic of Section 8 (5)(a) as well as Section 8 (5)(n) is Marine & Trade Insurance Company Limited vs Katz NO, 1979 (4) SA 961 A. This definitive judgment by Trollip J A has been appropriately summarised by Hodes firstly with regard to what is now Section 8 (5)(a) (at page 183/4) and secondly with regard to what is now Section 8 (5)(b) (at page 185). Sections 8 (5)(a) and 8 (5)(b) are fully dealt with in Chapter 9 below, paragraph's 9.2.4 and 9.2.6.2.

3.8.15.3 Apportionment of an Undertaking under Section 8 (5)

Whilst it is true that the Act itself makes no provision for payment of only a portion of the future

expenses commensurate with an apportionment against the claimant (see MVA Handbook, paragraph 10.41), it is equally true that the Act contains no such provisions with regard to any other type of damages, and there is consequently absolutely nothing which precludes the Appointed Agent from issuing an undertaking under Section 8 (5)(a) which takes the appropriate apportionment of blame into account. Indeed, such undertakings have been issued in practice for some time and this has now been judicially approved. See in this regard Majele vs Guardian National Insurance Company Limited, 1986 (4) SA 326 T. An undertaking of this nature will not be issued until liability has been accepted by the Appointed Agent, and the latter then simply issues an undertaking to pay the appropriate percentage of the future medical expenses.

3.8.16 SECTION 8 (6)

3.8.16.1 Most of the complicated provisions of Section 26 of the 1972 Act relating to direct payment to suppliers, publication of settlements in the Gazette, and the retention of an amount of R200 for sixty days after such publication, as well as the supplier's right to intervene in proceedings, have mercifully been scrapped, Section 8 (6) being the only remaining provision. It enables the supplier himself to claim

direct from the MVA Fund or the Appointed Agent, as the case may be, the cost of the services or goods supplied by him in connection with the accident in question. The supplier's claim is lodged by means of the form MV 4 and shall otherwise be subject, mutatis mutandis, to the provisions of the Act applicable to the claim of the third party concerned. Any defence which the Appointed Agent has against the claimant in respect of the accident in question, he also has against the supplier, including the right to plead an apportionment of damages.

3.8.16.2 The right thus afforded to the supplier clearly does not detract from the right which the supplier has under Common Law to recover from the injured person the amount due to him; the supplier has simply been given an alternative right to recover the amount in question direct from the MVA Fund or the Appointed Agent, as the case may be. It was held in Administrator, Transvaal vs AA Mutual Insurance Association Limited, 1960 (4) SA 525 T at 528 C that the claim or right of action was given statutorily to a supplier or person who has a contractual claim or right of action against an injured party who is able to satisfy the requirements of the Act and is thereupon entitled to claim from the insurer within the prescribed time. But according to the judgment such right to claim arises only when the accommodation has been furnished or when the services have in fact been

rendered, and not before. That being so the two year prescriptive period does not apply to the right of action under what is now Section 8 (6), such right being governed by the Prescription Act, Nr 68 of 1969. Nathan (page 87) submits that this judgment no longer applies because the wording of the Section was amended after the judgment. However, Hodes (page 176, foot note 203) disagrees. Since Section 8 (6) states that the supplier's claim "shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned", it is submitted that the prescriptive period laid down by Section 14 (1) of the new Act applies also to the supplier's claim under the Act. His claim under common law against the injured person is naturally governed by the provisions of the Prescription Act.

3.8.17 SECTION 8 (7): INTERIM PAYMENTS

3.8.17.1 This Section introduces for the first time the long overdue provisions relating to the payment of interim partial compensation. From the Section it is clear however that advance payments are limited to medical costs (which presumably includes the cost of hospitalisation) and loss of income. It must be accepted therefore that no interim payments may be made

in respect of general damages or loss of support. Loss of support is of course in a sense also "loss of income" but in Section 9 (1)(b) of the Act the legislature specifically refers to "loss of income or of support", which shows clearly that the legislature distinguishes between these two types of damages. Consequently, whether the omission of "loss of support" from Section 8 (7) is an oversight or whether it was deliberate, it seems that no case can be made out for seeking an advance payment in respect of a dependant's claim for loss of support.

3.8.17.2 It is also clear that an Appointed Agent has no authority of its own to make an advance payment in respect of medical costs or loss of income; the approval of the MVA Fund must first be obtained. Moreover, it is to be noted that there is no obligation to make an advance payment, no enforceable right which the claimant enjoys. The entire exercise is subject to the unfettered whim of the MVA Fund. The impression is given that the draftsman was torn between, on the one hand, the need to heed the call for interim payments, and on the other hand, a reluctance to relinquish any powers or rights. In the end he effectively relinquished nothing, leaving the claimant precisely where he had been prior to the introduction into the Scheme of Section 8 (7). After all, the MVA Fund have for many years been prepared, in their sole discretion,

to make interim payments in what they deemed to be appropriate cases, despite the fact that the 1972 Act contained no machinery for such payments. Section 8 (7) simply records an existing practice; it still gives the claimant no rights whatsoever. If a prediction is permitted, it is that Section 8 (7) in its present form will be short-lived. The unequal position in which the claimant still finds himself will not be tolerated indefinitely. Applications to Court for interim relief, in the nature of applications in terms of Rule 43 in divorce proceedings, would seem to be the obvious solution. Perhaps the Report of the Commission of Enquiry into the handling of Litigation in terms of the Motor Vehicle Accidents Act, 1986 ("the Vivier Commission") will hasten the demise of Section 8 (7) in its present form.

3.8.17.3 No specific format or procedure has been laid down in the Act or in the Regulations for requests for interim advances. Such requests should therefore simply be submitted informally to the Appointed Agent (or the MVA Fund, as the case may be). It is suggested that a letter be submitted giving details of the interim payment required and the reasons why such payment is justified. It goes without saying that interim advances will only be made in cases where the MVA Fund or the Appointed Agent are able to concede that the

claimant's claim must succeed at least partially on the merits.

3.8.17.4 No doubt the provisions of the Apportionment of Damages Act, Nr 34 of 1956, will always hover in the background as a guide to the amounts which will be advanced. If the available evidence on the merits indicates that the claimant will ultimately be awarded about 75 % of his proven damages, an interim advance in respect of proven medical expenses and loss of income is unlikely to exceed 50 % or 60 % of such losses.

3.8.17.5 There is nothing in the Section which precludes an arrangement whereby proven loss of income (or a percentage thereof) may be paid on a regular (monthly or weekly) basis. The intention of interim advances in respect of loss of income must surely be to keep the injured person going financially so as to enable him to attend to his financial needs and those of his family. Bills are normally required to be paid on a monthly basis, and the remedy created by Section 8 (7) will be scant consolation if the injured person must renew his pleas for assistance on a regular basis.

3.8.17.6 Despite the negative comments regarding the wording of the Section, its creation is certainly a step in the right direction, as long as the next step (in the same direction) is not unduly delayed.

Liability limited in certain cases.

9. (1) The liability of the MVA Fund or the appointed agent, as the case may be, in connection with any one occurrence to compensate a third party for any loss or damage contemplated in section 8 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall be limited, except where the person concerned was conveyed in or on the motor vehicle concerned during a period in which he rendered military service or underwent military training in terms of the Defence Act, 1957 (Act No. 44 of 1957), and while dressed in a uniform of the South African Defence Force—

(a) to the sum of R25 000 in respect of any bodily injury to or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in the motor vehicle in question—

(i) for reward; or

(ii) in the course of the business of the owner of that motor vehicle; or

(iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his employment; or

(iv) for the purposes of a lift club where that motor vehicle is a motor car; or

(b) in the case of a person who was being conveyed in the motor vehicle concerned under circumstances other than the circumstances referred to in paragraph *(a)*, to the sum of R25 000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of one such person, excluding the payment of compensation in respect of any other loss or damage,

but exclusive of the cost of recovering the said compensation.

(2) Where the loss or damage contemplated in section 8 is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the motor vehicle concerned and the third party is entitled to compensation under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), in respect of such injury or death—

(a) the liability of the MVA Fund or the appointed agent, as the case may be, in respect of the bodily injury to or the death of any one such employee shall be limited in total to the sum representing the difference between the amount which that third party could, but for the provisions of this paragraph, have claimed from the appointed agent or the amount of R25 000 (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act; and

(b) the appointed agent shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder,

without, however, any liability of the appointed agent to pay costs awarded against him in any legal proceedings being affected by anything in this subsection contained.

3.9 SECTION 9

COMMENTARY

3.9 Attention will first be given to the provisions of Section 9 (1) (Section 22 (1) of the 1972 Act), and thereafter to Section 9 (2) (Section 22 (2) of the 1972 Act).

3.9.1 Section 9 (1) can best be mastered if two cardinal features of the Section are appreciated:

3.9.1.1 The Section deals with the claims of passengers conveyed under various circumstances in a motor vehicle who seek damages from the Appointed Agent which has to handle claims arising from the driving that motor vehicle, i.e. the vehicle in which such passengers were conveyed. Section 9 (1) does not deal with claims which those same passengers seek to enforce under the Act against an Appointed Agent of some other vehicle.

3.9.1.2 The passengers to whom the Section relates are divided into six different categories (when we come to deal with Section 9 (2), a seventh category of claimants, who need not necessarily be passengers in the same sense as envisaged by Section 9 (1), will be identified, but for the moment attention must be focused exclusively on the six categories of passengers to which the provisions of Section 9 (1) relate.

3.9.2 THE SIX CATEGORIES OF PASSENGERS

Since Section 9 (1) sets out primarily to limit the compensation which passengers may recover under the Act from the Appointed Agent (or the MVA Fund) designated to handle claims arising out of the driving of the motor vehicle in which such passengers were conveyed when the bodily injuries were sustained, and since the legislature has decided that not all passengers will be compensated to the same extent, a clear distinction between the six categories of passengers envisaged by the Section must be appreciated. The six categories of passengers are those who at the time of the occurrence which caused the injury or death giving rise to the claim, were being conveyed in the motor vehicle in question:

Category 1: During a period in which such passenger rendered military service or underwent military training in terms of the

Defence Act, Nr 44 of 1957, and while dressed in a uniform of the South African Defence Force;

Category 2: For reward, as defined.

Category 3: In the course of the business of the owner of that motor vehicle;

Category 4: In the case of an employee of the driver or owner of that motor vehicle in the course of his employment and under circumstances which do not entitle him to compensation under the Workmen's Compensation Act, Nr 30 of 1941; and

Category 5: For the purposes of a lift club, as defined; or

Category 6: Under circumstances other than those mentioned in any of the preceding five categories.

3.9.3 LIMITATION OF COMPENSATION

With reference to the aforementioned six categories of passengers, the Section then provides that the compensation recoverable under the Act from the Appointed

Agent in question (or from the MVA Fund, as the case may be) shall be unlimited in the case of the passengers mentioned in category 1; shall be limited to the sum of R25 000 in the case of the passengers mentioned in categories 2, 3, 4 & 5, both special damages and general damages being claimable; and shall be limited to special damages only, up to a maximum of R25 000, as regards the passengers mentioned in category 6, special damages being monetary losses only, such as loss of income or support, the cost of hospitalisation and medical treatment and the cost of any services or goods relating to the bodily injury or death in question.

3.9.4 The aforegoing remarks constitute the bare framework and were intended to serve simply as an elementary introduction to what Section 9 (1) seeks to achieve. The basic understanding of a Section whose predecessors have been the subject of numerous interpretational agonies, will hopefully render more meaningful the consideration of the finer detail which now follows.

3.9.5 Apart from lifting the ceiling of the limitation of compensation from R12 000 to R25 000, and streamlining the Section by a process of abbreviation and re-arrangement of salient features, the legislature has essentially re-enacted Section 22 (1) of the 1972 Act in substantially similar terms. As has already been pointed out, the streamlining was undoubtedly prompted by the stringent

remarks of Botha J A in Santam Insurance Limited vs Taylor, 1985 (1) SA 514 A at 524 C - D. Abbreviation was achieved by removing from the Section the words which now constitute the definition of "convey" in Section1 of the Act. The considerable re-arrangement of the various provisions becomes clear if one carefully compares the wording of Section 9 (1) with that of Section 22 (1) of the 1972 Act. The result is eminently more satisfactory, and it is submitted that the impact of the Section has not been affected in any way in relation to recent decisions which recorded interpretational pronouncements.

3.9.6 IS THE AMOUNT OF THE LIMITED COMPENSATION PAYABLE INDIVIDUALLY TO EACH DEPENDANT OR COLLECTIVELY TO ALL DEPENDANTS?

The conflict between Du Plooy vs S A Onderlinge Brand en Algemene Versekeringsmaatskappy Beperk, 1975 (1) SA 791 O and Constantia Insurance Company Limited vs Hearne, 1984 (4) S A 48 E was laid to rest, insofar as the 1972 Act is concerned, by the Appeal Court in Constantia Insurance Company Limited vs Hearne, 1986 (3) SA 60 A, in which it was held that the Section should be construed as applying individually and not collectively, so that each dependant is entitled to recover the specified maximum amount. The question now arises whether this decision still holds good for the new Act?. It is submitted that it does not and

that the limitation is now collective in the sense that all the dependants will have to share the maximum amount of R25 000. Since the reasoning and motivation for this conclusion requires detailed analysis, specialist readers are referred to Appendix IX.

3.9.7 PASSENGERS WHO WERE MILITARY SERVICEMAN OR MILITARY TRAINEES

3.9.7.1 The provisions relating to this type of passenger have been tidied considerably. Earlier reference to "authorised leave" and to their conveyance "under circumstances where the owner or driver of the motor vehicle believed upon reasonable grounds that (the passenger) was a person rendering (military) services or undergoing (military) training" have been omitted, thus removing certain unfortunate anomalies. Whether or not this category of passengers qualifies for the unlimited compensation provided for in the Section, is now purely a question of fact:

(a) The conveyance must have occurred during a period in which the passenger rendered military service or underwent military training in terms of the said Act; and

(b) He must have been dressed in a uniform of the South African Defence Force.

3.9.7.2 The position of the military servicemen under the Act has vastly improved over the years. He started off being classified as an ordinary hitchhiker or non-farepaying passenger who had no claim against the insurer of the vehicle in which he was conveyed, and his position has developed to where he now enjoys the most favourable position of all passengers in the sense that he has not only retained the right to recover his full proven damages from the Appointed Agent designated to handle claims arising from the driving of any other motor vehicle, but he also has an unlimited claim against the Appointed Agent designated to handle claims arising from the driving of the vehicle in which he was conveyed at the time of the occurrence in question. For full details of the advancement of the military serviceman's rights under the Act over the years, see Hodes, pages 251 - 253.

3.9.7.3 In evaluating the position of the military serviceman one should not lose sight of the new disqualifying provisions contained in Section 10 (c) which relate inter alia to the situation where a member of the Defence Force is conveyed in the course of his employment in a motor vehicle owned by the South African

Defence Force, the South African Police, or the South African Transport Services. See in this regard paragraph 3.10.3 below.

3.9.8 PASSENGERS CONVEYED FOR REWARD

3.9.8.1 The definition of "reward" is discussed in paragraph 3.1.11 above and is consequently not repeated here.

3.9.8.2 The fact should not be overlooked that once it has been established that a passenger was, at the time of the occurrence in question, being conveyed for reward, as defined, he may claim under Common Law from the driver or owner of the vehicle concerned those damages which exceed the statutory limit of R25 000. Even if such driver or owner is a man of straw, the passenger need not necessarily be frightened off, because if the vehicle concerned was comprehensively insured under a standard motor policy, the driver or owner will be indemnified thereunder in respect of the claims of his passengers not covered under the Act.

3.9.8.3 It is self-evident that a specific passenger may during the same conveyance qualify for compensation under more than one of the categories mentioned in Section 9 (1). So for instance a passenger conveyed for lawful reward is also conveyed in the course of the business of the

owner of the taxi in question. Similarly, where the facts relating to the conveyance reveal that the reward was illegal under the Road Transportation Act, Nr 74 of 1977 (for instance where the conveyance was in a so-called pirate taxi), the passenger does not lose out on all compensation under the Act; he simply qualifies under a different category, namely the category mentioned in Section 9 (1)(b) in which only special damages are claimable. The point is that the precise nature and purpose of the trip in question must be fully investigated and the conveyance must be checked against each of the six categories listed.

3.9.8.4 An interesting situation arose in the case of Memani vs Santam Insurance Company Limited, 1986 (1) SA 661 E. The plaintiff had purchased return tickets from a bus owner between point A and point B. The bus broke down en route and the bus owner made alternative arrangements for the plaintiff (and other passengers) to have the trip completed in the kombi of a private person. The owner of the kombi received no payment for the conveyance of the passengers, and no permit existed in respect of the kombi which would have rendered the conveyance for reward of persons in the kombi legal in terms of the Road Transportation Act, Nr 74 of 1977. The kombi was involved in an accident and the plaintiff sued the third party insurer of the kombi for general

damages amounting to R1 400 and special damages (loss of income) amounting to R108,17. The Court held that although the plaintiff had been conveyed for reward in the kombi (by virtue of the fact that he had paid the bus owner for the whole trip), such reward was illegal under the Road Transportation Act with the result that the conveyance was not "for reward", as defined. Consequently the passenger's conveyance fell within the ambit of the old Section 22 (1)(d) (currently Section 9 (1)(b) of the new Act), with the result that he could recover only his special damages.

3.9.8.5 In Masombuka vs Constantia Versekeringsmaatskappy Beperk (Juta's Law Cassettes, February 1987 - to be reported in 1987 (1) SA February Edition) the somewhat novel plea was raised that since the conveyance of the plaintiff's daughter was to the knowledge of the plaintiff and/or the daughter illegal under the Road Transportation Act (Plaintiff having made a cash contribution towards the trip in question), the plaintiff and the daughter were debarred from recovering compensation under Act 56 of 1972 because of the principle that a person cannot derive any benefit from his own criminal conduct; nemo ex suo delicto meliorem suam conditionem facere potest. Kriegler J held that it must be shown that the payment of the "reward" must be a quid pro quo for the conveyance; there must be reciprocity of purpose between the contracting parties because:

> "Waar A aan B geld betaal en B aan A vervoer verskaf sonder dat die twee prestasies as quid pro quo vir mekaar bedoel is, vind geen vervoer teen vergoeding plaas nie."

On the facts of the case this element had not been established by the defendant, and the point failed. However, it is confidently predicted that a better prepared defendant will undoubtedly soon try his luck in this direction again, in order to overcome the factual shortcomings in Masombuka's case and seek a judgment on the legal proposition.

3.9.9 CONVEYANCE IN THE COURSE OF THE BUSINESS OF THE OWNER OF THE MOTOR VEHICLE CONCERNED

3.9.9.1 The definition of "business" is discussed in paragraph 3.1.3 above and should be referred to.

3.9.9.2 It should be noted that prior to the 1st of September 1978 the Section did not only refer to passengers conveyed in the course of the business of the owner of the motor vehicle concerned; at that stage it referred to conveyance in the course of the business of the driver or owner, but with effect from the said date the words "driver or" were deleted. This naturally excluded from cover those passengers who had sustained injuries

whilst being conveyed in the course of the business of the driver of the motor vehicle concerned. This represents quite a considerable body of claimants, and it is not really understood why it was considered necessary to non-suit them. Enquiries submitted to the MVA Fund did not receive a satisfactory reply: merely that the Section had been open to abuse, but without details of such abuse being available.

3.9.9.3 The case of Ntuli vs S A Eagle Insurance Company Limited, 1984 (4) SA 922 N is a good illustration of the type of claimant who has been non-suited as a result of the deletion from the Section of the words "driver or". The plaintiff's employer had hired a vehicle from the owner thereof, which was a hiring company. The lease was for a period of less than twelve months. (See sub-paragraph (d) of the definition of "owner" in Section 1 of the Act.) The plaintiff sustained injuries whilst he was being conveyed on the hired vehicle and he instituted action against the third party insurer of the vehicle in question, alleging inter alia that he had been conveyed in the course of the business of the owner of the insured vehicle. It was held that as the true owner of the vehicle, the hiring company, had relinquished control over the vehicle and over the use to which it was being put during the period of the lease, it could not be said that the plaintiff's

conveyance had been in the course of the business of the owner of the vehicle, i.e. the hiring company. The fact that the plaintiff had been conveyed in the course of the business of the driver could not assist the plaintiff since the reference to conveyance in the course of the business of the driver had been deleted from the Act prior to the plaintiff's injury. The plaintiff claimed general damages only and since he did not fall within one of the categories of passengers entitled to claim general damages, the question of Law was answered in the defendant's favour.

3.9.9.4 In AA Mutual Insurance Association Limited vs Biddulph, 1976 (1) SA 725 A Wessels J A reviewed earlier judgments and held:

(a) As the legislature had intended by the Act to give the greatest possible protection to third parties, words or phrases in Section 11 (1)(iii) (of the 1942 Act) of uncertain meaning should be construed in their favour and against insurers, from which it follows that "business" should be given a wide rather than a narrow meaning. How wide must be decided on the facts of each particular case.

(b) While "business" includes an active occupation or profession continuously carried on, this should not be regarded as the boundary of the meaning of

"business" in its widest sense. Thus, "even a single, isolated activity, enterprise, or pursuit of serious importance that occupies a person's time, energy or resources would also, in appropriate circumstances, be included within the meaning of "business"".

(c) The object of the activity, enterprise or pursuit need not be the making of a profit or income; an altruistic or philanthropic object, such as the advancement of medical science, can also suffice.

(d) An occupation indulged in purely for pleasure, sociability or something similar does not ordinarily constitute "business".

3.9.9.5 For a number of examples of cases where our Courts have held that conveyance occurred - or did not - in the course of the business of the (driver or) owner of the vehicle concerned, see Hodes pages 231 - 234.

3.9.10 CONVEYANCE OF AN EMPLOYEE OF THE DRIVER OR OWNER IN THE COURSE OF HIS EMPLOYMENT AND IN CIRCUMSTANCES WHICH DO NOT ENTITLE HIM TO COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACT, 30 of 1941

3.9.10.1 Since the Act contains no definitions of "employee" or

"course of employment", these words should bear their Common Law meanings.

3.9.10.2 It was pointed out in Ngubetole vs Administrator, Cape and Another, 1975 (3) SA 1 A that it should not be assumed that the concept "course of employement", as it is known to the Law of Vicarious liability, is in all respects identical to the "course of employment" as it was traditionally mentioned in MVA legislation relating to conveyance. In the relevant MVA legislation (Section 9 (1)(a)(iii) of the new Act) the enquiry is not whether the employee was acting in the course of his employment but rather whether he was being conveyed in the course of his employment. Consequently considerations which would be relevant in determining vicarious liability may not always be relevant with regard to conveyance as envisaged by the Act. With regard to vicarious liability the phrase "course of employment" relates to the question whether the master is to be held liable for the wrongful act of his servant; in MVA legislation "course of employment" simply serves to define one of the classes of persons conveyed upon the vehicle in question who have a limited claim for compensation under the Act.

3.9.11 CONVEYANCE FOR THE PURPOSES OF A LIFT CLUB

Conveyance for this purpose is discussed in relation to

the definition of "lift club" in paragraph 3.1.5 above, to which reference should be made.

3.9.12 CONVEYANCE UNDER CIRCUMSTANCES OTHER THAN THE CIRCUMSTANCES ENVISAGED BY THE OTHER CATEGORIES OF PASSENGERS

3.9.12.1 This is the category of passengers who traditionally had no claim under the Act, but who, with effect from the 11th April 1980 (Act Nr 23 of 1980) were given a limited claim for special damages only, and then to a maximum amount which at that stage was R12 000, and which is now R25 000. That general damages are not recoverable by this category of passengers was confirmed by the Appeal Court in Santam Insurance Company Limited vs Taylor, 1985 (1) SA 514 A. The costs of recovering the limited compensation are recoverable in addition to such compensation. General damages and any special damages in excess of R25 000 should be recovered under Common Law from the driver or owner of the vehicle in question. And of course the passenger concerned has an unlimited claim under the Act for his full proven general and special damages against the Appointed Agent (or against the MVA Fund, as the case may be) designated to handle claims arising from the driving of any other vehicle which collided with the vehicle in which the passenger was being conveyed.

3.9.13 CONVEY

3.9.13.1 The definition of "convey" in Section 1 of the Act is of course not exhaustive; it merely states that the Act of entering or mounting the motor vehicle in question for the purposes of being "so conveyed", and the Act of alighting from the motor vehicle in question after having been so conveyed, are included in the concept of "convey".

3.9.13.2 But when is a person conveyed and when not? It does not require too much imagination to realise that the mere physical presence of a person on a motor vehicle does not necessarily constitute conveyance as envisaged by Section 9 (1) of the Act. Situations may arise where a court must determine whether a claimant was, on the facts of a particular case, no more than a pedestrian (rather than passenger) in relation to the vehicle which caused his injury, in which event such pedestrian naturally has an unlimited claim arising from the driving of the vehicle concerned, or whether the claimant was actually being conveyed on the vehicle concerned, in which event his claim will be limited according to the category into which such conveyance fell. The various possibilities which could arise can best be illustrated by referring to a number of

interesting decisions.

3.9.13.3 In Aetna Insurance Company vs Minister of Justice, 1960 (3) SA 273 A a policeman approached an insured motor vehicle with the intention of searching it for liquor. The driver started pulling away, whereupon the policeman jumped onto the running board of the vehicle in an attempt to force the driver to stop. The driver continued driving and in fact drove in such a manner that the policeman was dislodged, suffering fatal injuries. In the claim arising from the policeman's death the insurer of the vehicle excepted to the claim on the basis that its liability was excluded because the policeman was being conveyed upon the vehicle as envisaged by the Act (at that time certain classes of passengers were still disqualified from claiming under the Act). The Court (Ramsbottom J A) pointed out that it was the intention of the legislature to afford the greatest possible protection to third parties, and consequently held that the word "conveyed" should be given a narrower rather than a wider meaning. At page 288 the learned Judge said the following:

> "The test is the purpose of the conveying in relation to the person conveyed, and in my opinion that purpose must be the transportation of the person conveyed. ... If the test is the purpose of the conveying, the question at once arises, who must have the purpose, the driver or the passenger or both? The answer to that

> question is, I think, that in some cases it would be a common intention: in some cases the purpose of the driver will be the determining factor: and in some cases it will be the purpose of the person conveyed .... While the purpose of either the person conveying or the person conveyed may determine the purpose of the conveyance, if neither has the necessary purpose, the person carried is not 'conveyed' for the purpose of the proviso."

3.9.13.4 A somewhat similar, albeit more humorous, situation arose in the case Netherlands Insurance Company Limited vs Van der Vyver, 1961 (1) SA 412 A. A private detective had been employed by a woman to observe the extra-marital activities of her husband. The detective followed the husband and found him in a compromising situation with a woman in his car. The detective tried to confront the husband but the latter was in no mood to dally, and drove off. The detective flung himself onto the bonnet of the vehicle in an effort to compel the husband to stop the vehicle, but the latter continued on his way, eventually dislodging the detective, thus causing him to sustain serious bodily injury. The detective instituted action under the Act against the vehicle's third party insurer. The latter pleaded that the detective had been "conveyed" as envisaged by the Act. The detective denied this, claiming that he should be compensated on the basis that he had been a pedestrian. The Appeal Court upheld the detective's contention, pointing out that the driver's sole purpose right from the beginning was to

dislodge the plaintiff, not to convey him. The plaintiff himself had no intention of being conveyed; he simply wanted to force the driver to stop.

3.9.13.5 In AA Mutual Insurance Association Limited vs Sibothobotho, 1981 (4) SA 593 A the facts were equally amusing, except for the plaintiff. The insured vehicle was a hearse which had developed engine trouble whilst en route to a funeral. A fault in the fuel supply was diagnosed and the plaintiff, one of the pall-bearers, undertook to sit on the front of the vehicle and drop petrol into the carburettor "by removing my finger now and again". The classic judgment of Diemont J A, then proceeds as follows at page 596 G:

> "The plan was approved without more ado and Eric Sibothobotho found himself perched on the front of the vehicle clutching a small tin full of petrol. Damane (the owner-driver) took up his position behind the steering wheel and while the carburetter was primed he turned the ignition key, started up the engine, engaged the automatic gear and, peering through the opening under the bonnet, proceeded to drive the hearse up the hill. The journey came to a swift and dramatic end. The car jerked forward; there was a flame and backfire explosion, and Sibothobotho disappeared over the front of the radiator. He suffered injury and in due course instituted action for damages."

One of the questions which the Court had to determine was whether the plaintiff had been conveyed as

envisaged by the Act, and this question was dealt with as follows at page 603 A - G:

> "The journey had come to an untimely stop and the driver and the pall-bearers had all alighted from the vehicle to consider their predicament. When plaintiff climbed onto the bumper of the vehicle it was not with the purpose of resuming the journey. The intention was to get the engine restarted. Plaintiff's evidence was accepted and he stated categorically that the intention was to get the engine started; they would then shut the bonnet, everybody would clamber into the car and the journey would be resumed. That stage was not reached and when plaintiff fell onto the road he was not being conveyed for the purpose of transportation; he was merely assisting in a mechanical operation to start the engine. As to the legal submission, it was argued that the intention of the driver was sufficient. It may well be that, where a Samaritan motorist stops his car in order to take an injured and unconscious pedestrian to hospital, one need look no further than the intention of the driver in deciding whether the passenger is being conveyed. ... In the circumstances of this case the driver's intention, even if accepted, cannot be looked at in isolation. The intention of the involuntary 'passenger' is at least as material as that of the driver. Plaintiff did not, I apprehend, stand on the front bumper of the hearse for the purpose of been transported anywhere. In a case such as this where both parties are conscious and fully aware of one another's presence in the vehicle, the question must be asked whether there was an intention common to both the person conveying and the person conveyed. No such common intention was established in this case ... A man sits or stands on the front of a motor vehicle performing a simple mechanical operation. The vehicle jerks forward three or four times. He has been moved, perhaps five paces, but to say that he has been conveyed as a passenger for this distance is to strain the language of the Motor Vehicle Insurance Act."

3.9.13.6 In Mali vs Shield Insurance Company Limited, 1984 (2) SA 798 SEC the facts were that the plaintiff had been in the act of mounting a passenger bus with the intention of being conveyed for reward. He knew that the passenger bus was one which normally stopped along that route for the purpose of allowing passengers to enter or alight. What he did not know, but which the driver of the bus knew, was that the bus had on the day in question been privately hired, with the result that the driver had no intention of allowing the plaintiff to enter the bus for any purpose whatsoever. The bus pulled away just as the plaintiff was trying to mount it, and he suffered bodily injuries, as a result of which he instituted action against the insurer of the bus. The Court found that there had been negligence on the part of the bus driver, and regarding the legal position the parties were ad idem that:

(a) If it was found that the plaintiff had been in the process of mounting the bus for the purpose of being conveyed for reward, he would be entitled to recover not only his special damages but also his general damages, the total of which was less than the maximum of R12 000.

(b) If it were found that the plaintiff was in the process of mounting the bus for the purpose of

being conveyed simpliciter (as opposed to being conveyed for reward), his claim would be limited to special damages only; and

(c) If it were to be found that the plaintiff should be deemed not to have been entering or mounting the insured bus for the purpose of being conveyed thereon, his claim would not be subject to any limitations and he would be entitled to the full amount of his agreed damages.

Dealing firstly with the question of whether the plaintiff had been in the act of entering the insured bus for the purpose of being conveyed for reward, the Court argued as follows:

(i) Reference was made at the outset to the case of Aetna Insurance Company vs Minister of Justice, 1960 (3) SA 273 A where the Appeal Court had found (as quoted above) that in the majority of cases a purpose common to both the person conveying and the person conveyed would determine the nature of the conveyance, but that in some cases the intention of one of them would suffice. (See the Aetna case at page 288.)

(ii) The Court then reaffirmed that no hard and fast

rule could be laid down which is applicable to all cases, and that each case must be decided on its own particular facts.

(iii) In general it can be said that before a passenger will be held to have been in the act of entering a vehicle for the purpose of being conveyed for reward, both he and the driver should intend that he be so conveyed.

(iv) Whatever the would-be passenger subjectively thought, if in fact he would not have been conveyed for reward, he could not be said to have been entering the vehicle for the purpose of being conveyed for reward as envisaged in the Act. And because he would, as a fact, only have been conveyed for reward if the driver had also intended that he be so conveyed, the absence of such an intention on the part of the driver would prevent the case from falling within the ambit of Section 22 (1)(b) read with Section 22 (1)(a)(i) of the 1972 Act. In other words, the requisite relationship between the reward and the conveyance will be absent unless there is a consonance of intention between the driver and the passenger (page 813).

(v) The correctness of the above approach could be

tested against the following example: A pedestrian, reasonably thinking that a private car which has stopped in an urban street is a taxi, wishes to board it for the purpose of being conveyed for reward, opens its door and attempts to board it at the very moment that the car pulls off. The pedestrian is injured. According to Kroon A J "common sense dictates that one should balk at the suggestion that the injured person was entering the vehicle for the purpose of being conveyed for reward as envisaged in Section 22 (1)(a) of the Act" (page 184 C).

(vi) Although there should <u>in general</u> be a coincidence of intention between the driver and the passenger before it can be held that the passenger was in the act of entering the vehicle for the purpose of being conveyed for reward, there might conceivably be cases where such a common intention may not be required but:

> "The instant case is in my view one which falls within the general rule which I have postulated, and in that it is clear that the driver of the insured bus had no intention of conveying the plaintiff for reward or, indeed, to convey him at all, the requisite common intention is lacking and in the circumstances the plaintiff has not established that he was in the act of entering the bus for the purpose of being conveyed for reward." (page 184

G)

(vii) On this reasoning the Court therefore puts paid to the contention that the plaintiff had been mounting the bus for the purpose of being conveyed for reward.

Despite this finding, the fact remained that the plaintiff himself had indeed had the intention, in attempting to mount the bus, to be conveyed thereon. The finding that it had not been established (because of the absence of common intention) that the plaintiff was mounting the bus for the purpose of being conveyed thereon for reward, did not preclude a finding that the plaintiff had been mounting the bus for the purpose of being conveyed simpliciter. The learned Judge, at page 815 D, stated that it was a "basic fallacy" to contend that where a passenger's intention to be conveyed for reward is by itself insufficient to bring him within the confines of Section 22 (1)(a)(i) or (b), a distinction cannot be drawn between conveyance for reward and conveyance simpliciter:

> "In my view such a distinction is capable of being drawn and, where required, should be drawn. As was pointed out in the Aetna Insurance case, Supra, at 287 G, the Act contrasts 'conveyance for reward' with 'conveyance otherwise than for reward'. The common characteristic of both is conveyance; the distinquishing feature is the presence or absence of the concept 'for

> reward'. And in my view it does not follow that because the reward element is found to be absent, one cannot find the conveyance element to be present. To find that the plaintiff in the present case did not have the intention to be conveyed would be to fly in the face of the clear realities of the situation ... I find therefore that the plaintiff does fall within the ambit of Section 22 (1)(d) and his claim is accordingly subject to the limitations placed thereon in terms of Section 22 (1)(bb)."

3.9.14 SECTION 9 (2): EMPLOYEES OF THE DRIVER OR OWNER OF THE MOTOR VEHICLE CONCERNED WHO ARE ENTITLED TO COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACT, NR 30 OF 1941

3.9.14.1 Although this Section re-enacts Section 22 (2) of the 1972 Act in substantially similar terms, attention should nevertheless be drawn to the following subtle insertions:

(a) Whereas Section 22 (2) of the 1972 Act referred simply to an employee of the driver or owner of "the motor vehicle", Section 9 (2) of the new Act refers to an employee of the driver or owner of "the motor vehicle concerned". It is submitted that the word "concerned" was simply inserted to stress what had already been held in Vrey vs Mutual & Federal Insurance Company Limited, 1983 (4) SA 38 W, namely that the reference in Section

22 (2) to "an employee of the driver or owner of the motor vehicle" is a reference only to an employee of the driver or owner of the motor vehicle against whose insurer the claim is brought. (At page 41 G.)

(b) There has been a radical rearrangement in the wording of Section 9(2)(a) in comparison with the wording of Section 22(2)(a) of the 1972 Act and it is submitted that this has had the effect of establishing collective limited liability to all third parties as opposed to individual liability to each third party. Specialist readers are referred in this regard to Appendix IX. See also paragraph 3.9.6.

(c) The amount of R12 000 mentioned in the 1972 Act has been raised to R25 000. The amount recoverable under the Act by an employee of the driver or owner of the motor vehicle concerned is therefore limited to the sum representing the difference between:

(i) the amount which the third party could, but for the limitation, have claimed from the Appointed Agent, or the amount of R25 000 (whichever is the lesser); and

(ii) any lesser amount to which that third party is entitled under the Workmen's Compensation Act, Nr 30 of 1941.

In other words, one first takes the claimant's actual damages or R25 000, whichever is the lesser, and one then deducts from the said amount the compensation to which the claimant is entitled under Act 30 of 1941.

3.9.14.2 Although Section 9 (2)(a) applies only to claims against the Appointed Agent (or the MVA Fund) designated to handle claims arising from the driving of "the motor vehicle concerned", (see Vrey's case, Supra) the following submission was made in the MVA Handbook at paragraph 2.45:

> "However, it (the Sub-Section in question) does not apply only to a workman who is a passenger in that vehicle; the only requirement is that the person who is injured or killed should be an employee of the driver or owner of the motor vehicle and that workmen's compensation should be payable in respect of such injury or death; the Sub-Section will therefore also apply to a case where such a workman was a pedestrian, or was a passenger in or driver of another vehicle, as long as he was an employee of the driver or owner of the motor vehicle."

This submission was confirmed in Ngwendu vs Shield

Insurance Company, 1986 (3) SA 177 SECLD.

3.9.14.3 Section 9 (2)(b) provides that where the loss or damage contemplated in Section 8 is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the motor vehicle concerned and the third party is entitled to be compensated under the Workmen's Compensation Act, Nr 30 of 1941 in respect of such injury or death, the Appointed Agent shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder. The submission by Hodes (page 260) that the correct construction to be placed on Section 22 (2)(c) of the 1972 Act is that its provisions apply only while the amount due to the workman by the Commissioner remains unpaid, but that, once such sum is paid, the latter can exercise his right of recourse in terms of Section 8 (1) of the Workmen's Compensation Act against the insurer for the amount paid out by him, was considered and rejected by the Appeal Court in Klaas vs Union and South West Africa Insurance Company Limited, 1981 (4) SA 562 A at page 584 to 585 D. Van Heerden A J A (as he then was) said the following at page 584 G - H:

> "Read in isolation the meaning of Section 22 (2)(c) appears to be reasonably clear. It renders inapplicable the provisions of Section 8 (1)(b) of Act 30 of 1941 to cases falling within the ambit of Section 22 (2)

> of Act 56 of 1972. It relieves the insurer from liability under Act 30 of 1941 for the amount of the compensation to which 'any such third party' is entitled thereunder, and the only liability created by that Act for the payment of such an amount is to be found in Section 8 (1)(b). Put differently, the only cause of action under the said Act against an insurer arises from the provisions of Section 8 (1)(b) in terms of which the Commissioner may recover from an insurer the compensation he is obliged to pay under the Act to the workman provided that the accident concerned was caused in circumstances creating a legal liability in the insurer to pay damages to the workman."

The Court drew attention to the fact that Section 24 (3) of the 1972 Act (the current Section 14 (6) of the new Act) provided that any right under Section 8 (1)(b) of the Workmen's Compensation Act, Nr 30 of 1941 to recover from an authorised insurer an amount which under that Act is required to be paid to a third party in circumstances other than those mentioned in Section 22 (2) of the 1972 Act, shall for the purposes of Sub-Sections (1) (excluding the proviso) and (2) of Section 24 of the 1972 Act be deemed to be a right to claim compensation under Section 21 of the 1972 Act, arising on the same date as the claim of the third party under the last-mentioned Section. The Court then proceeded as follows at page 585 G to 586 A:

> "Sections 24 (1) and (2) deal with the prescription of a third party's right to claim compensation under Section 21 from an insurer and with the powers of a court to relieve a third party from the effect of

such prescription. One of the main consequences flowing from the provisions of Section 24 (3) is that the right of action of the Commissioner against an insurer, founded upon Section 8 (1)(b) of Act 30 of 1941, becomes prescribed upon the expiration of a period of two years from the date upon which the claim of the workman (or his dependants) against the insurer arose. However, as appears from the (underlined) portion of Section 24 (3) quoted above (i.e. the words 'in circumstances other than those mentioned in Section 22 (2) of this Act'), this Sub-Section does not apply to cases falling within the ambit of Section 22 (2). The only conceivable reason for the exclusion of such cases is that in terms of Section 22 (2)(c) the Commissioner has no right of action against an insurer if the workman was injured or died in the circumstances set out in Section 22 (2), and that it was therefore manifestly unnecessary to provide for the prescription of a non-existing claim."

3.9.15 HOW IS THE WORKMEN'S COMPENSATION TO BE DEDUCTED FOR PURPOSES OF SECTION 9 (2)(a)?

3.9.15.1 It must be remembered that Section 9 (2)(a) (Section 22 (2)(a) of the 1972 Act) deals only with the single situation where the damages claimed under Section 8 (Section 21 of the 1972 Act) are claimed in respect of the bodily injury or death of an employee of the driver or owner of the motor vehicle concerned and the third party is a workman who is entitled to compensation in respect of such injury or death under the Workmen's Compensation Act, Nr 30 of 1941. Where this situation

arises the deduction must be made on the basis of the wording of Section 9 (2)(a). And since the wording of this Section requires a consideration of "the amount which that third party could, but for the provisions of this paragraph, have claimed from the Appointed Agent", the following obiter dictum of Van Heerden A J A in Klaas's case (Supra) at 587 B becomes understandable:

> "There is accordingly much to be said for the view that the compensation (under Act 30 of 1941) falls to be deducted from the total amount of the workman's Common Law damages even if he actually chose to claim a lesser sum."

The learned Judge therefore suggests that one must look at the claimant's full claimable Common Law damages "even if he actually chose to claim a lesser sum", and then deduct the compensation payable under Act 30 of 1941 from such full claimable Common Law damages.

3.9.15.2 Bearing in mind again that Section 9 (2)(a) deals only with the single situation referred to above, it must then immediately be pointed out where a workman has chosen to claim both compensation under Act 30 of 1941 as well as damages under Act 84 of 1986 under circumstances other than those mentioned in Section 9 (2)(a), the deduction exercise must be performed in terms of the provisions of Section 8 (1)(a) of the Workmen's Compensation Act, Nr 30 of 1941, and not in

terms of Section 9 (2)(a) of Act 84 of 1986. Klaas's case involved the single situation dealt with in Section 22 (2)(a) of the 1972 Act, (so that the deduction exercise fell to be done under that Section and not under Section 8 (1)(a) of Act 30 of 1941) but for interpretative purposes, the Court referred frequently to the provisions of Section 8 (1)(a) of Act 30 of 1941, and to the different applications of the relevant Sections of the two Acts. The following quotation from page 583 H to 584 A illustrates the difference:

> "But for the provisions of Section 22 (2) of Act 56 of 1972, the Appellant's claim would have been governed by the proviso to Section 8 (1)(a) of Act 30 of 1941. Had the proviso been applicable, the amount of compensation (in the extended sense) to which the Appellant was entitled would have had to be deducted from the damages suffered by him. The proviso applies to all claims for damages against 'third parties' arising from an accident in respect of which compensation is payable. In contrast, Section 22 (2) of Act 56 of 1972 deals with a circumscribed class of claims by a workman against an insurer, viz claims by an employee of the owner or driver of the insured vehicle. The reason for its enactment appears to be clear. The legislature intended to impose a quantitative limitation of R12 000 on an insurer's liability. At the same time it wished to give effect to its dominant policy that a workman should not recover double compensation by providing in Section 22 (2)(a), as was done in Section 8 (1)(a) of Act 30 of 1941 in respect of claims generally, for the deduction of the amount of the compensation, payable under the latter Act, from the maximum amount recoverable from the insurer. In the light of the interrelationship between, or associated nature of, Section 22 (2)(a) of Act 56 of 1972 and Section 8 (1)(a) of Act

> 30 of 1941, it is to my mind highly improbable that the legislature intended the 'compensation', which falls to be deducted in terms of the former Sub-Section, to be a different concept from the compensation (in the extended sense) which has to be subtracted according to the latter Sub-Section."

A further distinction to be drawn between Section 22 (2)(a) of Act 56 of 1972 on the one hand and Section 8 (1)(a) of Act 30 of 1941, on the other hand, appears from the following passage of the judgment at pages 581 H to 582 A:

> "From what has already been said, it follows that in terms of Section 8 (1)(a) of Act 30 of 1941, read with Section 21 of the MVA Act, a workman may, under the circumstances set out in the latter Sub-Section, claim from an insurer his Common Law damages, including medical expenses. However if the workman was injured in the special circumstances dealt with in Section 22 (2)(a), he may not recover more than R12 000 minus the amount to which he is entitled by way of compensation under Act 30 of 1941. But that Sub-Section does not impose a quantitative limitation on the workman's claim for damages. He is entitled to include in his claim all his Common Law damages and may, subject only to the quantitative limitation and the deduction to be made in respect of compensation, recover his full damages."

3.9.15.3 The Court also dealt more specifically with the meaning and application of Section 8 (1)(a) of Act 30 of 1941, which, as we have seen, deals with the deduction exercise in all cases where a workman entitled to compensation under Act 30 of 1941 also claims damages

under the MVA Act, other than those cases relating to the more circumscribed situation envisaged by Section 9 (2)(a) of Act 84 of 1986 or Section 22 (2)(a) of Act 56 of 1972. In this regard the following passage from the judgment appears at page 580 H to 581 D:

> "In Bonheim vs South British Insurance Company Limited, 1962 (3) SA 259 A at 266 Ogilvie Thompson J A pointed out that the precise meaning of the words 'shall have regard to' in Section 8 (1)(a) is not entirely clear, but assumed that they mean 'deduct'. However, there may be a good reason why the legislature used the above words. If a workman received free medical and hospital treatment he may decide not to claim from the wrongdoer any amount in respect of such treatment. In such a case it would be inequitable to deduct from the damages established by him the amount relating to medical aid which the Commissioner is entitled to claim under Section 8 (1)(b). It therefore appears to me that only like should be deducted from like. ... In view of the wording of, and interrelationship between Section 8 (1)(a) and (b) I am of opinion that the gist of the legislature's intention may be stated as follows: in preferring a claim against a wrongdoer (or any other defendant, such as an insurer, who may be held liable as a result of the commission of a delict) a workman may claim his ordinary Common Law damages, including medical expenses. In applying the proviso to Section 8 (1)(a), however, a Court must deduct from such damages the compensation (including medical aid) which the Commissioner may recover in terms of Section 8 (1)(b)."
>
> (Own underlining)

3.9.15.4 Klaas's case has not always been correctly understood or interpreted. Despite the definitive nature of this

judgment, which is now the locus classicus on the topics concerned, the points covered in the judgment somehow found their way to the Appeal Court once again and in a still unreported judgment handed down on the 26th May 1986 in the case of Senator Versekeringsmaatskappy Beperk vs Bezuidenhout (Appeal No 116/85) the Appeal Court again addressed and clarified various issues. Van Heerden J A (with whom Corbett J A, Hefer J A, Jacobs J A, and Nicholas A J A concurred) explained that his obiter dictum at page 587 of Klaas's case (to the effect that "there is accordingly much to be said for the view that the compensation falls to be deducted from the total amount of the workman's Common Law damages even if he actually chose to claim a lesser sum") related exclusively to claims falling within the ambit of Section 22 (2) of Act 56 of 1972. In the Bezuidenhout (unreported) case the plaintiff was not an employee of the driver or owner of the vehicle concerned, with the result that the quoted obiter dictum in Klaas's case was inapplicable. The deduction exercise in Bezuidenhout's case therefore fell to be implemented in terms of the proviso to Section 8 (1)(a) of Act 30 of 1941 which had been interpreted in Klaas's case to mean "that only like should be deducted from like". To illustrate this point it is necessary to record the following facts agreed upon by the parties in Bezuidenhout's case:

(a) The plaintiff had sustained bodily injuries whilst driving a vehicle which had come into collision with another vehicle which had been insured under the Act by the defendant, the driver of the insured vehicle having been solely to blame for the collision.

(b) The plaintiff was a workman under Act 30 of 1941 at the time of the collision in question.

(c) The Workmen's Compensation Commissioner had under the latter Act awarded:

(i) An amount of R2 650 in respect of temporary total disablement under Section 38 of that Act;

(ii) An amount of R17 131 being the capitalised value of a monthly pension under Section 39 (1)(d) of that Act;

(iii) Medical and incidental expenses amounting to R1 594,69.

(The total of these three awards being R21 375,69.)

(d) In respect of the only items of damages claimed

> under the Act by the plaintiff, his quantum was agreed as follows, namely R3 950,00 for future medical expenses and R12 000 for general damages, i.e. a total of R15 950.

(It should be added, for purposes of clarity, that plaintiff was not an employee of the driver or owner of the vehicle insured by the defendant, with the result that Section 22 (2)(a) of the 1972 Act was not applicable; any deduction would therefore have to be made under Section 8 (1)(a) of Act 30 of 1941.)

All that was in dispute in terms of the pre-trial minute was whether the total amount awarded under Act 30 of 1941 i.e. R21 375,69 should be deducted from the plaintiff's agreed quantum of R15 950, which would naturally mean that nothing was recoverable by the plaintiff under the Act. The Court a quo had resolved the dispute in favour of the plaintiff, ruling in terms of Klaas's case that nothing should be deducted from the plaintiff's agreed quantum and consequently awarding the plaintiff the full amount of R15 950 plus costs. The appeal was summarily dismissed with costs on the date of the hearing (1st of May 1986) and the Court's reasons were handed down on the 26th May 1986. Van Heerden J A quoted the following passage from the judgment in the Court a quo:

> "It is apparent from the above that the proviso to Section 8 (1)(a) did not require a blind arithmetical deduction to be made in all cases ... A Court has in my view to have regard to what the Commissioner paid or is likely to pay the workman and if the Court is satisfied on the facts placed before it that the workman is not going to be compensated twice for the same injuries, the proviso to Section 8 (1)(a) will have been met."

and commented on this passage as follows:

> "Die Hof het dus tereg daarop gewys dat al wat Artikel 8 (1)(a) beoog, is dat 'n werksman nie dubbele vergoeding mag verhaal nie, of, anders gestel, dat die delikpleger nie meer as die getroffene se werklike skade aan hom en/of die Kommissaris sal betaal nie. En in casu het die Kommissaris natuurlik nie toekomstige mediese koste aan die eiser toegeken nie, en op die oog af ook geen ideële skadevergoeding nie."

And since in Bezuidenhout's case the deduction fell to be made under Section 8 (1)(a) of Act 30 of 1941 (and not under Section 22 (2)(a) of Act 56 of 1972) "only like should be deducted from like", (Klaas's case at page 581 B) with the result that nothing fell, in casu, to be deducted from Bezuidenhout's agreed quantum because that quantum could not be likened to what had been awarded by the Commissioner.

3.9.15.5 It should be added, with regard to Bezuidenhout's case, that Van Heerden J A confirmed that the Workmen's Compensation Act, Nr 30 of 1941 is concerned only with

pecuniary loss and not with general damages, thus approving earlier pronouncements to this effect in Bhoer vs Union Government and Another, 1956 (3) SA 582 C at 592, South British Insurance Company Limited vs Harley, 1957 (3) SA 368 A at 373, and Natal Provincial Administration vs Buys, 1957 (4) SA 646 A at 655 G.

3.9.15.6 The combined effect of the judgments in the Klaas and Bezuidenhout cases can therefore be summarised as follows:

(a) Where an employee of the owner or driver of the motor vehicle concerned (i.e. the driving of which gave rise to the claim) claims damages under the Act by virtue of circumstances also rendering him a workman entitled to compensation under Act 30 of 1941, the deduction exercise is done in terms of Section 22 (2)(a) of the 1972 Act (Section 9 (2)(a) of the 1986 Act) which provides that the total amount of compensation to which the claimant is entitled under Act 30 of 1941 must be deducted from his total Common Law damages (or R25 000 whichever is the lesser) even if the amount actually claimed by the claimant under either Act is less than the claimant's full entitlement under such Act. (Klaas's case at page 587 A - B)

(b) In all other claims under the Act by claimants who

are also workmen entitled to compensation under Act 30 of 1941, (i.e. in circumstances other than those mentioned in Section 9 (2)(a) of Act 84 of 1986) the deduction exercise has to be done in terms of Section 8 (1)(a) of the latter Act, and in such cases "only like should be deducted from like", in other words:

(i) Medical expenses which the Commissioner is obliged to pay may only be deducted from the medical expenses which the claimant has claimed and which are recoverable from the insurer (or Appointed Agent) under the Act.

(ii) Awards for temporary or total disablement in terms of Sections 38 and 39 of Act 30 of 1941 are awards in respect of loss of earnings, and may therefore only be deducted from the claimant's claim against the insurer (or Appointed Agent) for loss of earnings.

(iii) Act Nr 30 of 1941 makes no provision for the payment of general damages; consequently no portion of the amount awarded under Act 30 of 1941 may be deducted from the claimant's general damages.

(c) For further discussion on claims affected by the Workmen's Compensation Act, Nr 30 of 1941, see Chapter 4.

10. An appointed agent shall not be obliged to compensate any person in terms of section 8 for any loss or damage— Liability excluded in certain cases.

(a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable if section 12 had not been enacted; or

(b) suffered as a result of bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death—

(i) was being conveyed for reward on a motor vehicle which is a motor cycle; or

(ii) is a person referred to in section 9 (1) *(b)* and a member of the household, or responsible in law for the maintenance, of the driver of the motor vehicle concerned, and was being conveyed in or upon the motor vehicle concerned; or

(c) suffered as a result of bodily injury to or the death of a member of the South African Police, the South African Defence Force or the South African Railways Police Force, caused by or arising from the driving of a motor vehicle in which the member was conveyed in the course of his employment and owned by the South African Police, the South African Defence Force or the South African Transport Services; or

(d) if the claim concerned has not been instituted and prosecuted by the claimant, or on behalf of the claimant by—

(i) any person entitled to practise as an attorney within the Republic; or

(ii) any person who is in the service, or who is a representative, of a state or government or a provincial administration or the Administration of the territory of South West Africa or any local authority.

3.10 SECTION 10

COMMENTARY

3.10.1 SUB-SECTION (a)

This Sub-Section substantially re-enacts Section 23 (a) of the 1972 Act. It means, in simple terms, that the Appointed Agent is not liable to compensate any person in terms of Section 8 of the Act for any loss or damage for which neither the driver nor the owner would have been liable if Section 12 had not been enacted. Section 12 provides that when a third party is entitled under

Section 8 to claim from the MVA Fund or its Appointed Agent any compensation in respect of any loss or damage resulting from any bodily injury or the death of any person caused by or arising out of the driving of the motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party shall not be entitled to claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as a servant in the execution of his duty, from the employer, unless the MVA Fund or its Appointed Agent is unable to pay the compensation. One is tempted to abbreviate Section 10 (a) to mean simply that the Appointed Agent is not liable for compensation under Section 8 for any damages for which neither the driver nor the owner of the motor vehicle concerned would have been liable under Common Law, but it was pointed out in Mphosi vs Central Board for Cooperative Insurance Limited, 1974 (4) SA 633 A that this would not be strictly correct. It is therefore more correct to ask whether either the driver or the owner of the vehicle would have been liable (at Law) for the loss being claimed from the Appointed Agent if Section 12 had not been enacted. In this regard it must be remembered that Section 7 of the Workmen's Compensation Act, Nr 30 of 1941 precludes any workman or any dependant of a workman from instituting action at Law against such workman's employer to recover any damages in respect of an injury due to an accident resulting in the disablement or death of such workman, liability on the part of such employer in respect of any such disablement or death arising only under the provisions of that Act. But it

must immediately be pointed out that Section 7 of Act 30 of 1941 does not preclude any action at Law by a workman against a fellow-employee. Thus if the claimant could have sued the driver for his damages if Section 12 of the Act had not been enacted, then he is not debarred by Section 10 (a) from recovering his damages under Section 8 of the Act from the Appointed Agent designated to handle claims arising from the driving by that driver of the vehicle in question. However, if the same vehicle had been driven by the claimant's employer himself when the claimant was injured, any claim which the claimant would have had against such employer (if Section 12 had not been enacted) would have been prohibited by Section 7 of Act 30 of 1941, and once that claim has been thus excluded it follows that the claimant's claim under the MVA Act has also been excluded. This distinction is illustrated by Mphosi's case (Supra). The plaintiff was a workman who was injured as a result of his employer driving the insured vehicle negligently, and he sought to recover damages from the MVA insurer of the vehicle. A plea was upheld to the effect that such claim was disqualified because Section 7 of Act 30 of 1941 prohibited an action by a workman against his employer, and Section 23 (a) of the 1972 Act (Section 10 (a) of the new Act) relieved the MVA insurer from liability on the basis that neither the driver nor the owner (the owner being himself the driver) would have been liable if Section 27 (the new Section 12 (a)) had not been enacted. However, if the same insured vehicle had been driven at the time by a fellow-employee instead of by the employer himself, the claim under the Act would have succeeded because Section 7 of Act 30 of 1941 would have

have to be amended, otherwise such passenger will be debarred even from claiming damages under the Act which arise from the driving of some other motor vehicle covered by the Act. Ironically, if the reward paid by the passenger in respect of the conveyance on the motor cycle was illegal under the Road Transportation Act, the passenger will have a claim under the Act against the Appointed Agent designated to handle claims arising from the driving of that motor cycle, the extent of such claim depending on which of the other categories mentioned in Section 9 (1) the conveyance fell into. The MVA Handbook (paragrapgh 2.34) pointed out that this provision invited the attention of the legislature, and this statement can only be endorsed and repeated.

3.10.2.2 Turning now to Section 10 (b)(ii) it must be noted that whilst at first blush this Sub-Section seems simply to have been re-enacted, closer scrutiny reveals a subtle but very significant amendment to Section 23 (b)(ii) of the 1972 Act. For the disqualification to become operative, the latter Sub-Section required the injured or deceased person to have been "a person referred to in Section 22 ...", which naturally referred to any passenger falling in any of the six categories of passengers mentioned in Section 22 of the 1972 Act. But the new Section 10 (b)(ii) mentions for exclusion only "a person referred to in Section 9 (1)(b) ..."

which narrows the exclusion down to that category of passengers who were, when injured, being conveyed in the motor vehicle concerned under circumstances other than the circumstances mentioned with regard to all other categories of passengers, i.e. that category of passengers which limits the compensation under the Act to special damages only. The effect of Section 10 (b)(ii) in its full context is therefore that those passengers whose claims are limited by Section 9 (1)(b) to special damages only, will be totally disqualified from claiming damages under the Act if they are also members of the household, or responsible in Law for the maintenance, of the driver of the motor vehicle concerned. The following example will illustrate the significance of the amendment insofar as it effects certain categories of passengers. We look firstly at claims which arose prior to the 1st of May 1986, and we take the example of a military serviceman who has come home on authorised leave and who finds himself being conveyed in an insured motor vehicle driven by his father who then negligently overturns the vehicle, thus injuring the son. The son's claim for damages under the Act is totally disqualified by Section 23 (b)(ii) of the 1972 Act because he was "a person referred to in Section 22" (a military serviceman on authorised leave and dressed in his official uniform being such a person) and he is also a member of the household of the

driver of the motor vehicle in question. If we then look at precisely the same circumstances in relation to a claim which arose on or after the 1st of May 1986 we find that the military serviceman's claim is now not affected at all because he is not "a person referred to in Section 9 (1)(b)" as required by Section 10 (b)(ii).

3.10.2.3 Member of the household

Who is "a member of the household" of the driver? The answer to this question has been sought on many occasions in our courts and obviously more than one meaning can be attached to these words, depending on the circumstances. Nevertheless, the definition advanced by Human J in the Court a quo was accepted by the Appeal Court in the case of Incorporated General Insurances Limited vs Reinecke, 1976 (1) SA 591 A at 599:

> "A household unit, generally, consists of one or more people who ordinarily reside in the same dwelling and who are bound to some extent by ties of dependency to one of them who is the head of the household."

Hofmeyr J A pointed out that this could only be regarded as an approximation of what the notion in issue would normally embrace. In the same case Trollip J A held that while it was difficult to define precisely what the expression "member of a household"

meant, it seemed clear that for a person to be a member of a household, at least two fundamental elements had to co-exist viz

(a) There had to be some relationship, affinity, or tie between him and the other member or members of the household, such as a family tie; and

(b) The person had to "occupy" or "live" or "dwell" in the household premises, which imported some degree of continuous or permanent presence there. (At page 600)

In Clark and Company vs Lynch, 1963 (1) SA 183 N, which did not deal with the term "member of the household", but more particularly with the term "household" in relation to a husband's liability for household necessaries, it was held that "household" should not be limited to the husband and wife and children born of that marriage. It extended to cover all persons who are part of the organised family establishment centring on the man and his wife living together in a joint home. In the particular context of the wife's power to bind her husband for necessaries, it included the husband, the wife, their children and their servant or anyone else living with them either permanently or temporarily as part of the joint establishment of the spouses. Whether this case can be advanced in

support of the contention that a servant is "a member of the household" as envisaged in Section 10 (b)(ii), is debatable, but dictionary definitions generally do not limit members of a household to blood relations, and the requirements of Trollip J A in Reinecke's case mentioned above also do not restrict the affinity or tie between the members to a blood relationship. But the phrase is certainly ambiguous (see Hodes, at page 194) and since it relates to the total exclusion of liability under the Act the principle that the Act is to be interpreted to give the widest possible protection to claimants, will undoubtedly play a role when our courts are called upon to determine whether a servant is a member of the household of the driver of an insured vehicle in given circumstances. It is submitted that this is a factual enquiry which will depend on the specific evidence advanced in a given case.

3.10.2.4 In Masombuka vs Constantia Versekeringsmaatskappy Beperk (Juta's Law Cassettes, February 1987 - to be reported in 1987 (1) SA February Edition) the plaintiff's daughter was a passenger in a vehicle driven (negligently) by her brother and the Court had to decide whether her claim was defeated by the provisions of Section 23 (b)(ii) of the 1972 Act (Section 10 (b)(ii) of the 1986 Act). Kriegler J

awarded special damages in the maximum amount of R12000 under Section 22 (1)(d) of the Act, after reasoning inter alia as follows. The wording of Section 23 (b)(ii) disqualifies a passenger who is "a member of the household .... of the driver" of the vehicle concerned. This precipitates the question whether the driver does have a household. If the answer is "no", cadit quaestio. If the answer is in the affirmative, a second question must be asked, namely whether the injured person was a member of that household, i.e. the driver's household. The relationship which the legislature intended between the passenger and the driver was that whilst the latter "has" a household, the former is merely a member thereof. The Section pointedly does not refer simply to persons who are both members of the same household; it indicates that the disqualification only applies if the passenger is a member of the household of the driver, thus suggesting that the driver must be the (or a) head of the household before the claim of a passenger-member of the driver's household can be defeated by the Section. Even if this was not the meaning intended by the legislature, then the Section is in any event ambiguous, and since the intention of the Act is "to give the greatest possible protection to third parties", it would be wrong for a Court to choose that meaning which would exclude a category of passengers which would otherwise (on the other meaning) be

included.

> "Ek konkludeer gevolglik dat die uitsluiting op grond van lidmaatskap van 'n huishouding in Artikel 23 (b)(ii) van Wet 56 van 1972 alleen van toepassing is waar die bestuurder van die versekerde voertuig ten tye van die betrokke voorval die (of 'n) hoof was van die huishouding waarvan die beseerde pasassier 'n lid was. Die bestuurder was nie die hoof van die huishouding waarvan (eiser se dogter) 'n lid was nie. Die vordering namens laasgenoemde word dus nie deur die bedoelde uitsluiting getref nie."

3.10.3 SUB-SECTION 10 (c)

3.10.3.1 This Section provides that claims resulting from bodily injury to or the death of a member of the S A Police, the S A Defence Force or the S A Railways Police Force caused by or arising from the driving of a motor vehicle in which such member was conveyed in the course of his employment, and which was owned by the S A Police, the S A Defence Force or the S A Transport Services are now totally disqualified under the Act. This disqualification is most unfortunate since it leaves the members of the three forces in a much poorer position.

3.10.3.2 Enquiries as to the motivation for the introduction of this new Sub-Section have not met with a satisfactory explanation. It is simply said that the three forces

concerned regard the provisions made in other Acts for their members as adequate. Adequacy is of course a relative concept, but once it appears that rights have been taken away from persons which they previously enjoyed, then their remaining (lesser) rights must in that context be regarded as inadequate rather than adequate in relation to their earlier rights.

3.10.3.3 It is suspected that the disqualification has been introduced into the Act because the forces concerned namely the S A Police, the S A Defence Force and the S A Railways Police, are simply not prepared to become embroiled in litigation against their own employees. A case in point is Mkhunqwana vs Minister of Defence, 1984 (4) SA 745 E. In this case the plaintiff was an employee of the defendant and he was conveyed in a vehicle belonging to the defendant, and driven by one Kruger, "in the course of the business of the owner thereof and/or in the course of his employment with the owner thereof". The vehicle concerned was not insured in terms of the provisions of Act 56 of 1972, which therefore rendered the owner a so-called self-insurer thereof in terms of Section 3 of the Act. The vehicle was involved in a collision which was caused by the negligence of the said Kruger and the plaintiff sustained injuries. The plaintiff admitted having received compensation under the Workmen's Compensation Act, Nr 30 of 1941 in the sum of R114,64 and he claimed

from the Defendant the difference between the said amount and the total damages which he alleged he had suffered. The defendant pleaded that the plaintiff was at all material times a "workman" and that the defendant was an "employer" in terms of Act 30 of 1941, and that the collision was an "accident" as envisaged by the said Act and that, in the premises, and by reason of the provisions of Section 7 of Act 30 of 1941 the action by plaintiff against defendant could not succeed. The plaintiff excepted to the special plea on the grounds that since the defendant was being sued not as the plaintiff's employer but as a quasi-insurer of the motor vehicle concerned in terms of Section 3 of Act 56 of 1972, Section 7 of Act 30 of 1941 was consequently inapplicable. The plaintiff's exception was allowed and the special plea was struck out with costs. In arriving at this result, the Court (Zietsman J) relied at least partly on the reasoning of Ogilvie Thompson J in the case of Bhoer vs Union Government and Another, 1956 (3) SA 582 C at 593 D to 594 C. In the latter case the learned Judge had firstly pointed out that the right of action lay against the respondent, not in its capacity as employer, but in its capacity as quasi-insurer ("that is to say, in its capacity of being equated, by virtue of the provisions of Section 19 (3) (of the 1942 Act), to a registered company"), and he then concluded as follows:

"The conclusion which I reach accordingly is that neither the first two proviso's to Section 11 (1) of the Motor Vehicle Insurance Act 29 of 1942, nor the provisions of Section 7 of the Workmen's Compensation Act, 30 of 1941, debar an employee, who has sustained injury arising out of the negligent driving by another of a motor vehicle owned by his employer and who is entitled to workmen's compensation therefor, from bringing an action pursuant to the provisions of Section 11 (1) of the Motor Vehicle Insurance Act, 29 of 1942, for damages for shock, pain and suffering against his employer where such employer is not insured with a registered company but is, by virtue of Section 19 (3) of the Motor Vehicle Insurance Act, 1942, liable to injured persons in accordance with the provisions of Section 11 of that Act as if he were a registered company."

See also Natal Provincial Administration vs Buys, 1957 (4) SA 646 A at 658 D - E. Zietsman J also considered Mphosi vs Central Board for Co-operative Insurance Limited, 1974 (4) SA 633 A, and distinquished that case from Mkhunqwana's case on the following basis:

"This case is clearly distinquishable from the present case in that in Mphosi's case the owner of the uninsured vehicle, who was the plaintiff's employer, was also the driver thereof. Had neither the Workmen's Compensation Act nor the Motor Vehicle Insurance Act been passed, the plaintiff would have had an action against the owner/driver of the vehicle. Because of the passing of the Workmen's Compensation Act, the plaintiff could no longer sue the owner/driver of the vehicle because this person happened to be his employer, and Section 7 (a) of the Workmen's Compensation Act precluded any such action. The Motor Vehicle Insurance Act did not come to his assistance by reason of the fact that

> Section 11(1)(i) of the said Act (Act 29 of 1942) provided that a registered company (or the owner of an uninsured motor vehicle, as the case may be) would not be liable for any damages for which neither the driver nor the owner of the vehicle would have been liable if the Act had not been passed. The Motor Vehicle Insurance Act which is now operative (Act 56 of 1972) has a similar provision (Section 23 (a)) but it does not lead to the same result in the present case since the plaintiff here bases his action upon the negligence of the driver of the uninsured vehicle who, not being his employer, would not have been able to rely upon Section 7 (a) of the Workmen's Compensation Act if he had been sued."

(See also paragraph 3.10.1)

In a situation as envisaged by Section 10 (c), more particularly where a member of the SA Defence Force was conveyed in such circumstances in a vehicle owned by the Minister of Defence, it is hardly conceivable that the driving of the vehicle in question will ever be performed by the employer himself; it will virtually always have been performed by a fellow-employee, thus leaving the way open for an action under the Act. But this door has now effectively been closed by Section 10 (c).

3.10.3.4 Once a claim is disqualified under the Act, the claimant concerned may naturally look to the rights he then enjoys under Common Law. Such rights will still be subject to the provisions of Section 7 of Act 30 of 1941 (precluding an action for damages by a workman or his dependants against such workman's employer), but it

must be remembered that Section 8 of Act 30 of 1941 preserves the workman's Common Law right of action against the driver of the vehicle concerned. (See Mkhunqwana's case at page 747 E and 748 D.) It seems therefore that the driver (who is not also owner) of the vehicle wherein the member of the Force in question was being conveyed when he was injured, has been left high and dry inasmuch as he remains exposed to the member's Common Law action for damages. But the member's claim under the Act would (if it had not been disqualified by Section 10 (c)) have been limited to R25 000, (minus the award under Act 30 of 1941) and the driver would in any event have been liable for any damages beyond such limitation.

3.10.3.5 It must be noted that the claims which members of the three Forces mentioned in Section 10 (c) have where their injuries were caused by the driving of some other vehicle, have not been affected; only the limited claim they enjoyed under Section 9 of the Act has been abolished.

3.10.3.6 The question arises whether the disqualification holds good where a member of one Force was conveyed in the course of his employment in a vehicle owned by one of the other Forces. It happens quite frequently these days that members of the S A Defence Force are conveyed

in the course of their employment in vehicles owned by the S A Police, or vice versa. It is submitted that the wording of Section 10 (c) is wide enough to cover such cases and that consequently the disqualification will apply even where a member of one Force was conveyed in the course of his employment in a vehicle owned by one of the other two Forces.

3.10.3.7 It must be noted that the disqualification will apply only if the member concerned was conveyed in the course of his employment. If the member concerned was not being conveyed in the course of his employment, the Act will apply and the member's claim will be subject to the provisions of Section 9 (1)(b). If the vehicle carried no token of identification at the time of the accident, the member's claim will lie against that Appointed Agent which is designated by the Date Schedule relating to tokenless vehicles and which indicates the Appointed Agent in accordance with the date on which the accident occurred.

3.10.4 SECTION 10 (d)

3.10.4.1 This Section provides that an Appointed Agent may repudiate liability for a claim under the Act if such claim has not been "instituted and prosecuted" by the claimant himself, or on his behalf by:

(a) Any person entitled to practise as an attorney within the Republic; or

(b) Certain public servants.

Claims handled on behalf of claimants by public servants (presumably those whose duties include the handling of such claims) and claims conducted by claimants themselves, are so rare that the comments relating to Section 10 (d) may be confined to claims "instituted and prosecuted" by attorneys.

3.10.4.2 The precursor to Section 10 (d) was Section 23 (d) of the 1972 Act, which was introduced into that Act in 1978 (Act 69 of 1978) in pursuance of the recommendation of the Wessels Commission (paragraph 2.7.2 of the Report) that the handling of claims under the Act should be reserved to the claimants themselves or to their attorneys. The legislature sought to achieve this result by providing in Section 23 (d) of the 1972 Act that the authorised insurer could repudiate liability if the claim had not been "instituted" by the claimant himself or by an attorney or by one of the specified public servants. It will immediately be noted that "instituted" under Section 23 (d) of the 1972 Act has now become "instituted and

prosecuted" under Section 10 (d) of Act 84 of 1986. This subtle amendment seeks to remedy the loophole exposed in Section 23 (d) of the 1972 Act in the case of Msomi vs S A Eagle Insurance Company Limited, 1983 (4) SA 592 D. In that case a claims investigator had acted as the claimant's agent in preparing and completing the MVA 13 claim form. The form was signed by the claimant himself, but was delivered by the claims investigator under cover of a letter signed by the claimant himself. The meaning of "institute" was considered and on the facts of the case it was held that the claim was not defeated by the provisions of Section 23 (d). The insertion of the words "and prosecuted" into Section 10 (d) will certainly make it more difficult for so-called claims consultants to continue handling claims under the Act on behalf of claimants. Claimants entrusting such claims to such persons do so at their own peril, but claimants will regrettably seldom be aware of the provisions of Section 10 (d) of the Act.

3.10.5 EXCLUSION OF PERSONS WHO REFUSE OR FAIL TO UNDERGO MEDICAL EXAMINATIONS OR TO FURNISH MEDICAL EVIDENCE

3.10.5.1 The provisions of Section 23 (c) of the 1972 Act are a notable omission from Section 10 of the 1986 Act, but these provisions have not been scrapped; they have

simply been taken out of the Act and put into the Regulations. The new Regulation 7 (2)(a) reads as follows:

> "(2) An Appointed Agent shall not be obliged to compensate -
>
> (a) Any person in terms of Section 8 of the Act for any loss or damage suffered as a result of bodily injury to any person who -
>
> (i) Unreasonably refuses or fails to subject himself at the request of the Appointed Agent and at the cost of that Agent, to any medical examination or examinations by medical practitioners designated by the said Agent;
>
> (ii) Refuses or fails to furnish the Appointed Agent, at his request and cost, with copies of all medical reports in his possession that relate to the relevant claim for compensation; or
>
> (iii) Refuses or fails to allow the Appointed Agent at his request to inspect all records relating to himself that are in the possession of any hospital or his medical practitioner ..."

These provisions are virtually identical to the provisions of the old Section 23 (c). Why they have been taken from the Act and inserted in the Regulations appears from paragraph 3.8.5 above, but the effect remains the same. As has already been pointed out the handling of claims under the Act is by Sections 6 (1)(a) and (b) rendered "subject to the provisions of

the regulations", and the liability of the MVA Fund or its Appointed Agent is by Section 8 (1) of the Act based "on the prescribed conditions".

3.10.5.2 Prior to 1978 there were no provisions in the 1972 Act whereby a claimant could be called upon in the pre-summons period to submit himself to a medical examination or to make available to the defendant the relevant medical evidence. The defendant had to wait until summons was issued before he could avail himself of the Rules of Court, such as Supreme Court Rule 36. Section 23 (c) of the 1972 Act was introduced, in pursuance of a recommendation by the Wessels Commission, (paragraph 2.8.8.2 of the Report) to close this gap.

3.10.5.3 In Union and South West Africa Insurance Company vs Fantiso, 1981 (3) SA 293 A it was stated by Rumpff C J at page 301 D that:

> "As the object of the Section is to allow the insurer to get information, forfeiture of plaintiff's claim will only be allowed, in my view, if the information is wilfully withheld after a request is made, or if the request is deliberately ignored ... there must be a consideration of elasticity and reasonableness in the application of Section 23 (c)(ii) and (iii), although the word 'unreasonably' has been specifically mentioned only in (c)(i)."

3.10.5.4 In view of the interrelation between Regulation 7

(2)(a) and the Rules of Court relating to medical examinations it is appropriate to refer to the case of Goldberg vs Union and South West Africa Insurance Company Limited, 1980 (1) SA 160 E where the provisions of Supreme Court Rule 36 were considered. See also Selamolela vs President Versekeringsmaatskappy Beperk, 1981 (3) SA 1099 T.

Presumptions regarding driving of motor vehicle.

11. (1) For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle.

(2) For the purposes of this Act a person who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle while it moves from that place as a result of gravity, or while it is stationary at that place or at a place to which it moved from the first-mentioned place as a result of gravity.

(3) Whenever any motor vehicle has been placed or left at any place, it shall, for the purposes of this Act, be presumed, until the contrary is proved, that such vehicle was placed or left at such place by the owner of such vehicle.

3.11 SECTION 11

COMMENTARY

3.11 Sections 11 (1), 11 (2) and 11 (3) are verbatim re-enactments of Sections 1 (2), 1 (3) and 1 (4) of the 1972 Act. They are all deeming provisions and relate to the so-called extended meaning of "driving", and are therefore normally considered in relation to injury or death "caused by or arising out of the driving of a motor vehicle", as envisaged by Section 8 (1) of the Act.

3.11.1 SECTION 11 (1)

This Section deems a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum, to be driven by the person in control of such vehicle. The Section envisages a vehicle in motion and does not relate to stationary vehicles. It involves, for instance, the person steering a defective vehicle which is being towed. See Schlebush vs President Versekeringsmaatskappy, 1963 (2) PH J23 T; Flynn vs Unie Nasionaal Suid-Britse Versekerings-maatskappy Beperk, 1974 (4) SA 283 NC. The last-mentioned case also held that the words "in control of the vehicle" did not necessarily envisage "physical and continued regulation of the movement of a vehicle, since such interpretation would render a good deal of the Section supererogatory". (At page 286.)

3.11.2 SECTION 11 (2)

This Section provides that a person who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle while it moves from that place as a result of gravity, or while it is stationary at that place or at a place to which it moved from the first-

mentioned place as a result of gravity. The Section certainly gives an extended meaning to the term "driving" in Section 8. The classic illustration is to be found in the case of Van der Poel vs AA-Onderlinge Assuransie-Assosiasie Beperk, 1980 (3) SA 341 T. That case involved the situation where a tractor had been parked on a slope, in gear and with the brake on. A three and a half year old boy playing on the tractor had caused it to start moving down the slope "as a result of gravity", thus injuring the plaintiff. It was held that at the time of the incident the tractor was regarded (in terms of Section 1 (3) of the 1972 Act) as having been driven by its owner. But the Section in express terms also envisages the situation where the vehicle is stationary. That collisions with such stationary vehicles were held to have arisen from the "driving" of such vehicles for the purpose of the Act, appears from cases such as Rajamma vs Union and National Insurance Company Limited, 1971 (2) SA 86 D; Van Wyk vs Netherlands Assurance Company of S A Limited, 1971 (2) SA 264 W; and Churchill vs Standard General Insurance Company Limited, 1977 (1) SA 506 A. However, the extended meaning of "driving" may not be taken too far. Where a vehicle has been brought to a stop in the sense that it was switched off and parked, and the door negligently opened by the driver in order to alight, the injuries sustained as a result of a passing vehicle or cyclist colliding with the open door were held not to have been caused by or arisen out of the "driving"

of the vehicle concerned. See Wells vs Shield Insurance Company Limited, 1965 (2) SA 865 C; Khoza vs Netherlands Insurance Company of SA Limited, 1969 (3) SA 590 W. A fortiori where the door of a stationary lorry had been opened not by the driver but by the passenger, the injuries sustained by the plaintiff who had collided with the open door were also held not to have arisen out of the "driving" of the lorry in question. (Pretoria City Council vs Auto Protection Insurance Company Limited, 1963 (3) SA 136 T.) For cases where the injuries had been sustained as a result of the operation of certain types of mechanical implements or machines see Petersen vs Santam Insurance Company Limited, 1961 (1) SA 205 C; Roos vs AA Mutual Assurance Association Limited, 1974 (4) SA 295 C; Sehire vs Central Board for Co-operative Insurance Limited, 1976 (1) SA 524 W; and Nkhala vs Mutual & Federale Versekeringsmaatskappy, 1985 (1) SA 824 O.

3.11.3 SECTION 11 (3)

This Section provides that when a motor vehicle has been placed or left at any place, it shall be presumed, until the contrary is proved that such vehicle was placed or left at such place by the owner thereof. This Section is of no real significance in relation to the Appointed Agent's liability, since such liability is not dependent

upon the motor vehicle concerned having been driven by the owner himself. The Section therefor has more relevance to offences of a criminal nature.

3.11.4 COMBINATION VEHICLES

3.11.4.1 On our roads there are a great variety of vehicles which are attached to other vehicles, such as motor cars and caravans, or trailers and many types of mechanical horses and trailers. Under the 1972 Act trailers and caravans had to be separately insured from the towing vehicles and the question often arose, particularly where the towing vehicle and the towed vehicle were insured by different insurers, as to which of the insurers should be held liable for damages under the Act in specific circumstances. It was pointed out in Hunt, Leuchars and Hepburn vs S A Fire and Accident Insurance Company, 1966 (3) SA 773 W that a trailer, "when it is being hauled, it becomes integrated with the vehicle which provides the motive power". For this discussion such vehicles will be referred to as combination vehicles.

3.11.4.2 The two leading cases on this question are Santam Versekeringsmaatskappy Beperk vs Kemp, 1971 (3) SA 305 A and Churchill vs Standard General Insurance Company Limited, 1977 (1) SA 506 A. Since the Kemp case is

considered and discussed in some detail in the Churchill case, and even qualified in some respects (see page 514 H of the Churchill case) the relevant principles will be discussed mainly in relation to the remarks of Rumpff C J in the Churchill case. These principles can best be illustrated by reference to the undermentioned findings and comments of the learned Chief Justice. Whereas the learned Chief Justice refers to a "trekvoertuig" (such as a mechanical horse, a tractor or a motor car) and a "sleepvoertuig" (such as a caravan or a trailer), reference will herein be made simply to a "towing vehicle" and a "trailer":

(a) Apart from the specific provision relating to "driving" in Section 1 (3) of the 1972 Act (Section 11 (2) of the 1986 Act), there is no indication in the Act that the legislature intended to alter the Common Law approach to the doctrine of causation, and it is clear that the words "caused by or arising out of" (as used in Section 22 of the 1972 Act and Section 8 of the 1986 Act) should be interpreted so as to coincide with the Common Law approach. (Page 515 B to G).

(b) Applying the Common Law approach of causation, the insurer of the negligently driven towing vehicle is liable under the Act if that vehicle caused the

damage, i.e. if the collision was with the towing vehicle and not with the trailer. That insurer (Appointed Agent) is also liable if the trailer caused the damage; i.e. if the collision was with the trailer and not with the towing vehicle. This follows from the fact that the driving of the towing vehicle was the cause of the damage inflicted by the trailer. The insurer (Appointed Agent) of the trailer which inflicted the damage is <u>also</u> liable for the damage because the trailer will normally be regarded as having been "driven" by the driver of the towing vehicle. Both insurers are then jointly and severally liable. (Page 516 A - B).

(c) Applying once again the principles of the Common Law in a case where the damage is inflicted solely by the towing vehicle, the insurer (Appointed Agent) of the trailer would not be liable; this follows from the fact that the driver of the trailer (i.e. the person deemed to be the driver thereof) did not in that case cause the damage. (Page 516 B)

(d) Where a trailer coupled to a towing vehicle has its own separate driver, the insurer (Appointed Agent) of the trailer would carry sole liability if, on the facts, the negligence of the driver of

the trailer was the sole cause of the damages inflicted by the trailer. Similarly, the insurer (Appointed Agent) of the trailer would in that case also carry sole liability if the negligence of the driver of the trailer was the cause of the damage inflicted by the towing vehicle whose driver was not also negligent. If both drivers were negligent, there would again probably be joint and several liability on the part of both insurers (Appointed Agents) depending on the circumstances. (Page 516 D - E).

(e) Consequently, where the driver of a towing vehicle to which a trailer is coupled, drives the towing vehicle negligently as a result of which a third party collides with the trailer, it would be wrong to say that the insurer of the trailer is solely liable for the damages; the fact that the collision was with the trailer and not with the towing vehicle does not detract from the fact that the insurer (Appointed Agent) of the latter is also jointly and severally liable. Any remarks contained in the majority judgment in Kemp's case which could be interpreted to have the effect that an insurer of a towing vehicle or a trailer could be liable only when the towing vehicle or trailer inflicted the damage in question, and that the

insurers (Appointed Agents) could be jointly and severally liable only where the damage was inflicted by both vehicles, is specifically rejected by the Court. (Page 514 F - H) In this regard the learned Chief Justice pointed out (at page 515 B) that the position under Common Law would be as follows:

> "Sonder hierdie Wet sou, kragtens die Gemene Reg, 'n bestuurder wat 'n trekvoertuig bestuur, waaraan 'n sleepvoertuig gekoppel is, aanspreeklik wees vir skade veroorsaak weens nalatige bestuur van die trekvoertuig. Hy sou in so 'n geval aanspreeklik wees of die trekvoertuig of dan wel die sleepvoertuig die skade aanbring. Hy is aanspreeklik omdat die skade in sodanige gevalle veroorsaak is deur die bestuur van die trekvoertuig."

(f) It is also important to note that on the facts of Churchill's case (a widow claiming damages arising from the death of her husband who was a passenger in a vehicle which had collided from the rear with a trailer drawn by a towing vehicle), the Chief Justice pointed out that the plaintiff widow had two separate causes (or rights) of action, namely:

(i) The right to be compensated for damages arising from her husband's death "caused by or arising out of the driving" of the towing vehicle; and

(ii) The right to be compensated for such damages "caused by or arising out of the driving" of the trailer.

Despite the fact that both vehicles were simultaneously driven by the same driver, and that the negligence was in both cases the same, the liability, where the towing vehicle and the trailer happened to be insured by different companies, would depend upon separate insurance contracts, and since each insurer could individually seek protection with regard to the prescriptive provisions of the Act, compliance with those provisions in relation to one insurer would not necessarily have the effect of interrupting prescription in relation to the other insurer. (At page 516 G - 517 D)

3.11.4.2 In the circumstances it is clear that the Common Law approach should always be applied in order to establish which of two insurers (Appointed Agents) of a combination vehicle should be held liable, or whether both such insurers (Appointed Agents) should be held jointly and severally liable. If there is any doubt whatsoever, the latter course should be adopted.

12. When a third party is entitled under section 8 to claim from the MVA Fund or its appointed agent any compensation in respect of any loss or damage resulting from any bodily injury to or the death of any person caused by or arising out of the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party shall not be entitled to claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as a servant in the execution of his duty, from his employer, unless the MVA Fund or its appointed agent is unable to pay the compensation.

Claim for compensation lies against MVA Fund or appointed agent only

3.12 SECTION 12

COMMENTARY

3.12.1 The effect of Section 12 is that to the extent to which a third party is entitled to claim damages under Section 8 of the Act from the Appointed Agent (or the MVA Fund, as the case may be,) that third party is debarred from recovering such damages from the owner or driver of the vehicle concerned or, if the driver drove the vehicle in the course of his employment, from his employer, unless the MVA Fund or its Appointed Agent is unable to pay the compensation. The disqualification of a claim against the owner or driver (or the latter's employer) applies, in other words, only to the extent that the damages in question are recoverable from the Appointed Agent (or MVA Fund) under the Act. As pointed out by Jansen J A in Da Silva & Another vs Coutinho, 1971 (3) SA 123 A, Sections 8 and 12 of the Act are complementary and they purport to do no more than to substitute for the Common Law action for damages, an action against an Appointed Agent, and

this substitution required that the owner or driver be relieved of his original liability vis-â-vis the third party. It follows therefore that the persons thus relieved from liability under the Act (the owner and the driver and the latter's employer) may be sued for any amount of damages exceeding the sum of the limited damages payable under Section 9 of the Act. (Rose's Car Hire (Pty) Limited vs Grant, 1948 (2) SA 466 A) Similarly the owner or driver (or the latter's employer) will be personally liable for so much of the compensation which the Appointed Agent or the MVA Fund is unable to pay by reason of its insolvency. (Parmer vs Joe Borg's Transport & Another, 1963 (4) SA 488 N

3.12.2 Section 20 (2) of the 1972 Act obliged an owner of a motor vehicle to produce at the request of a third party or his agent, the prescribed proof of insurance of the vehicle concerned, such as the declaration of insurance. In Da Silva & Another vs Coutinho, 1971 (3) SA 123 A the owner negligently failed to comply with such a statutory request and the Appeal Court upheld a Common Law claim against the owner for such amount of damages as the third party would, but for the owner's said failure, have been able to recover under the Act. This is understandable because under the 1942 and 1972 Acts a declaration of insurance was issued in respect of each insured vehicle and the production of this document was often the only means of identifying the authorised insurer against whom

the third party had to lodge his claim under the Act. Where the owner negligently failed to produce the document in question, thus denying the third party the identification of the authorised insurer to be sued, it followed (according to the Appeal Court) that the owner's breach of his statutory duty created a cause of action under Common Law which could not be defeated by the precursor to Section 12. Unfortunately this judgment will no longer apply because the 1986 Act makes no provision for any document similar to the earlier declaration of insurance, and it contains no provision similar to Section 20 (2) of the 1972 Act whereby the owner can be obliged by the third party or his agent to produce any document whereby the Appointed Agent concerned will be identified.

Submission of information to MVA Fund or appointed agent and third party

13. (1) When, as the result of the driving of a motor vehicle, any person other than the driver of that motor vehicle has been killed or injured, the owner and the driver, if he is not the owner, of the motor vehicle shall (if reasonably possible, within 14 days after the occurrence) furnish an appointed agent or the MVA Fund, as the case may be, on the prescribed form with particulars of the occurrence and also the prescribed statements.

(2) Any person who fails to comply with any provision of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R200, unless he is unable to comply with the provision concerned and his inability is not due to his own action or default.

(3) The appointed agent shall within 14 days after the third party has complied with the provisions of section 15 (2) *(b)*, furnish the third party or his agent with a copy of the information and statements which the said owner or driver furnished in terms of subsection (1) of this section, as well as all statements which were obtained from witnesses to the occurrence.

(4) Any person who furnishes false information in connection with a token of identification issued in terms of section 2 (1) and attached, at the time of an occurrence out of which a claim in terms of section 8 arises, to a motor vehicle to which it relates and which is involved in that occurrence, shall be guilty of an offence and liable on conviction to a fine not exceeding R250.

3.13 SECTION 13

COMMENTARY

3.13.1 SECTION 13 (1) - DUTY TO REPORT ACCIDENTS

3.13.1.1 This Section corresponds largely with the provisions of Section 20 (1) of the 1972 Act. There is therefore still an obligation on the owner as well as on the driver (if he is not also owner) of the motor vehicle which has inflicted bodily injury to report the accident within fourteen days of the occurrence (if reasonably possible) to an Appointed Agent or to the MVA Fund, as the case may be. Failure to comply with this obligation may still result in a fine (not exceeding R200, Section 13 (2)) and/or in the Appointed Agent having a right of recourse. (Section 16, read together with Regulation 11.) See Regulation 10.

3.13.1.2 The difference between the old and the new Sections lies in the nature of the particulars of the occurrence which the owner and the driver must furnish. Under Section 20 (1) of the 1972 Act the details which had to be furnished were specified, such as the time and place of the occurrence, the name and address of persons who

were killed or injured and of persons who were upon the insured vehicle at the time of the occurrence, as well as a description of any other vehicle involved in the occurrence and the name and address of the driver of each such other vehicle and of any person who witnessed the occurrence. Section 20 (1)(b) also obliged the owner and the driver to furnish any other reasonable information at his disposal which the authorised insurer may from time to time request him to furnish. In practice this boiled down to a so-called statutory "accident report form" which the owner and driver were obliged to complete for the insurer in question within fourteen days (if reasonably possible) after the occurrence. By contrast Section 13 (1) of the 1986 Act requires the owner and the driver to furnish (also within fourteen days, if reasonably possible) firstly, particulars of the occurrence "on the prescribed form", and secondly, "also the prescribed statements". The prescribed form is form MV 5 which is considerably more comprehensive than the particulars required under the former Act, and which also makes provision for a sketch of the scene of the accident and for a description of the accident which must be signed by the driver and the owner. The reference in Section 13 (1) to the furnishing of "the prescribed statements" presumably refers to that portion of form MV 5 which requires the owner and the driver to give a full description of the

accident; there is certainly no reference to any further statements in the Regulations. The former "accident report form" contained no statement by the driver or other information relating to the causation of the occurrence. By virtue of the provisions of Section 20 (2) of the 1972 Act, the third party or his agent was entitled to receive a copy of the statutory "accident report form", which left the third party without any details of the circumstances of the accident as had been conveyed by the owner or driver of the insured vehicle to the insurer concerned. As we shall presently see, Section 13 (3) now obliges the Appointed Agent to furnish copies of form MV 5 and "the prescribed statements" to the third party (or his agent), but only after the latter has performed certain obligations resting on him.

3.13.2 SECTION 13 (3)

3.13.2.1 This Section requires the Appointed Agent to furnish to the third party (or his agent) a copy of form MV 5 plus copies of "the prescribed statements" which the owner and driver were obliged to furnish to the Appointed Agent (or to the MVA Fund) within fourteen days after the occurrence. But the Appointed Agent's obligation to do so only arises once the third party has complied with the provisions of Section 15 (2)(b), (read

together with Regulation 7 (2)(b)(iii))and then he must carry out his obligation within fourteen days after such compliance. Section 15 (2)(b) states that the third party may not have summons served on the Appointed Agent before the third party has complied with "all the prescribed requirements" of the Appointed Agent. Such "prescribed requirements" are then to be found in Regulation 7 (2)(b) which requires the third party to furnish to the Appointed Agent not only an affidavit (together with the MV 3 claim form) giving particulars of the occurrence, but also copies of all statements and documents relating to the merits plus "such further particulars of the said occurrence as the Appointed Agent may require". (Regulation 7 (2)(b)(iii)) It follows therefore that the Appointed Agent is not obliged to furnish to the third party (or his agent) any portion of its evidence concerning the merits until such time as the third party has himself furnished to the Appointed Agent every scrap of documentary evidence concerning the merits as specified in Regulation 7 (2)(b)(i) and (ii) plus any further particulars of the merits "as the Appointed Agent may require" in terms of Regulation 7 (2)(b)(iii).

3.13.2.2 It seems that the legislature had a laudable objective in mind, namely that there should be a reciprocal duty on the claimant and the defendant respectively, to exchange at an early stage all evidence available to

them on the merits. This would serve to eradicate the situation where the parties could play with their cards close to their chests while they jockey for advantage in the course of litigation or settlement negotiations. But it is one thing to have a laudable objective in mind, and quite another thing to achieve that objective, and the legislature has unfortunately created a totally one-sided situation favouring the Appointed Agent which holds little advantage for the claimant. It is necessary to amplify and motivate this statement.

3.13.2.3 The right which the Appointed Agent enjoys to call for "such further particulars of the said occurrence" as he may require, is clearly an ongoing right. By the same token it is therefore an ongoing obligation resting on the claimant. There is nothing in Regulation 7 (2)(b)(iii) which precludes the Appointed Agent from seeking "such further particulars of the said occurrence" on more than one occasion and even, for that matter, up to shortly before trial. The purportedly reciprocal duty resting on the Appointed Agent to furnish his evidence on the merits to the claimant (or his agent) does not appear to be an ongoing obligation; it is an obligation which the Appointed Agent must carry out within fourteen days after the claimant has given him all the evidence

concerning the merits requested of him by the Appointed Agent, and then the obligation appears to lapse. Arguably, if the Appointed Agent at a later stage seeks to avail himself once again of his rights under Regulation 7 (2) (b)(iii) (by calling yet again for "such further particulars of the said occurrence as the Appointed Agent may require"), the claimant may call on the Appointed Agent once again under Section 13 (3) to furnish "all statements which were obtained from witnesses to the occurrence", but one of the many problems confronting the claimant is that a lazy Appointed Agent may simply sit back and have the merits fully investigated by the claimant, by simply making repeated calls for "such further particulars of the said occurrence as the Appointed Agent may require", which creates the artificial position that apart from the contents of the form MVA 5 the Appointed Agent has nothing to give to the claimant under Section 13 (3) other than evidence relating to the merits which the claimant furnished to the Appointed Agent under Regulation 7 (2)(b).

3.13.2.4 Another illustration of the inequality created by the legislature is that failure by the Appointed Agent to furnish the claimant with his evidence on the merits within fourteen days after the claimant has complied with the provisions of Section 15 (2)(b) and Regulation 7 (2)(b), does not result in any sanction penalty or

prejudice of whatever nature. A dishonest claims clerk could therefore withhold damning statements obtained by him on the merits with total impunity. Alternatively he can put off almost indefinitely the obligation of furnishing his evidence to the claimant by simply making repeated further requests under Regulation 7 (2)(b)(iii). By contrast the claimant's slightest non-compliance with the provisions of Regulation 7 (2)(b) results in the total repudiation of his claim. The claimant must therefore take great care in considering any further, even repeated, requests by the Appointed Agent under Regulation 7 (2)(b)(iii) for such further particulars regarding the merits as the Appointed Agent may require. Even where he does not have the further information available which the Appointed Agent calls for, the wording of Regulation 7 (2)(b)(iii) seems wide enough for the Appointed Agent simply to insist:

> "If you do not have it available, then go out and get it for me, because until you do so, you will not have complied with the provisions of Section 15 (2)(b), which means not only that I do not have to give you any evidence available to me on the merits, but also that your failure to comply with this (further) request under Regulation 7 (2)(b)(iii) will entitle me to repudiate your claim."

And then when it gets round to the Appointed Agent's obligation under Section 13 (3) to give his evidence on the merits to the claimant, he may simply respond to a

request in this regard by saying:

> "The accident has not even been reported to me and I have neither the MV 5 form nor anything further to give you except what you have already given me, and I do not intend undertaking any further investigations; why should I? I can simply use Regulation 7 (2)(b)(iii) to oblige you to undertake whatever investigations I require."

Once the Appointed Agent adopts this or any similar attitude his obligation under Section 13 (3) becomes non-existent and the "reciprocal" obligation to exchange evidence on the merits holds no benefit for the claimant whatsoever. See also paragraph 3.8.5.

3.13.2.5 It has already been pointed out (paragraph 3.13.2.4) that no sanction prejudice or penalty follows upon non-compliance by the Appointed Agent with the obligations resting on him under Section 13 (3). Reference has also been made (paragraph 3.13.2.4) to the severe prejudice which confronts the claimant if he fails to comply with the provisions of Regulation 7 (2)(b). But this Regulation also imports various new prescriptive connotations into the claims procedure. The Appointed Agent may now raise, as complete defences, the following points:

(a) Whether the claimant's affidavit on the merits under Regulation 7 (2)(b)(i) was submitted within

fourteen days after the claimant was in a position to do so; or

(b) Whether any further statements or documents relating to the merits were furnished to the Appointed Agent within fourteen days after they came into the claimant's possession.

The claimant and his attorney are already subjected to a multitude of technical hazards and traps; it is a pity that these have been compounded, particularly at a time when there is a general call for the legislature to strive to simplify the system. To give but one example: An attorney consults with the claimant and takes instructions for the preparation of the affidavit required to be lodged by Regulation 7 (2)(b)(i). Thereafter he draws the affidavit and mails it to his client so that it may be signed before an independent Commissioner of Oaths. By the time the signed affidavit comes back to the attorney's office through the mail, the attorney has left on a two-week holiday, with the result that it only comes to his attention upon his return to office. He now mails it to the Appointed Agent, the document being in the hands of the postal authorities for a further five or six days. By the time the affidavit reaches the Appointed Agent it is clear that it was not submitted to the Appointed

Agent within fourteen days after the claimant was in the position to do so. The same applies to any statement obtained by or on behalf of the claimant under Regulation 7 (2)(b)(ii); if it is not furnished to the Appointed Agent within fourteen days after the claimant came into possession of it, the Appointed Agent has the right to repudiate. Nowhere in Regulation 7 (2)(b) is the element of reasonableness mentioned; compare Regulation 7 (2)(a)(i). It will now depend on whether the requirements of the Regulations will be held by our Courts to be directory or mandatory, and whether the element of reasonableness and the principle of substantial compliance will be read into the new Scheme. (See paragraph 3.8.5.) But the impact of Regulation 7 (2)(b) is so devastating that strict adherence to its provisions is too repugnant to contemplate. In the meantime the undertaking by the MVA Fund that Appointed Agents will be instructed not to require the affidavits envisaged in Regulation 7 (2)(b)(i) to be furnished prior to the lodgment of the claim itself, and not to repudiate liability where such an affidavit is not possible at all (where dependants simply are not able to describe the merits from their own knowledge) is scant consolation. To include certain unreasonable provisions in a new Act and then immediately to state that they will not be enforced simply means that they should not have been put there in the first place. The

legislature must reconsider these provisions.

3.13.2.6 It is clear from the provisions of Section 13 (3), read together with Section 15 (2)(b) and Regulation 7 (2)(b)(iii), that the Appointed Agent may indefinitely frustrate the claimant's right to have summons served. Section 15 (2)(b) expressly prohibits the service of summons on the Appointed Agent "before all the prescribed requirements of the Appointed Agent have been complied with". And since the claimant's obligation to furnish further evidence concerning the merits under Regulation 7 (2)(b)(iii) is ongoing in the sense that the Appointed Agent may submit repeated requests for further evidence, the claimant never really knows, until he has been told, whether he has complied with "all the prescribed requirements of the Appointed Agent" for purposes of Section 15 (2)(b). The claimant consequently does not know whether he is entitled to have summons served or not. To counter this situation, it is suggested that the claimant's attorney should in his letter accompanying the claim documents, or in any subsequent letter wherein he responds to a request by the Appointed Agent for further information in terms of Regulation 7 (2)(b)(iii), specifically request the Appointed Agent to confirm that the prescribed requirements have now been complied with. The Appointed Agent's ability to

frustrate the service of summons on him indefinitely is bad enough in itself, but what is more disconcerting is the effect which the Appointed Agent's repeated reliance on Regulation 7 (2)(b)(iii) could possibly have as regards prescription of the claim. This aspect is more fully discussed under the Commentary on Section 14, but it may be stated here that in a case where the Appointed Agent has made an offer of settlement which has not been accepted, nothing stops the Appointed Agent from calling for further information under Regulation 7 (2)(b)(iii) and since Section 15 (2)(b) would, in such a case, remain a bar to the service of summons, the question arises whether the claim may not become prescribed. The answer to this question depends on the interpretation to be placed on the proviso to Section 14 (1)(a) read together with Section 15 (2). See in this regard paragraph 3.14.1.2, 3.14.1.3 and 3.14.1.7 (c) below.

3.13.3 SECTION 13 (4)

3.13.3.1 This Section provides that any person who furnishes false information in connection with a token of identification issued in terms of Section 2 (1) and attached to the motor vehicle concerned at the time of an occurrence giving rise to a claim under Section 8, shall be guilty of an offence and liable on conviction

to a fine not exceeding R250. Unfortunately the legislature has not really made it clear as to what mischief it wished to avoid by enacting this Section. It has been so widely worded that it can obviously hit persons whom it was never intended to affect. Since the Act no longer contains any obligation on the owner of the vehicle concerned to furnish any information or documents to the claimant or his agent, one's first reaction is that the Section could not have been intended to refer to the owner. But on reflection the wording is clearly wide enough to cover the owner as well as, for that matter, the driver of the vehicle in question; after all, the phrase "any person" appears to mean exactly what it says. For the same reason the Section must also be considered wide enough, however laughable it may seem, to cover the investigating policeman who wrongly records the token number or the name of the insurer appearing on the token of identification. Likewise, where the investigating officer correctly recorded the information concerned at the scene of the accident, but some other police officer, when subsequently making a copy of the police report, transcribes an incorrect number onto the copy, such latter police officer is in effect also furnishing "false information". The same would seem to apply even to the claimant who inserts an incorrect token number (or Appointed Agent) in the relevant questions contained

in the claim form MV 3. The possibilities are endless, but only one further such possibility need be mentioned. It must be remembered that Appointed Agents are paid R450 for each claim handled by them. Presumably the legislature had in mind some sort of collusion between certain parties which would result in a claim being handled by an Appointed Agent not entitled to do so. If a distinction is drawn between information which is merely incorrect through inadvertence, (as in the examples relating to the policeman and the claimant) and information which is "false" in the deliberate sense of the word, then this last-mentioned possibility becomes more meaningful. But regrettably the true intention does not appear from the section. It is suggested that the legislature review Section 13 (4) in order to indicate its intention with a greater degree of clarity.

Prescription of claim.

14. (1) *(a)* Notwithstanding the provisions of any other law relating to prescription, but subject to the provisions of paragraph *(b)* of this subsection, the right to claim compensation under section 8 from an appointed agent in respect of claims referred to in section 6 (1) *(a)* (i) shall become prescribed upon the expiration of a period of two years from the date upon which the claim arose: Provided that prescription shall be suspended during the periods referred to in subsection (2) of this section and section 15 (2).

(b) Prescription of a claim for compensation under sections 6 (1) *(a)* and 8 shall not run against—

(i) a minor;

(ii) any person detained as a patient in terms of the provisons of the Mental Health Act, 1973 (Act No. 18 of 1973); or

(iii) a person under curatorship.

(2) If an appointed agent does not within 60 days after receipt of a claim as set out in section 15 (1) object to the validity thereof, prescription shall, notwithstanding the provisions of subsection (1), be interrupted until after the expiration of a period of 90 days from the date on which the appointed agent delivers to the claimant or his representative per registered post or by hand a notice to—

(a) repudiate liability; or

(b) convey an offer of settlement of the claim to the claimant or his representative.

(3) If a third party's claim for compensation has become prescribed under subsection (1) of this section and a court having jurisdiction in respect of such claim is satisfied, upon application by the third party concerned—

(a) where the claim became prescribed before compliance by the third party with the provisions of section 15 (1), that by reason of special circumstances he or, if he instructed any other person to comply with those provisions on his behalf, such person could not reasonably have been expected to comply with the said provisions before the date on which the claim became prescribed; or

(b) where the claim became prescribed after compliance by him with the said provisions, that by reason of special circumstances he or, if he instructed any other person to act on his behalf in this connection, such person could not reasonably have been expected to serve any process by which the running of prescription could have been interrupted, on the appointed agent before that date; and

(c) that the appointed agent is not prepared to waive its right to invoke the prescription,

the court may grant leave to the third party to comply with the said provisions and serve process in any action for enforcement of the claim on the appointed agent in accordance with the provisions of section 15 (2) before a date determined by the court, or, as the case may be, to serve such process on the appointed agent before a date so determined.

(4) The court shall not grant an application referred to in subsection (3) unless—

(a) the application is made within a period of 90 days after the date on which the claim became prescribed in terms of subsection (1); and

(b) the third party has given security to the satisfaction of the court for the costs of the appointed agent in connection with the application.

(5) A plea of prescription in terms of subsection (1) shall not be upheld in any action in which the relevant process was served on the appointed agent by virtue of leave granted under subsection (3).

(6) Notwithstanding the provisions of section 8 of the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), any right under subsection (1) *(b)* of that section to recover an amount which under that Act is required to be paid to a third party in circumstances other than those mentioned in section 9 (2) of this Act, shall for the purposes of subsection (1) (excluding the proviso) and subsection (3) of this section be deemed to be a right to claim compensation under section 8 of this Act arising on the same date as the claim of such third party under the last-mentioned section: Provided that if the recovery of any such amount has been debarred under this subsection, any compensation thereafter awarded to the third party under this Act shall be reduced by the amount concerned.

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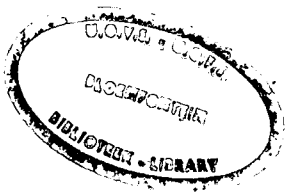

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MVA PRACTICE

UNDER THE

MOTOR VEHICLE ACCIDENTS ACT, 1986

by

DUDLEY PERCIVAL HONEY

This thesis is submitted to comply with the requirements of the degree

LL.M.

in the

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Universiteit van die Oranje-Vrystaat
BLOEMFONTEIN
3 - NOV 1988
T 346.68086232 HON
BIBLIOTEEK

3.14 SECTION 14

COMMENTARY

3.14.1 SECTION 14 (1)(a)

This Section is substantially similar to Section 24 (1)(a) of the 1972 Act, except in two respects:

(a) Inasmuch as the Section expressly states that it relates only to claims as referred to in Section 6 (1)(a)(i) i.e. claims arising from the driving of a motor vehicle in those cases where the identity of either the owner or the driver thereof has been established (as opposed to claims referred to in Sectin 6 (1)(b) where the identity of neither the owner nor the driver of the vehicle concerned can be established), the Section now confirms in express terms that it deals only with claims against Appointed Agents, and not claims against the MVA Fund.

(b) The proviso to the Section no longer refers to only one period during which the two-year prescriptive period shall be suspended; it now states that "prescription shall be suspended during the periods

referred to in Sub-Section (2) of this Section and Section 15 (2)."

3.14.1.1 Section 24 (1)(a) of the 1972 Act also related exclusively to claims under the Act against an authorised insurer, and not to claims under Regulations 5 & 6 involving the MVA Fund, but this fact had to be deduced from other provisions, not from the Section itself. See Kunene vs Union National South British Insurance Company Limited, 1976 (4) SA 782 D at 785 F - G).

3.14.1.2 The other innovation in the Section is decidedly more complex. Section 24 (1)(a) of the 1972 Act provided that a claim against an authorised insurer became prescribed upon the expiration of a period of two years from the date upon which the claim arose, "provided that prescription shall be suspended during the period of 90 days referred in Section 25 (2)." And Section 25 (2) laid down that summons could not be served on the authorised insurer before the expiration of a period of ninety days as from the date on which the claim was sent or delivered by hand, as the case may be, to the authorised insurer in terms of Section 25 (1). There was therefore just the one period during which prescription was suspended. By contrast the proviso to Section 14 (1) (a) now lays down that prescription

shall be suspended during the periods referred to in Sections 14 (2) and 15 (2). At first blush the new Section appears to refer to two periods of suspension, but a proper analysis reveals that the legislature probably had three periods in mind:

(a) The period mentioned in Section 14 (2);
(b) The period mentioned in Section 15 (2)(a); and
(c) The period (albeit indefinite) mentioned in Section 15 (2)(b).

3.14.1.3 The period of suspension mentioned in Section 14 (2) is easily identifiable and its meaning is discussed in the Commentary on Section 14 (2) below. (Paragraph 3.14.3) It is the reference to Section 15 (2) which causes some difficulty. Section 15 (2)(a) mentions the same traditional 90-day period of suspension calculated as from the date on which the claim was sent or delivered by hand, as the case may be, to the Appointed Agent, and this too causes no problem. But if one reads the word "periods" in Section 14 (1)(a) as referring only to the two periods mentioned in Section 14 (2) and Section 15 (2)(a), it means that prescription shall not be suspended during the indefinite period referred to in Section 15 (2)(b), i.e. the "period" before "all the prescribed requirements of the Appointed Agent have been complied with". This brings us back to the requirements prescribed by Regulation 7 (2)(b), and

particularly to Regulation 7 (2)(b)(iii). If prescription were not suspended while the Appointed Agent is availing himself of the provisions of Regulation 7 (2)(b)(iii) by calling upon the claimant or his agent to furnish "such further particulars of the said occurrence as the Appointed Agent may require", the result would be so devastatingly prejudicial to the claimant that such an intention on the part of the legislature seems inconceivable. As we have seen, Section 15 (2)(b) precludes the service of summons on an Appointed Agent before the claimant has complied with all the "prescribed requirements of the Appointed Agent", including the requirement in Regulation 7 (2)(b)(iii) to furnish such further evidence in writing regarding the merits of the occurrence as the Appointed Agent may require. If prescription were not suspended while the Appointed Agent is frustrating the claimant's right to have summons served, the Appointed Agent could in each case engineer the prescription of the claimant's claim, and since such a result could never have been intended, it must be assumed that prescription is suspended during the period envisaged in Section 15 (2)(b) i.e. that period preceding compliance by the claimant with the prescribed requirements of the Appointed Agent. (The proviso to Section 14 (1)(a) should be amended to make it clear that it refers not only to the period of 90

days mentioned in Section 15 (2)(a) but also to the indifinite period mentioned in Section 15 (2)(b).) The construction contended for above regrettably brings with it a great deal of uncertainty as regards the precise period during which prescription is interrupted. Let us assume that the Appointed Agent has called for further evidence concerning the merits in terms of Regulation 7 (2)(b)(iii). The claimant responds to this request by sending a letter to the Appointed Agent containing certain information. The claimant is unsure whether the information in question will satisfy the Appointed Agent's request. He posts the letter on Day One, it is received at the office of the Appointed Agent on Day Two, it comes to the attention of the claims clerk handling the matter on Day Three, the claims clerk does not acknowledge receipt of the information or, if he does, he does not specifically state whether the information satisfies his request in the sense that he now regards all the prescribed requirements as having been complied with. Assuming that the other periods of suspension mentioned in Section 14 (2) and Section 15 (2)(a) have already expired, when does the interruption of prescription terminate on the above set of facts? The Appointed Agent may tacitly regard the evidence furnished by the claimant as proper compliance with "all the prescribed requirements", but he does not convey this state of mind to the claimant. Or he simply has not arrived at

any state of mind on this aspect, because he is still applying his mind to other aspects of the claim, or he is simply not applying his mind to the claim at all. There is so much uncertainty in the determination of the period of interruption envisaged in Section 15 (2)(b) that it will no doubt be argued that the legislature never envisaged the "period" referred to in Section 15 (2) (b) as being a period during which prescription is suspended. Moreover the proviso to Section 15 (2) mentions only "the said period", thus suggesting that the legislature itself had only one "period" in mind in Section 15 (2). But it is nevertheless submitted, despite these arguments, that the intention must have been that the "periods" referred to in the proviso to Section 14 (1)(a) include the indefinite period envisaged in Section 15 (2)(b). The fatal results flowing from the contrary arguments could simply never have been intended; indeed the MVA Fund confirms this. The Act will surely continue to be interpreted in such a way as to give the widest possible protection to the claimant. It is however a pity that the legislature has not seen fit to state its intentions with a greater measure of clarity. It will simply have to review this aspect of the new Act, firstly to make it clear beyond doubt that the proviso to Section 14 (1)(a) covers also the indefinite period referred to in Section 15 (2)(b), and secondly there

will have to be some provision whereby the date of termination of the period of interruption relating to Section 15 (2) (b) will become clearly identifiable. There should, it is submitted, be an obligation on the Appointed Agent to indicate whether all its prescribed requirements have been complied with and there should be a further provision stating that the period of interruption will terminate on the date on which the Appointed Agent's state of mind on this point has been conveyed to the claimant. It has already been submitted that attorneys representing claimants should call on the Appointed Agent, either in the letter under cover of which the claim was submitted or in the letter furnishing evidence on the merits in response to a request under Regulation 7 (2)(b)(iii), to indicate whether all the prescribed requirements have now been complied with, but there is no obligation on the Appointed Agent to respond to such a request and even if it does, the exact date on which the period of interruption terminated may not be easily identifiable. See paragraph 3.14.1.7 (c) below.

3.14.1.4 It should be noted that the provisions of Section 14 of Act 84 of 1986 apply only to claims which arose on or after the 1st of May 1986. Claims which arose prior to the said date are still governed by the provisions of Act 56 of 1972. Section 20 of the new Act states clearly that its provisions do not apply with reference to a claim which arose prior to the commencement of the

Act (1st May 1986), and that any such claim shall be dealt with as if the new Act had not been passed.

3.14.1.5 WHEN DOES PRESCRIPTION COMMENCE RUNNING UNDER SECTION 14 (1)(a)

(a) Leaving aside for the moment the exceptions dealt with in Section 14 (1)(b), it is to be noted that "the right to claim compensation ... shall become prescribed upon the expiration of a period of two years from the date upon which the claim arose". When does the claim arise? The answer to this question is simply that in non-fatal injury cases the claim arises on the date of the collision, but in fatal injury cases the claims of the dependants only arise on the date on which the breadwinner dies, which date could conceivably be a considerable time after the date of the collision. (Thomas vs Liverpool and London and Globe Insurance Company of SA Limited, 1968 (4) SA 141 C) Where a wife and her husband, for example, both sustain bodily injuries in the same collision and the husband subsequently dies a a result of his injuries, the wife will have two separate causes of action, namely one in respect of her own injuries and one in respect of the loss of support suffered as a result of the death of her husband.

Prescription with regard to the first-mentioned cause of action will commence to run on the date of the collision whereas prescription with regard to her second cause of action will commence to run only on the date of her husband's death, since it is on this date that her claim for loss of support "arose". Thus in the case of Evins vs Shield Insurance Company Limited, 1980 (2) SA 814 A at 839 F the majority of the Appellate Division, per Corbett J A, stated the following:

> "Consequently, applying (as I think I should) the ordinary and well-accepted legal meaning of cause of action, I am of the view that at Common Law a plaintiff's claim for damages or bodily injuries is a cause of action quite separate and distinct from that which the same plaintiff may acquire against the same defendant for loss of support, even though both causes of action derive from a common occurrence."

(b) Suspension of the two year period

While the right to claim compensation under Section 8 prescribes after the expiration of a period of two years calculated from the date on which the claim arose, the two-year period is suspended, as submitted above,

(i) During the period mentioned in Section 14 (2);

(ii) During the period mentioned in Section 15 (1)(a); and

(iii) During the indefinite period mentioned in Section 15 (2)(b).

The two-year period stops running, i.e. is suspended, during the period referred to in (i), (ii) and (iii) above. Once the periods of suspension have expired, the unexpired portion of the two-year prescriptive period recommences to run. It is therefore necessary to know how to calculate not only the two-year period, but also the various periods of suspension or interruption. (Section 14 (1)(a) states that prescription shall be suspended, inter alia, during the period referred to in Section 14 (2). The latter Section then refers to prescription being "interrupted". Although "suspension" and "interruption" do not always have the same meaning, it is submitted that nothing hinges on the interchange in terminology between the two Sections.

3.14.1.6 CALCULATION OF THE TWO-YEAR PERIOD

The two-year period is calculated in accordance with the ordinary civil method which means in effect that the period commences at the beginning of the first day

and terminates at the beginning of the last day, or, stated otherwise, the first day is included and the last day is excluded. (Kleynhans vs Yorkshire Insurance Company Limited, 1957 (3) SA 544 A; Somdaka vs Northern Insurance Company Limited, 1960 (2) SA 852 D). This simply means that if a collision occurred on the 10th of May 1986, the claim will become prescribed at midnight on the 9th of May 1988, unless of course the statutory claim form is lodged within that period.

3.14.1.7 CALCULATION OF THE VARIOUS PERIODS OF SUSPENSION OR INTERRUPTION

In this regard there are now two new periods to be considered apart from the traditional 90 day period mentioned in Section 15 (2)(a), namely the new periods mentioned in Section 14 (2) and Section 15 (2)(b) respectively.

(a) The traditional 90-day period mentioned in Section 15 (2)(a)

Dealing firstly with the traditional 90-day period mentioned in Section 15 (2)(a), it is to be noted that the calculation of this period is done, once again, by the civil method and not in terms of Section 4 of the Interpretation Act Nr 33 of 1975.

Practically speaking, this means that the first day is included and the last day excluded. The date of despatch (by registered mail) or delivery (by hand) is therefore counted as the first day of the 90 day period. This was aptly put by the Appellate Division (per Rabie J A) in S A Mutual Fire and General Insurance Company Limited vs Fouche, 1970 (1) SA 302 A at 311 H:

> "Dat die skorsingstermyn 'n aanvang neem op die dag waarop die skorsingshandeling geskied ..."

Therefore, counting the date of despatch (or delivery by hand, as the case may be) as the first day, the remaining 89 days are then simply counted off on a calendar. Prescription will then re-commence to run on the 91st day and will continue to run for so much of the two-year prescriptive period as remained unexpired on the date when the form MV 3 was despatched or delivered. For example, where the claim documents were despatched (or delivered) on the last day of the two-year prescriptive period, it is deemed to have been delivered when one day still remained unexpired, and when the 90-day period expires, the unexpired portion of the original two-year period, namely one day, now commences to run, so that in this example summons will have to be served on the day

after expiry of the 90 day period.

(b) The new 90-day (plus) period mentioned in Section 14 (2)

But whilst the above comments explain the calculation of the traditional 90 day period, it must immediately be pointed out that in those cases where the Appointed Agent has not within 60 days after receipt of the claim objected to the validity thereof, prescription shall also in terms of Section 14 (2) be interrupted until after the expiration of a (different) period of 90 days from the date on which the Appointed Agent delivers to the claimant or his representative by registered post or by hand a notice wherein the Appointed Agent either repudiate liability or makes an offer of settlement. This new period of suspension (or interruption) introduced by Section 14 (2) is not really a 90-day period; it expires 90 days after the Appointed Agent has delivered the notice repudiating liability or making an offer of settlement. Hence the fact that it is referred to as the 90-day (plus) period. It clearly overlaps the traditional 90 day period referred to in Section 15 (2)(a). When does the period of suspension referred to in Section 14 (2) commence?

It is submitted that it commences immediately after expiry of the 60 day period after receipt by the Appointed Agent of the MV 3 claim form, i.e. the period available to the Appointed Agent to object to the validity of the claim. But the 60 day period mentioned in Section 14 (2) will not always coincide with the first 60 days of the traditional 90-day period mentioned in Section 15 (2)(a). The latter period commences to run "op die dag waarop die skorsingshandeling geskied" i.e. on the date on which the claim form is despatched (by registered mail) or delivered by hand. By contrast the period of 60 days mentioned in Section 14 (2) commences on the date of receipt of the claim form. Thus, where the claim form was delivered to the Appointed Agent by hand, the 60 day period mentioned in Section 14 (2) will coincide with the first 60 days of the traditional 90 day period referred to in Section 15 (2)(a), but where the claim form was despatched by registered mail (and therefore received by the Appointed Agent a number of days after the date of such despatch) the 60 day period mentioned in Section 14 (2) commences on the date on which the claim form was received by the Appointed Agent. The effect of Section 14 (2), insofar as it relates to the suspension of prescription, seems to be that this new period of suspension commences

on the 61st day after receipt by the Appointed Agent of the MV 3 claim form (at which point in time prescription is in any event already interrupted by the traditional 90 day period mentioned in Section 15 (2)(a), and which has then not yet expired) and the suspension continues until after the expiration of 90 days from the date on which the Appointed Agent's repudiation or offer of settlement was delivered to the claimant or his representative. This means that a claim against whose validity the Appointed Agent has not objected within 60 days after receipt thereof, can in effect never become prescribed until the Appointed Agent has either repudiated liability or made an offer of settlement, and then only after the expiration of a period of 90 days after such repudiation or offer of settlement was delivered to the claimant or his representative by registered post or by hand. Since this new period of suspension created by Section 14 (2) will always terminate later than the termination of the traditional 90-day period mentioned in Section 15 (2)(a), the date of termination of the said traditional period will now only be significant in a case where the Appointed Agent did indeed object to the validity of the claim within 60 days after receipt thereof, in which event the new period of

suspension never enters into the picture, because it is only created by the Appointed Agent's failure to object to the validity of the claim within 60 days after receipt thereof.

(c) The indefinite period mentioned in Section 15 (2)(b)

Turning now to the calculation of the third period of suspension or interruption, namely the indefinite period referred to in Section 15 (2)(b), reference should firstly be made to the comments offered in this regard in paragraph 3.14.1.3 above. The term "all the prescribed requirements of the Appointed Agent" as contained in Section 15 (2)(b) may arguably relate exclusively to "such further particulars of the said occurrence" as the Appointed Agent may specially have called for under Regulation 7 (2)(b)(iii). The provision that prescription shall be suspended until "all the prescribed requirements of the Appointed Agent have been complied with", seems to have been designed primarily for the protection of the claimant. The prescribed requirements mentioned in Regulations 7 (2)(b)(i) and (ii) are "prescribed conditions" as envisaged by Section 8 (1), and as such they require compliance in every case and not only when

specially called for by the Appointed Agent. It is really only Regulation 7 (2)(b)(iii) which empowers the Appointed Agent to specially call for such further evidence as he may require. In this sense the requirements of Regulations 7 (2)(b)(i) and (ii) are not "prescribed requirements of the Appointed Agent"; they are simply prescribed conditions which require compliance in each claim under Section 8. If this reasoning is correct, then only requests for further evidence on the merits under Regulation 7 (2)(b)(iii) should be regarded as prescribed requirements "of the Appointed Agent" for purposes of Section 15 (2)(b), read together with the proviso to Section 14 (1) (a). In other words, prescription will only be suspended in relation to time utilised in response to a request by an Appointed Agent under Regulation 7 (2)(b)(iii), and not to non-compliance by the claimant with any other "prescribed condition", such as a failure by the claimant to furnish to the Appointed Agent a copy of a witness statement within fourteen days after having come into possession thereof, as required by Regulation 7 (2)(b)(ii). It would be understandable for the legislature to suspend prescription in favour of the claimant for a period commensurate with the period during which

the claimant was precluded by the Appointed Agent (under Regulation 7 (2)(b)(iii)) from interrupting prescription by the service of summons. However, it would be less understandable if the claimant who had ignored all the prescribed conditions contained in Regulations 7 (2)(b)(i) and (ii) could obtain protection against prescription by claiming that the running of prescription had been interrupted for as long as his own non-compliance with the prescribed conditions had existed. Although we are admittedly on new ground here, and counter-arguments readily come to mind , the submission is nevertheless made, albeit with some hesitation, that the interruption of prescription under Section 15 (2)(b) read together with the proviso to Section 14 (1)(a), relates only to requests by the Appointed Agent under Regulation 7 (2)(b)(iii) for further evidence on the merits, and, that being the case, the commencement and termination of such a period of suspension should be interpreted against this background. Thus, in a case where the Appointed Agent never calls for further evidence on the merits under Regulation 7 (2)(b)(iii) no suspension will come into operation other than the suspension referred to in Section 14 (2) (90 days after the Appointed Agent repudiates liability or makes an offer of settlement) and the traditional suspension for 90

days after the despatch or delivery of the claim documents to the Appointed Agent under Section 15 (2)(a). On the other hand where a request has been made by the Appointed Agent under Regulation 7 (2) (b)(iii), if one were to pursue the above line of reasoning to its logical conclusion, the period of suspension should be commensurate with the time it took the claimant to obtain and furnish the evidence called for by the Appointed Agent. Logically it would therefore seem that the suspension would commence when the Appointed Agent's request under Regulation 7 (2)(b)(iii) is conveyed to the claimant or his agent, and would terminate on the date on which the required evidence is furnished to the Appointed Agent, the question as to whether the evidence thus furnished constitutes compliance with the request being a factual one. Any further request made by the Appointed Agent under Regulation 7 (2)(b)(iii) would then have the same effect in the sense that the running of prescription would again be interrupted afresh and the suspension created by such further request will again terminate when the further evidence has been furnished. Only time will tell whether this construction is upheld by our Courts, but the invitation to the legislature to review the provisions concerned in order to

achieve greater clarity is repeated.

3.14.1.8 INTERRUPTION OF PRESCRIPTION BY SERVICE OF SUMMONS

Only the actual service of summons, as opposed to the mere issue thereof, will interrupt prescription. (Kleyhans vs Yorshire Insurance Company Limited, 1957 (3) SA 544 A) In Agnew vs Union and South West Africa Insurance Company Limited, 1977 (1) 612 SE it was held that Section 14 of the Prescription Act, Nr 68 of 1969 (which provides that the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor) is applicable to the prescriptive period laid down by Act 56 of 1972. Our Courts have not been called upon to consider this point after the 1978 amendments to the Act.

3.14.2 SECTION 14 (1)(b) - Prescription does not run against certain persons

3.14.2.1 This Section provides that prescription of a claim under the Act shall not run against:

(a) A minor;

(b) A person detained as a patient in terms of the provisions of the Mental Health Act, Nr 18 of 1973; or

(c) A person under curatorship.

The Section substantially re-enacts Section 24 (1) (b) of the 1972 Act, which was introduced into that Act with effect from the 1st of September 1978. It was at that stage expressly stated not to apply to claims arising from occurrences which took place prior to the 1st of September 1978, which claims were therefore still subject to the position which pertained prior to that date.

3.14.2.2 The position relating to claims which arose before 1st of September 1978

Since we will for a number of years still have to deal with claims which arose prior to the 1st of September 1978, particularly claims relating to minors, it is necessary to deal with the legal position pertaining to such claims, and in this regard it must first be noted that the Act at that stage contained no provision similar to the present Section 14 (1)(b) to the effect that prescription does not run against certain classes of claimants, such as minors. It is therefore appropriate to review the relevant authorities relating to such classes of claimants before the 1978 amendments to the 1972 Act will promulgated.

(a) Minors (Claims which arose prior to 1st September

1978)

In President Insurance Company Limited vs Yu Kwam, 1963 (3) SA 766 A the Appellate Division held that the then current Prescription Act, 18 of 1943 was applicable to the Motor Vehicle Act, 29 of 1942 and that prescription consequently did not run against minors. Subsequently the former Prescription Act was replaced by the new Prescription Act, 68 of 1969, and Act 29 of 1942 was replaced by Act 56 of 1972. A number of cases thereupon followed wherein it was held that Section 13 (1) of the new Prescription Act applied to claims on behalf of minors under Act 56 of 1972. (Jonker vs Rondalia Assurance Corporation of SA Limited, 1976 (2) SA 334 E; Roux vs Santam Versekerings-maatskappy Beperk, 1977 (3) SA 261 T; Enslin vs S A Eagle Insurance Company Limited, 1981 (3) SA 71 W; SA Mutual Fire and General Insurance Company Limited vs Eyberg, 1981 (4) SA 318 A) In order to appreciate the implications of these decisions, it is necessary to point out that Section 13 (1) of the Prescription Act, Nr 68 of 1969 provides as follows:

"If

(a) The creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any Law or any order of Court from

interrupting the running of prescription as contemplated by Section 15 (1); or

(b) - (h) Not relevant for present purposes;

(i) The relevant period of prescription would, but for the provisions of this Sub-Section, be completed before or on or within one year after the day on which the relevant impediment referred to in paragraph (a) ... has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

In other words if the two-year period would, but for the provisions of Section 13 (1), be completed before or on or within one year after the minor attains majority, the period of prescription shall not be completed before one year has elapsed after the attainment of majority. It is this provision which our Courts applied in the series of cases quoted above.

(b) Persons who are insane or under curatorship (Claims which arose prior to 1st September 1978)

The legal position relating to this class of claimant developed along similar lines to those relating to minors, in the sense that the Prescription Act played a dominant role, and since Section 13 (1) of the Prescription Act referred not only to minors, insane persons and persons

under curatorship, but also to persons "prevented by superior force ... from interrupting the running of prescription ...", most of the relevant authorities relate to the enquiry as to whether prescription ran against a person while he was unconscious or non compos mentis. In S A Mutual Fire and General Insurance Company Limited vs Mapipa, 1963 (3) SA 603 E the Court stated the following at 610 F:

> "The underlying principle seems clearly to be that where a creditor's mental condition is such that he cannot act to preserve his right of action, prescription does not run to extinguish his action during the period of his incapacity."

This case was followed in Marais vs Commercial Union Assurance Company of SA Limited, 1977 (2) SA 269 T. In both cases the Court declined to follow the contrary view taken in Wulfes vs Commercial Union Assurance Company of SA Limited, 1969 (2) SA 31 N.

3.14.2.3 THE CORRESPONDING CURRENT POSITION (CLAIMS WHICH AROSE AFTER THE 1ST OF SEPTEMBER 1978)

Having in the preceeding paragraph reviewed the position which pertained prior to the enactment of the

1978 amendments, two features of the amended Section 24 of the 1972 Act become significant:

Firstly the provisions relating to prescription as set out in Section 24 were now stated to pertain "notwithstanding the provisions of any other Law relating to prescription"; and

Secondly the Act itself now, in Section 24 (1)(b), provided that prescription shall not run against the three stated cases of persons (minors, persons detained under the Mental Health Act, and persons under curatorship), thus excising the applicability of the Prescription Act in this regard.

In Terblanche vs S A Eagle Insurance Company Limited, 1983 (2) SA 501 N it was held that the new Section 24 of the 1972 Act (Section 14 of the 1986 Act) "was intended to be fully comprehensive on the matter of prescription of claims for compensation under the MVA Act and was intended to exhaust its subject-matter", so that prescription under the Act should henceforth be dealt with strictly in accordance with the provisions of the Act itself, the provisions of the Prescription Act being no longer relevant.

Minors (claims which arose on or after 1st September 1978)

Minors' claims which arose prior to the 1st of September 1978 were, as we have seen subject to the provisions of Section 13 (1) of the Prescription Act which, as we have seen, afforded the minor a period of one year after majority if the two-year period after the claim arose would otherwise have been completed earlier. The excising of the applicability of the Prescription Act to MVA claims had the effect that only the normal two-year prescriptive period would henceforth be relevant, and it follows that claims of minors which arose after the 1st of September 1978 will become prescribed only after the lapse of a period of two years after the minor has attained majority. Any uncertainty regarding this point was resolved by the decision in the case of Erasmus vs Protea Assurance Company Limited, 1982 (2) SA 64 N. (With regard to other classes of claimants mentioned in Section 14 (1)(b), namely persons detained under the Mental Health Act and persons unde curatorship, it is submitted that the running of prescription against them will be suspended for as long as their legal impediment continues to exist.)

3.14.2.4 Effect of marriage on a female minor

It is significant to note that it was held in Santamversekeringsmaatskappy Beperk vs Roux, 1978 (2) SA 856 A that the word "minor" where it appears in Section 13 (1) of the Prescription Act, Nr 68 of 1969, must be understood to refer to any person who has not yet become 21 years of age, including a girl who marries in community of property before reaching that age. That case was decided when the provisions of Section 13 (1) of the Prescription Act still applied to the provisions of Act 56 of 1972, but it is submitted that the same meaning will be ascribed to the word "minor" as it appears in the amended Section 24 (1)(b) of the 1972 Act and in Section 14 (1)(b) of the 1986 Act. The claim under Act 56 of 1972 or Act 84 of 1986 of a woman married in community of property but who has not yet attained the age of 21 years, will therefore become prescribed after the lapse of a period of two years as from her 21st birthday, as in the case of all other minors.

3.14.2.5 PERSONS WHO ARE UNCONSCIOUS OR non compos mentis

The case of Terblance vs S A Eagle Insurance Company Limited, 1983 (2) SA 501 N highlighted the omission from the 1972 Act (and thus also from the 1986 Act) of the protection against prescription previously afforded

by Section 13 (1) of the Prescription Act to persons while they are unconscious or non compos mentis. Since the latter class of claimant is listed neither in Section 24 (1)(b) of the 1972 Act nor in Section 14 (1)(b) of the 1986 Act, and since Section 13 (1) of the Prescription Act no longer applies, prescription does run against such persons even while they are unconscious or non compos mentis.

3.14.2.6 WHO WOULD QUALIFY AS BEING "A PERSON UNDER CURATORSHIP?

It has been held that these words are wide enough to refer also to a person in respect of whom a curator ad litem has been appointed. (See Van Rhyn NO vs AA Onderlinge Assuransie-Assosiasie Beperk, 1986 (3) SA 460 O)

3.14.3 SECTION 14 (2)

3.14.3.1 This is a new Section which should not be confused with Section 25 (1)(b) of the 1972 Act which started off in similar fashion ("If an authorised insurer does not within 60 days after receipt of a claim ...") but which then proceeded to deal with an entirely different topic.

In terms of Section 14 (2) the failure on the part of the Appointed Agent to object to the validity of a claim within 60 days after receipt thereof has the effect of interrupting prescription until a period of 90 days has expired after the date on which the Appointed Agent delivers to the claimant or his representative by registered post or by hand a notice repudiating liability or making an offer of settlement of the claim.

3.14.3.2 As to the time when this period of suspension commences (if at all) and when it terminates, see paragraph 3.14.1.7 above.

3.14.3.3 If the Appointed Agent does within the stated period object to the validity of the claim, the merits of the objection need not necessarily be conceded, and the Court may subsequently even overrule the Appointed Agent's objection to the validity of the claim, but it is submitted that the mere fact that an objection was made will render the rest of the Section inoperative. Once an objection to the validity of the claim has been made within the 60 day period, the interruption of prescription envisaged in the second part of the Section does not materialise.

3.14.3.4 It is to be noted that the notice repudiating liability or making an offer of settlement must be delivered to

the claimant or his representative "per registered post or by hand". When does the Appointed Agent "deliver" the notice in question to the claimant or his representative? Delivery by hand obviously creates no difficulty, but delivery "per registered post" involves two dates, namely the date of despatch and the date on which the notice is received by the claimant or his representative. It is submitted that the date on which the notice in question is received by the claimant or his representative will be the effective date and not the date of despatch. In Section 15 (2)(a), which deals with the traditional 90-day period of suspension following upon service of the claim form on the Appointed Agent, the legislature refers to "the date on which the claim was sent or delivered by hand" thus indicating the date of despatch as the effective date, and since the legislature in Section 14 (2) chose the words "from the date on which the Appointed Agent delivers to the claimant or his representative per registered post or by hand", the deliberate change in the wording must serve to indicate that the 90 day period mentioned in Section 14 (2) commences on the date the notice in question is received by the claimant.

3.14.3.5 It has already been pointed out that the interruption of prescription created by Section 14 (2) is not

limited to 90 days; it seems to commence on the 61st day after the claim form was received by the Appointed Agent and continues running until after the expiration of a period of 90 days calculated from the date on which the notice was delivered to the claimant or his representative.

3.14.3.6 It also bears repeating that the effect of this Section is that once 60 days have elapsed after receipt by the Appointed Agent of the claim form without objection having been made, the claim in question can never come prescribed until the Appointed Agent has done one of two things, i.e. he must either have repudiated liability or he must have made an offer of settlement of the claim. Only when this has been done and a period of 90 days has thereafter expired, will the two-year prescriptive period recommence running and can the claim become prescribed.

3.14.4 APPLICATIONS FOR CONDONATION

3.14.4.1 PROVISIONS OF THE ACT

Sections 14 (3), 14 (4) and 14 (5) relate to applications for so-called condonation, and they correspond substantially with the provisions of Section 24 (2) of the 1972 Act. Sections 14 (3) and 14 (4) provide that if an Appointed Agent is not prepared to

waive its right to invoke prescription, a claimant whose claim has become prescribed may obtain leave from the Court to comply with the requisite statutory requirements beyond the two-year period but before a date determined by the Court, provided the application is made within a period of 90 days after the claim became prescribed and security for the Appointed Agent's costs relating to the application has been furnished. Such claimant will have to satisfy the Court that:

(a) Where his claim became prescribed before the MV 3 claim form was lodged, he, or the attorney representing him, could not "by reason of special circumstances" reasonably have been expected to lodge the claim documents timeously; or

(b) Where the claim became prescribed after the claim documents were lodged, he, or his attorney, could not "by reason of special circumstances" reasonably have been expected to serve the summons timeously.

3.14.4.2 WHEN IS AN APPLICATION FOR CONDONATION "MADE"?

As was pointed out above, application for condonation must be "made" within a period of 90 days after the date on which the claim became prescribed. In a number

of cases this requirement has been interpreted to mean that the application must be issued and served within the 90 day period after prescription, but the application need not be actually heard within that period. (Fischer vs Commercial Union Assurance Company of SA Limited, 1977 (2) SA 499 C; Peters vs Union and National South British Insurance Company Limited, 1978 (2) SA 58 D; Zungu vs Kwa-Zulu Government, 1980 (1) SA 231 D; Kunene vs Union National South British Insurance Company Limited, 1976 (4) SA 782 D; Tyhopho vs Santam Insurance Company Limited, 1984 (2) SA 73 Tk; Modise vs Incorporated General Insurance Limited, 1985 (4) SA 650 B GD at 655 D - 656 B. However, the Eastern Cape Division has held that such application must be actually heard within the period of 90 days after the claim prescribes, otherwise the Court is obliged to dismiss the application. (Lange vs President Insurance Company Limited, 1976 (3) SA 632 E)

3.14.4.3 AGREEMENTS EXTENDING THE PRESCRIPTIVE PERIOD

There is a practice of claimants and insurers coming to an agreement, prior to the issue of summons, that the prescriptive period is in effect extended. After obtaining the necessary consent from the MVA Fund, the insurer issues a letter to the claimant or his attorney confirming that the insurer undertakes not to plead prescription, provided summons is served prior to a

certain specified date, which date allows a pre-arranged extension of the two-year period. This cannot be generally encouraged and attorneys who indulge in it should know that they may be courting disaster. It has been held that a claimant who has made himself a party to such an arrangement, has placed himself beyond the scope of the Act in the sense that an application for condonation can no longer be brought under Section 24 (2) of the 1972 Act, i.e. Section 14 (3) of the 1986 Act. (Kriel vs President Versekerings-maatskappy Beperk, 1981 (1) SA 103 T at 105 B - G)

While circumstances may arise where an agreement extending prescription may be the sensible thing to do, the point is simply made that it could also be dangerous. One reason for this is that an application for condonation must be brought within 90 days after the date on which the claim became prescribed, and an undertaking from the insurer that it will not plead prescription provided the summons is served prior to a certain (extended) date, does not necessarily also extend the period of 90 days within which the application is to be brought. Thus, the true prescriptive date will normally come and go, as will the subsequent 90 day period during which condonation is to be sought, and the claimant could thus find himself beyond the said 90 days when he wants to apply for condonation (see

Kriel's case at 105 F). In Grey vs Southern Insurance Association, 1982 (3) SA 688 E the Court drew attention to the distinction between an agreement extending prescription and an agreement waiving the right to rely on prescription as a defence. A waiver to plead prescription (provided summons is served by not later than a specified extended date) does not change the date on which the claim became prescribed, and since an application for condonation must be made within 90 days after the claim became prescribed, such application cannot be made within 90 days after the date agreed upon by the parties as the date up to which the defendant had agreed to waive his right to plead prescription (see page 692 A - E and 693 F). The reasoning in this case was adopted and followed by Munnik J P in Vilikazi vs National Employers' General Insurance Company Limited, 1985 (4) SA 251 C, but a different approach was adopted by Theal Stewart J P in Modise vs Incorporated General Insurances Limited, 1985 (4) SA 650 B GD. After pointing out that the Appeal Court had held in Bezuidenhout vs A A Mutual Assurance Association, 1978 (1) SA 703 A at 711 D and 711 G that although the language of Section 24 (2) (b)(i) of the 1972 Act (Section 14 (4)(a) of the 1986 Act) is undoubtedly peremptory, the requirements thereof may be waived by the authorised insurer (or Appointed Agent) concerned, the learned Judge in Modise's case then proceeded to review the judgments in the Kriel and Grey

cases:

> "I am in respectful agreement with the conclusions reached in the Bezuidenhout case. I hold that the insurer can waive the benefits of the prescriptive provision and of the requirement that an application for relief shall be made within 90 days. Once that is accepted, it seems to me that the propositions elucidated in Grey's case and in Kriel's case must be examined with it in mind. If the parties are entitled in Law to alter one of the terms of the statute which governs their relationship, then, once they do so, one must look to see what effect, if any, that agreement has on any of the other terms of the statute which are relevant and which are also negotiable. Grey's case and Kriel's case held that the extra 90 day period runs from the expiry date of the prescriptive period fixed by Section 24 and from no other date. This may be so in an appropriate case, but, if the benefit of that period can be waived, then I see no reason why its commencing date cannot be fixed by agreement. If the parties agree, either expressly or by inference, that those 90 days are to run from the expiry of a period of prescription fixed by agreement, then I consider that the Court has jurisdiction to give effect to that agreement. I would think that, provided the parties remained within the parameters fixed in Bezuidenhout's case and do not tamper with any provisions in the Act which are not negotiable for reasons of general policy or public interest, then it is open to them to tailor certain aspects of the Act to their particular circumstances, at the same time accepting that the remainder of the Act governs the remaining aspects of their situation."
>
> (Page 653 H - 654 C)

On the facts the Court then found that the parties "did not distinguish between the difference between a waiver

of the right to plead prescription and an extension of the prescriptive period", and that they simply substituted a fixed date upon which the claim was to become prescribed in the place of the period of two years and 90 days laid down by Section 24 (1)(a) of the 1972 Act; they also did not intend to exclude the operation of the remainder of the statutory provisions, with the result that an application for condonation was still possible within 90 days after the extended date of prescription. It is submitted that practitioners must take great care in negotiating a so-called extension of prescription. A waiver of the right to plead prescription provided that summons is served by a certain "extended" date is not necessarily the same as a simple agreement extending prescription, and a waiver on the part of the Appointed Agent to rely on the provisions of Section 14 (4)(a) must, like any other waiver, be proved by the person relying on it. It is therefore recommended that summons should be issued and served as soon as this is possible under Section 15 (2) of the Act, in order that the running of prescription may be interrupted. After service of summons the parties may agree to suspend the pleading in appropriate cases, in an effort to avoid unnecessary costs while they endeavour to negotiate a settlement, but the practice of extending prescription prior to summons being issued should be approached with circumspection. Apart from the abovementioned

problems, such agreements may also cause problems for an Appointed Agent who later seeks a contribution from a joint wrongdoer in terms of the Apportionment of Damages Act, Nr 34 of 1956. See Thwala vs Santam Insurance Company Limited, 1977 (2) SA 100 D.

3.14.4.4 SPECIAL CIRCUMSTANCES

(a) Before the definition of "special circumstances" was built into the 1972 Act with effect from the 1st of September 1978, the Appellate Division held in two cases that the negligence of the claimant's attorneys constituted special circumstances which justified an order granting condonation in respect of the relevant non-compliance. (See Webster vs Santam Insurance Company, 1977 (2) SA 874 A; Bezuidenhout vs A A Mutual Assurance Association, 1978 (1) SA 703 A.) However, as a result of these decisions a definition was built into the Act to the effect that "special circumstances" no longer include any neglect, omission or ignorance on the part of the third party or the person representing him. Applications for condonation have subsequently become more hazardous and actions against attorneys who negligently allow their clients' claims to become prescribed have become rather more common. (See, for instance, Slomowitz

vs Kok, 1983 (1) SA 130 A)

(b) The Courts have over the years evolved a number of important basic principles with regard to the meaning of "special circumstances" in applications for condonation under the Act. These principles may briefly be listed as follows:

(i) The Court must be satisfied that the circumstances relied upon by the applicant are the cause of, or reason for, the failure to effect timeous service. (See Federated Employers' Insurance vs Magubane, 1981 (2) SA 710 A at 717 B.)

(ii) The circumstances relied upon must be unusual or unexpected (Magubane case (Supra) at 717 C).

(iii) The Court must be satisfied that because of such circumstances it could not reasonably have been expected of the party concerned to effect timeous service. In other words his conduct, and particularly his failure to effect timeous service, must be critically examined in the light of the criterian of reasonableness. (Magubane's case at page 717 D)

(iv) There should be a causal connection between the special circumstances relied on by the third party and his failure to comply with the relevant provisions of the Act before his claim became prescribed (Commercial Union Assurance Company vs Johannesburg City Council, 1983 (1) SA 226 A at 232 G)

(v) The failure to comply with the provisions of the Act must be "by reason of" the alleged "special circumstances", i.e. the circumstances relied upon must be the effective cause of the failure and not merely a subsidary contributing factor. (Garvin vs President Insurance Company Limited, 1983 (2) SA 112 N at 117 G)

(vi) Since the word "neglect" (in the definition of "special circumstances") itself implies a measure of culpability, the other words in the definition namely "omission" and "ignorance" should also be interpreted as meaning only an omission or ignorance which is culpable (Oelofse vs Santamversekerings-maatskappy Beperk, 1982 (3) SA 882 A at 890 C, confirming the earlier obiter dictum of

Corbett J A in Federated Employers' Insurance Company Limited vs Magubane, 1981 (2) SA 710 A at 716 F - 717 A).

(vii) Where the attorney handling the claim delegates certain matters incidental to the claim to a staff member, then, provided the attorney is not himself guilty of blameworthy negligence in any respect, condonation may be granted on the basis that "special circumstances" were present (Coetzee vs Santamversekeringsmaatskappy Beperk, 1985 (1) SA 376 A). In such a case a distinction is drawn between staff members who do only administrative work and staff members who by virtue of their professional qualifications are able to be entrusted with full responsibility for the handling of a claim. (Coetzee's case at page 394 E - I). Thus in Oelofse vs Santamversekeringsmaatskappy Beperk, 1982 (3) SA 882 A the attorney handling the claim had given an instruction to his secretary to ensure that the claim documents were served on the defendant on a certain date. A subsequent enquiry by the attorney concerned received the response (from the secretary in question) that the documents had indeed been delivered as per

his instructions. It later appeared that the messenger to whom the secretary had delegated the task of delivering the documents, had only delivered them, contrary to his instructions, after the claim had become prescribed. It was held that since the attorney believed upon reasonable grounds that the claim had been delivered, it could not reasonably have been expected of him to take any further steps to ensure that the claim did not become prescribed; "special circumstances" therefore existed and condonation was granted. Similarly, in Feni vs Protea Assurance Company Limited, 1984 (2) SA 519 C, the applicant's attorney had instructed his secretary to send the claim form to the company concerned by registered mail, telling her to ascertain the post office box number from the telephone directory. She did this, but instead of sending it to P O Box 594, she addressed it to P O Box 294. The claim form was ultimately returned to the attorney's office and unbeknown to him his secretary re-addressed it correctly but by this time the claim had prescribed. It was held that the attorney himself had not been blameworthy and

the actions of his secretary did not preclude relief, the facts constituting "special circumstances" as defined. But where the person handling the claim delegates a simple administrative task to a junior clerk his failure to make enquiries timeously (before prescription) as to whether the task had been carried out, will amount to culpable negligence, and in such a case "special circumstances" will not have been established. (Mkhomolo vs President Versekeringsmaatskappy, 1984 (1) SA 342 T; Guthrie vs AA Mutual Assurance Association Limited, 1986 (4) SA 979 W.) And where an articled clerk with an LL.B. degree but with limited experience diarised a particular file incorrectly by counting 90 Court days instead of 90 calendar days, thus allowing the claim to become prescribed, "special circumstances" were held not to have been established. Mutual & Federal Insurance Company vs Job, 1987 (1) SA 63 C.

(c) It remains only to deal with miscellaneous cases in which the Court had to decide whether "special circumstances" (as defined) had been established or not. In Dube vs President Insurance Company Limited, 1979 (4) SA 420 D the applicant was

illiterate and was paralysed from the waste down as a result of the collision in question. He lived in a remote area about 150 km from Durban, and a two-hour walk away from the main road. There was no postal or telephone service at his home and the applicant had to rely on others, who were often reluctant to carry him about. After obtaining legal aid at the relevant office he had failed to return to his attorneys' offices because his helpers had insisted on returning home immediately. The claim had become prescribed and it was held that the real cause for this had been the applicant's inability to obtain the assistance he needed to transport him. Consequently "special circumstances" were held to have been established, and condonation was granted. In Mamela vs Constantia Insurance Company Limited, 1983 (1) SA 218 A the plaintiff had entrusted his claim to a so-called claims consultant. The MVA 13 claim form had been submitted to the hospital where the plaintiff had been treated, but the form was mislaid and the claims consultant prepared a new form and wrote a number of letters to the plaintiff (who had in the meantime been retired as a consequence of his injuries and had returned to his home in Natal), but no replies to the letters had been received although they had also not been

returned to the claims consultant. Finally a telegram had the desired effect, but by the time the new MVA 13 claim form had been signed and delivered, the claim had prescribed. The Appeal Court held that the claims consultant had taken inadequate steps to ensure that post would reach the plaintiff (e.g. by registering letters) and held that a reasonable man, in the claims consultant's position would have appreciated the need for even more urgent steps to inform the plaintiff that his claim might become prescribed, particularly when time was beginning to run out. The claims consultant's omissions in this regard were the direct cause of the claim becoming prescribed, and "special circumstances" had not been proved, with the result that the application for condonation was disallowed. In Commercial Union Assurance Company vs Johannesburg City Council, 1983 (1) S A 226 A the respondent was an employer individually liable under Act 30 of 1941 and as such it had paid compensation to a workman who had been injured as a result of the alleged negligent driving of a vehicle insured by the Appellant. By virtue of Section 8 (1)(b) of Act 30 of 1941 the council was entitled to a right of action against the insurer for the recovery of the compensation paid, but the council had failed to institute its action timeously and had been

obliged to bring an application for condonation. The facts revealed that the insurer had never admitted liability but all the correspondence and all the discussions which were held were concerned only with the quantum of the claim. The Court held that although the merits of the claim never featured in the negotiations between the parties, it could not be said that the insurer had by its conduct accepted liability on the merits. The prescription of the claim had been attributable to the negligence of the council's claims manager in failing to direct his attention timeously to the question of prescription and to obtain timeously an extension of the prescriptive period. In the circumstances "special circumstances" were not present and condonation could not be granted. In National Employers' General Insurance Company Limited vs Masilo, 1986 (1) SA 249 T, which was an appeal to the full Bench, the Court a quo had held, on the facts, that the authorised insurer had lulled the claimant's attorney into a mistaken belief that the company intended settling the claim and that if such settlement did not materialise, the company would not rely upon prescription. On the strength of the company's actions the Court a quo further held that the claimant's attorney reasonably and bona fide

believed that he need not, and indeed should not issue summons because, having regard to the insurer's sympathetic attitude towards a settlement, such action would have caused unnecessary costs. "Special circumstances" were therefore found by the Court below to be present, but this decision was reversed on appeal. The facts were that five weeks prior to prescription the insurer had sent a letter containing a remark made without prejudice that the merits would probably be conceded, and asking for a certificate setting out the deceased's income. This certificate was duly sent but never acknowledged. The plaintiff's attorney had then left the matter in abeyance for a month, by which time the claim had prescribed. The attorney had made no enquiry as to whether the certificate had been received and did not explain why he had done nothing to pursue the matter for more than a month. It was held that the normal prudent attorney would have either obtained a written confirmation of waiver of prescription in the sense of an extension of time or would have issued summons in the absence thereof. "Special circumstances" were therefore held not to have been established. See also Botha vs S A Eagle Insurance Company Limited, 1985 (2) SA 132 SE where it was also held that the plaintiff's attorney had been brought under the

bona fide belief that the insurer had granted an extension, and where the Court held that the attorney's state of mind was not so unreasonable that it amounted to neglect or culpable omission or culpable ignorance. In this case the Court relied on the case of Masilo vs National Employers' General Insurance Company Limited, 1984 (3) SA 527 W which, as we have seen, was reversed on appeal, and it is accordingly submitted that Botha's case should not be regarded as authoritative for the pronouncements contained therein. In Mosala vs Santam Insurance Company Limited, 1986 (1) SA 808 O the claimant's attorney had been unable, despite diligent efforts, to establish who the insurer was of the vehicle which had caused the claimant's injuries. The vehicle in question had carried no token of insurance. The claimant's attorney had written four letters to respondent, only to be told that the token number quoted was incorrect and that respondent denied insuring the car in question. Three days before prescription the claimant's attorney had received another token number and had telephoned respondent, but was told he could not be helped at that stage and when respondent eventually confirmed that it had indeed insured the vehicle in question, the claim had become

prescribed. The Court found that "special circumstances" were present and condonation was granted.

3.14.5 SECTION 14 (6)

3.14.5.1 This Section provides that notwithstanding the provisions of Section 8 of the Workmen's Compensation Act, 30 of 1941, the right under Section 8 (1)(b) of that Act to recover an amount of compensation which under that Act is required to be paid to a third party in circumstances other than those mentioned in Section 9 (2) of the MVA Act, shall for the purposes of Section 14 (1) (excluding the proviso) and Section 14 (3) of the MVA Act be deemed to be a right to claim compensation under Section 8 of the latter Act arising on the same date as the claim of such third party under the last-mentioned Section, provided that if the recovery of such amount has been debarred by Section 14 (6), any compensation thereafter awarded to the third party under the MVA Act shall be reduced by the amount concerned. Section 8 (1)(b) of the Workmen's Compensation Act of course gives the Workmen's Compensation Commissioner or an employer individually liable a right of action against the person who has incurred liability for compensation (other than the employer) for the recovery of the compensation the

Commissioner (or employer) is obliged to pay as a result of the accident concerned.

3.14.5.2 It is to be noted that the proviso in Section 14 (1)(a) of the MVA Act is specifically excluded, i.e. the proviso that prescription shall be suspended during the periods referred to in Section 14 (2) and Section 15 (2). The claim of the Commissioner (or employer) is expressly stated to arise on the same date as the claim of the third party under Section 8 of the MVA Act, and in the absence of any period of suspension, summons must be issued and served within the two-year period.

3.14.5.3 Section 14 (6) relates to the recovery of compensation paid under Act 30 of 1941 only in circumstances other than those mentioned in Section 9 (2) of the MVA Act. The latter Section deals with the limitation of liability of the Appointed Agent where the loss or damages is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the vehicle concerned in those instances where the third party is entitled to compensation under Act 30 of 1941. And in terms of Section 9 (2)(b) the Appointed Agent shall not be liable under Act 30 of 1941 for the amount of the compensation to which a third party is entitled thereunder. It is for this reason that the two-year prescriptive period laid down in Section 14 (6) relates only to "circumstances other than those mentioned in

Section 9 (2) of this Act", because it would be senseless to create a two-year prescriptive period for a non-existent right of recovery (of compensation paid under Act 30 of 1941) under Section 9 (2) of the MVA Act. In Klaas vs Union and South West Africa Insurance Company Limited, 1981 (4) SA 562 A, Van Heerden A J A (as he then was) said the following at page 585 E - 586 A about the corresponding provisions of the 1972 Act:

> "In my opinion any possible doubts as to the meaning of Section 22 (2)(c) of Act 56 of 1972 are removed by the provisions of Section 24 (3) of that Act ... Sections 24 (1) and (2) deal with the prescription of a third party's right to claim compensation under Section 21 from an insurer and with the powers of a Court to relieve a third party from the effect of such prescription. One of the main consequence flowing from the provisions of Section 24 (3) is that the right of action of the Commissioner against an insurer, founded upon Section 8 (1)(b) of Act 30 of 1941, becomes prescribed upon the expiration of a period of two years from the date upon which the claim of the workman (or his dependants) against the insurer arose. However, as appears from the (phrase 'in circumstances other than those mentioned in Section 22 (2) of this Act') this Sub-Section does not apply to cases falling within the ambit of Section 22 (2). The only conceivable reason for the exclusion of such cases is that in terms of Section 22 (2)(c) the Commissioner has no right of action against an insurer if the workman was injured or died in the circumstances set out in Section 22 (2), and that it was therefore manifestly unnecessary to provide for the prescription of a non-existing claim."

It would seem therefore that whenever the Commissioner (or employer) has a right under Section 8 (1)(b) of Act

30 of 1941 to recover compensation paid under that Act, his right of recovery shall be deemed to be a right to claim compensation under Section 8 of the MVA Act arising on the same date as the claim of the third party concerned under the said Section.

3.14.5.4 Where the claim of the Commissioner (or employer) has become prescribed under Section 14 (6) read together with Section 14 (1)(a) (excluding the proviso) any damages recoverable by the third party under the MVA Act shall nevertheless be reduced by the amount concerned. The obvious intention hereof is, once again, to prevent the workman from receiving double compensation. In this regard it must be remembered that Section 8 (1)(a) of Act 30 of 1941 provides that where a workman claims compensation under that Act and also institutes proceedings for the recovery of damages under the MVA Act, the Court must, in awarding such damages, have regard to the amount which will be payable to the Commissioner (or the employer individually liable) by the Appointed Agent under Section 8 (1)(b) of Act 30 of 1941.

3.14.6 CONFLICTING PRESCRIPTIVE PROVISIONS AND NOTICE PERIODS

The present-day attorney practices amidst a veritable minefield of prescriptive provisions, notice periods, so-

under Regulation 8 is as follows:

(a) Regulation 8 (2)(a)(i) provides that the claim form (MV 3) "shall be delivered to the MVA Fund within two years from the date of the occurrence which gave rise to the said bodily injury or death ..."

(b) Regulation 8 (2)(c)(i) provides that the MVA Fund shall not incur any liability unless summons has been properly served on it within two years and 90 days from the date of the occurrence which gave rise to the bodily injury or death.

3.14.7.2 Insofar as claims against an Appointed Agent are concerned, Section 14 (1)(b) of the Act provides that prescription shall not run against minors, persons detained under the Mental Health Act, or persons under curatorship. By contrast claims against the MVA Fund under Regulation 8 are again different in the sense that:

(a) Regulation 8 (2)(a)(ii) states that the requirement that the claim form, MV 3, shall be delivered to the MVA Fund within two years from the date of the occurrence concerned, shall apply to all third parties and claimants, irrespective

of whether they are subject to any legal disability; and

(b) Regulation 8 (2)(c)(ii) states that the requirement that summons shall be served on the MVA Fund within two years and 90 days from the date of the occurrence in question, applies to all third parties and claimants, irrespective of whether they are subject to any legal disability.

3.14.7.3 Whereas Sections 9 (3) and 9 (4) of the Act create the machinery for an application for condonation in respect of claims against an Appointed Agent, no such machinery exists in Regulation 8 relating to claims against the MVA Fund. Consequently when a claim against the MVA Fund has become prescribed, condonation of prescription is not possible. As stated by Didcott J in Kunene vs Union National South British Insurance Company Limited, 1976 (4) SA 782 D at page 785 G:

> "(The MVA Fund's) obligation to meet the claim depends moreover on compliance with procedural requirements and the observance of time limits dictated, not by Sections 24 and 25, but by Regulation 5 alone. These differ in a number of detailed respects from their statutory counterparts. In particular, they are not subject to judicial relaxation."

3.14.7.4 In the circumstances practitioners would be well

advised to tread carefully in claims against the MVA Fund, and to be mindful of the important differences in the prescriptive provisions concerned.

3.14.8 ACTIONS FOR CONTRIBUTIONS BETWEEN JOINT WRONGDOERS

3.14.8.1 Section 2 (6)(a) of the Apportionment of Damages Act, Nr 34 of 1956 provides that where judgment has in any action been given against any joint wrongdoer for the full amount of the damages suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, and subject to the necessary notice having been given under Section 2 (2) of the said Act, recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage in such amount as the Court may deem just and equitable, having regard to the parties' respective degrees of blame. Thus where a third party was injured in a collision which was caused by the joint negligence of the drivers of two vehicles insured by two different insurers, one of whom had paid the third party's compensation beyond the two-year prescriptive period stipulated in Section 24 (1) of the 1972 Act, the question arose whether an action by the insurer (which had paid the compensation) for a contribution from the insurer of the other vehicle was subject to the provisons of Section 24 (1) of the 1972 Act.

(Commercial Union Assurance Company Limited vs Pearl Assurance Company Limited, 1962 (3) SA 856 E.) The Court held that the right to a contribution "is independent of and wholly distinct from the right given to an injured party to claim compensation from a third party insurer, and is in no way governed by ..." the prescriptive provisions of the MVA Act. The Court held that it is the Apportionment of Damages Act, Nr 34 of 1956 which governs the right to claim a contribution, and the latter Act laid down that such claim must be brought within one year of the date of the judgment to which the contribution relates. (Section 2 (6) (b) of Act 34 of 1956 provides that "the period of extinctive prescription in respect of a claim for a contribution shall be twelve months calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal ..."). The reasoning in the Commercial Union case was also followed in Shield Insurance Company Limited vs Zervoudakis, 1967 (1) SA 735 E.

Procedure.

15. (1) A claim for compensation under section 8 shall—

(a) be set out in the prescribed manner on a prescribed form which shall include provision for a medical report or reports, completed by the prescribed person or persons, in regard to the cause of the death or the nature and treatment of the bodily injury in connection with which the claim is instituted and for the prescribed supporting proof and particulars;

(b) be sent by registered post or delivered by hand, at his registered office or local branch office, to the appointed agent who issued the token of identification attached to the vehicle concerned or the appointed agent who in terms of the regulations must handle the claim, and who shall, in the case of delivery by hand, at the time of the delivery acknowledge receipt thereof and the date of such receipt in writing.

(2) No such claim shall be enforceable by legal proceedings commenced by a summons served on the appointed agent—

(a) before the expiration of a period of 90 days as from the date on which the claim was sent or delivered by hand, as the case may be, to the appointed agent as provided for in subsection (1); and

(b) before all the prescribed requirements of the appointed agent have been complied with:

Provided that if the appointed agent repudiates in writing liability for the claim before the expiration of the said period, the claimant may at any time after such repudiation serve summons on the appointed agent.

(3) An action to enforce such a claim may be brought in any court of otherwise competent jurisdiction within whose area of jurisdiction the occurrence which caused the injury or death took place.

3.15 SECTION 15

COMMENTARY

3.15.1 SECTION 15 (1)

3.15.1.1 Sub-Sections (a) and (b) substantially re-enact Section 25 (1)(a) of the 1972 Act, except whereas the latter Section simply referred to the delivery of the claim documents to the authorised insurer concerned, Section 15 (1)(b) necessarily (as a result of Section 6 (1)(a)(i) read together with Regulation 7 (1)) refers

to "the Appointed Agent who issued the token of identification attached to the vehicle concerned or the Appointed Agent who in terms of the Regulations must handle the claim".

3.15.1.2 The provisions of Section 25 (1) (b) of the 1972 Act have been scrapped in the sense that they have not been incorporated into the 1986 Act. But since Section 15 (1) of the 1986 Act corresponds with Section 25 (1)(a) of the 1972 Act, reported cases dealing with the latter Section will apply with equal force to Section 15 (1) of the 1986 Act, provided of course that the provisions of the Regulations will not now (in the light of the fact that Sections 6 (1)(a) and (b) and 8 (1) of the Act appear to render the Act subject to the Regulations) be considered mandatory as opposed to being merely directory. (See paragraph 3.8.5 above.) Consequently all the leading cases dealing with "substantial compliance" with the provisions of the earlier counterparts to Section 15 (1) will hopefully continue to guide practitioners in the future. See particularly Rondalia Versekeringskorporasie van SA Beperk vs Lemmer, 1966 (2) SA 245 A; Kruger vs Rondalia Versekerings-korporasie van SA Beperk, 1976 (2) SA 504 T at 508 C; Nkisimane vs Santam Insurance Company Limited, 1978 (2) SA 430 A; AA Mutual Insurance Association Limited vs Gcanga, 1980 (1) SA 858 A; Constantia Insurance Company Limited vs

Nohamba, 1986 (3) SA 27 A; Haai vs Commercial Union Assurance Company Limited, 1986 (2) SA 209 NC. The effect and implementation of Section 15 (1) is fully considered in paragraphs 7.4.1 - 7.5.4 below.

3.15.1.3 For a fuller discussion on the question of "substantial compliance", see paragraph 3.8.5 above and paragraph 7.4.5 below and see also Hodes at pages 141 - 159.

3.15.2 SECTION 15 (2)

3.15.2.1 This Section is substantially similar to Section 25 (2) of the 1972 Act, except that it does contain the far-reaching innovation contained in Section 15 (2)(b). This latter Sub-Section has already been fully discussed in the Commentary on Section 14 (1)(a) of the Act, and reference should in this regard be made to paragraphs 3.14.1.2 and 3.14.1.7 above.

3.15.2.2 But apart from the provisions of Section 15 (2)(b) the rest of the Section is still subject to the same analysis and interpretation as given in relation to Section 25 (2) of the 1972 Act by Trollip J A in Nkisimane & Others vs Santam Insurance Company Limited, 1978 (2) SA 430 A.

3.15.2.3 As regards the calculation of the period of 90 days

mentioned in Section 15 (2)(a) see paragraph 3.14.1.7 (a) above. The day on which the claim documents were sent by registered mail, (or delivered by hand) counts as the first of the 90 days, and a further 89 days are then simply counted off on a calendar. And since the date of despatch (by registered mail) counts as the first day of the 90 day period, it follows that in such a case the Appointed Agent has less than 90 days within which to investigate and consider the claim.

3.15.2.4 The proviso to the Section makes it clear that if the Appointed Agent repudiates liability in writing before the expiration of the 90 day period the claimant may at any time after such repudiation serve summons on the Appointed Agent. The words "the said period" in the proviso clearly relate to one period only, namely the period of 90 days mentioned in Section 15 (2)(a). Since the proviso relates only to the situation where the Appointed Agent repudiates liability before expiration of the 90-day period, the operation of the proviso lapses along with the expiry of the said period. After the expiry of the 90 day period service of summons can of course still be thwarted under Section 15 (2)(b) read together with Regulation 7 (2)(b)(iii). It would seem that even such a repudiation (made after expiry of the 90 day period mentioned in Section 15(2)(a)) will not necessarily

prevent an Appointed Agent from once again reverting to his rights under Regulation 7(2)(b)(iii), thereby again thwarting the claimant's right to have summons issued and served. Let us assume the Appointed Agent has after expiry of the traditional 90-day period repudiated liability (in which event the proviso to Section 15(2) is no longer operative) and the claimant now raises issues on the strength of which the Appointed Agent is invited to reconsider his repudiation. There is nothing stopping the Appointed Agent from doing so and there also appears to be nothing stopping him from again calling for further evidence on the merits under Regulation 7 (2)(b)(iii), in which event the provisions of Section 15 (2)(b) will again become a bar to the service of summons. See paragraphs 3.13.2.6; 3.14.1.2; 3.14.1.3 and 3.14.1.7 (c) above.

3.15.3 SECTION 15 (3)

3.15.3.1 This Section provides that an action for damages under Section 8 may be brought in any Court of otherwise competent jurisdiction within whose area of jurisdiction the occurrence which caused the injury or death took place. It is identical to Section 25 (3) of the 1972 Act.

3.15.3.2 The provisions of this Section do not affect the

plaintiff's right to institute action in the Court having jurisdiction over the area wherein the Appointed Agent's head office is situated.

3.15.3.3 With regard to jurisdiction in actions by the Workmen's Compensation Commissioner under Section 8 of Act 30 of 1941, see Ongevallekommissaris vs Unie en Nasionale Versekeringsmaatskappy Beperk, 1969 (3) SA 438 O.

3.16 SECTION 16

16. When an appointed agent has paid any compensation under section 8 he may, under the prescribed circumstances, without having obtained a formal cession of the right of action, recover from the owner of the motor vehicle concerned or from any person whose negligence or other unlawful act caused the loss or damage concerned, so much of the amount paid by way of compensation as the third party concerned could, but for the provisions of section 12, have recovered from the owner or from the person whose negligence or other unlawful act caused the loss or damage, as the case may be, if the appointed agent had not paid any such compensation.

Appointed agent's right of recourse.

COMMENTARY

3.16.1 APPOINTED AGENT'S RIGHT OF RECOURSE

3.16.1.1 Section 16 basically re-enacts Section 28 (1) of the 1972 Act except that whereas the wide provisions of Section 28 (1) were subject to Sub-Sections (2) and (3) of that Section, the new Section 16 of the 1986 Act refers simply to the Appointed Agent's right of

recourse being subject to "the prescribed circumstances". In other words the bulk of the remainder of Section 28 of the 1972 Act has been taken out of the Act and inserted in the Regulations, just as in the case of the old Section 23 (c). Section 16 should therefore be viewed in conjuction with Regulation 11.

3.16.1.2 Section 16 gives an Appointed Agent who has paid compensation under Section 8 of the Act a right of recourse "under the prescribed circumstances" against "the owner of the motor vehicle concerned or ... any person whose negligence or other unlawful act caused the loss or damage concerned" for so much of the amount paid by way of compensation as the third party could under Common Law have recovered from the owner or from the person whose negligence or other unlawful act caused the loss or damage if it had not been paid by the Appointed Agent. It is therefore appropriate to quote Regulation 11 in full:

> "11 (1)
>
> Any Appointed Agent's right of recourse against the owner of a motor vehicle under Section 16 of the Act shall only be applicable -
>
> (a) In any case where the motor vehicle was being driven at the time of the occurrence which gave rise to the payment of compensation by a person

other than the owner and -

(i) The said person was under the influence of intoxicating liquor or of a drug to such a degree that his condition was the sole cause of such occurrence and the owner allowed him to drive the motor vehicle knowing that he was under the influence of intoxicating liquor or of a drug; or

(ii) The said person was driving the motor vehicle without holding a licence issued under any Law relating to the licensing of drivers of motor vehicles, which he was required to hold, or the said person, being the holder of a learner's or other restricted licence issued under such Law, failed, while he was driving the motor vehicle, to comply with the requirements or conditions of such learner's or restricted licence, and the owner allowed him to drive the motor vehicle knowing that he did not hold such a licence or that he failed to comply with the requirements or conditions of such learner's or restricted licence, as the case may be; or

(b) In any case where, at the time of such occurrence, the motor vehicle was being driven by the owner and -

(i) He was under the influence of intoxicating liquor or of a drug to such a degree that his condition was the sole cause of such occurrence; or

(ii) He was driving the motor vehicle without holding a licence issued under any Law relating to the licensing of drivers of motor vehicles or, being the holder of a learner's or other restricted licence issued under such Law, failed, while he was driving the motor vehicle, to comply with the requirements or conditions of such learner's or restricted licence; or

(iii) He failed to comply with any requirement of Section 13 (1) of the act with reference to the said occurrence (the onus of proving that the MVA Fund or the Appointed Agent, as the case may be, could not reasonably within fourteen days after the occurrence have been informed of the occurrence and of the place and time thereof, shall be on the owner concerned) or knowingly furnished the MVA Fund or the Appointed Agent with false information relating to such occurrence.

(2)

The provisions of Sub-Regulation (1)(b)(i), (ii) and (iii) shall apply mutatis mutandis in respect of any right of recourse by the Appointed Agent against any person who, at the time of the occurrence which gave rise to the payment of the compensation, was driving the motor vehicle in question with or without the consent of its owner."

3.16.1.3 It will immediately be noted that Section 16 gives the Appointed Agent a right of recourse against three classes of persons, namely

(a) The owner of the motor vehicle concerned;

(b) The driver of that vehicle; and

(c) Any other person whose negligence or other unlawful act caused the loss or damage concerned.

However, Regulation 11, by which the legislature sought to qualify the all-embracing right of recourse created by Section 16, qualifies it in respect of only two

classes of persons, namely the owner (Regulation 11 (1)) and the driver (Regulation 11 (2)). The startling result is that in every case where the loss or damage was caused by the negligence or other unlawful act of a person other than the owner or the driver of the vehicle concerned (such as the servant of the owner acting in the execution of his duty), the Appointed Agent has an unqualified right of recourse against such person. This must be an inadvertent omission and it should accordingly be remedied by the legislature.

3.16.1.4 RIGHT OF RECOURSE AGAINST THE OWNER

The Appointed Agent will have a right of recourse against the owner of the motor vehicle concerned in the following cases:

(a) Where he allowed some other person to drive the vehicle knowing that such other person was under the influence of liquor or drugs and where the effect of the liquor or drugs was the sole cause of the occurrence.

(b) Where he allowed some other person to drive the vehicle knowing that such person did not hold a valid driver's licence or that such person failed to comply with the requirements or

conditions of any learner's or restricted licence held by him.

(c) Where the owner was himself driving the vehicle at the time of the occurrence in question and:

(i) He was under the influence of liquor or drugs to such an extent that his condition was the sole cause of the occurrence; or

(ii) He drove the vehicle without holding a valid driver's licence or failed to comply with the requirements or conditions of any learner's or restricted licence held by him; or

(iii) He failed to complete the MV 5 (accident report form) and deliver it to the Appointed Agent or the MVA Fund within fourteen days (if reasonably possible) after the occurrence (the onus of proving that he could not reasonably have done so within the specified time being on him) or

(iv) He knowingly furnished the MVA Fund or the Appointed Agent with false information relating to the occurrence in question.

No right of recourse is given against the owner who failed to comply timeously with the provisions of Section 13 (1) of the Act in a case where the vehicle was driven by a person other than the owner himself, this despite the fact that both the owner and the driver (if he is not the owner) have an obligation under Section 13 (1) to report the accident timeously, regardless of who was driving at the time of the occurrence. Similarly, the Appointed Agent has no right of recourse against the owner who knowingly furnished the MVA Fund or the Appointed Agent with false information of the occurrence concerned in a case where the vehicle was driven at the time by a person other than the owner. Consequently the owner who was not driving the vehicle at the time of the occurrence in question, but who knowingly furnishes false information about the occurrence to the MVA Fund or the Appointed Agent, is immune. It is also to be noted that the earlier right of recourse relating to false information in the application for a token, where the unroadworthiness of the vehicle concerned was the sole cause of the occurrence, has been scrapped.

3.16.1.5 RIGHT OF RECOURSE AGAINST THE DRIVER WHO WAS NOT ALSO THE OWNER OF THE VEHICLE CONCERNED

Since Regulation 11 (2) refers to the Appointed Agent's

right of recourse against any person who at the time of the occurrence in question "was driving the motor vehicle in question with or without the consent of its owner", it clearly relates to a right of recourse against a person other than the owner; moreover, the right of recourse against the owner is dealt with in Regulation 11 (1). Regulation 11 (2) accordingly relates to the driver of the vehicle concerned who was not also its owner, and it gives the Appointed Agent a right of recourse against such driver in the following circumstances:

(a) Where the driver was under the influence of liquor or drugs to such an extent that his condition was the sole cause of the occurrence;

(b) Where he was driving the vehicle without holding a valid driver's licence or contrary to the requirements or conditions of any learner's or restricted licence held by him; or

(c) Where he failed to complete and furnish the MV 5 (accident report form) to the Appointed Agent or the MVA Fund (as the case may be) within fourteen days after the occurrence (the onus of proving that he could not reasonably have done so timeously being on him); and

(d) Where he knowingly furnished the MVA Fund or the Appointed Agent with false information relating to such occurrence.

It is to be noted that this right of recourse (against the driver who was not the owner) is accorded to the Appointed Agent whether such driver drove the vehicle in question with or without the consent of its owner. Under Section 28 of the 1972 Act the authorised insurer had an unqualified right of recourse against the person who had driven the vehicle without its owner's consent, for example a thief or an unauthorised driver. In other words, such right of recourse was not limited to any specific circumstances such as being unlicensed or being intoxicated; the right of recourse against an unauthorised driver was always available. The right of recourse against a person other than the owner of the vehicle but who drove it with the owner's consent at the time of the occurrence, was qualified in the sense that it existed only if the specified circumstances were present relating to driving under the influence of liquor or drugs, driving without a valid licence or contrary to the conditions of a learner's (or restricted) licence, or the failure to report the accident timeously. Under Section 16 of the 1986 Act, read together with Regulation 11 (2), the Appointed Agent has a right of recourse against the driver (not

being also the owner) of the vehicle concerned in the circumstances listed in (a) - (d) above whether the driving occurred with or without the owner's consent. It seems to follow therefore that even against a thief the Appointed Agent has a right of recourse only in the circumstances listed in (a) - (d) above, i.e. the circumstances mentioned in Regulation 11 (1)(b). Admittedly Regulation 11 (1) makes it clear that the Appointed Agent shall have a right of recourse against the owner only in the circumstances specified in Regulations 11 (1)(a) and (b), and the word "only" does not appear in Regulation 11 (2), but it must be remembered that Section 16 states that the Appointed Agent will have a right recourse "under the prescribed circumstances", and since Regulation 11 (2) mentions only those circumstances listed in Regulation 11 (1)(b), it must follow that the Appointed Agent has a right of recourse against the driver who was not also the owner of the vehicle concerned, only in the circumstances listed in (a) - (d) above. The use of the words "with or without the consent of its owner" in Regulation 11 (2) renders any other construction nonsencical.

For a fuller discussion of the right of recourse as it existed under Section 28 of the 1972 Act, see Hodes (pages 339 - 353); Nathan (pages 90 - 93) and MVA

3.16.1.6 Regarding the requirement in Regulations 11 (1)(a)(i) and 11 (1)(b)(i) that the effect of the intoxicating liquor or drug should be the "sole cause" of the occurrence in question, see Lambrechts vs African Guarantee and Indemnity Company Limited, 1955 (3) SA 459 A, where it was held by Schreiner J A at 468 that:

> "If the degree of that influence was such that his condition was the decisive cause of the occurrence, it was the sole cause within the meaning of that paragraph, for obviously the word "sole" does not exclude the co-existence of other mere causae sine qua non."

If the occurrence in question was consequently caused by the combined negligence of the driver of the vehicle concerned and the driver of some other vehicle, then it cannot be said that the intoxicated condition of the driver of the vehicle concerned was the sole cause of the collision, and in such a case an action by an Appointed Agent to enforce its right of recourse will not succeed.

3.16.1.7 With regard to the Appointed Agent's right of recourse against an owner for knowingly allowing an unlicensed driver to drive the vehicle in question, it was held in Unie Nasionaal Suid-Britse Versekeringsmaatskappy vs Hollenbach, 1979 (1) PH J6 (NC) that the owner's

admission that he had not excluded the possibility that the employee in question might not have a driver's licence, was sufficient for the insurer's right of recourse to be established. In other words constructive knowledge on the part of the owner, as opposed to actual knowledge, will suffice.

3.16.1.8 The Appointed Agent must have been legally obliged to pay the claimant's compensation under the Act.

An ex gratia payment of compensation to a claimant cannot give rise to a right of recourse against the owner or driver whose actions led to the claim in question; there must have been a legal obligation on the Appointed Agent to pay compensation under Section 8 of the Act. (Springbok Timber and Hardware Company vs Nationale Employers' Mutual General Insurance Company Limited, 1970 (1) SA 346 A; Marine & Trade Insurance Company Limited vs Haug, 1961 (3) SA 658 W; United Insurance Company Limited vs Keck, 1962 (3) SA 617 O.) But once it is stated that there must have been a legal obligation on the Appointed Agent to pay the compensation under the Act, it follows that the claimant must have complied with all the provisions of the Act which are conditions precedent to the Appointed Agent's liability thereunder. Since Section 8 (1) of the 1986 Act now provides that the MVA Fund or its

Appointed Agent (as the case may be) shall be obliged to pay compensation "on the prescribed conditions", payment of compensation under the Act in a case where "the prescribed conditions" were not complied with, will presumably not give rise to a valid right of recourse against the owner or driver under Section 16 of the Act. An indulgence or relaxation by the Appointed Agent with regard to a "prescribed condition" could therefore prove fatal with regard to any subsequent right of recourse which the Appointed Agent seeks to enforce against any person mentioned in Section 16.

The enforcement of a right of recourse would seem to be fraught with difficulties and obstacles. (Compare President Versekeringsmaatskappy Beperk vs Lategan, 1986 (3) SA 692 A) The Appointed Agent is obliged to prove each and every element of liability under the Act except such as are admitted on the pleadings. Not only must he prove that all the "prescribed conditions" were complied with by the claimant, but also that the loss or damage was caused by or arose out of the driving of a motor vehicle in the circumstances envisaged in Section 8 of the Act, and even the reasonableness of the quantum of the compensation paid to the claimant. Section 16 states that the Appointed Agent may recover from the owner or from any person whose negligence or other unlawful act caused the loss or damage concerned

"so much of the amount paid by way of compensation as the third party concerned could, but for the provisions of Section 12, have recovered from the owner or such other person if the compensation had not been paid by the Appointed Agent. The Appointed Agent can accordingly recover only such damages as would have been awarded to the claimant under Common Law.

A waiver by the Appointed Agent of any defence it may have had against the claimant's claim under Section 8 could lead to a subsequent effort to enforce a right of recourse being successfully resisted. Compare in this regard the facts in the case of Thwala vs Santam Insurance Company Limited, 1977 (2) SA 100 D which, though not identical, are certainly analogous. Consequently the extension by an Appointed Agent of the prescriptive period laid down in Section 14 (1)(a) of the Act may well have the effect of divesting the Appointed Agent of any right of recourse he may have had against the persons mentioned in Section 16.

To overcome the onerous task resting on an Appointed Agent to prove all the essential components mentioned in Section 8 of the Act, the co-operation of the person against whom the Appointed Agent has a right of recourse will naturally be of great assistance but will regrettably seldom be available. Hodes suggests at

page 344:

> "An insurance company defending or settling an action brought against it by a third party would, it seems, be well advised to give the person against whom it might ultimately have a right of recourse under Section 28 the opportunity of taking part in such defence or settlement, or at least of being consulted."

In theory this makes good sense, and in practice the person concerned is often invited to have access to the Appointed Agent's documentation relating to the claim and to co-operate in the disposal thereof. But the Appointed Agent or his legal representative is often confronted with the practical situation that he requires the active co-operation of the owner and/or the driver of the vehicle concerned (to investigate and evaluate the claimant's claim), but such co-operation is singularly lacking when the threat of an ultimate right of recourse has been so much as mentioned.

3.16.1.9 THE ELEMENT OF PREJUDICE IN RELATION TO NON-REPORTING OF ACCIDENTS

It is a well known fact that the vast majority of accidents which have to be reported under Section 13 (1) of the Act, are in fact not so reported. Often the lodgment of the claim form is the first indication which the Appointed Agent has of the accident in

question. It is submitted that the new MVA Scheme which requires that notice of an accident will in many cases have to be given to the MVA Fund which does not have branches throughout the country, will result in an even larger percentage of unreported accidents. The public are simply not aware of the obligation resting on them to report accidents to anybody other than the police and perhaps the comprehensive motor insurers. Assuming (from experience and not from any empirical statistics) that some 90 % of accidents will not be reported as required by Section 13 (1), it would follow that Appointed Agents would technically have a right of recourse against the owner and/or driver concerned under Regulation 11 (1)(b)(iii) in a corresponding number of cases. This could of course nullify the entire intention of the MVA Scheme if this particular right of recourse were to be religiously enforced. Over the years however a practice has evolved whereby an Appointed Agent does not enforce the right of recourse relating to the failure of the owner and/or the driver to report an accident; such right of recourse is usually only enforced when the owner or the driver fails to respond to repeated requests for co-operation with regard to investigation of the claim in question. Some companies stick to the letter of the Law more rigidly than others and there is consequently a distinct lack of consistency in this regard. Against this background it is therefore a pity that the

legislature did not qualify this particular right of recourse by stating that it would only apply where the Appointed Agent could prove that it had been prejudiced by the non-compliance in question. Indications that such a qualification would appear in the new Act, indeed an undertaking to this effect, unfortunately came to nought, but it is nevertheless believed that an amendment along these lines is to be considered in the foreseeable future.

3.16.1.10 THE RIGHT OF RECOURSE OF THE DEPOSITOR (FORMERLY THE SELF-INSURER)

(a) A distressing omission from the new Act and Regulations is a right of recourse in favour of the Depositor created by Section 5 (2)(b). Sections 28 (4) and (5) of the 1972 Act gave such a right of recourse to a self-insurer under Section 3 (1) of that Act. A person to whom a certificate of exemption had been issued under Section 29 (1) of the 1972 Act was one such self-insurer as envisaged in Section 3. As such he enjoyed the right of recourse afforded by Sections 28 (4) and (5). The Depositor created by Section 5 (2) (b) of the 1986 Act, read together with the new Regulation 5, has been entirely overlooked in this respect; neither the Act nor the Regulation

makes mention of any right of recourse, and the right of recourse envisaged in Section 16 relates only to an Appointed Agent. This is another indication of the lack of thought and preparation that went into the creation of a Depositor at a very late stage in the development of the new Act and Regulations.

(b) Indications are that a number of bodies are keen to become Depositors under the Act and the legislature will have to take steps to create a right of recourse in favour of such Depositors, apart from generally tidying up the rights and obligations of Depositors, particularly with regard to liability mutatis mutandis in accordance with the provisions of Section 8. (See also paragraph 3.5.10.)

(c) As regards the position relating to the right of recourse of the self-insurer under the 1972 Act see Hodes at page 340 and 350 - 352; Nathan page 93.

3.17 SECTION 17

17. (1) The Minister may make regulations as to— Regulations.

(a) matters in respect of which statistics are to be kept by appointed agents, the manner in which such statistics shall be compiled and the furnishing of information in connection therewith;

(b) any matter which in terms of this Act is required or permitted to be prescribed by regulation;

(c) in general, any matter which he may consider necessary or expedient to prescribe in order to attain or promote the objects of this Act.

(2) A regulation made under subsection (1) may prescribe penalties not exceeding a fine of R500 or not exceeding imprisonment for a period of three months, for any contravention of or failure to comply with its provisions.

COMMENTARY

This Section simply empowers the Minister to make Regulations as to the matters specified in the Section. As it is of no consequence in relation to the handling of claims under the Act, no comments are called for. (See however the reference to Section 17 (1)(b) in paragraph 3.8.5.1.)

3.18 SECTION 18

18. This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel.

COMMENTARY

This Section is identical to Section 35 of the 1972 Act. It is self-explanatory and requires no further comment.

3.19 SECTION 19

19. Subject to the provisions of section 20, the laws mentioned in the Schedule are hereby repealed or amended to the extent indicated in the third column of the Schedule.

COMMENTARY

This Section repeals the Laws mentioned in the Schedule,

including Act 56 of 1972 and all the amendments subsequently effected to that Act, subject however to the provisions of Section 20 which are discussed below.

3.20 SECTION 20

> 20. Subject to the provisions of section 3 (3)— Savings.
> *(a)* the provisions of this Act shall not apply with reference to a claim for compensation which arose prior to the commencement of this Act under a law repealed by section 19, and any such claim shall be dealt with as if this Act had not been passed; and
> *(b)* the liability for all agreements and undertakings concluded by—
>
> (i) the Motor Vehicle Assurance Fund in terms of a law repealed by section 19; or
> (ii) authorized insurers in terms of section 21 (1C) of the Compulsory Motor Vehicle Insurance Act, 1972 (Act No. 56 of 1972),
>
> shall, where applicable, remain in force as if this Act had not been passed.

COMMENTARY

As will be noted, the new Act does not apply with reference to claims for compensation which arose prior to the commencement of the Act (1st May 1986) and such claims will still be governed "as if this Act had not been passed", i.e. in terms of the provisions of Act 56 of 1972. It is submitted that it would have been more satisfactory to provide that the new Act will apply only to claims which arose from accidents which occurred on or after the 1st of May 1986. Since the claims of dependants often "arise" on a date subsequent to the date of the accident which gave rise to the claim, we now have the problem of an accident occurring prior to the 1st of May 1986 causing the death of the breadwinner of

certain dependants on or after the said date. Let us assume that an accident occurred shortly prior to 1st May 1986 and the breadwinner sustained injuries which led to his death shortly after 1st May 1986. The widow's claim for loss of support therefore arose on the date of the breadwinner's death, i.e. after the new Act had become operative. If she had herself also sustained bodily injuries in the same accident, her claim relating to her own injuries would have arisen on the date of the Accident. (Evins vs Shield Insurance Company Limited, 1980 (2) SA 814 A) Section 20 (a) preserves the applicability of the otherwise repealed 1972 Act only in respect of claims which arose prior to 1st May 1986. The claim for loss of support of the widow in casu did not arise before 1st May 1986. But certainly this claim cannot be dealt with under the new Act; after all the loss was caused by a vehicle bearing the insurance token of an authorised insurer who was on risk at the time of the accident. But that authorised insurer could technically raise a plea to the widow's claim for loss of support to the effect that the 1972 Act (under which the relevant token was issued) has been repealed in respect of claims which arose on or after the 1st May 1986 and that it is consequently not liable in respect of that claim. The new Act is also not applicable to that claim. Although Section 20 (a) appears to suggest that the new Act is applicable to all claims which arose on or after 1st May 1986, this can certainly not be the case in respect of the widow's claim in casu. As from 1st May 1986 an entirely new scheme came into operation with twelve new participating Appointed Agents, a brand new fuel levy

system and an Act containing novel provisions for the handling of claims and for identifying of the defendant which must accept liability. It is therefore submitted that this widow (and other dependants) is technically without remedy and that the legislature should correct this aspect.

Section 20 (b) preserves the continuing liability under all agreements and undertakings concluded by:

(a) The Motor Vehicle Assurance Fund in terms of a Law repealed by Section 19; or

(b) Authorised insurers in terms of Section 21 (1C) of Act 56 of 1972.

These liabilities remain in force as if the new Act had not been passed.

3.21 SECTION 21

21. This Act shall be called the Motor Vehicle Accidents Act 1986, and shall be deemed to have come into operation on 1 May 1986.

COMMENTARY

This Section confirms that the Act, when promulgated, became operative retrospectively with affect from the 1st of May 1986.

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CHAPTER 4

THE INTERRELATIONSHIP BETWEEN THE WORKMEN'S COMPENSATION ACT AND THE MVA ACT

4.1 LIMITED APPLICATION

It is not necessary that the practitioner who involves himself in the handling of MVA claims should make a detailed study of the entire Workmen's Compensation Act, Nr 30 of 1941, as amended. Whilst there is an important interrelationship between the two Acts, Act Nr 30 of 1941 has only limited application in the sense that only a few of the provisions of the said Act have a direct effect on the MVA Act.

4.2 TERMINOLOGY

It is necessary to appreciate the meaning of certain terms and phrases which relate to Act 30 of 1941.

4.2.1 THR WORKMAN

A "workman" is defined by Section 3 (1) of Act 30 of 1941 as (subject to the exclusions mentioned in Section 3 (2)) "any person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, is oral or in writing, and whether the remuneration is

calculated by time or by work done or is in cash or in kind ...". Of course, this wide definition should be seen against the background that a workman is entitled to compensation under Act 30 of 1941 only in relation to accidents which occur in the course and scope of the worman's employment (as to an "accident", see paragraph 4.2.2 below).

It is to be noted that "workman" refers not only to the employee himself; certain other persons are included in the definition, inter alia his dependants "when a workman is dead or under disability". (Section 3 (1)(c))

By contrast Section 3 (2) provides that certain classes of persons shall not be regarded as workmen, notably those whose earnings (as calculated under Section 41) exceed R18 000 per annum, (Section 3 (2)(b)), and certain members of the Defence Force and the S A Police. (Section 3 (2)(a))

4.2.2 "ACCIDENT"

4.2.2.1 Section 2 gives the following definition:

> "'Accident' means an accident arising out of and in the course of a workman's employment and resulting in a personal injury."

4.2.2.2 Since the above definition would normally exclude an accident occurring whilst the workman was proceeding to

or from his place of work, the legislature chose to widen the ambit of the Act, which it did in Section 27 (3) which reads as follows:

> "For the purpose of this Act the conveyance of a workman free of charge to or from his place of work by means of transport controlled and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such workman's employment."

(Assistent Ongevalle Kommissaris vs Ndevu, 1980 (2) SA 976 EC)

Since this Section deals only with the conveyance of a workman to or from his place of work "by means of transport controlled and specially provided by his employer for the purpose of such conveyance" an employee's trip to or from his place of work in any other manner is not deemed to be undertaken in the course of his employment for purposes of Act 30 of 1941. Thus when an employee sustains injuries whilst travelling to or from his place of work with his own transport, he is not entitled to compensation under that Act. (To step into this breach policies of insurance have been negotiated between certain employers and certain insurers, inter alia the policy concluded between certain mining companies and Rand Mutual Assurance Company Limited.)

4.2.3 THE WORKMAN'S RIGHT TO "COMPENSATION"

4.2.3.1 Section 27 (1) of Act 30 of 1941 provides that:

> "If an accident happens to a workman resulting in his disablement or death, the workman shall be entitled to the benefits under this Act; provided that ..."

If the definition of "accident" quoted in paragraph 4.2.2.1 above is then taken into account, it becomes clear that the benefitspayable under Act 30 of 1941 accrue only to a workman for a so-called Injury On Duty. ("Besering Aan Diens").

4.2.4 "COMPENSATION"

4.2.4.1 Compensation under Act 30 of 1941 refers exclusively to the benefits provided for in that Act, and should therefore not be confused with the terms "compensation" and "any loss or damage" which appear in Section 8 of the MVA Act. Act 30 of 1941 concerns itself only with actual pecuniary losses. It makes no provision for items of damages such as pain and suffering, loss of amenities of life and the like. In South British Insurance Company Limited vs Harley, 1957 (3) SA 368 A Schreiner A C J referred as follows to a dictum of Ogilvie Thompson J in the case of Bhoer vs Union

Government and Another, 1957 (3) SA 582 C at 592:

> "In Bhoer's case .... Ogilvie Thompson J came to the conclusion, upon consideration of the provisions of the 1941 Act, that it was concerned only with pecuniary loss ... I agree ... that the provisions of Chapter V of the 1941 Act are generally inconsistent with the contention that it covers factors like pain and loss of amenities."
>
> (Page 373)

In Natal Provincial Administration vs Buys, 1957 (4) SA 646 A at 655 G, Fagan C J said the following about the above-quoted statement from Harley's case:

> "The claim in that case was for pain and suffering and for loss of amenities of life. These are types of loss or damage in respect of which no provision for compensation is made in the Workmen's Compensation Act ..."

This was confirmed more recently in the unreported judgment of the Appeal Court in the case of Senator Versekeringsmaatskappy Beperk vs R C Bezuidenhout delivered on the 26th of May 1986 by Van Heerden J A.

4.2.4.2 "Compensation" under Act 30 of 1941 is defined in Section 2 simply as "compensation under this Act". Chapters V and VI of the Act deal respectively with the "Amount and Method of Compensation" and the "Recovery of Compensation". Speaking broadly, Chapter V prescribes fixed formulae according to which the compensation

> employed elsewhere in the Act, the word has, for the purposes of Section 8, an extended meaning which includes medical aid. Thus, in terms of Section 8 (1)(a) a workman may both claim compensation (including medical aid) under the Act and institute a Common Law action for the recovery of damages, while Section 8 (1)(b) confers upon the Commissioner a right of action for the recovery of the compensation (including medical aid) he is obliged to pay under the Act. The cardinal question is whether the word "compensation" in Section 22 (2)(a) of Act 56 of 1972 bears the the restricted or the extended meaning."

The "cardinal question" mentioned in the last sentence of this quotation was then considered by the learned Judge and resolved at page 584 A - B as follows:

> "The legislature intended to impose a quantitative limitation of R12 000 on an insurer's liability. At the same time it wished to give effect to its dominant policy that a workman should not recover double compensation, by providing in Section 22 (2)(a), as was done in Section 8(1)(a) of Act 30 of 1941 in respect of claims generally, for the deduction of the amount of the compensation, payable under the latter Act, from the maximum amount recoverable from the insurer. In the light of the interrelationship between, or associated nature of, Section 22 (2) (a) of Act 56 of 1972 and Section 8 (1) (a) of Act 30 of 1941, it is to my mind highly improbable that the legislature intended the "compensation", which falls to be deducted in terms of the former Sub-Section, to be a different concept from the compensation (in the extended sense) which has to be subtracted according to the latter Sub-Section."

It follows therefore (despite the minority judgment of Galgut A J A) that the term "compensation" must be

interpreted in the extended sense in both Section 22 (2)(a) of Act 56 of 1972 and Section 8 (1)(a) of Act 30 of 1941. The workman may accordingly claim medical and hospital expenses from the Appointed Agent even though they were paid by the Commissioner (or employer individually liable) under Act 30 of 1941. Likewise the Commissioner (or employer individually liable) may include "medical aid" paid by him under Act 30 of 1941 in any claim against an Appointed Agent under Section 8 (1) (b) of Act 30 of 1941. For a more detailed discussion see paragraphs 3.9.14.3 & 3.9.15 above.

4.2.5 EMPLOYER INDIVIDUALLY LIABLE

Act 30 of 1941 provides that an employer may make arrangements to take upon himself the obligations under that Act of the Commissioner and to exercise his rights. An "employer individually liable" is such an employer. Consequently references to the Commissioner in this Chapter should be seen as including the so-called "employer individually liable".

4.3 A WORKMAN MAY CLAIM COMPENSATION UNDER ACT 30 OF 1941 AS WELL AS UNDER THE MVA ACT

4.3.1 Section 8 (1) of the Workmen's Compensation Act provides

as follows:

(i) Where an accident in respect of which compensation is payable was caused in circumstances creating a legal liability in some person other than the employer (hereinafter referred as the third party) to pay damages to the workman in respect thereof -

(a) The workman may claim both compensation under this Act and take proceedings in a Court of Law against the third party to recover the damages: provided that where any such proceedings are instituted, the Court shall in awarding damages, have regard to the amount which, by virtue of the provisions of paragraph (b), is likely to become payable to the Commissioner or the employer individually liable (hereinafter referred to as the employer) as the case may be, by the third party; and

(b) The Commissioner or the employer by whom compensation is payable shall have a right of action against the third party for the recovery of the compensation he is obliged to pay under this Act as a result of the accident, and may exercise such a right either by intervening in proceedings instituted by the workman against the third party or by instituting separate

proceedings: provided that the amount recoverable in terms of this paragraph shall not exceed the amount of damages, if any, which in the opinion of the Court would have been awarded to the workman but for the provisions of this Act.

The reference in this Section to "the third party" is to the wrongdoer who caused the workman's injuries, i.e. the Appointed Agent. It should therefore not be confused with the "third party" mentioned in Section 8 of Act 84 of 1986 where it bears the meaning of "claimant".

4.3.2 Section 8 (1)(a) gives the workman the right to claim compensation under both Acts concerned, but since the legislature intended that the workman should not receive double compensation, the proviso was added that a Court, in awarding damages under the MVA Act, "shall ... have regard to" the amount which is likely to become payable to the Commissioner (or the employer individually liable) by the Appointed Agent under Section 8 (1)(b). The latter Section then gives the Commissioner (and the employer individually liable) the right to recover from the Appointed Agent the compensation which he is obliged to pay under Act 30 of 1941 as a result of the accident in question. But the amount which the Commissioner (or the

said employer) may thus recover shall not exceed "the amount of damages, if any, which in the opinion of the Court would have been awarded to the workman if Act 30 of 1941 had not been enacted". Van Heerden A J A put it as follows in Klaas vs Union and South West Africa Assurance Company Limited, 1981 (4) SA 562 A at 581 C - D:

> "In view of the wording of, and interrelationship between Sectin 8 (1) (a) and (b) I am of opinion that the gist of the legislature's intention may be stated as follows: in preferring a claim against a wrongdoer (or any other defendant, such as an insurer, who may be held liable as a result of the commission of a delict) a workman may claim his ordinary Common Law damages, including medical expenses. In applying the proviso to Section 8 (1) (a), however, a Court must deduct from such damages the compensation (including medical aid) which the Commissioner may recover in terms of Section 8 (1)(b)."

4.3.3 The workman's claim under the MVA Act is limited not only by the proviso to Section 8 (1)(a) of Act 30 of 1941 (which is a "limitation" only in the sense that it seeks to avoid the workman receiving double compensation); the damages recoverable by him under the MVA Act can be further limited under the latter Act itself, depending on the circumstances wherein the workman sustained his injuries:

(a) If the workman was conveyed as a passenger in a motor vehicle which was negligently driven but of which neither the driver nor the owner was his employer,

and he seeks damages under the MVA Act from the Appointed Agent designated to handle claims arising out of the driving of that vehicle, Section 9 (1) of the Act will place a limitation on his damages as it does in respect of any other passenger in that vehicle. The limitation (beyond the limitation imposed by the proviso to Section 8 (1)(a) of Act 30 of 1941) depends on which of the six categories of passengers the workman fell into in respect of the conveyance in question. He may for instance have been sent on an errand by his employer and he may have been conveyed "for reward" on a public bus in order to reach his destination.

(b) If the workman was an employee of the driver or owner of the vehicle which caused his injury and was entitled to compensation under Act 30 of 1941, and seeks damages under the MVA Act from the Appointed Agent designated to handle claims arising out of the driving of that vehicle, Section 9 (2) of the Act will apply. This would for instance be the case where the workman was conveyed on a vehicle belonging to his employer and driven by a fellow-employee who negligently overturned the vehicle.

(c) If the workman was conveyed (for whatever purposes) upon vehicle A which collided with vehicle B belonging to the workman's employer and driven by a

fellow-employee, and the workman was entitled to compensation under Act 30 of 1941, Section 9 (2) of the Act will again apply, just as it would if the workman had been a pedestrian and had been run down by a vehicle belonging to his employer and driven by a fellow-employee. If he seeks damages under the MVA Act from the Appointed Agent designated to handle claims arising out of the driving of his employer's said vehicle (i.e. vehicle B) the provisions of Section 9 (2) will apply. (See Ngwendu vs Shield Insurance Company, 1986 (3) SA 177 SE)

(d) If the workman was a pedestrian who was run down by a vehicle of which neither the driver nor the owner was his employer, his damages recoverable under the MVA Act are not further limited by that Act; the only "limitation" will be the one contained in the proviso to Section 8 (1)(a) of Act 30 of 1941.

4.4 DEDUCTION OF WORKMEN'S COMPENSATION

4.4.1 It has already been pointed out that Section 8 (1)(a) of Act 30 of 1941 enables the workman to claim compensation both under Act 30 of 1941 as well as under the MVA Act, but that in such a case the proviso to Section 8 (1)(a) will become operative in that the Court awarding damages under the MVA Act "shall .... have regard to the amount

which" the Commissioner (or employer individually liable) is likely to recover from the Appointed Agent under Section 8 (1)(b) of Act 30 of 1941. The words "shall .... have regard to" are often loosely referred to as meaning that the compensation awarded to the workman under Act 30 of 1941 should be deducted from the damages recoverable under the MVA Act. (See Bonheim vs South British Insurance Company Limited, 1962 (3) SA 259 A at 266 and compare Klaas vs Union and South West Africa Insurance Company Limited, 1981 (4) SA 562 A at 581 A.) For a full discussion on the interrelationship between Section 8 (1) of Act 30 of 1941 and Section 9 (2) of Act 84 of 1986 see paragraphs 3.9.14.3 and 3.9.15 above. Suffice to say that where the "deduction" is effected under Section 8 (1)(a) of Act 30 of 1941, the golden rule is that "only like should be deducted from like". (See Klaas's case at page 581 B) Where the "deduction" is to be effected in terms of Section 9 (2) (a) of Act 84 of 1986 (i.e. where the loss or damage is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the motor vehicle concerned and the claimant is entitled also to compensation under Act 30 of 1941) the workman is entitled (under the MVA Act) to "the difference between the amount which (he) could, but for the (limitation) of this paragraph, have claimed from the Appointed Agent or the amount of R25 000 (whichever is the lesser) and any lesser amount to which (the) third party is entitled by way of compensation under (Act 30 of 1941)". In this

regard Van Heerden A J A said in Klaas's case (Supra) at page 587 B:

> "There is accordingly much to be said for the view that the compensation falls to be deducted from the total amount of the workman's common law damages even if he actually chose to claim a lesser sum."

4.4.2 Even where the Commissioner's claim for recovery of compensation under Section 8 (1)(b) of Act 30 of 1941 has become prescribed, the amount which the Commissioner was obliged to pay to the workman under Act 30 of 1941 must nevertheless be deducted from the damages awarded under the MVA Act. See Section 14 (6) of Act 84 of 1986 and the remarks of Ogilvie Thompson J A in Bonheim vs South British Insurance Company Limited, 1962 (3) SA 259 E at 269 E.

4.4.3 EFFECT OF APPORTIONMENT

When the workman's damages under the MVA Act are subject to an apportionment under the Apportionment of Damages Act, Nr 34 of 1956, the amount awarded under Act 30 of 1941 should be deducted from the nett (apportioned) damages. In other words the apportionment is first applied against the proven damages and the award under Act 30 of 1941 is then deducted from the reduced damages. (Wille vs Yorkshire Insurance Company Limited, 1962 (1) SA

183 N) If the award under Act 30 of 1941 exceeds such reduced (apportioned) damages the workman's claim under the MVA Act cannot succeed. If the workman was a passenger whose claim was limited to R25 000 by Section 9 (1), the award under Act 30 of 1941 must be deducted from the total quantum of the damages or R25 000, whichever is the lesser.

4.5 A WORKMAN MAY NOT SUE HIS EMPLOYER

4.5.1 Section 7 of Act 30 of 1941 provides as follows:

From and after the fixed date -

(a) No action at Law shall lie by a workman or any dependant of a workman against such workman's employer to recover any damages in respect of an injury due to an accident resulting in the disablement or death of such workman; and

(b) No liability on the part such employer shall arise save under the provisions of this Act in respect of any such disablement or death.

4.5.2 This Section has a signifant and sometimes complex effect on claims under the MVA Act. Although it has been held not to apply to an action by a workman against his

employer as a self-insurer under the 1972 Act (Mkhungwana vs Minister of Defence, 1984 (4) SA 745 E), it precludes not only the workman's Common Law action for damages against his employer, but also the workman's claim under the MVA Act against the employer's insurer (or Appointed Agent) in those cases where the employer himself was the wrongdoer. But where the claim arises from the negligence not of the employer personally, but of the workman's fellow-employee Section 7 of Act 30 of 1941 will not defeat such a claim. See the discussion of this topic in paragraphs 3.10.1 & 3.10.3. Suffice it to refer at this point simply to Mphosi vs Central Board for Co-operative Insurance Limited, 1974 (4) SA 633 A and Gcilitshana vs General Accident Insurance Company, 1985 (2) SA 367 C.

4.6 PROCEDURAL STEPS BY THE WORKMAN BEFORE INSTITUTING A CLAIM UNDER THE MVA ACT

4.6.1 Section 8 (2) of Act 30 of 1941 provides that the workman must before instituting proceedings under the MVA Act, notify the Commissioner of his intention to do so. He must also do so if he intends to abandon the proceedings or to relinquish or settle his claim for damages, and he is obliged to furnish such particulars (relating to such notification) as the Commissioner may require.

4.6.2 Section 8 (5) of the said Act provides that no proceedings

in a Court of Law to recover damages from any wrong-doer (i.e. from an Appointed Agent under the MVA Act) may be taken by a workman unless -

(a) He has obtained the prior written consent of the Commissioner to do so; or

(b) He has lodged a claim for compensation against the Commissioner.

It should be noted that the distinction between black workmen and others was deleted with effect from 1st of April 1984 by Section 3 of the Workmen's Compensation Amendment Act, 29 of 1984; consequently, with reference to an accident which occurred on or after the 1st of April 1984 any workman (including a black workman) must either have obtained the prior written consent of the Commissioner to institute proceedings under the MVA Act, or he must have lodged a claim under Act 30 of 1941 with the Commissioner.

4.6.3 In Phoenix Assurance Company Limited vs Kloppers, 1952 (3) SA 229 T Rumpff A J (as he then was) interpreted Section 8 (5) as follows:

> "It is clear that before an action like the present can be instituted the plaintiff must either have lodged a claim with the Commissioner or must have obtained the Commissioner's written consent. It follows in my opinion that one or other of the two prerequisites must be alleged in the

declaration."

In Tyulu and Others vs Southern Insurance Association Limited, 1974 (3) SA 726 E the following was stated by Eksteen J:

> "It is not contended that any such notification was given to the Commissioner prior to the institution of the action and this seems to me to be fatal to the plaintiff's cause of action. In the course of argument Mr Smalberger informed the Court from the Bar that the consent of the Commissioner for the institution of the ... action was only obtained after the summons was issued. Where compliance with the requirements of Section 8 (5) is a condition precedent to the institution of action, as I think it is, then it seems to me that the plaintiff was not entitled to issue his summons until the liability was complete. His whole cause of action must subsist when the summons is issued."

And in Mutual & Federal Insurance Company Limited vs Kok, 1985 (2) SA 225 Tk AD it was stated "that the decisions in Phoenix and Tyulu correctly state the Law". The matter finally came before the Appeal Court in S A Eagle Insurance Company Limited vs Bavuma, 1985 (3) SA 42 A where it was held

(a) That Section 8 (5) was introduced solely for the Commissioner's benefit (at page 50 D , confirming Tyulu's case (Supra) at 730 H);

(b) That the provisions of Section 8(5) are capable of being

waived by the Commissioner (at page 50 F);

(c) That the facts of the case the Commissioner was shown to have waived compliance with the provisions of Section 8 (5);

(d) That since the Commissioner had waived compliance with the provisions of Section 8 (5), those provisions could not be relied upon by the defendant (appellant) as a bar to the proceedings.

This judgment does not seem to detract from the earlier findings in the Phoenix, Tyulu and Kok cases referred to above. Consequently, unless there has been a waiver by the Commissioner (in which event such waiver should be alleged - Bavuma's case at page 50 H), compliance with the provisions of Section 8 (5) would seem to be prerequisites to the Appointed Agent's liability, and compliance with these provisions should be alleged in the particulars of claim.

4.6.4 It is not clear why Act 30 of 1941 should have two different Sub-Sections dealing with notification on the one hand and the Commissioner's prior written consent (or the lodgment of a claim against the Commissioner) on the other hand, but it is suggested to attorneys handling MVA claims on behalf of workmen that they should simply during

the pre-summons period address a letter to the Commissioner notifying him under Section 8 (2) of Act 30 of 1941 of the workman's intention to institute proceedings and seeking his consent under Section 8 (5), insofar as such consent may be required, to do so. Since a letter should in any event be addressed to the Commissioner to obtain details of the final award to the workman under Act 30 of 1941, all these aspects may be disposed of by means of a single letter. (See also paragraph 7.2.8.)

4.7 PRESCRIPTION OF THE COMMISSIONER'S CLAIM UNDER SECTION 8 (1)(b) OF ACT 30 OF 1941

4.7.1 Section 14 (6) of Act 84 of 1986 provides that notwithstanding the provisions of Section 8 of Act 30 of 1941 the right of the Commissioner under Section 8 (1)(b) to recover from an Appointed Agent the amount which he was required to pay to the workman shall be deemed, in circumstances other than those mentioned in Section 9 (2) of the Act, to be a right to claim compensation under Section 8 of the MVA Act. Consequently the Commissioner's claim is subject to the prescriptive provisions of Section 14 (1)(a), but since the proviso to this Section is specifically excluded (which deals with the periods of suspension) the Commissioner's claim becomes prescribed within two years after the claim arose. See the

Commentary on Section 14 (6) in paragraph 3.14.5 above. The reason why Section 14 (6) refers to "circumstances other than those mentioned in Section 9 (2)" of the Act, is that by virtue of the provisions of Section 9 (2)(b) of the Act the Commissioner has no right of action as envisaged in Section 8 (1)(b) of Act 30 of 1941 when the circumstances mentioned in Section 9 (2) are present, i.e. where the loss or damage contemplated in Section 8 of the Act is suffered as a result of the bodily injury or the death of an employee of the driver or owner of the motor vehicle concerned and the workman is entitled to compensation under Act 30 of 1941. (Klaas vs Union and South West Africa Insurance Company Limited, 1981 (4) SA 562 A)

4.7.2 Section 8 (3) of Act 30 of 1941 provides, with regard to the Commissioner's claim against the Appointed Agent under Section 8 (1)(b):

> Notwithstanding anything contained in any Law, no claim by the Commissioner ... shall become prescribed until after the expiration of a period of three months from the date on which the Commissioner has made an award of compensation certified by him to be a final award, provided written notice of the intention of the Commissioner ... to institute proceedings ... has been given to the third party within twelve months of the receipt by the Commissioner ... of due notice of the accident.

There is clearly a conflict between this Section and the provisions of Section 14 (6) of the MVA Act, but the

latter Act will undoubtedly take precedence when such a conflict arises. (See paragraph 3.14.5.)

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CHAPTER 5

RECIPROCAL OBLIGATIONS BETWEEN SOUTH AFRICA AND NEIGHBOURING STATES AND TERRITORIES

5.1 Act Nr 84 of 1986 applies of course to the Republic of South Africa (which includes, by virtue of Section 18, the territory of South West Africa, including the Eastern Caprivi Zipfel), except insofar as its provisons are rendered applicable elsewhere. By the same token the Republic's neighbouring states, Bophuthatswana, Lesotho, Swaziland, Transkei, Botswana and Ciskei, all have their own MVA legislation which applies only in the countries concerned except insofar as such legislation is rendered applicable in South Africa. By virtue of the vast interchange of traffic between South Africa and those neighbouring states it was deemed necessary to make suitable arrangements in order to accommodate the situation where a vehicle registered in South Africa is driven in one of those neighbouring states and the situation where a vehicle registered in such neighbouring state is driven in South Africa. Not only does the MVA legislation in the neighbouring states differ from state to state, but it also differs in varying degrees from the South African legislation. Against this background the task of devising various reciprocal inter-state schemes is understandably complex. For some years these schemes have been regulated

partially by the various Acts themselves and partially by certain inter-state Undertakings exchanged on a reciprocal basis.

5.2 The promulgation of Act Nr 84 of 1986 has, with one or two exceptions, not altered the position materially, and much of what pertained prior to the 1st of May 1986 still applies. Consequently reference may fruitfully still be made to the treatment of this subject in the MVA Handbook (Chapter 5), and particularly the Undertakings which have been incorporated in that work in Appendix IV at pages 257 - 273. Practitioners should note that the promulgation of Act 84 of 1986 was not accompanied by newly-negotiated Undertakings; the same Undertakings are still valid since they all contain clauses to the effect that they will remain binding on those who issued them "notwithstanding any amendments which may from time to time be made to the Law governing the compulsory insurance of motor vehicles in the Republic of South Africa ...". Nevertheless new Reciprocal Undertakings are currently being negotiated.

5.3 It is to be noted that whilst South Africa has an MVA Fund and twelve participating Appointed Agents, the position differs in the various neighbouring states. Whilst the Transkei, Ciskei and Boputhatswana each has an MVA Fund, Botswana, Lesotho and Swaziland have no such Funds. One consequently has the position that some of the foreign

Undertakings are issued by insurance companies whilst others are issued by an MVA Fund. From South Africa's point of view all the Undertakings to the six neighbouring states concerned have been issued by the MVA Fund.

5.4 WHAT DO THESE UNDERTAKINGS PROVIDE?

5.4.1 Despite differences here and there, these Undertakings essentially provide, in the case where they are given by an MVA Fund, as follows:

(a) That whenever a motor vehicle insured under the MVA legislation of the country giving the Undertaking is involved in an accident in the country to which the Undertaking is given, and the insurer concerned fails to meet its obligations under the MVA legislation applicable in the country of occurrence, the MVA Fund concerned will pay such compensation as the claimant would have been entitled to recover if the motor vehicle had been insured under the relative MVA legislation of the country of occurrence; and

(b) That the Undertaking shall remain binding on the MVA Fund concerned notwithstanding any amendments which may from time to time be made to the corresponding MVA legislation applicable in the country to which

the Undertaking is given.

5.4.2 Where the Undertaking is given by an insurance company (as in the case of Botswana, Lesotha and Swaziland) the Undertaking essentially provides:

(a) That whenever a motor vehicle insured by the company concerned is involved in an accident in the country to which the Undertaking is given, the said insurer undertakes to compensate any person entitled thereto up to the amount which he would have been entitled to recover if the motor vehicle in question had been insured under the MVA legislation of the country to which the Undertaking is given, i.e. the country of occurrence; and

(b) That the Undertaking shall remain binding on the insurer giving it notwithstanding any amendments which may from time to time be made to the MVA legislation in the country to which the Undertaking is given.

5.4.3 Since the party giving the Undertaking binds itself to ensure compliance with the provisions of the MVA legislation applicable in the country to which the Undertaking is given (i.e. the country of occurrence), any claim envisaged in such Undertaking is subject in both substance and procedure to the MVA legislation applicable

in the country of occurrence. The claim form prescribed by the legislation applicable in the country of occurrence should therefore also be used.

5.4.4 In those cases where the Undertaking is given by an MVA Fund, the action of the claimant nevertheless lies against the insurer concerned, which is of course not a party to the Undertaking; the MVA Fund merely guarantees the compensation to which the claimant is entitled. In such a case the claimant cannot without more ado found his cause of action against the insurer on the Undertaking given by the MVA Fund, and the claimant should therefore prior to the lodgment of his claim against the insurer, or at the latest prior to the issue of summons, obtain an acknowledgement from the insurer concerned that it regards itself bound by the Undertaking given by the MVA Fund. Since such insurer is broadly speaking an agent of the Fund it is unlikely that it will refuse to give such acknowledgement. If the insurer does refuse to regard itself bound by the Undertaking given by the MVA Fund, it is difficult to see how the claimant can make out a cause of action against it. The insurer after all operates in a different state and under a different Act whose effect does not extend beyond the borders of the state for which it was enacted. Its liability can effectively only be extended to the country of occurrence on a contractual basis and if it does not declare itself to be bound by a

contract (i.e. the Undertaking) concluded by another party (the MVA Fund) it simply cannot be held legally liable for the claimant's damages; in such a case the claimant will have to hold the MVA Fund which issued the Undertaking liable.

5.4.5 Where the Undertaking is given by the insurer itself (which is what happens in the case of vehicles insured under the corresponding legislation in Botswana, Swaziland and Lesotho) the formulation of a cause of action on behalf of the claimant is also not without its difficulties. After all, the Undertakings are normally given by the insurer to the Republic's Minister of Transport Affairs and the claimant is not a party to this "agreement". Presumably the Undertaking should be regarded as a contract in favour of a third party (the claimant). The same will probably be the case where an insurer refuses to regard itself bound by the Undertaking given by the MVA Fund and the claimant seeks to recover from the latter under its Undertaking; the Undertaking by the MVA Fund will then also presumably have to be regarded as an agreement for the benefit of a third party, i.e. the claimant.

5.5 CLAIMS ARISING FROM THE DRIVING IN NEIGHBOURING STATES OF VEHICLES REGISTERED IN SOUTH AFRICA

5.5.1 Section 8 of Act 84 of 1986 imposes liability on the

Appointed Agent (or the MVA Fund, as the case may be) in respect of claims caused by or arising out of the driving of a motor vehicle "at any place in the Republic". Subject to the provisions of Section 8 (2), our Act therefore does not apply when the vehicle concerned causes bodily injury in some neighbouring state.

5.5.2 But Section 6 (1)(l) of the Act provides that the MVA Fund "may accept liability towards any other government for payment of compensation in terms of any law relating to the compulsory insurance of motor vehicles in force in such government's territory caused by or arising out of the driving in that territory of any motor vehicle registered in the Republic". It is under this Section of the Act that the MVA Fund is authorised to issue an Undertaking to the government of any neighbouring state whereby it accepts liability for the payment of compensation "in terms of any law relating to the compulsory insurance of motor vehicles inforce in such government's territory", arising out of the driving in that territory of any motor vehicle registered in the Republic. Hence the Undertakings to Botswana, Lesotho, Swaziland, Transkei, Ciskei and Boputhatswana whereby the MVA Fund "warrants" that whenever a South African vehicle is involved in an accident in the neighbouring state concerned, the authorised insurer of such vehicle (the new Undertakings will probably refer to the Appointed Agent)

"will make good to any person the compensation which he would have been entitled to recover" in terms of the MVA legislation applicable in that neighbouring state if the vehicle in question had been insured under the relevant legislation in that state, and the MVA Fund further "undertakes and agrees that if such authorised insurer should fail to do so the MVA Fund will itself do so". The Undertaking goes no further than warranting payment of such compensation as is payable in terms of the relevant MVA legislation applicable in the country of occurrence. The claim is therefore regulated in all respects not by Act 84 of 1986 but by the provisions of the Act governing compulsory motor vehicle insurance in the neighbouring state where the accident occurred. Such Act will therefore have to be studied, the procedures laid down therein will have to be followed and the claim will be subject to the quantitative limitations specified therein.

5.5.3 JURISDICTION

The corresponding MVA legislation in each of the six neighbouring states mentioned above contains a provision that an action may be brought in any Court of otherwise competent jurisdiction within whose area of jurisdiction the occurrence took place. And since the Undertaking under which the Appointed Agent concerned is to be held liable states that the Appointed Agent will pay such

compensation as the claimant would have been entitled to recover if the vehicle had been insured under the corresponding MVA legislation applicable in the neighbouring state concerned, it follows that the action may also be instituted in any Court of otherwise competent jurisdiction within whose area of jurisdiction the occurrence took place. In issuing the Undertaking the MVA Fund appears therefore to have impliedly consented, on behalf of the Appointed Agent concerned, to the jurisdiction of the Court within whose area the accident took place. However, the claimant's attorney (probably a practitioner from the neighbouring state concerned) would be well advised to submit a specific request to the Appointed Agent concerned to expressly consent to the jurisdiction of the Court in question in the country of occurrence. In the unlikely event that the Appointed Agent should refuse to consent to such jurisdiction, the attorney concerned could of course take the matter up with the South African MVA Fund, requesting it to ensure that the Appointed Agent tows the line, or alternatively he may simply rely on the implied consent to jurisdiction flowing from the provisions of the Undertaking, but the former would be preferable and there should be no problem in getting the MVA Fund to bring pressure to bear on the Appointed Agent in this regard; the Appointed Agent is after all just that, namely the agent of the Fund.

An attachment to found jurisdiction is not necessary when

there has been consent to jurisdiction. In Centner NO vs Griffin NO, 1960 (4) SA 798 W Roper A J said at 799 C:

> "It is I think clear that in our modern practice a submission to the jurisdiction by a peregrinus is sufficient to give the Court jurisdiction without an attachment of property ad fundandam jurisdictionem."

This was followed in Du Preez vs Philip-King, 1963 (1) SA 801 W at 803 A, Cinemark (Pty) Limited vs Transkei Hotel, 1984 (2) SA 332 W. (But compare Slabbert vs Herbst, 1981 (4) SA 257 NC). In the case of Mabuda vs Minister of Co-operation and Development, 1984 (2) SA 49 CkSC the claimant sought damages from the defendant for bodily injuries and instituted action in the Ciskei Supreme Court. The Court, relying on the forerunner to the current Undertaking issued by the MVA Fund to the Government of Ciskei, found that the South African Government had by its conduct consented to the jurisdiction of the Court wherein the action was heard. After referring to the fact that consent to jurisdiction may be given either expressly or impliedly by conduct, Pickard J said at page 53 E:

> "It seems clear, however, that a consent or submission to jurisdiction need not necessarily be specifically intended to relate to an impending or particular, known, existing or anticipated action. It is quite conceivable that a defendant may submit to the jurisdiction of a particular Court before any dispute has

arisen or is foreseen. He may consent in general terms for any disputes that may arise or are foreseen to arise."

And after referring to the relevant provisions of Act 56 of 1972 and of the agreement between the two governments, the Court added the following at page 55 E to H:

"The existence of the aforementioned statutory provisions, the agreement mentioned, and the well-known presence of large numbers of South African Government-owned, uninsured vehicles being driven in Ciskei, must clearly at all times have been facts of which the South African Government had full knowledge. It follows therefore that the South African Government, as a responsible authority, friendly to Ciskei and its people, could never have intended to unduly burden inhabitants of Ciskei, injured by the negligent driving of its vehicles in Ciskei, with an obligation to attempt to recover damages in a Court foreign to them and situated far afield outside their own country. Clearly the South African Government, by allowing so many of its vehicles to operate here without being insured or without making other provision to protect injured persons here, was of the view that in the event of such injury it would be considered, in terms of the provisions of Section 3 (1) of Act 56 of 1972, to be 'liable mutatis mutandis ... as if it were an authorised insurer .... under Section 12'. Such an insurer would presuppose a company subject to the jurisdiction of this Court for actions arising in Ciskei. Also the all-important South African Government-created and controlled MVA Fund would retain all its functions in Ciskei after independence. This being so I have no hesitation in coming to the conclusion that the South African Government has, through its conduct and attitude, clearly indicated, by necessary implication, its acquiescence to submit to the jurisdiction of this Court in matters of this nature, and cannot now object to this Court exercising jurisdiction in the action before me."

It is submitted that the current Undertaking in existence between the MVA Fund and the Government of Ciskei is even more clearly conducive to the conclusion that the MVA Fund and its Appointed Agents have impliedly consented to the jurisdiction of the Court within whose area the accident occurred in the neighbouring state in question.

5.5.4 Of course a claimant who sustained his bodily injuries in a neighbouring state may elect to institute action in South Africa, more particularly in the Court where the Appointed Agent has its registered head office. This election will however open the door to certain practical problems, although these will not be insurmountable. Firstly, since the Undertaking goes no further than to warrant payment of such compensation as the claimant could have recovered if the vehicle concerned had been insured in the neighbouring state concerned, the relevant MVA legislation (including any incidental legislation such as legislation relating to apportionment of damages or assessment of damages) would have to be proved. And since the claimant may be a peregrinus he may also be called upon to furnish security. Indeed he may also have difficulty in securing the presence of persons who witnessed the accident in the neighbouring state in question, but the point is simply made that the claimant is entitled to bring his action in an appropriate Court in South Africa as well.

5.5.5 SERVICE OF SUMMONS

All the neighbouring states in question presumably have rules of Court corresponding with our Supreme Court Rule 5 which provides that no process whereby proceedings are instituted shall be served outside the Republic unless the plaintiff has first obtained the leave of the Court to sue by way of edictal citation. Of course the Appointed Agent may itself appoint an agent in the neighbouring state in question who is authorised to receive the summons, for instance the Appointed Agent's branch in that state or any affiliated company. In such case the summons may simply be served on such agent. Consequently to avoid the trouble and expense of a special application to Court for leave to have summons served by way of edictal citation, the Appointed Agent should be requested to appoint in writing an agent in the neighbouring state authorising such agent to accept service of the summons. In cases where this is not possible or where it is refused the aforesaid application will have to be brought.

5.6 CLAIMS ARISING FROM ACCIDENTS IN SOUTH AFRICA CAUSED BY FOREIGN VEHICLES

5.6.1 Whereas Section 2 (1)(a) prohibits the driving of a motor

vehicle unless it displays a token of identification "in the prescribed form", Section 2 (2) releases certain classes of vehicles from this obligation. Among the vehicles so released are those which are registered in a territory outside the Republic or in Botswana, Lesotho or Swaziland or in any territory which formerly formed part of the Republic and subsequently became independent, and which is insured in terms of the corresponding MVA legislation in force at such place, and in respect of which "a prescribed undertaking" has been furnished to pay compensation under Section 8 for any loss or damage caused by or arising out of the driving of the insured motor vehicle in the Republic. In other words if:

(a) The vehicle is registered in one of the aforementioned places (see Section 2 (2)(b) and (c)) and

(b) It is insured under the corresponding MVA legislation in the country of its origin and

(c) "A prescribed Undertaking" has been issued by the MVA Fund of the country of the vehicle's origin, or, if such country has no MVA Fund, by an insurance company conducting MVA business in such country, to pay compensation as envisaged in Section 8 (1) of Act 84 of 1986

such foreign vehicle is released from the obligation of displaying the prescribed token of identification.

5.6.2 WHO PAYS THE COMPENSATION?

Section 5 (2)(a) states that the moneys of the MVA Fund shall not be used to pay compensation as contemplated in Section 8 for claims arising out of the driving in the Republic of motor vehicles registered in Bophuthatswana, Botswana, Ciskei, Lesotho, Swaziland, Transkei and any other territory which formerly formed part of the Republic and subsequently became independent, and which are insured under the provisions of the corresponding MVA legislation in force in the said territories, and in respect of which "the prescribed provision" has been made for payment of compensation arising from such circumstances. In other words if:

(a) The foreign vehicle concerned is registered in one of the territories referred to in Section 5 (2)(a); and

(b) It is insured under the provisions of the corresponding MVA legislation in force in the territory of its origin; and

(c) An Undertaking has been issued (i.e. the "prescribed

provision has been made") to the Republic's Minister of Transport Affairs by the MVA Fund of the territory in question or, if it has no MVA Fund (as is the case in Botswana, Lesotho and Swaziland), by an insurance company conducting MVA business in that territory;

then the moneys in the MVA Fund may not be used for the payment of compensation arising in such a situation.

The legislature has chosen very strange wording to achieve its intentions. It says that moneys in the South African MVA Fund may not be used to pay claims for the compensation contemplated in Section 8 if such claims arose in the aforementioned circumstances. Section 5 (2) (a) clearly contemplates that such compensation will indeed be paid by somebody in the said circumstances but it does not say by whom. Obviously the compensation will then be paid by the MVA Fund or the insurance company concerned which made the "prescribed provision", i.e. issued the Undertaking covering the situation in question, and the legislature could so easily have said so. In any event the implication is clear.

5.6.3 Reference has above been made to the "prescribed provision", which has been equated with the reciprocal Undertaking issued from one of the named foreign territories. The prescribed provisions in question are then contained in Regulation 4 which again follows the

same strange negative type of wording namely that "compensation shall be payable, exclusive of any liability on the part of the MVA Fund, for loss or damage as contemplated in Section 8 of the Act which arises out of the driving at any place in the Republic of a motor vehicle registered in ....", and then proceeds to set out the provisions relating to Undertakings issued from Botswana, Lesotho, Swaziland, Bophuthatswana, Ciskei and Transkei. The different provisions then make it clear that the compensation which Section 5 (2)(a) of the Act says may not be paid out of the moneys in the South African MVA Fund, shall be paid by virtue of the provisions of the Undertakings issued from the foreign territories concerned, whether by an MVA Fund or by an insurance company. So for instance Regulation 4 (1) relating to Botswana and Lesotho states that the declaration of insurance of the foreign vehicle in question shall be issued "subject to an Undertaking by such insurance company to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by Act 84 of 1986". And in the case of Regulation 4 (c), which relates to vehicles insured in Bophuthatswana, the proviso requires the Bophuthatswana MVA Fund to furnish an Undertaking to pay, in the event of the authorised insurer concerned failing to do so, compensation (as envisaged in Section 8 (1) of the Act) in

respect of loss or damage caused by such motor vehicle to any person whomsoever "in the circumstances and subject to the conditions prescribed by the Act".

5.6.4 Having identified in Regulation 4 the prescribed provisions relating to the neighbouring state in which the vehicle which caused the bodily injury is insured, the next step is to consider the precise provisions of the Undertaking issued from that neighbouring state. The current Undertakings issued from Botswana, Lesotho, Swaziland, Transkei, Ciskei and Bophuthatswana are reproduced on pages 257 to 268 of the MVA Handbook, but since those Undertakings still have references to insurance and insurers, new Undertakings have been prepared and forwarded to the various states which, though not materially different in substance, meet the demands of South Africa's new fuel levy system with effect from the 1st of May 1986. By and large the Undertakings ensure that the body which issued it (either an MVA Fund or an insurance company operating in the foreign territory concerned) will be responsible to compensate a person injured in South Africa in accordance with the provisions of Act 84 of 1986, i.e. as though the foreign vehicle had been a South African vehicle falling under the new fuel levy system applicable there. In other words the claim is subject, both in substance and in procedure, to the provisions of Act 84 of 1986 and the compensation is subject to the quantitative limitations laid down by that

Act. The claimant should therefore also use the claim form, MV3, contained in the Regulations and once again the claimant should submit certain requests to the insurer prior to lodgment of the claim documents, or at the latest prior to the issue of summons:

(a) If the Undertaking was issued by an MVA Fund, the insurer of the vehicle should be requested to confirm that it regards itself bound by the Undertaking issued by that MVA Fund;

(b) The insurer of the vehicle should be requested to consent expressly to the jurisdiction of the Court in whose area the accident occurred (failing which there is in any event an implied consent to such jurisdiction - see paragraph 5.5.3 and 5.6.5; and

(c) The insurer of the vehicle should be requested to make a written appointment of an agent in South Africa who is thereby authorised to accept service of summons on its behalf, in order that an application to Court for leave to sue by way of edictal citation may thus be avoided.

5.6.5 JURISDICTION

See first of all paragraph 5.5.3 which is applicable here, mutatis mutandis. Since Section 15 (3) of the Act

provides that "an action to enforce .... a claim may be brought in any court of otherwise competent jurisdiction within whose area of jurisdiction the occurrence which caused the injury or death to place", a South African practitioner representing a claimant injured by a foreign vehicle would naturally prefer to have the action instituted in that Court "within whose are of jurisdiction the occurrence ..... took place". The problem is however that the defendant with which he is dealing here is a foreign defendant, seated in one of the six neighbouring states referred to above, i.e. Lesotho, Botswana, Swaziland, Ciskei, Transkei and Bophuthatswana. Since Undertakings have been issued from those territories, either by an MVA Fund (in the case of Transkei, Ciskei and Bophuthatswana), or by an insurance Company (in the case of Botswana, Lesotho and Swaziland), wherein an undertaking is given to ensure that compensation is paid to any person entitled thereto, for the damages which such (injured) person could have recovered if the foreign vehicle been insured in the Republic, it follows that the claim is subject, in substance and procedure, to Act 84 of 1986. Knowing that such claims would be subject to the provisions of Act 84 of 1986, the bodies which issued the Undertakings must necessarily have appreciated the provisions of Section 15 (3) of that Act, and there appears to be a clear implied consent to the jurisdiction of the Court within whose area of jurisdiction the accident

took place. Compare Mabuda vs Minister of Co-operation and Development, 1984 (2) SA 49 CkSC. Any agreement between the two countries concerned establishing any arrangement to issue Reciprocal Undertakings could of course also serve to establish a consent to jurisdiction by conduct. But the South African practitioner would be well-advised to request the foreign MVA Fund or foreign Insurance Company (as the case may be) which issued the Undertaking, to give an express consent to the jurisdiction of the South African Court in whose area the accident occurred. (Where the Undertaking has been issued by an MVA Fund, the company which insured the vehicle concerned in the foreign country should in any event be requested to confirm that it considers itself bound by the Undertaking issued by the MVA Fund of that country, and all the aspects raised in (a), (b) and (c) of paragraph 5.6.4 could be dealt with in a single letter.)

Once there has been a consent to jurisdiction, either express or by conduct, an application ad fundandam jurisdictionem is not necessary. (Centner NO vs Griffin NO, 1960 (4) SA 798 W at 799 C, and the further authorities mentioned in paragraph 5.5.3 above.)

Where the Undertaking was issued by an MVA Fund (as in the case of Transkei, Ciskei and Bophuthatswana), and the insurer of the foreign vehicle concerned refuses to give an express consent to jurisdiction, the MVA Fund which

issued the Undertaking should be contacted and requested to bring the necessary pressure to bear on the insurer concerned, failing which reliance will have to be placed on the implied consent. As a last resort the claimant's action may be instituted in the foreign state in question, but then the claimant will be confronted with the difficulties mentioned with regard to the reversed position as set out in paragraph 5.5.4.

5.6.6 SERVICE OF SUMMONS

See first of all the remarks in paragraph 5.5.5 above which obviously apply here again, mutatis mutandis. The South African Supreme Court Rule 5 provides that no process whereby proceedings are instituted shall be served outside the Republic unless the plaintiff has first obtained the leave of the Court to sue by way of edictal citation. Of course the foreign defendant may appoint an agent within South Africa authorising such agent to receive service of summons. Such agent could be the sister-company of the insurer which insured the foreign vehicle in the state in question. It is accordingly suggested that the South African practitioner representing a person injured in South Africa by a foreign vehicle should request the foreign defendant to appoint an agent in South Africa who will accepts service of summons, thus avoiding the necessity for an application to Court for leave to serve summons by way of edictal citation,

otherwise such application will have to be brought.

5.7 RECIPROCITY WITH REGARD TO UNINSURED VEHICLES

5.7.1 The reciprocal Undertakings are very specific in referring only to insured motor vehicles. (As previously stated the new Undertakings will not refer to "insured" vehicles, but rather to vehicles falling under South Africa's fuel levy system which came into force on the 1st of May 1986.) Nowhere in the new Act or Regulations are there any provisions corresponding to those of the old Regulation 5 (5) promulgated under the 1972 Act, the reason obviously being that South Africa no longer has any "uninsured" vehicles, all "motor vehicles" (as defined in Section 1) being included in the new fuel levy system. It unfortunately follows that claims arising from the driving in South Africa of an uninsured foreign vehicle are not the subject of any legislative or contractual arrangement to safeguard the interest of the injured accident victim or the dependants of the deceased victim. In this regard the MVA Handbook says the following in paragraph 5.15:

> "Our MVA Fund has indicated that, in the light of (the old Regulation 5 (5)), it will compensate persons injured as a result of the driving of an uninsured foreign vehicle in the same way as it would compensate those injured as a result of the driving of a South African uninsured vehicle. It appears that the MVA Funds of Transkei, Ciskei and Bophuthatswana,

who have adopted our current MVA Act and Regulations, will do the same."

This will now technically no longer hold good because the inter-state arrangements were based on a system of reciprocity. Under the new Scheme which came into effect on the 1st of May 1986 South Africa no longer has any "uninsured" vehicles whereas the neighbouring states undoubtedly still have a large number of uninsured vehicles, many of which find themselves from time to time on South African roads. In such circumstances a system which is based on reciprocity must fall away and a South African claimant's only remaining remedy will be that which he enjoys under common law, i.e. a totally unsecured claim which more often than not may prove to be totally worthless. Nevertheless practitioners representing such claimants should immediately contact the MVA Fund, as they may well still be prepared, in the light of what follows below, to compensate the victim on an ex gratia basis.

5.7.2 It is believed however that at least some of the neighbouring states will shortly announce that they themselves are switching to a fuel levy system (apparently with retrospective effect to the 1st of January 1987), which would remedy the situation with regard to those states. (Indeed, it is hoped that all the states concerned will in due course follow suit.) New reciprocal Undertakings with those states will no doubt follow,

wherein there will be no further reference to insurance or insurers, such references being simply to motor vehicles registered in the participating countries.

5.8 VENDA

5.8.1 The remarks and comments hitherto made in this Chapter have related only to Botswana, Lesotho, Swaziland, Ciskei, Transkei and Bophuthatswana. The position of Venda therefore requires some attention.

5.8.2 Section 8 (2) of Act 84 of 1986 states that the provisions of Section 8 (1) of the Act (dealing with the liability of the Appointed Agent or the MVA Fund, as the case may be, arising from the driving of a motor vehicle in the Republic) will also apply in respect of loss or damage resulting from or arising out of the driving of a motor vehicle in a territory which formed part of the Republic before becoming an independent state IF an agreement has been concluded between the government of the Republic and the government of the state concerned under which the MVA Fund or its Appointed Agent accepts liability to apply the provisions of Section 8 (1) in that territory for an agreed period.

5.8.3 Section 8 (2) applies specifically to Venda. Whilst it is true that Venda is not the only state which formed part of

the Republic before becoming independent (the same applies to Transkei, Ciskei and Bophuthatswana), Venda is the only state which does not have its own MVA legislation, hence the necessity for an agreement to be concluded with the South African Government whereby the South African MVA legislation is rendered applicable to Venda.

5.8.4 The agreement between the governments of South Africa and Venda is currently in the process of preparation but it has already been agreed to in principle, with the result that it is already operative; the fuel levy system is operating in Venda and the levies are being paid to South Africa and it is generally accepted that Act Nr 84 of 1986 is fully operative in Venda. The same twelve Appointed Agents are entitled to operate there and there are no other companies involved in the Scheme.

5.8.5 There is however a slight question-mark regarding the manner in which the legislature sought to achieve the applicability of the new Scheme in Venda. It will be noted that Section 8 (2) provides that once an agreement to this effect as been concluded between the two governments to this effect, "the provisions of Sub-Section (1) also apply ...." in Venda. But why should only Section 8 (1) of the Act apply in Venda? Surely Sections 8 (3), 8 (4), 8 (5), 8 (6) and 8 (7) were also intended to be applicable in Venda? Indeed Section 8 (1) cannot apply

effectively without a number of other Sections of the Act such as Sections 1, 6, 9, 10, 11, 12, 13, 14, 15, 16 and 20 being also applicable. For that matter, assuming a vehicle is driven in Venda without displaying a token of identification and the motorist is charged under Section 2 (1)(a) of the Act, read together with Section 2 (3) which prescribes a maximum fine of R100. How will the state prove that Sections 2 (1)(a) and 3 are applicable in Venda while Section 8 (2) states that only Section 8 (1) is applicable there? Similarly, on what basis can an Appointed Agent which has been sued under Section 8 (1) by a passenger falling in one of the six categories mentioned in Section 9 (1) establish a plea to the effect that the claimant is subject to the quantitative limitations mentioned in Section 9 (1)? Even worse, how can the Appointed Agent plead that a particular claimant is precluded from recovering compensation under Section 8 (1) by virtue of the provisions of Section 10 of the Act? And surely it was intended that a claimant seeking compensation under Section 8 (1) of the Act would have to lodge an MV3 claim form under Section 15 (1)? Where an Appointed Agent wishes to plead that the claimant failed to comply with the provisions of Section 15 (1) of the Act, on what Section of the Act does he rely for the proposition that Section 15 (1) is applicable at all? No doubt it was the intention that all the aforementioned Sections of the Act would also apply in Venda, but the legislature will have to apply its mind to the question of

whether it has achieved this intention. The corresponding Section in the 1972 Act was Section 21 (2), which provided that if an agreement to this effect had been concluded between the governments of South Africa and Venda, authorised insurers would thereunder be entitled to "exercise and perform .... the powers and functions which, in terms of the Law applicable in (Venda), are conferred upon or assigned to persons who in terms of that Law are authorised to insure motor vehicles in and in respect of that territory for such purposes as are contemplated in this Act". Those provisions, though also not the epitome of clarity, clearly had a far wider ambit than the corresponding provisions in Section 8 (2) which render only Section 8 (1) applicable to Venda. If the agreement to be concluded between the two governments purports to render applicable to Venda any Section other than Section 8 (1), the agreement might well be ultra vires the Act in that respect.

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CHAPTER 6

LOCUS STANDI IN IUDICIO

6.1 Whether or not a plaintiff has *locus standi in iudicio* to institute an action under Section 8 of Act 84 of 1986 depends not so much on the provisions of the said Act as on the common law and certain statutes which specifically affect such plaintiff's rights. (In particular the Matrimonial Property Act 88 of 1984.) The promulgation of Act 84 of 1986 has in no way changed the position which pertained prior to such promulgation.

6.2 Since the position remains unchanged and since the principles relating to *locus standi in iudicio* with specific reference to MVA claims has been comprehensively dealt with in the MVA Handbook (Chapter 6), there is really no need to repeat what is stated there, except insofar as any recent developments are concerned.

6.3 THE CLAIM OF THE BLACK WOMAN MARRIED BY CUSTOMERY UNION FOR LOSS OF SUPPORT UPON THE DEATH OF HER HUSBAND

6.3.1 Section 31 (2) of the Black Laws Amendment Act, Nr 76 of 1963 provides as follows:

> (2) No such claim for damages shall be enforceable by any person who claims to be a partner to a customery union with such deceased partner unless

(a) Such person produces a certificate issued by a commissioner stating the name of the partner, or in the case of union with more than one woman, the names of the partners, with whom the deceased partner had entered into a customery union which was still in existence at the time of death of the deceased partner; and

(b) Such person's name appears on such certificate.

In terms of Sub-Section (2A), which was inserted by Act 83 of 1984, the certificate referred to in Section 31 (2) shall be accepted as conclusive proof of the existence of a customery union of the deceased partner and the partner, or, in the case of a union with more than one woman, the partners whose name or names appear on such certificate.

6.4 THE CERTIFICATE UNDER SECTION 31 (2) OF ACT 76 OF 1963

6.4.1 As pointed out in Chapter 6 of the MVA Handbook this certificate has been the subject of much conflicting judicial pronouncements. Reference was there made to the cases of Pasela vs Rondalia Versekeringskorporasie van SA Beperk, 1967 (1) SA 339 W; Mayeki vs Shield Insurance Company Limited, 1975 (4) SA 370 C; Makgae vs Sentraboer Koöperatief Beperk, 1981 (4) SA 239 T; Dlikilili vs Federated Insurance Company Limited, 1983 (2) SA 275 C; Msomi NO vs Nzuza, 1983 (3) SA 939 D and Monamodi vs Sentraboer Co-op Limited, 1984 (4) SA 845 W.

6.4.2 Subsequent to the above-mentioned decisions the matter came up once again in the case of Mgoqi vs Protea Assurance Company Limited, 1985 (4) SA 159 C wherein the Full Bench of the Cape Provincial Division followed Monamodi vs Sentraboer Co-operative Limited (Supra), the Court stating the following at page 161 D - E:

> "In my view the ordinary meaning of the words 'a certificate issued by a commissioner stating ...' in Section 31 (2)(a) is wide enough to include both a certificate of registration reflecting an entry in a register and a certificate based on some other source of information, stating what the Sub-Section requires to be stated. The production of a certificate of registration may be an easy and convenient way of proving a customery union, but it is clearly not the only one. I can find no indication in the rest of the Section or of the Act justifying such a limitation on the ordinary meaning of the words."

See also the article by Prof Kerr titled "Customery Union Widow's Claim in Delict", 1984 SALJ 224.

6.4.3 It is submitted that the Monamodi and Mgoqi cases are correct and should be followed. Dlikilili's case (Supra) has now been overruled by Mgoqi's case but Msomi's case (Supra) still stands in Natal. (It was there held that the certificate had to emanate from a register of customery unions.)

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CHAPTER 7

PRACTICAL ASPECTS OF THE PREPARATION AND HANDLING OF CLAIMS

This topic covers a very wide field which will be subdivided into the following categories:

1. Taking instructions: the first consultation.
2. Initial preparatory work
3. Investigation
4. Preparation and lodgment of claim documents
5. The suspension periods
6. Summons

Inevitably the comments which follow are directed more at assisting the plaintiff's attorney rather than the defendant's attorney.

7.1 TAKING INSTRUCTIONS: THE FIRST CONSULTATION

7.1.1 The attorney should set aside sufficient time for this important consultation since a wide range of subjects will necessarily will have to be covered.

7.1.2 DOES THE CLIENT HAVE A CLAIM?

The first step is to establish whether the client has a

claim or not. A few minutes should therefore be spent in questioning the client in order to glean the essential facts which gave rise to the client's decision to consult an attorney. A few short questions concerning the circumstances of the accident will normally enable the attorney to advise the client whether his particular circumstances qualify for a claim under the Act. The attorney will naturally not overlook the fact that if his client's case does not qualify for a claim under the Act, a claim under the common law might well be possible against some other person, such as the driver and/or owner of the vehicle wherein the injured person was conveyed. Moreover, in many cases these days the client will have a claim partially under the Act and partially under common law. Knowledge of the provisions of the Act will also enable the attorney to advise his client at this early stage whether the quantum of his claim is subject to any statutory limitation.

7.1.3 STATEMENT/AFFIDAVIT ON THE MERITS

7.1.3.1 Regulation 7 (2)(b)(i) reads as follows:

> (2) An Appointed Agent shall not be obliged to compensate -
>
> (a) ....
>
> (b) Any person in terms of Section 8 of the Act for any loss or damage if the claimant concerned refuses or fails -

> (i) To submit to the Appointed Agent, together with his MV3 claim form or within fourteen days after being in a position to do so, an affidavit in which particulars of the occurrence that gave rise to the claim concerned are fully set out.

Bearing in mind that Section 8 of the Act provides that the Appointed Agent shall only be liable "on the prescribed conditions", and that the above-quoted Regulation 7 (2)(b)(i) is one such "prescribed condition", it will henceforth be necessary for the claimant to furnish to the Appointed Agent the prescribed affidavit on the merits. This affidavit need of course not be prepared during the first consultation; the practitioner may prefer to prepare it at a stage when he prepares the MV3 claim form, at which time more evidence concerning the merits may have been unearthed, and the criminal trial may have been completed. On the other hand, once it has been established that the client qualifies for a claim, the attorney should in any event during the first consultation minute a comprehensive statement concerning the circumstances and causation of the accident in question. A few rough notes are not good enough; great care should be taken in compiling this statement, since this will enable the attorney to evaluate any contention by the opposing party that the claim should be reduced in terms of the Apportionment of Damages Act 34 of 1956. It is also advisable to have

the statement signed, in case the deponent later changes his story. (See also paragraphs 7.3.2 (a) & 7.4.2.2 below).

Returning now to the affidavit prescribed under Regulation 7 (2)(b)(i) it should be noted that the Regulation requires the claimant "to submit ... an affidavit in which particulars of the occurrence that gave rise to the claim concerned are fully set out". The Regulation does not specify in so many words that the Affidavit must be by the claimant himself, but this is certainly what the legislature seems to have intended. Nevertheless, certain classes of claimants, such as the dependants of a breadwinner who was killed as a result of the accident in question, will not be able to give an affidavit from their own knowledge describing the circumstances of the collision; obviously only persons who actually witnessed or experienced the accident themselves will normally be in a position to testify under oath as to how the accident happened (see also paragraph 3.8.4 above.) Although the MVA Fund, which was responsible for the drawing of the Regulations, has conceded that it will be impossible for certain claimants to comply with what was intended in Regulation 7 (2)(b)(i) (and has undertaken to review it), there are in the meantime two options open to the claimant who is unable to testify under oath as to how the accident occurred:

(a) He may simply make an affidavit wherein he confirms that he cannot from his own knowledge describe the circumstances of the accident under oath, stating the reasons for his inability to do so; (the MVA Fund has confirmed that such an affidavit will be acceptable) and

(b) He may simply attach to his claim documents "an affidavit" by some other person who himself witnessed or experienced the accident.

With regard to (b) above it should be noted that Regulation 7 (2)(b)(ii) requires the claimant in any event to furnish the Appointed Agent with copies of all statements obtained from witnesses. For purposes of the latter Regulation such "statements" need not be made under oath, but if a "statement" by a person other than the claimant himself is to be used in order to comply with Regulation 7 (2)(b)(i), it will have to be submitted to the Appointed Agent in the form of an affidavit. (See also paragraph 3.8.5.)

7.1.3.2 Practitioners must bear in mind that the affidavit required by Regulation 7 (2)(b)(i) is not given to the Appointed Agent on a "without prejudice" basis. Indeed, there can be no doubt that the Appointed Agent will be able to use the affidavit in question for purposes of

cross-examination at the trial. In the interest of the claimant and of the attorney himself the affidavit will accordingly have to be drawn as accurately as possible, even if it contains elements which may be damaging to the claimant's case. It is all very well to submit a statement which, on indulgent paper, creates the impression that the claimant has an impeccable case on the merits, but it must be remembered that the deponent will be subjected to searching and probing cross-examination at the trial, and experience has shown that an apparently flawless case can come crashing down with devastating effect once it is properly tested. The attorney should consequently himself undertake the task of testing the veracity and reliability of the deponent's allegations before he reduces them to writing. It is a simple exercise to put to the deponent informally the type of question which he may expect to receive in the witness box, without offending him. In this manner the attorney should satisfy himself as best he can that what is reduced to writing is the deponent's true version of the facts to which he is able to testify. The use of phrases subtly chosen to create nuances demonstrating the facts in a manner more favourable to the claimant's case than an in-depth examination will reveal them to be, should be avoided at all costs: Firstly it gives a false gloss to the claimant's prospects; secondly it is simply not honest, and the dishonesty is bound to be exposed; and thirdly

the spirit of the new requirements regarding an early exchange of evidence on the merits is that the search for the truth should be conducted at an early stage so that the matter may be concluded on the basis of the true facts at as soon and inexpensive a stage as possible. It is not suggested that the affidavit should be prepared on a question-and-answer basis; the statement should simply contain what both the claimant and his attorney honestly expect the claimant's evidence at the trial ultimately to be. And since Regulation 7 (2)(b)(i) requires that particulars of the occurrence should be "fully" set out, the temptation to omit the damaging aspects should be resisted. After all, when the carefully omitted evidence is eventually exposed at the trial the question "Did you tell your attorney these facts when he consulted with you for purposes of drawing the prescribed affidavit?" will undoubtedly rear its ugly head. The attorney should therefore realise and appreciate that his own integrity is at stake. He should therefore simply present his client's case as it really is, not as he wishes it to be. (See also paragraphs 7.3.2 (a) and 7.4.4.2.)

7.1.4 POLICE STATEMENTS

It should be noted that upon the instructions of the Commissioner of Police, the Station Commander in question

will, upon payment of a small fee, supply a copy of a statement made to the police in connection with the accident concerned, to the deponent or to his attorney or to the Appointed Agent, provided all aspects relating to criminal prosecution have been concluded and the deponent in question has signed a written authority wherein he waives his privilege attaching to his police statement. Consequently, if the client (and/or his witnesses) confirms that a statement was indeed made to the police, a written authority should be prepared and his signature thereto obtained so that a copy of the statement can be applied for. It is essential that the attorney should establish at this early stage whether the client's version on the merits accords with the version he supplied earlier to the police.

7.1.5 NO STATEMENTS TO BE MADE TO OTHER PERSONS

The client should be advised not to give any statements to other persons before consulting his attorney regarding any approaches in this regard. Where the client is approached by the police for a statement, the attorney should advise the client whether it would be in the latter's interests to make such a statement or not. If so, it would be advisable for the attorney himself to prepare the statement and to have it attested before an independent commissioner of oaths, before it is handed to the investigating officer. Experience in this type of case

has revealed that the policeman's own choice of words in minuting such a statement often turns out to be an embarrassment to the deponent when the latter finds himself under cross-examination in the witness stand.

7.1.6 NOTES REGARDING NATURE OF INJURIES AND TREATMENT

During this first consultation the attorney should make notes regarding the nature of the injured person's injuries and the treatment thereof, including the name and address of the doctor/specialist who treated him and of the hospital where he was hospitalised, and also the precise period of such hospitalisation. On the strength of this information the attorney will then be able to decide whether a detailed medico-legal report should be obtained or whether the statutory medical form will suffice. He should also consider having photographs taken of visible injuries or disfigurement, as these often have a greater impact than verbal descriptions.

7.1.7 APPOINTMENT FOR MEDICO-LEGAL EXAMINATION

If the injured person's injuries and the after-effects thereof justify the expense of a full medico-legal examination, it is advisable to telephone a specialist during this consultation for an appointment which is mutually suitable. Often, however, the injuries have not

become sufficiently stabilised by the time this consultation is held, in which event the appointment will have to be made at a later stage.

7.1.8 MEDICAL AND HOSPITAL ACCOUNTS/VOUCHERS

All medical and hospital accounts/vouchers should be obtained from the client (or if not available, he should be requested to deliver them as soon as possible), and the client should indicate which accounts have been paid and which are still unpaid. In respect of any unpaid medical accounts the client's instructions should be sought as to whether he proposes paying these or whether he requires the attorney to seek the suppliers' consent that payment may be deferred until after finalisation of the claim. (Obviously the supplier is not obliged to consent to any such deferment, but in practice such consent is often given, particularly where the quantum of the medical expenses incurred makes recovery from the claimant unlikely.) The client should be advised that accounts incurred with any provincial hospital need not be paid, since such hospitals will upon request agree to deferment of payment until after finalisation of the claim, and will reverse the charges upon proof that the claim has succeeded. (See paragraph 9.2.1.)

7.1.9 WRITTEN AUTHORITY: HOSPITAL RECORDS

The attorney should obtain the client's signature to two written consents wherein the hospital in question is authorised to allow the attorney in question as well as the defendant to peruse the records relating to the injured person's hospitalisation and to receive extracts therefrom. Without such authorisation the hospital authorities will neither complete the requisite statutory medical form nor allow the attorneys to peruse the relevant dossier. Where possible, this consent should reflect the hospital's reference number and/or the date of the patient's admission.

7.1.10 ABSENCE FROM WORK: LOSS OF EARNINGS

It should be established from the client whether there was any absence from work as a result of injuries sustained in the collision, and if so, for what period. Where necessary, the name and address of the employer should be obtained so that details of any loss of earnings may be called for. Further comments concerning this aspect are contained in paragraph 9.2.5 below.

7.1.11 WAS THE PERSON INJURED IN THE COURSE OF HIS EMPLOYMENT?

The client should be requested to indicate whether the person concerned was injured in the course of his

employment, and, if so, whether the employer has notified the Workmen's Compensation Commissioner. The Commissioner's reference number should be obtained since it will be necessary for the attorney to correspond with that official. (As to who is a workman, see Chapter 4.)

7.1.12 PARTIAL COMPLETION OF MV3 CLAIM FORM

The attorney should go through the MV3 claim form with the client during this first consultation in order to obtain as much as possible of the required information. Available information should be minuted and the client should be given a list of outstanding information still required of him. It is important to remember that Note (iv) at the top of the MV3 claim form requires paragraphs 2 - 5 as well as paragraph 6 (a) thereof to be completed before the form is submitted to a doctor for completion of the medical form. (Form MVA 13 required paragraphs 1 - 4 as well as paragraph 6 (a) to be completed at this stage, but the name of the defendant need no longer be inserted in the new form MV3 prior to the form being submitted to a doctor for completion, but on the other hand paragraph 5 of the form which deals with particulars of any other vehicles involved in the collision must now also be completed at this stage whereas this was not necessary with regard to the old MVA 13 form.)

7.1.13 POWER OF ATTORNEY

It is advisable to obtain a power of attorney at this first consultation, not only to institute action but also, in appropriate cases, to sign the MV3 claim form on behalf of the claimant.

7.1.14 COVER FOR FEES AND DISBURSEMENTS

While deposits are in practice not always obtained, the first consultation is naturally the time to attend to this aspect, particularly in cases where medico-legal reports (or actuarial reports) will have to be obtained. Experience has shown that such reports can be extremely costly and the attorney should be mindful of the fact that he will be responsible for the payment of the costs relating to such reports. Indeed, specialists often refuse to deliver the medico-legal reports until the account for the examination and compilation of the report has been paid. (They are quite entitled to do so as they receive their instructions from the attorney.) In addition, the attorney could be faced with a number of other disbursements including the cost of a radiological report (where applicable), police plan and report, copies of police statements an/or criminal records, experts' reports, the deputy sheriff's charges, counsel's fees, stamps, etc.

7.1.15 INSPECTION in loco

If it is practicably feasible, it will often be extremely important for the attorney to visit the scene of the accident on the day of the first consultation. If tracks and marks or other physical indications have not been erased, photographs and measurements and/or other observations will often have great value, particularly since measurements and other details recorded by the police are likely to be inadequate, inaccurate, misleading or quite useless. Since it is not advisable that the attorney himself become a witness in his client's case, he should retain the services of an assessor or photographer for the inspection in loco, or perhaps a surveyor (or draftsman) in case a scale plan is required.

This concludes the main features of the first consultation. The steps which a prudent attorney ought to take immediately after such consultation will now be considered.

7.2 INITIAL PREPARATORY WORK

7.2.1 INFORMATION FROM THE POLICE DOCKET

In the first place a letter should be written to the station commander of the district in question containing sufficient details to enable the latter to identify the

accident in question, wherein the attorney calls for the following information:

(a) A copy of the police plan and report.

(b) In the event of the plan and report being not yet available (for instance, where the criminal trial or the inquest is still pending), the name and address of the driver of the vehicle concerned, as well as the name of the Appointed Agent which issued the token (if any), the token number and numberplate reading.

(c) The names and addresses of all persons who gave statements to the police in connection with the accident. (The purpose of this request is obviously to identify the witnesses, with a view to obtaining written consents from them authorising the police to supply copies of their police statements.)

(d) Details of any criminal prosecution and/or trial (or inquest), such as the relevant case number and the date of hearing, so that application may be made to the clerk of the court for a copy of the record.

(e) Confirmation that the police dossier will not be destroyed pending finalisation of the civil claim.

7.2.2 COMPLETION OF THE STATUTORY MEDICAL FORM

A letter should be written to the doctor/s who treated the injured person, or to the superintendent of the hospital where the person was treated, enclosing the MV3 claim form (of which paragraphs 2, 3, 4, 5 and 6(a) must be already completed), requesting him to complete the medical portion of the form. It goes without saying that if this letter is addressed to the hospital superintendent, it should be accompanied by the written consent referred to in paragraph 7.1.9 above. More detailed comments on the requirements for completion of this medical form are set out in paragraphs 7.4.3 and 7.4.4.

7.2.3 INSTRUCTIONS TO SPECIALIST CONCERNING MEDICO-LEGAL EXAMINATIONS

In cases where the attorney decides that a full medico-legal report is necessary, a letter should be addressed to the specialist of his nomination confirming the date, time and venue for the examination, and giving detailed instructions as to the aspects which should receive the specialist's specific attention in this report. In this regard the following information should normally be adequate:

(a) The nature, extent and severity of each injury.

(b) The nature and duration of all treatment administered thus far (including the relevant dates of hospitalisation) with details of any complications which may have arisen during the treatment and an indication of the results/effects of the treatment and an indication of any permanent disablement.

(c) The effect which the patient's disablement has had on his earning capacity and the amenities of life.

(e) The nature of any future medical treatment, the anticipated date and duration thereof, and the specialist's estimate of the costs arising from such future treatment.

7.2.4 CERTIFICATE FROM EMPLOYER REGARDING LOSS OF EARNINGS

7.2.4.1 Since it is necesaary for a claim in respect of alleged loss of earnings to be properly vouched, a letter should be written to the injured person's employer calling for the information required. In drafting this letter the attorney must be thoroughly au fait with the implications of the relevant decisions dealing with payments and benefits accorded by an employer to an employee in respect of periods during which the employee

was absent from work as a result of the injuries which gave rise to the claim for compensation under the Act. The effects and implications of these decisions may broadly be categorised as follows:

(a) Where the employer paid the employee's remuneration, or part thereof, in respect of the period of absence from work, and did so without obligation, purely as a gesture of goodwill or benevolence, the employee may nevertheless again recover from the Appointed Agent the full amount he would have received from his employer had he not been injured, since the Appointed Agent is in such circumstances not entitled to the benefits accruing from the employer's benevolence or goodwill. (Santam Versekeringsmaatskappy Beperk, vs Byleveldt, 1973 2 SA 146 A at 150 - 154)

(b) Where the employee has already recovered his actual loss of earnings from some other source (other than the wrongdoer), such as by virtue of the provisions of a contract of insurance taken out by him prior to the loss, the full loss is nevertheless also recoverable from the Appointed Agent in question, since the proceeds of the claimant's own insurance policy are regarded as res inter alios actae, and the wrongdoer (Appointed Agent) is not entitled to

benefits accruing from the claimant's policy of insurance. (Santam Versekerings-maatskappy Beperk v Byleveldt (Supra) at 152 E - H; Van Dyk v Cordier, 1965 (3) SA 723 O; Van der Merwe & Olivier, Die Onregmatige Daad in die Suid-Afrikaanse Reg (4th Edition) at pages 183 - 184; Corbett, Buchanan & Gauntlett, The Quantum of Damages, 3rd Edition page 14).

(c) But where wages have been paid to the employee as of right by virtue of the terms of his contract of employment, in the sense that the employer was obliged thereunder to make payment of such wages in respect of the period of absence, such wages are not recoverable from the Appointed Agent. (Dippenaar vs Shield Insurance Co Ltd, 1979 (2) SA 904 A; Serumela vs S A Eagle Insurance Company Limited, 1981 (1) SA 391 T at 392 c - 393 E; Krugell v Shield Shield Versekeringsmaatskappy Beperk, 1982 (4) SA 95 T at 102 A - 104 F.)

7.2.4.2 Having regard to the aforegoing legal principles, the attorney should include in his letter to the employer enquiries concerning not only the precise period of absence from work and the employee's salary at the relevant time, but also details of any payments made to the employee in respect of such period of absence, and particularly whether

the employer was obliged by virtue of the employee's terms of employment to effect such payments, or whether the payments concerned were made without obligation and purely as a gesture of goodwill, benevolence or generosity. In fact, it would be prudent to ask for a copy of any written contract of employment or any Regulations governing such employment.

7.2.5 LISTS OF MEDICAL AND HOSPITAL ACCOUNTS

All medical and hospital vouchers should be scrutinised to avoid duplication, sorted and arranged, and a list compiled reflecting separately the expenses incurred with provincial hospitals, private hospitals and other medical suppliers. This list will be supplemented from time to time as further vouchers are received and the final list will be attached to the MV3 claim form together with copies of the vouchers specified therein.

7.2.6 REQUESTS FOR DEFERMENT OF PAYMENT

If so instructed by the client, the attorney should now write to all medical suppliers whose accounts are still unpaid, requesting their consent to deferment of payment until after finalisation of the claim. Provincial hospitals will readily give such consent and will, as

stated above, reverse their charges upon written proof that the claim has been successful. But other medical suppliers, including doctors, are certainly not obliged to agree to deferment of payment of their accounts. (See also paragraph 7.1.8.)

7.2.7 DOCUMENTS FOR SUBMISSION TO SPECIALISTS

Steps should be taken to obtain copies of all medical reports and/or records, including the X-rays taken after the accident and the radiological reports relating thereto, all of these to be placed at the disposal of the specialist before he conducts his medico-legal examination.

7.2.8 NOTIFICATION/PERMISSION: WORKMEN'S COMPENSATION COMMISSIONER

If the claimant is also entitled to compensation under the Workmen's Compensation Act, Nr 30 of 1941, a letter should be addressed to the Commissioner (or to the employer individually liable, as the case may be):

(a) Notifying him in terms of Section 8 (2) of that Act, of the claimant's intention to institute action (and seeking his consent to do so, if so requied by virtue of Section 8 (5) of that Act) for damages in terms of

Act 84 of 1986; (See paragraph 4.6.4 above) and

(b) Requesting him to furnish details of all awards made by him to the claimant under Act 30 of 1941.

Broadly speaking all amounts paid to the claimant by the Commissioner will be deducted by the Court from damages awarded under Act 84 of 1986, and details concerning the Commissioner's award will have to be inserted in the appropriate space in the MV3 claim form. See in this regard the Commentary on Section 9 (2) of the Act, (paragraph 3.9.14) as well as paragraph 4.4.

7.2.9 DEMAND TO OWNER FOR INFORMATION

7.2.9.1 Section 20 (2) of the 1972 Act enabled the claimant or his attorney to demand of the owner of the vehicle concerned:

(a) That he produce "the prescribed proof of insurance of the motor vehicle at the time of the occurrence in question ...", i.e. the declaration of insurance (MVA3) or the so-called "notice of change of ownership and proof of insurance" (MVA11), as well as a copy of the so-called "statutory accident report form" completed by the insured for his MVA insurer in respect of the accident in question;

and

(b) That he permits the claimant or his representative to make a copy "of any such information" or to take extracts from it.

Insofar as Act 84 of 1986 is concerned the legislature has unfortunately seen fit to scrap the provisions referred to above. Section 13 of the Act (the successor to Section 20 of the 1972 Act) retains the obligation resting on the owner and the driver of the vehicle concerned to report the accident to the Appointed Agent (or the MVA Fund, as the case may be) within fourteen days after the occurrence, but one searches in vain for any provisions corresponding with Section 20 (2) of the 1972 Act.

7.2.9.2 The claimant consequently no longer has any enforceable right whereby he can demand that the owner should furnish information which will enable the claimant to identify the Appointed Agent which issued the token which was on the motor vehicle concerned at the time of the accident, or indeed whether there was such a token on the vehicle at all. For a fuller discussion of this aspect , see paragraph 7.3.4.

7.2.10 REQUEST TO AUTHORISED INSURER FOR INSURANCE DOCUMENTS

Not even under the 1972 Act did the claimant or his legal representative have any right to demand of the authorised insurer that it should furnish any documents or information, but it did happen in practice - and it was prudent for the claimant's attorney to do so - that a letter was written to the company indicated by the police report (or identified by the owner) as the authorised insurer of the vehicle in question, requesting such company to confirm that it was on risk at the time of the accident and to furnish copies of the documents referred to in paragraph 7.2.9.1 above. There is no reason why attorneys representing claimants should in future not continue with this practice; indeed, since the claimant no longer has any right to demand information or documents from the owner of the vehicle concerned, the claimant and his attorney will have to "beg, borrow or steal" the required information or documents from all available sources. Where the vehicle bore a token of identification at the time of the accident a letter should be despatched to the company which issued that token to seek confirmation that it did indeed issue the token in respect of that vehicle. Unfortunately the claimant will not even be entitled to request a copy of the statutory MV5 accident report form because the Appointed Agent only becomes obliged under Section 13 (3) of the Act to furnish the claimant or his

agent with a copy of that form "within fourteen days after the third party has complied with the provisions of Section 15 (2)(b)", which in turn refers to the stage when the claimant has complied with "all the prescribed requirements of the Appointed Agent". And as we have seen, the "prescribed requirements of the Appointed Agent" are to be found in Regulation 7 (2)(b) and particularly 7 (2)(b)(iii). Thus, whereas the authorised insurer would under the 1972 Act have furnished the required documents to the claimant or his attorney as soon as these were available, the Appointed Agent will under the new Act be entitled by Section 13 (3) to refuse to furnish a copy of the statutory accident report form until the prescribed requirements mentioned in Section 15 (2) (b) read together with Regulation 7 (2)(b(iii) have been complied with. In this respect the claimant clearly finds himself in a poorer position than under the 1972 Act despite the fact that he admittedly becomes entitled to the documents mentioned in Section 13 (3) once all the prescribed requirements have been complied with.

7.2.11 THE ATTORNEY'S FILE

In conclusion of this second category of steps to be taken by the attorney in connection with his client's claim, two suggestions are made which, it is hoped, could be fruitfully followed:

(a) Warning against prescription

It is suggested that the date of the collision be endorsed in an eye-catching colour on a conspicuous part of the file cover so as to act as a constant reminder of the threat of prescription. Later the date of despatch of the MV3 claim documents should be similarly endorsed, together with the expiry date of the 90-day period, and the date on which the MV3 claim form was received by the Appointed Agent. The latter date will in the case of despatch of the claim documents by registered mail have to be obtained from the Appointed Agent, but it is necessary for the attorney to have this date, having regard to the provisions of Section 14(2) of the Act. Further dates which should similarly be recorded in a prominant place, are firstly, the date on which the claimant's attorney receives the Appointed Agent's notice under Section 14 (2) repudiating liability or making an offer of settlement, and secondly the date on which the claimant has finally complied with "all the prescribed requirements of the Appointed Agent as envisaged in Section 15 (2)(b) read together with Regulation 7 (2)(b)(iii).

(b) Subdivision of file contents

Experience has shown that many attorneys have rather shoddy habits concerning the contents of the MVA file. More often than not the contents are in such a chaotic state of disarray that a great deal of time must repeatedly be wasted in rummaging through the rather voluminous file to find certain documents or information or to check what steps have already been taken and what should still be done. It is absolutely imperative that a series of inner files be used to effect an orderly subdivision of the documentation and to facilitate easy reference and access. Although circumstances (and tastes) may vary, the following subdivisions will normally be found to work well:

(i) Correspondence

(ii) Merits

This sub-file will contain such documents as the police plan and reports, witness statements, a copy of the claimant's affidavit as required by Regulation 7 (2)(b)(i), the record of the criminal trial, photographs and other documents relating to causation of the accident, including the copy of the MV5 and other statements eventually to be received from

the Appointed Agent in terms of Section 13 (3) of the Act.

(iii) Medical reports

This sub-file will contain all medico-legal reports, other medical records, the statutory medical form and the notes made during the first consultation concerning the injured person's injuries and the treatment thereof.

(iv) Medical and hospital vouchers

This sub-file will contain the lists of the medical and hospital accounts to be claimed, together with copies of the supporting vouchers listed therein, arranged according to the sequence indicated by the lists.

(v) Documents relating to the identity of the Appointed Agent

This sub-file will contain any information gathered in connection with the token which was on the vehicle concerned at the time of the accident, including copies of any correspondence relating thereto, and in the case where the vehicle concerned carried no token at the time of the accident, copies of

correspondence with the Appointed Agent seeking its confirmation that it will be handling the claim by virtue of the Date Schedule published in the Government Gazette of the 12th of September 1986 whereby claims are to be distributed to the various participating Appointed Agents according to the date of the accident.

(vi) Loss of earnings

This aspect often involves acquiring not only a certificate from the claimant's employer but also tax returns, balance sheets, profit and loss accounts, etc. If all these documents are kept in a single sub-file, together with copies of any correspondence written/received in connection with the claimant's alleged loss of earnings, the attorney will not have to search through his entire file when the time comes to evaluate the client's claim for loss of earnings or to reply to queries from the opposition in this regard.)

(vii) MV3 claim form and annexures

This sub-file will initially contain the partially completed MV3 claim form where it will be easily accessible for purposes of

further completion from time to time as necessary information comes to hand, and after the document has been completed and signed, a full copy thereof, with all annexures thereto, will remain in this sub-file.

(viii) The pleadings

This sub-file will contain copies of all the pleadings and formal notices properly sorted and bound in chronological sequence.

(ix) Counsel's brief

Once the services of an advocate have been employed, care should be taken to file in his brief a full set of pleadings and notices and to ensure that counsel has a full and identical replica of his attorney's own set of pleadings and notices.

This brings us to the end of the second category of steps in the claims procedure. The first consultation has been held and quite a number of letters have been dictated in preparation for the more substantial investigations which are now to follow.

7.3 INVESTIGATION

The steps in this third category are taken over a period of time, as and when the attorney receives reaction to the letters by which he initiated his enquiries, as indicated in paragraph 7.2.

7.3.1 RECEIPT OF POLICE PLAN AND REPORT

The following aspects with regard to this document should be borne in mind:

7.3.1.1 It should be carefully considered immediatly upon receipt thereof. The attorney should check whether it accords with the allegations of the claimant and his witnesses, and secondly the measurements and key thereto should be considered in order to check whether the police have recorded such measurements as are crucial to a determination of blame, and particularly also whether sufficient fixed points have been recorded to render possible a reconstruction of the point of impact (or other important marks or features) during a later inspection in loco.

7.3.1.2 Any problems arising out of the plan and report should be taken up with the police without delay so as avoid problems at a later stage. It often transpires that information recorded by the investigating officer in his

official pocket book have been incorrectly transposed to the police plan; similarly, copies of the plan and report often differ in some detail from the original plan and report in the dossier.

7.3.1.3 Careful perusal of the report (SAP 352) is also essential since it contains a fair amount of detail which is called for in the MV3 claim form. However, under no circumstances should reliance be placed solely on police information relating to important details such as the date of the accident, the identity of the Appointed Agent and the relevant token number. Information gleaned in this respect from the police report should be checked and corroboration should be obtained from other sources. Errors in details recorded in the police documents are not infrequent and if such details are left unchecked, the attorney would be courting disaster.

7.3.1.4 If circumstances demand it, the scene of the accident should be visited together with the client. Efforts should be made to reconstruct the point of impact from the measurements recorded by the police. The habit of delaying this inspection until a day or two before the trial cannot be recommended; the attorney will be required to adopt an attitude on the merits and may be called upon to express his views on a possible apportionment at an early stage, and he should ensure

that he is well prepared for this. And since it is not advisable that the attorney himself become a witness in his client's case, he should retain the services of an assessor or photographer for the inspection *in loco*, or perhaps a surveyor (or draftsman) in case a scale plan is required.

7.3.2 WITNESSES AND EXPERTS

During this period of investigation the attorney should conduct a thorough investigation into the merits of the collision, and in this regard he should *inter alia* bear in mind the following:

(a) *Witness statements*

Consultations with all witnesses should be arranged as soon as possible. The attorney should preferably conduct the consultations personally and minute the statements himself. During these consultations he will be afforded an early opportunity of evaluating the reliability/credibility of his client's witnesses. Assessors are seldom well versed in the legal principles which are crucial to the determination of blame in specific types of collisions, and lengthy assessors' reports and/or statements frequently miss the point entirely, are

grossly misleading or utterly without value. A rude awakening may await the client's legal team at Court if too much reliance is placed on the cold paperwork of an assessor or a policeman or even a colleague or an articled clerk. Only the attorney himself, with his personal knowledge of the case and his experience in trial actions, will be able to probe effectively beneath the surface which at first glance might appear to be plausible. Effective dissipation of superficial defences lies squarely within the province of the attorney, particularly since he has the training and the experience to evaluate the authenticity of reconstructive representations, by anticipating the type of well-directed questioning to which the witnesses will be subjected under cross-examination. The wisdom of exposing your own client's case to rigorous testing at an early stage cannot be over-stated, and will be sorely remembered by those who have had the misfortune of observing their paper-cases crumble and disintegrate in the witness stand. (See also the remarks in this regard in paragraph 7.1.3 above.)

Moreover, it goes without saying that statements should be minited while the experience is still fresh in the minds of the witnesses concerned, since many months, even years, will pass before the witness is called upon to testify in Court, by which time his

recollections may have faded, or his loyalties become clouded. Hence the necessity for obtaining a signature to each and every statement. And since copies of all the claimant's witness statements must be furnished to the Appointed Agent under Regulation 7 (2)(b)(ii), the draftsman of these statements must bear in mind the remarks set out in paragraph 7.1.3 relating to the preparation of the claimant's affidavit on the merits, which apply here with equal force.

(b) Experts

Experts too should be consulted at an early stage. Allegations concerning mechanical defects, direction of impact, stopping distances, burst tyres, etc., should be submitted to expert scrutiny at a time when the vehicle (or parts thereof) are still available, and/or when marks on the road are still visible. More often than not, cases are won by thorough investigation and preparation at an early stage rather than in those last few days before the trial when the entire exercise turns into a race directed towards beating the time limites prescribed by the rules of Court.

7.3.3 RECEIPT OF THE CRIMINAL RECORD

A copy of the criminal record or inquest should not, as so often happens in practice, be slipped into the attorney's file, there to slumber in ineffectual tranquility until eventually being disentombed and transferred to counsel shortly before commencement of the trial by an articled clerk basking in an aura of uncaring nescience. The document should be immediately and carefully perused, since it often contains a wealth of information which could fruitfully be used in furthering the client's case. A successful litigation attorney is one who assumes and retains for himself complete control over the conduct of the client's case; his attentions are constantly directed to the gathering and evaluation of evidence and he does not run to counsel about each petty aspect which crops up. In short, he does not participate in the present-day practice of some attorneys who appear incapable of doing anything without first seeking counsel's advice, thus eroding and emasculating the established practice of "instructing counsel".

Every scrap of evidence contained in the criminal record should be perused, checked and evaluated and the witnesses should be consulted in order to assess their real value. The document should not simply be regarded as a record of all available evidence; it is rather a platform from which further investigations can and should be pursued.

7.3.4 IDENTIFICATION OF THE APPOINTED AGENT

7.3.4.1 It has already been pointed out that the claimant no longer has any rights corresponding to those which were contained in Section 20 (2) of the 1972 Act whereby the owner of the vehicle concerned could be obliged to furnish certain documents and/or information which would enable the claimant to identify the Appointed Agent liable for the client's damages. It must also be borne in mind that some vehicles will carry tokens of identification and others not. It is very important to note that claims arising from the driving of tokenless vehicles will not be handled by the MVA Fund as was the case under Regulation 5 of the 1972 act. Claims arising from the driving of tokenless vehicles are handled by Appointed Agents in accordance with the Date Schedule published in the Government Gazette on the 12th of September 1986. (See paragraph 3.2.1.3 above where the Schedule has been reproduced.) Once either the owner or the driver of the vehicle concerned has been identified, the claim must be handled by an Appointed Agent. Regulation 7 (1) then provides that if the vehicle concerned carried a token of identification referred to in Section (2)(1)(a) of the Act, the claim must be handled by the Appointed Agent which issued that token. If the vehicle carried no token of identification, but the identity of either the owner or the driver is known,

the aforementioned Date Schedule must be consulted to establish which Appointed Agent will handle the claim. (See Regulation 7 (1)(b))

7.3.4.2 With regard to claims arising from the driving of tokenless vehicles, disaster awaits the unwary attorney who misquotes the exact date of the accident in question. This is going to be a particular problem with regard to accidents which occurred shortly prior to or shortly after midnight. In many instances two consecutive dates of the month have been allocated to two different Appointed Agents. The police report might well reflect a certain date as the date of the accident because the police arrived at the scene of the accident some time after midnight. But the accident may in fact have occurred a few minutes before midnight, i.e. on the preceding date, which could involve a totally different Appointed Agent as defendant. It is submitted that if there is any uncertainty as to which of two Appointed Agents should handle a particular claim, because of uncertainty as to the correct date of the accident, the claimant's attorney would be prudent if he held both Appointed Agents liable jointly and severally. (It may be noted here that the MVA Fund claims to have instructed the participating Appointed Agents <u>not</u> to take the point that the wrong defendant has been sued because of uncertainty as to the correct date, and any action to the contrary should therefore be drawn to the

attention of the Fund.)

7.3.4.3 The attorney should immediately set about the task of establishing with which Appointed Agent his client's claim must be lodged. Since nobody is obliged to assist him in his quest to identify the correct Appointed Agent, the claimant may have to tap various sources, one of these being the owner of the vehicle concerned. Even where the identity of the Appointed Agent who must handle the claim is known, the name and address of the owner and the driver are nevertheless required by the claimant because he must insert these details in the MV3 claim form. The police report identifies only the driver of the vehicle, who frequently is not its owner. What is more, the police report often reflects an incorrect token number or Appointed Agent. In the past it occurred often that more than one third party token was displayed on a vehicle, particularly where the owner has not removed old tokens, and it therefore happened that the details of an inapplicable token were recorded in the police report. Admittedly Section 2 (1)(a) prohibits a vehicle displaying more than one token of identification, but this is unlikely to deter motorists from having more than one token of identification on their vehicles at a given time. Where this does happen both Appointed Agents must surely be liable, jointly and severally. Another problem which the claimant may

encounter is that the token of identification on the vehicle concerned may have been totally destroyed or lost in the accident in question, in which regard see paragraph 3.6.4 for a more detailed discussion.

The attorney should be mindful of these practical problems and should be aware of the various alternatives open to him. These alternatives include, where the vehicle's registration number is known, an application to the licencing authorities to furnish the name and address of the owner of the vehicle at the date of the accident. In fact, the right to demand the necessary information from the owner of the vehicle having been abolished, the licencing authorities will have to prepare themselves for a flood of enquiries under the new MVA Scheme. A letter may of course also be written to the driver and/or the owner of the vehicle requesting him/them to identify the Appointed Agent whose token was on the vehicle concerned at the time of the accident, but neither of them can be forced to respond. Where the token was either lost or destroyed in the collision, the claimant may find himself in real trouble because as Regulation 7 (1) is presently worded the claimant may not in such circumstances refer to the Date Schedule; that Schedule refers only to vehicles which <u>in fact</u> bore no token at the time of the accident. If the owner does not co-operate by identifying the correct Appointed Agent, the claimant will accordingly be without remedy

until such time as Regulation 7 (1) is amended. (Hopefully this will be done with retrospective effect). Where the identity of the Appointed Agent has been established, but not that of the owner, the necessary information could of course be requested (apart from the licencing authorities) from the Appointed Agent, and although the latter would not be obliged to supply this information, a great deal of co-operation is often encountered in practice in this regard. And where the token number is known but the name of the Appointed Agent which issued it is not known, the missing information can of course be obtained from the MVA Fund which has records of the tokens issued to the different Appointed Agents.

7.3.5 It has been mentioned that the owner was obliged under Section 20 (2) of the 1972 Act to furnish certain documents to the claimant which would enable the latter to identify the authorised insurer liable for the claimant's damages. In fact, Section 20 (3) of that Act provided that if the owner failed to respond to the statutory demand, he could be criminally prosecuted. Moreover an attorney representing the claimant could also consider applying for a mandamus against the owner, compelling him to comply with his obligations under Section 20 (2) of Act 56 of 1972. In Da Silva vs Coutinho, 1971 (3) SA 123 A the owner had negligently failed to comply with the

obligation resting upon him in terms of Section 20 (2) of the said Act and the Appeal Court held that such breach of the statutory duty rendered the owner liable in his personal capacity under common law for the damages which the claimant could have recovered under the MVA Act from the insurer concerned, but for the owner's failure to identify such insurer. Whether or not this judgment will still apply is debatable. Firstly there is no longer a statutory duty upon the owner under the Act to furnish the necessary documents or information. Secondly the new Scheme also does not have a document corresonding with the old Declaration of Insurance which was an important document issued to the owner along with the token of insurance and which, according to the Appeal Court, could be kept in a safe place by the owner for a reasonable time so as to enable him to comply, upon request, with the statutory duty resting upon him. But in the absence of such statutory duty a claimant who has been non-suited under the Act because of his inability to identify the Appointed Agent concerned will be confronted with grave difficulties in his endeavours to prove causal negligence on the part of the owner who failed to identify the Appointed agent against whom the claimant's claim should be lodged. It is submitted however that the normal principles relating to Aquilian liability will apply and that in accordance with cases such as Minister van Polisie vs Ewels, 1975 (3) SA 590 A, an action may well still be sustained.

7.4 PREPARATION AND LODGMENT OF CLAIM DOCUMENTS

An integral part of the preparation of the claimant's claim document is naturally the calculation and proper formulation of the claim, but since the quantum of damages is dealt with in Chapter 9, the following comments will be limited to the actual procedural requirements in the preparation and lodgment of the claim documents.

7.4.1 COMPLETION OF THE MV3

Completion of the claim form is really a very simple exercise, provided the questions and the notes constituting the printed part of the form are carefully read. In fact, defects in the forms usually arise from the fact that the attorney's earlier research in connection with the aspects dealt with above in this Chapter has been superficial or because he has erroneously relied on uncorroborated sources. He may, for instance, have relied on information obtained from the police report without obtaining the necessary corroboration. The actual completion of the claim form is quite elementary, but the completed document should again be carefully checked for typographical errors.

As previously stated, some of the paragraphs in the claim form were completed during the first consultation, and others prior to the form being despatched to the doctor

who treated the injured person. Paragraph 9 will usually be the last paragraph to be completed.

7.4.2 THE ANNEXURES

7.4.2.1 Quantum

A well-prepared set of claim documents ought to comprise quite voluminous paperwork. Regarding quantum it should be remembered that the claims clerk who will be attending to the claim on behalf of the Appointed Agent concerned, will usually have to quantify the damages solely on the strength of evidence accompanying the claim. In the interests of his client, the attorney should therefore not hesitate to append annexures which go beyond the minimum requirements contained in the Act and the Regulations. And still on the topic of quantum, failure to annex vouchers which are required by the Act and/or the Regulations can result in prejudice. Admittedly the old Regulation 16 (4)(i), which provided that if the claim document was not accompanied by the required supporting vouchers in respect of special damages, the claim in respect of the missing vouchers would not be acceptable until satisfactory documentary proof was produced, has not been re-produced in the new Regulations promulgated under the 1986 Act. But not too much significance should be attached to this. Section 15 (1)(a) of the new Act requires that a claim for compensation under Section 8

shall be set out "in the prescribed manner" and on the "prescribed form", which form (MV3) shall include provision "for the prescribed supporting proof and particulars". Regulation 9 (1)(a) provides that "precise details shall be given in respect of each item under the heading "Compensation claimed" and shall, where applicable, be accompanied by supporting vouchers", and in addition form MV3 itself states in paragraph 9 that the claim "must be supported by vouchers, where applicable". It seems that every item of damages claimed under paragraph 9 of MV3, except for general damages, is an item where vouchers are "applicable". In the cir cumstances the attorney representing the claimant would be well advised to ensure that every item of special damages is vouched in one way or another. The claims clerk handling the matter on behalf of the Appointed Agent concerned will always be looking for some sort of cor roboration for each item of special damages claimed. The golden rule is that the claimant's attorney should put himself in the position of the Appointed Agent's claims clerk and ask himself whether he would have been able to quantify the claim as it was presented. If the amount claimed under any of the items of special damages had to be calculated, the calculation should be set out on a special annexure so that it may be checked at the receiving end. See also paragraph 9.2.5.1.)

7.4.2.2 Merits

Turning now to the question of causation of the accident concerned ("the merits"), the position under the new Act is even more explicit than in the case of the quantum of the claim, and certainly considerably more prejudicial to the claimant. It should once again be remembered that Section 8 of the 1986 Act states that the Appointed Agent (or the MVA Fund, as the case may be) shall be liable for the claimant's damages "on the prescribed conditions", and these conditions are to be found in Regulation 7 (2) which lists the circumstances under which the Appointed Agent shall not be obliged to pay compensation under the Act. Since we are dealing here exclusively with annexures to the claim documents, we need refer only to Regulation 7 (2)(b). In summarised form this Regulation in effect states that the Appointed Agent may repudiate liability if the claimant refuses or fails -

(a) To attach to the claim form (MV3) "an affidavit in which particulars of the occurrence that gave rise to the claim concerned are fully set out" (or to submit such affidavit within fourteen days after being in a position to do so);

(b) To furnish the appointed Agent with "copies of all statements and documents" relating to the merits

within fourteen days after having come into possession thereof; or

(c) To furnish in writing such further particulars concerning the merits as the Appointed Agent may require.

It is therefore imperative that every scrap of documentary evidence on the merits in possession of the claimant or his attorney should be attached to the claim form or submitted to the Appointed Agent within fourteen days after it came into their possession. No doubt all sorts of schemes will be devised by those not keen to fall in with the spirit of the obligatory early exchange of evidence on the merits, but they will do so at the risk of the client's claim being totally repudiated. It may safely be anticipated that it will become standard practice for a claimant to be cross-examined as to the date on which certain evidence came into his possession. See also paragraph 7.1.3.2. Even rough notes made in respect of a consultation or telephonic discussion with a witness will constitute "documents relating to the occurrence" and will therefore be subject to the provisions of Regulation 7 (2)(b)(ii). An attorney who decides to simply commit to memory what he is told by the client and his witnesses (to avoid reducing it to a "document") will soon discover the shortcomings of his memory,

particularly when detailed negotiations on an apportionent ensue, or when he has to plead the precise grounds of negligence on which his client relies. And it is submitted that tape-recorded statements will also be classified as "documents" which ought to have been exchanged. Overlooking for the moment the fact that the so-called reciprocal duties resting on the claimant and the defendant respectively are at present very one-sided and heavily loaded in favour of the Appointed Agent (which can, and will surely, be amended to correct the current imbalance), attorneys should simply resign themselves to the fact that they have entered a new era wherein a full and honest disclosure of all evidence on the merits at an early stage is an essential part of the scheme. See the remarks in paragraphs 3.13.2.2 et seq.

7.4.2.3 Checklist

The following could serve as a checklist of the annexures which should accompany the MV3 claim form:

(a) It goes without saying that the statutory medical form must always accompany the claim documents (indeed, if more than one doctor treated the injured person it would be advisable to have a separate medical form prepared by each such treating doctor), the only exception to this

requirement being that referred to in sub-paragraphs (k) and (m) below. See also paragraph 7.4.3.

(b) A list of hospital and medical accounts should be attached together with supporting vouchers in respect of each item listed therein. See also paragraphs 9.2.1 and 9.2.2.

(c) In respect of any amounts claimed for future hospital or medical treatment a medical report or certificate should be attached unless the items claimed are vouched by a full medico-legal report. (Admittedly paragraph 8 of the statutory medical form requires the doctor to indicate the estimated costs of any future treatment, but experience has shown that this paragraph is seldom if ever properly completed.) See also paragraph 9.2.3.

(d) The claim for any past or future loss of earnings should also be vouched in one way or another; the Appointed Agent will always insist on some form of documentary substantiation for the amount claimed. Where the plaintiff is an employee, a certificate from the employer should therefore be attached. (See also paragraph 7.2.4 above). If he was self-employed, an auditors' certificate or the

plaintiff's balance sheet and/or profit and loss accounts or tax returns should be attached. Future losses may of course be vouched by an actuarial report or by a separate statement prepared by the attorney setting out how the amount claimed has been arrived at. (It goes without saying that the fact that future losses are likely to occur will have to be supported by the medical evidence attached.) (See also Note (ii)(b) at the top of the MV3 claim form.)

(e) Note (ii) at the top of the MV3 claim form reminds the claimant that it is desirable to attach to the claim form all medico-legal reports in the claimant's possession.

(f) A written authority for inspection by the Appointed Agent (or MVA Fund) of all records in possession of any hospital or medical practitioner regarding the injured or deceased person must accompany the form. (See Note (iii) at the top of the MV3 claim form.)

(g) In a case where a full medico-legal report is not available a memorandum or statement by the injured person should be prepared and attached, setting out the nature and extent of the injuries, the degree and duration of any pain, suffering, discomfort and loss of amenities of life, etc, details of the

treatment administered and the results thereby achieved, and particulars of any still-existing after-effects or permanent disability and/or disfigurement. The statutory medical form is far too cryptic to do justice to the claim.

(h) Immediately below paragraph 2 (b) of the MV3 claim form, the claimant is reminded that in the event of a claim for loss of support or a claim on behalf of another person, photocopies of relevant marriage and/or birth certificates, as the case may be, should accompany the form.

(i) In a claim for loss of support, the deceased's earnings at the time of his death should be vouched by his employer or in some other manner (see sub-paragraph (d) above) and the manner in which the loss of support has been calculated should be set out on a separate memorandum, or an actuarial report should be attached.

(j) Where compensation is claimed by or on behalf of more than one dependant, the information required by paragraph 8 of the MV3 claim form shall be set out on a separate statement in respect of each dependant, and attached to the claim form.

(k) Where the injuries were fatal, paragraph 7 of the claim form calls for a copy of the post mortem examination to be attached to the claim form, if available. (It is to be noted that a post mortem report is not the same thing as an inquest report as referred to in Regulation 9 (1)(b)(ii) in relation to persons who were killed "outright".) But see sub-paragraph (m) below, and paragraph 7.4.3.

(l) With regard to the merits (causation) of the accident the claimant must attach copies of every piece of documentary evidence in his possession at the time of lodgment of the claim (or if further documentary evidence should subsequently come into his possession he must furnish copies thereof to the Appointed Agent within fourteen days after having come into possession thereof). This naturally includes not only the prescribed affidavit mentioned in Regulation 7 (2)(b)(i), but also, under Regulation 7 (2)(b)(ii), the police plan and report, copies of all statements by the client or his witnesses, any notes relating to the merits, plans, sketches, taperecordings, photographs or any other documents of whatever nature relating to the occurrence that gave rise to the claim.

(m) Lastly, with regard to dependants' claims, but only

where the deceased was killed "outright", the statutory medical form need not (but may) be completed and submitted along with the claim documents. Regulation 9 (1)(b)(ii) provides that in such a case (where the person was killed outright) the form MV3 shall be accompanied by a copy of the inquest report or where there has been a criminal prosecution, a copy of the charge sheet, but both of these documents may only be used if they indicate clearly "that such person's death resulted from the accident to which the claim relates". (See also paragraph 7.4.3 below.)

It is to be noted that the claimant's statement mentioned in Regulation 7 (2)(b)(i) must be on oath whereas the witness statements mentioned in Regulation 7 (2)(b)(ii) need not be sworn to. It is strange therefore that paragraph 4 (d) of the MV3 claim form reads as follows:

> "Detailed account of the accident, including a rough sketch of the scene of the accident supported by sworn statements by claimant and eye witnesses (if any) must be furnished on a separate statement attached to this form."

This must be an error in the form and should be corrected. In the meantime the provisions of the

Regulation must surely prevail, and the statements of eye-witnesses need not, it is submitted, be under oath.

7.4.3 DOCUMENTARY EVIDENCE TO BE ANNEXED IN CASES OF DEATH

7.4.3.1 Regulation 9 (1)(b)(ii) reads as follows:

> Where a person is killed outright in a motor accident, the completion of the said medical report shall not be a requirement, but in such an event the form MV3 shall be accompanied by a copy of the inquest report, or in the case of a prosecution of the person who caused the deceased's death, a copy of the relevant charge sheet in which it is clearly indicated that such person's death resulted from the accident to which the claim relates.

Except for the reference to "the relevant charge sheet", this Regulation corresponds substantially with the old Regulation 16 (1)(b)(ii).

7.4.3.2 The reference to a person who was killed "outright" has from time to time raised the odd eyebrow, but it simply relates to the case where the deceased was killed instantly. It must therefore be noted that only in those cases where the deceased died instantly may the statutory medical form be substituted by the documents mentioned in Regulation 9 (1)(b)(ii) namely the inquest report or the charge sheet, and then only if these documents make it clear that the deceased's death resulted from the accident to which the claim relates.

7.4.3.3 The words "but in such an event" are somewhat unfortunate inasmush as it is not clear whether they refer to the event "where a person is killed outright" or the event where the claimant chooses to use a document other than the statutory medical form. The statement that the completion of the statutory medical form "shall not be a requirement" where the deceased was killed outright, seems to indicate that the completion of the statutory medical report shall in such circumstances not be a pre-requisite; in other words it need not (but may still) be used where the deceased was killed outright. But this construction is somewhat shaken by the words which then follow, namely "but in such an event the form MV3 shall be accompanied by ...", which tends to suggest that whenever the deceased was killed outright, the claimant shall use either the Inquest Report or the charge sheet. The interpretation which has always been followed is that the completed statutory medical form may always be used, i.e. even where the deceased was killed outright; on this basis the other two documents (the inquest report and the charge sheet) may be used in place of the statutory medical form, provided they indicate clearly that the deceased's death resulted from the accident to which the claim relates. It is submitted that this interpretation is correct.

7.4.3.4 Inquest report

The first document which may be used instead of the completed statutory medical form is the Inquest Report. (Afrikaans: "Geregtelike Doodsondersoek") This is to be distinguished from the post mortem report to which reference was made in the old Regulation 16 (1)(b)(ii) (under the 1972 Act) before it was amended with effect from 23rd November 1984. The post mortem report is therefore no longer regarded by the legislature as a proper substitute for the statutory medical report. And the Inquest Report, it must again be stressed, may only be used where the deceased was killed instantly and the said report indicates clearly that his death resulted from the accident to which the claim relates.

7.4.3.5 Charge sheet

The other document which may now be used in place of the statutory medical form is the charge sheet, but again the language is strange inasmuch as the Regulation states that this document may be used "in the case of a prosecution of the person who caused the deceased's death" and then only if it clearly indicates that the deceased's death resulted from the accident to which the claim relates. The manner in which it has been phrased tends to suggest that the charge sheet may only be used in the case of a conviction of the accused because if

the accused was acquitted, the charge sheet no longer seems to relate to "the person who caused the deceased's death". In this respect the Regulation is certainly not a credit to the linguistic abilities of the draftsman. Why should a charge sheet be good enough in a case where the accused was convicted but inadequate in a case where he was acquitted? We are not concerned here with the merits; we are concerned with proof that the deceased died from injuries sustained in the accident to which the claim relates. If the charge sheet was considered by the legislature to be adequate whether the accused was convicted or acquitted, why refer to a prosecution of the person "who caused the deceased's death"? Surely the situation simply relates to a prosecution of any person in connection with the deceased's death? The legislature will clearly have to review this provision and make its intention clearer. The claimant is already confronted with more than enough technical hazards and traps; quite frankly he can do without provisions as incomprehensible and inept as this one. In the meantime, for those practitioners brave enough to use the charge sheet in place of either the statutory medical form or the inquest report, it may be safer to use the charge sheet only in the case of a conviction, and provided always that the charge sheet clearly indicates that the deceased's death resulted from the accident to which the claim relates.

7.4.3.6 Death certificate not acceptable per se

For some or other reason many attorneys representing claimants have in the past simply attached a death certificate to the claim form, whether the deceased was killed instantly or whether he died subsequently. This is a very dangerous practice. It has already been pointed out that a properly completed statutory medical form is always acceptable and that the only authorised substitutes for this document are (and only in the case of instant death) the Inquest Report or the charge sheet, and then only if these documents clearly indicate that the deceased died as a result of the accident to which the claim relates. A mere death certificate has never been an acceptable substitute, particularly as it does not clearly indicate that the deceased's death resulted from the accident to which the claim relates. Nevertheless, in Shield Insurance Company Limited vs Booysen, 1979 (3) SA 953 A it was held that a death certificate together with a copy of the relevant criminal trial constituted "substantial compliance" with the requirements of Section 25 (1) of the 1972 Act, read together with the old Regulation 16 (1)(b)(ii). This case does not afford authority for the proposition that a simple death certificate will by itself constitute an acceptable substitute for the statutory medical form or the inquest report or charge sheet in the prescribed circumstances. "Substantial compliance" was, in the

Booysen case, only found to be present because the information not appearing ex facie the death certificate itself was fortuitously contained in the record of the criminal trial.

7.4.3.7 It has already repeatedly been stated that the statutory medical form may always be used in fatal cases, whether the death was instant or not. Admittedly Regulation 9 (1)(b)(i) states that the medical report shall be completed by the medical practitioner "who treated the deceased or injured person", and a person who died instantly will not in the normal sense of the word be "treated" by any medical practitioner. But in Davids vs Protea Assurance Company Limited, 1980 (4) SA 340 C it was held that a statutory medical form completed by the pathologist who performed the post mortem, but who never "treated" the deceased, was acceptable since the evidence thus furnished in the plaintiff's claim documents did not frustrate or materially impair the object of the provisons of the old Regulation 16 (1)(b). Marais A J put it as follows:

> "Can it really be said that the completion of a medical report of this nature by a hospital intern who had the deceased in his care for say fifteen minutes before he succumbed, fulfills the object of Regulation 16 (1)(b) but that its completion by the pathologist who conducted a medico-legal post mortem to determine the cause of death 'frustrates' or materially impairs' it? I think not."

7.4.3.8 Having thus dealt with the type of medical documentation which may be attached to the MV3 claim form in fatal accident cases, it remains only to stress once again that a document other than a completed statutory medical form may be used only where the deceased was killed "outright", i.e. he died instantly. It follows that where the deceased died some time later, the legislature did not contemplate the use of anything other than the statutory medical form on the reverse side of the MV3 claim form.

7.4.4 COMPLETION OF THE STATUTORY MEDICAL FORM IN NON-FATAL CASES

7.4.4.1 Regulation 9 (1)(b)(i) substantially re-enacts its predecessor, Regulation 16 (1)(b)(i). It reads as follows:

> The medical report on the form MV3 shall be completed by the medical practitioner who treated the deceased or injured person for the bodily injuries that he sustained in the occurrence from which the claim arises, or by the superintendent (or his representative) of the hospital where the deceased or injured person was treated for such bodily injuries: provided that if the medical practitioner or the superintendent (or his representative) concerned fails to complete the medical report on request within a reasonable time and it appears that as a result of the passage of

> time the claim in question may become prescribed, the medical report may be completed by another medical practitioner who has fully satisfied himself regarding the cause of the death or the nature and treatment of the bodily injuries in respect of which the claim is made.

It is clear therefore that the statutory medical form shall be completed by:

(a) The medical practitioner who treated the deceased or injured person for the injuries sustained in the accident; OR

(b) The superintendent (or his representative) of the hospital where the deceased or injured person was treated for such injuries; OR

(c) If the medical practitioner (or the superintendent or his representative) concerned fails to complete the medical form on request within a reasonable time and it appears that the claim may become prescribed, the medical form may be completed by another medical practitioner who has fully satisfied himself regarding the cause of death or the nature and treatment of the injuries in question.

It is also clear that the form must be completed by

one of the two first-mentioned doctors and that the claimant may consult another medical practitioner only if there is a threat of prescription. Thus, even when the doctor who treated the claimant fails to complete the form within a reasonable time, but there is nevertheless still no threat of prescription, it seems that the claimant may not consult another doctor to complete the form.

7.4.4.2 The inclination of the Courts to excuse a failure to adhere strictly to the requirements of the Act and/or the Regulations (compare Shield Insurance Company vs Booysen, 1979 (3) SA 953 A) should under no circumstances be taken as a licence to non-compliance. It should be remembered that no compliance at all can never constitute "substantial compliance". See for instance Zwane vs Commercial Union Assurance Company of SA Limited, 1975 (4) SA 492 W and Modibedi vs Sentraboer Koöperatief Beperk, 1981 (4) SA 377 W. Both these cases concerned the requirement in the old Regulation 16 that the statutory medical form should be completed by the doctor who actually treated the injured person, and both cases were decided on the wording of Regulation 16 prior to its amendment on the 1st September 1978 (The amendment was limited to the circumstances under which a claimant would be entitled to approach a doctor other than the one who treated him, for completion of the form). In both cases the claimant had had the medical

form completed by a doctor other than the one who had treated him and this was found by the Court in each case to have been a total failure to comply with the relevant provisions, so that the question of "substantial compliance" simply did not arise; both actions failed.

7.4.4.3 It is important to note that no doctor, not even the one who treated the injured person, is obliged to complete the statutory medical form. (Lottering vs Lombaard, 1971 (3) SA 270 T) But an unreasonable or negligent failure by such a doctor can be reported to the Medical Council for disciplinary action.

7.4.5 THE CLAIM FORM MV3 : SUBSTANTIAL COMPLIANCE

7.4.5.1 Regulation 9 (1)(a), which is substantially similar to its predecessor, Regulation 16 (1)(a)(i), reads as follows:

> The claim form and medical report provided for in Section 15 (1) of the Act shall be combined in the form MV3, as set out in the annexure hereto, which shall be completed in all its particulars. A clear reply shall be given to each question and if a question is not applicable the words "not applicable" shall be inserted. A form on which ticks, dashes, deletions and alterations have been made that are not confirmed by a signature, shall not be regarded as properly comleted. Precise details shall be given in respect of each item under the heading "Compensation claimed" and shall, where applicable, be accompanied by

supporting vouchers. Despite the peremptory language our Courts have viewed these requirements as being merely directory and have leaned towards a somewhat indulgent attitude whereby "substantial compliance" will suffice. See the cases mentioned in paragraph 3.15.1.2 above and see paragraph 3.8.5.

Of particular importance is the case of Nkisimane vs vs Santam Insurance Company Limited, 1978 (2) SA 430 A in which Trollip J A stated and/or reiterated a number of important features of the MVA Act and its Regulations:

(a) The general object of the Act is to afford to third parties the widest possible protection by way of compensation for any loss sustained by them through the negligent or unlawful driving of motor vehicles (at 434 E and 435 E).

(b) Nevertheless, Section 25 of the 1972 Act (Section 15 (1) of the 1986 Act) was enacted mainly for the benefit of authorised insurers (Appointed Agents), the purpose of this Section being to ensure that, before being sued for compenstation, an authorised insurer (Appointed Agent) will be informed of sufficient particulars about the claim and will be given sufficient time so as to be able to consider and decide whether to resist the claim or to settle or compromise it before any costs of litigation are incurred (at 434 F - G).

(c) The requirement that the prescribed claim shall first be submitted to the authorised insurer (Appointed Agent) before any legal proceedings are commenced, is peremptory since an effective sanction has been enacted in Section 25 (2) of the 1972 Act (Section 15 (2) of the 1986 Act), read together with Section 24 (1) of the 1972 Act (Section 14 (1) of the 1986 Act), namely that unless the requirement is complied with, the claim cannot be enforced by legal proceedings and the running of prescription is not suspended (at 434 G).

(d) But while the lodgment of the claim documents with the authorised insurer (Appointed Agent) is peremptory, the requirement that the contents thereof shall be "set out in the prescribed manner", (Section 15 (1)(a) of the 1986 Act), i.e. in the manner prescribed by the Regulations, is merely directory, despite the seemingly imperative language used in the Regulations (at 435 A - F).

(e) Nevertheless, the requirement that the contents of the claim documents shall be set out in the manner prescribed by the Regulations, "is not the kind of directory provision whose fulfilment or non-fulfilment is legally immaterial; substantial compliance with those requirements is necessary"

(at 435 F).

(f) In order to determine whether there has been substantial compliance in a specific case, the Court must bear in mind firstly that the requirements concerning the contents of the claim form, though directory, are co-joined with the peremptory requirement that "a claim for compensation under Section 21" (Section 8 of the 1986 Act) shall be lodged with the authorised insurer (Appointed Agent), failing which the peremptory requirement will not have been complied with, and the claim will be invalid; and secondly that the object of Section 25 (Section 15 of the 1986 Act) is to provide the authorised insurer with sufficient information to enable it to decide whether to resist the claim or to settle or compromise it before being sued. (at page 435 G - H)

(g) Consequently, the Court will look in each case at the nature of the information which the claimant has inserted in the claim documents in order to determine whether such contents constitutes "a claim for compensation under Section 21" (Section 8 of the 1986 Act), and in doing so the Court will read the claim form (including the medical report) as a whole; it will not focus attention merely on

specific questions in the form that may have been left unanswered, since answers elsewhere in the documentation may constitute sufficient compliance (at page 437 E - F), it being unlikely that the legislature intended that a claimant should possibly have to forfeit his claim for compensation for merely failing to set out all the details of his claim with the exactitude or precision prescribed by the Regulations (at page 435 E).

(h) Nevertheless, Trollip J A pointed out that claimants would be well advised to try to comply with the Regulations "as fully as possible" (at page 436 D).

To these requirements listed by Trollip J A should be added the fact that the Appointed Agent itself has a duty to investigate certain aspects; it cannot merely sit back, do nothing, and then rely on "its failure to make the enquiries". Constantia Insurance Company Limited vs Nohamba, 1986 (3) SA 27 A at p 38 G, 39 B, 39 D - E, 39 G - H, 40 C - D and 40 F - G; and the authorities referred to there.

7.4.5.2 What is the position when the claim form is submitted to the correct Appointed Agent but important information relating to the vehicle or token in question have been

omitted from the MV3 claim form? In this regard the following is stated in the MVA Handbook in paragraph 8.24 at page 117 (admittedly more in relation to the law of evidence than to procedure, but nevertheless opposite):

> "Say in a case the owner testifies that the declaration of insurance and the token were destroyed by fire (with the result that he cannot make these documents available to the claimant) and that he is unable to recall the number of the declaration/token, but he does state quite categorically that the insurance was obtained from XYZ company and that it related to the period wherein the collision occurred. Obviously XYZ company may experience internal difficulties, even insurmountable difficulties, in identifying the correct insurance by tracing the correct token/declaration number. The company might well adopt the attitude that it will not admit having been on risk in relation to the claimant's claim until such time as the latter has furnished the correct token/declaration number. .... It is submitted, however, that this attitude alone will not justify the Court in finding that the claimant's onus has not been discharged. If the evidence given on behalf of the claimant (by the owner) was positive and satisfactory in all respects, to the effect that he had obtained the insurance from XYZ company and that it was valid at the time of the collision in question, then obviously the Court will be at liberty to hold this allegation to have been adequately proved on a balance of probabilities. It relates purely to a question of fact."

Facts somewhat analogous to the hypothetical facts posed above had to be decided in the case of Haai vs Commercial Union Assurance Company Limited 1986 (2) SA 209 NC. In that case the plaintiff had instituted

action against the defendant under Act 56 of 1972 for damages sustained in a motor collision. The MVA 13 claim form had not specified the registration letters and number, the number of the token or declaration of insurance, or the name and address of the driver of the bus which had allegedly run the plaintiff down. The claim form merely stated that these particulars were not known and that the bus in question belonged to Kimberly Bus Services (Pty) Limited whose buses were all insured by the defendant. The defendant contended that the claim had prescribed because there had been no compliance with the requirements of Section 25 (1) of the 1972 Act (Section 15 (1) of the 1986 Act). After reviewing all the leading authorities, Steenkamp J held that as the date, time and place of the accident had been supplied, a reasonable insurer could have determined whether it was the insurer of the relevant vehicle and would have been able to determine whether it was on risk; it was accordingly held that the claim form constituted substantial compliance with the provisions of Section 25 (1) of the 1972 Act and that the claim had accordingly not prescribed. At page 218 F:

> "Ek twyfel of dit ooit die wetgewer se bedoeling was dat versekeraars hulle kon beroep op 'n onvoltooide MVA 13-vorm soos in hierdie geval waar dit duidelik is dat daar geen benadeling was nie en waar dit gemene saak is dat die verweerder die versekeraar is van die voertuig wat die eiser raak gery

het en waar die botsing self ook deur die verweerder erken is."

And with reference to dicta by Trollip J in AA Mutual Insurance Association Limited vs Gcanga, 1980 (1) SA 858 A at 865 D - E, and by De Kock J in Viljoen en 'n Ander vs AA-Onderlinge Assuransie-Assosiasie Beperk, 1973 (2) SA 673 T at 678 D, Steenkamp J stressed once again that an Appointed Agent cannot simply sit back upon receipt of the claim form and then rely on any non-compliance detectable therein. In this regard he stated at page 215 I:

"Laastens is dit belangrik om in ag te neem dat die versekeraar nie maar kan terugsit en net op die gegewens wat die eiser aan hom in die MVA 13-form verskaf kan verlaat nie. Daar is 'n verpligting op die versekeraar om self na die werklike feite van elke saak ondersoek te doen."

He added at page 218 C:

"Die verweerder het ook self 'n plig om daadwerklik te probeer vasstel, aan die hand van die mededeling wat aan hom verstrek was, of hy op risiko is al dan nie."

7.4.5.3 Supplementary documents: information submitted subsequent to the claim form

It should be noted that the Appellate Division has held "that documents or information that are given to the

authorised insurer to supplement, complete or correct the submitted form MVA 13, can be considered in determining whether or not Section 25 (1) of the 1972 Act and the relevant Regulations have been duly complied with". (Shield Insurance Company Limited v Booysen, 1979 (3) SA 953 A at 961 B - F; Constantia Insurance Company Limited vs Nohamba, 1984 (4) SA 927 E at page 933 F - G.) On the other hand, if a completed claim form does not comply substantially with the statutory requirements, details cannot after the prescription date be furnished to the Appointed Agent in an effort to supplement or correct the defective claim form. (Haai's case, (Supra) at page 215 B and see also AS Jasat vs Mayor and City Councillors of the City of Pietermaritzburg and Another, 1976 (1) PH J14.)

7.4.5.4 Unsigned claim form

Even in cases where the MVA 13 claim form had not been signed by the claimant, but was otherwise adequately completed, it has been held to constitute "substantitial compliance" with the requirements of Section 25 of the 1972 Act (Mogape vs Netherlands Insurance Company of SA Limited, 1978 (4) SA 609 W; Shield Insurance Company Limited vs Booysen, 1979 (3) SA 953 A at 958 - 959.)

7.4.5.5 A defective form can defeat a claim despite the

principle of "substantitial compliance". There are cases in which the Courts have concluded that the claim documents failed to meet the requirements of Section 25 (1) of the 1972 Act, read together with the relevant Regulations. After all, Regulation 16 (4)(ii) of the 1972 Act (Regulation 9 (3) of the 1986 Act) clearly provides that "Any form ... not completed as prescribed shall not be acceptable as a claim under the Act". One such case was Badenhorst vs Sentrale Raad vir Koöperatiewe Assuransie Beperk, 1977 (2) SA 788 T in which the claimant gave incorrect information concerning the name and address of the owner of the insured vehicle, with the registration letters and number of the vehicle also being incorrect. The Court held that the MVA 13 form was defective in essential respects and that the object of Section 25 (1) of the 1972 Act had been frustrated by the defects. However, since the correct declaration number was supplied by the claimant in that case and since the Act was amended in 1978 to provide that a change of ownership no longer terminated the insurance, (which now attached to the vehicle and no longer to its owner) it is doubtful (particularly in the light of Haai's case) whether this case will still be followed today. The same applies to some extent to the case of Viljoen vs AA-Onderlinge Assuransie-Assosiasie Beperk, 1973 (2) SA 673 T in which not only the name and address of the owner were incorrectly reflected in the claim documents, but also the number of the relevant

declaration of insurance.

7.4.5.6 Claim form no longer deemed by the Act to be valid

Section 25 (1)(b) of the 1972 Act provided that if the authorised insurer did not within 60 days after receipt of a claim "so set out" which was sent or delivered to the authorised insurer within six months after the date of the occurrence giving rise to the claim, object to the validity of the claim documents, the claim would be deemed to be valid in law in all respects. This provision has not been included in the 1986 Act and is therefore no longer applicable except in respect of claims which arose prior to the 1st of May 1986.

7.4.6 LODGMENT OF THE CLAIM DOCUMENTS

7.4.6.1 In terms of Section 15 (1) of the Act the MV3 claim form "shall .... be sent by registered post or delivered by hand, at his registered office or local branch office, to the Appointed Agent who issued the token of identification attached to the vehicle concerned or the Appointed Agent who in terms of the Regulations must handle the claim, and who shall, in the case of delivery by hand, at the time of the delivery acknowledge receipt thereof and the date of such receipt in writing". The claimant therefore has the choice of despatching the

documents by registered mail to the company's head office (or its local branch office), or of delivering the documents by hand to the company's head office (or local branch office). Only in the case of delivery by hand (whether to the head office or to the local branch office) is the company obliged to acknowledge receipt in writing and to record the date of such receipt in the acknowledgement.

7.4.6.2 Despite the requirement that where the claimant chooses to effect delivery through the mail he should use registered mail, the appellate division has held that this requirement is directory and not imperative and that despatch of the claim documents by ordinary (unregistered) mail can nevertheless constitute substantial compliance with the provisions of Section 15 (1). (Commercial Union Assurance Company of SA Limited, vs Clark, 1972 (3) SA 508 A) In that case it was common cause that the unregistered letter had indeed been received by the defendant, with the result that the company was in no way prejudiced.

7.4.6.3 The reference to the company's "local branch office" gives rise to some uncertainty. The section may refer to that branch office which issued the token, or it may refer to the office which is handling the claim, or it may even refer to the office at the seat of the supreme Court where the action is to be instituted.

Nevertheless, this requirement has not given rise to significant difficulties in practice, and it is submitted that a problem encountered in this regard will be resolved on the questin of whether the company was prejudiced. It is in any event always safe to deliver the claim documents to the company's head office, whether this is done by registered mail or by hand.

7.5 THE 90-DAY PERIOD AFTER DELIVERY (DESPATCH) OF THE CLAIM DOCUMENTS

7.5.1 Section 15 (2) provides, in short, that no claim shall be enforceable by a summons served on the Appointed Agent:

(a) Before the expiration of a period of 90 days as from the date on which the claim was sent or delivered by hand;

(b) Before all the prescribed requirements of the Appointed Agent (under Regulation 7 (2)(b)(iii)) have been complied with;

provided that if the Appointed Agent repudiates liability for the claim in writing before the expiration of the said period, the claimant may at any time after such repudiation serve summons on the Appointed Agent.

See the discussion on Section 15 (2) in paragraph 3.15.2 above.

7.5.2 OBJECT OF THE 90-DAY SUSPENSION

The object of the 90-day suspension was stated by Trollip J A in Santam Insurance Company Limited vs Vilakasi, 1967 (1) SA 246 A at 255 E (at a time when the relevant period was still 60 days) as follows:

> "The general object of the section is to avoid legal costs being unnecessarily incurred to the detriment of the claimant and the company, especialy the latter, by obliging the claimant to furnish the company with the presribed particulars of his claim and by thereafter affording the company a moratorium from certain legal proceedings for 60 days (now 90 days) to enable it to consider and discuss the claim and possibly pay or compromise it."

Compare the remarks in this regard by the same learned Judge in the case of Nkisimane vs Santam Insurance Company Limited, 1978 (2) SA 430 A at 434 F.

7.5.3 CALCULATION OF THE 90-DAY PERIOD

See the discussion on this topic in paragraph 3.14.1.7. Calculation of the 90 day period is done by the civil method and not in terms of Section 4 of the Interpretation Act, Nr 33 of 1975. Practically speaking it amounts to the first day being included and the last day excluded.

The date of despatch (by mail) or delivery (by hand) is therefore counted as the first day of the 90-day period. In S A Mutual Fire & General Insurance Company Limited vs Fouche, 1970 (1) SA 302 A at 311 H Rabie J A (as he then was) stated inter alia "dat die skorsingstermyn 'n aanvang neem op die dag waarop die skorsingshandeling geskied ...". Counting the day of despatch (or delivery) as the first day, the remaining 89 days are then simply counted off on a calendar. The case of Thomas v Liverpool London & Globe Insurance Co of SA Limited, 1968 (4) SA 141 C contains an explanation of this aspect which is perhaps clearer than in the above-quoted appellate division judgment.

In view of the significant innovation with regard to the suspension of prescription brought about by the proviso to Section 14 (1)(a) of the Act, read together with Section 14 (2), see the fuller discussion of this topic in paragraph 3.14.1 et seq.

7.5.4 AUTHORISED INSURER DID NOT ALWAYS HAVE FULL 90 DAYS TO CONSIDER CLAIM

Although the prescriptive period is suspended by Section 15 (2)(a) for a full 90 days, it was held under the 1972 Act that this does not necessarily mean that the authorised insurer will enjoy a full 90 days to consider

and investigate the claim. Where the claim documents were mailed by registered post, the 90-day period commences on the date of despatch, but the company only receives the mailed documents a few days later so that it will in those cases have less than 90 days within which to consider and investigate the claim in question. (Commercial Union Assurance Company of SA Limited vs Clark, 1972 (3) SA 508 A at 515 H). But by virtue of the proviso to Section 14 (1) (a) of the 1986 Act, read together with Section 14 (2) prescription is now further suspended, in a case where the Appointed Agent does not within 60 days after receipt of the claim object to the validity thereof, until after the expiration of a period of 90 days from the date on which the Appointed Agent delivers to the claimant or his representative by registered post or by hand a notice to either:

(a) Repudiate liability; or

(b) Convey an offer of settlement of the claim.

See paragraph 3.14.3.

7.5.5 WRITTEN PRE-SUMMONS OFFERS OF SETTLEMENT

Since the 90-day period is intended, inter alia, to afford the Appointed Agent an opportunity of compromising the claim before being saddled with lititgation costs, it is

appropriate to draw attention again to the provisions of Section 8 (4) which reads as follows:

> In issuing any order as to costs on making such award, the Court may take into consideration any written offer in settlement of the claim concerned against it or him, made by the MVA Fund or its Appointed Agent before the relevant summons was served on it or him.

This expressly relates to pre-summons offers only, and with regard to such offers the effect will be somewhat similar to that of a post-summons payment into Court. A claimant who rejects a pre-summons offer made by the insurer, runs the risk of paying all costs incurred thereafter if, at the end of the subsequent trial, the Court awards damages in a lesser amount than the offer. See also paragraph 3.8.14.

7.6 SUMMONS

7.6.1 PREMATURE SUMMONS WILL NOT INTERRUPT PRESCRIPTION

Unless there has been a written repudiation of the claim by the Appointed Agent, summons may not be served prior to the expiration of the 90-day period or (in terms of Section 15 (2)(b)) before all the prescribed requirements of the Agent under Regulation 7 (2)(b)(iii) have been complied with. It follows that premature service of the summons will not interrupt prescription. (Ndandani vs

Royal Insurance Co Ltd, 1966 (3) SA 565 E; Santam Insurance Company Limited vs Vilakasi, 1967 (1) SA 246 A. Nevertheless a summons which was issued prematurely may be re-served after the provisions of Section 15 (2) have been complied with. (Evins vs Shield Insurance Company Limited, 1980 (2) SA 814 A at 832 C; Marine & Trade Insurance Company Limited vs Reddinger, 1966 (2) SA 407 A.)

7.6.2 EARLY ISSUE OF SUMMONS IS ADVISABLE

Since prescription re-commences to run once the periods of suspension have expired, it is recommended that summons be issued and served forthwith. Thereafter the parties may agree to suspend the pleadings (in an efort to avoid unnecessary costs while they endeavour to negotiate a settlement) if they so wish. But quite apart from avoiding prescription, another practical reason why summons should be issued as soon as possible after expiry of the periods of suspension is that the claimant thereby becomes entitled to taxed party-and-party costs if his claim is successful. Settlements prior to summons have the inherent problem that Appointed Agents normally offer only a smallish global contribution towards the claimant's costs, and a refusal to settle could be a perilous decision since the claimant could be confronted with the risks flowing from the provisions of Section 8 (4) relating to pre-summons offers. In any event, acceptance

of a mere nominal contribution towards the claimant's costs always carries the disadvantage that the client is then faced with a far more substantial attorney-and-client charge, and the intention of the legislature was surely that the claimant should get a full indemnity not only in respect of his damages, but also in respect of his legal costs. See paragraph 3.8.14.3.

7.6.3 MERE ISSUE OF SUMMONS DOES NOT INTERRUPT PRESCRIPTION

In cases where the statutory claim form was served within the two-year period it is to be noted that it is the service of summons on the authorised insurer which interrupts prescription; the mere issue of summons does not suspend the running of prescription. (Kleynhans vs Yorkshire Insurance Company Limited, 1957 (3) SA 544 A). See also paragraph 3.14.1.8.

7.6.4 AMOUNTS AND INJURIES MENTIONED IN SUMMONS MAY DIFFER FROM THOSE IN THE MV3 CLAIM FORM

Nothing prevents the claimant from claiming amounts in his summons which are different (higher or lower) to the amounts previously claimed in the MV3 claim form. Nor is the claimant obliged to file a new MV3 claim form before amending his claim. (Boti vs Unie en Nasionale

Versekeringsmaatskappy Beperk, 1968 (4) SA 567 O; Nkisimane vs Santam Insurance Company Limited, 1978 (2) SA 430 A at 439 C - G.) A claimant can even claim amounts in his summons in respect of certain heads of damages for which he specifically indicated that he was claiming "nil" in his MV3 claim form, as long as there has been "substantial compliance" with the Act's general requirements. (Lambert-Zakiewicz vs Marine & Trade Insurance Company Limited, 1975 (4) SA 597 C) Similarly, nothing precludes the claimant from tendering evidence at the trial in respect of injuries actually sustained by him but which do not accord with the statutory medical form lodged on his behalf. (Kwele vs Rondalia Assurance Corporation of SA Limited, 1976 (4) SA 149 W). But circumstances may justify the defendant to file an appropriate plea to meet such a case. In Nkisimane's case (Supra) the following was said by Trollip J A at page 439 E - F:

> "It is possible (no firm view need be expressed) that a claimant's pleadings might diverge so widely from his MVA 13 form, including the medical report that it could found a defence that the MVA 13 form was submitted mala fide or fraudulently thereby vitiating it, or that the pleadings embodied a new or different claim which was not covered by the MVA 13 form, or that material information in the MVA 13 form is so wrong as to render it null and void, and the claim is therefore unenforceable by the proceedings. But those and other possible defences based on such discrepancies must be specifically pleaded and canvassed in evidence as far as it may be necessary."

7.6.5 AMENDMENT OF PARTICULARS OF CLAIM: NEW CAUSE OF ACTION?

It is of importance to note that a plaintiff may amend the particulars of claim to his summons by deleting a reliance on one of the categories of passengers listed in Section 9 of the Act, and substituting therefor a reliance on a differenct category under that section. This has been held not to constitute the introduction of a new cause of action. In Dladla vs President Insurance Company Limited, 1982 (3) SA 198 W the plaintiff had relied in his original particulars of claim on an allegation that at the time of the collision he had been a fare-paying passenger in the insured vehicle. He later sought to amend his particulars of claim by deleting that allegation and by substituting for it an allegation that at the time of the collision he was conveyed in the vehicle during the course and scope of his employment as a servant of the owner of the motor vehicle. The defendant opposed the application, submitting that it would introduce a new cause of action which had become prescribed. Goldstone J held that in claims under the MVA Act the cause of action was to be found in Section 21 of the 1972 Act (Section 8 of the 1986 Act) and that the plaintiff's cause of action remained substantially unchanged if the plaintiff's reliance on one of the categories of passengers listed in Section 22 (the new Section 9) was substituted by a reliance on a different category. Section 22 of the 1972 Act (Section 9

of the 1986 Act) after all does no more than list and identify the various categories of passengers whose claims are statutorily limited; the true cause of action remains in the wide wording of Section 21 of the 1972 Act (Section 8 of the 1986 Act). The same result, for substantially similar reasons, was achieved in the case of Mokoena vs S A Eagle Insurance Company Limited, 1982 (1) SA 780 O.

Since the cause of action is seated in Section 8 of the Act 84 of 1986, an amendment seeking to substitute certain factual allegations relating to the contents of that Section might well constitute a new cause of action. In Churchill vs Standard General Company Limited, 1975 (3) S A 503 W the plaintiff's husband had been killed in a collision between a motor car wherein he had been travelling as a passenger, and a trailer drawn by a mechanical horse. The plaintiff's particulars of claim initially sought to hold the defendant insurer liable as insurer of the mechanical horse. Since the car had actually collided with the trailer (which was drawn by the horse) the plaintiff sought and obtained a further amendment whereby the defendant was also held liable as insurer of the trailer. This latter amendment was effected after prescription had intervened and the Court held that the plaintiff's right of action against the defendant as insurer of the horse was different from the plaintiff's right of action against the defendant as insurer of the trailer, and it consequently held that the

new cause of action had become prescribed. (This finding, incidentally, did not detract from the plaintiff's claim against the defendant as insurer of the mechanical horse.) This judgment was confirmed by the Appellate Division in Churchill vs Standard General Insurance Company Limited, 1977 (1) SA 506 A at 516 G - 517 D). Amendments seeking to increase the quantum of the amount claimed, do not constitute the introduction of a new cause of action, and are allowable. (Wigham vs British Traders Insurance Company Limited, 1963 (3) SA 151 W; Sheriff vs Royal Insurance Company, 1952 (4) SA 263 C; but compare Richter vs Capital Assurance Company Limited, 1963 (4) SA 910 E.)

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MVA PRACTICE

UNDER THE

MOTOR VEHICLE ACCIDENTS ACT, 1986

by

DUDLEY PERCIVAL HONEY

This thesis is submitted to comply with the requirements of the degree

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BLOEMFONTEIN
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CHAPTER 8

CLAIMS AGAINST THE MVA FUND (UNIDENTIFIED VEHICLES)

8.1 Section 6 (1)(b) of Act 84 of 1986 provides that the MVA Fund shall, subject to the provisions of the Regulations, "handle" those claims referred to in Section 8 of the Act which arise from the driving of a motor vehicle of which neither the owner nor the driver can be identified. Consequently, as from the 1st of May 1986 when the new Act came into effect, the MVA Fund will handle only those claims mentioned in Section 6 (1)(b). Previously, of course, the MVA Fund was also involved in claims relating to the driving of uninsured motor vehicles but since there are under the new Scheme no longer any uninsured motor vehicles, those claims which previously fell to be dealt with under the old Regulation 5 of the 1972 Act, are now under the new Act handled by the Appointed Agents, as long as either the owner or the driver has been identified, as specified in Section 6 (1)(a)(i). Thus, where the vehicle concerned carried no token of identification at the time of the accident, it is now no longer regarded as an "uninsured" vehicle; the claim must be lodged with the Appointed Agent designated by the Date Schedule published in the Government Gazette of the 12th of September 1986 which allocates specific dates of the year to specific Appointed Agents. In other words, a claim arising from the driving of a tokenless vehicle lies against

that Appointed Agent to whom the date of the accident in question has been allocated according to the said Date Schedule. Regulation 7 (1)(b) provides that an Appointed Agent shall be liable for handling claims under Section 8 of the Act which arise out of the driving of a motor vehicle to which a token of identification is not attached, but of which the identity of the owner or driver is known, in which event the claim will be dealt with by the Appointed Agent indicated "in the notice published in the Gazette in terms of Section 6 (1)(a)(ii) of the Act", i.e. in the Date Schedule. (See Appendix II)

8.2 Having noted that claims arising from the driving of vehicles of which neither the owner nor the driver can be identified must be handled by the MVA Fund under Section 6 (1)(b), it remains only to deal with the procedures and principles relating to such claims, which brings us to Regulation 8 (See Appendix III). It must also immediately be noted that claims against the MVA Fund are no longer lodged by means of a different claim form; the same claim form, MV3, is used for claims against the MVA Fund as for claims against an Appointed Agent.

8.3 Regulation 8 (1) provides that the liability of the MVA Fund (for claims under Section 8 of the Act arising from the driving of a motor vehicle of which neither the owner nor the driver can be identified) shall be subject to a number

of conditions. A number of conditions are then listed in Regulation 8 (1), but those are by no means the only conditions since Regulation 8 (2) then lists a number of "further conditions", and indeed most of the remaining Sub-Regulations contain "conditions" of one type or another. Whenever an attorney has occasion to handle a claim against the MVA Fund, he should simply read the entire Regulation, particularly as the strictly procedural aspects are throughout intermingled with so-called "conditions". An effort will nevertheless be made herein to separate the "conditions" or prerequisites to the Fund's liability from the limitations and exclusions of liability, the strictly procedural requirements and the provisions relating to the Fund's rights.

8.4 REQUIREMENTS FOR LIABILITY

8.4.1 Proof to the satisfaction of the MVA Fund must be produced that the bodily injury or death in question arose from the negligent or unlawful driving of "the unidentified motor vehicle"; (Regulation 8 (1)(a) (i));

8.4.2 Satisfactory evidence must be produced to the MVA Fund that the claimant took all reasonable steps to identify the owner or driver of the unidentified motor vehicle (Regulation 8 (1)(a)(ii));

8.4.3 The claimant's inability to obtain judgment in terms of Section 8 of the Act must not be due to any act or

omission on his part (Regulation 8 (1)(a)(iii));

8.4.4 The MVA Fund shall not incur any liability unless the unidentified motor vehicle (including anything on, in or attached to it) came into physical contact with the injured or deceased person or with any other person, vehicle, conveyance or any other object or objects which directly or indirectly caused or contributed to the injury or death (Regulation 8 (1)(a)(iv), and see also Terblanche vs Minister van Vervoer, 1977 (3) SA 462 T and Verster vs Motor Vehicle Assurance Fund, 1978 (3) SA 691 A. Some form of evidence must be submitted in this regard with the claim.

8.5 LIMITATIONS AND EXCLUSIONS OF LIABILITY

8.5.1 The liability of the MVA Fund shall not exceed the amount for which an Appointed Agent would have been liable if the motor vehicle in question had been identified (Regulation 8 (1)(b));

8.5.2 The MVA Fund shall not be obliged to make any payment to any department of the Government of the Republic, any provincial administration or the administration of South West Africa, the Workmen's Compensation Commissioner, the National Transport Commission, a black authority (as defined in Section 1 of the Act), any local authority

mentioned in Section 70 of the Workmen's Compensation Act, Nr 30 of 1941, or to any other employer individually liable under the last-mentioned Act (Regulation 8 (1)(c));

8.5.3 Nor does the MVA Fund's liability extend to any amounts paid or payable to any medical practitioner for medical services rendered by him in the course of his employment with any provincial hospital, body or authority referred to in 8.5.2 above, where and insofar as such provincial hospital, body or authority is liable for the payment of such medical services (Regulation 8 (1)(d));

8.5.4 Section 10 of the Act, which excludes an Appointed Agent from liability in certain cases, applies mutatis mutandis to the liability of the MVA Fund (Regulation 8 (1)(e)).

8.6 PROCEDURAL PROVISIONS

When the claimant's attorney has established that his client has a claim under Section 6 (1)(b) of the Act read together with Regulation 8, and he has prepared the necessary MV3 claim document, including all the necessary annexures (see paragraph 8.8 below), the further procedure would then be as follows:

8.6.1 Before the expiry of a period of two years from the date of the occurrence which gave rise to the claim (i.e. the date of the accident) the form MV3 shall be delivered to

the MVA Fund mutatis mutandis in accordance with the provisions of Section 15 (1) of the Act. Since Section 15 (1) of the Act applies, the claim form should be "sent by registered post or delivered by hand". It is very important to note that the two-year period referred to above shall apply to all third parties and claimants, irrespective whether they are subject to any legal disability. (Regulation 8 (2)(a)(ii)) Prescription therefore runs against minors, persons under curatorship and patients under the Mental Health Act, since the provisions of Section 14 (1)(b) of the Act are not applicable to claims under the Regulations. (Kunene vs Union National South British Insurance Company Limited, 1976 (4) SA 782 D at 785 F - G)

8.6.2 The MVA Fund shall within 90 days of receipt of the claim documents notify the claimant in writing:

(a) Whether it accepts or rejects liability for the claim; or

(b) Whether it consents to be sued in the matter (Regulation 8 (2)(b));

8.6.3 If the MVA Fund rejects liability for the claim or fails to notify the claimant of its decision within 90 days:

(a) The claimant shall be entitled to submit written representations to the Minister of Transport Affairs for permission to sue the MVA Fund; and

(b) A copy of such representations shall be supplied to the Fund.

(c) Such representations shall also contain full details of the circumstances which gave rise to the claim in question.

8.6.4 The Minister shall be entitled to request such further information from the claimant or from the MVA Fund or to require the claimant to institute such further enquiries or to take such further steps as the Minister may direct. The Minister's decision as to whether or not the claimant may sue the MVA Fund shall be final and binding on all parties concerned. (Regulation 8 (2)(b)) In the case of Terblanche vs Minister van Vervoer, 1977 (3) SA 462 T the MVA Fund had refused to be sued because it had concluded, on the available evidence, that there had been no physical contact as required by the old Regulation 6. Thereafter the claimant had submitted representations to the Minister who, after also considering the evidence, issued a certificate to the effect that the claimant could not sue the MVA Fund. The claimant thereupon took the matter on review to the Supreme Court and the application was likewise refused. The judgment affords guidance as

regards the Minister's powers and duties under the Regulation, and also regarding the nature of the onus resting on the applicant who seeks to review the Minister's decision. (See also Administrator, Transvaal and the Firs Investment (Pty) Limited vs Johannesburg City Council, 1971 (1) SA 56 A)

8.6.5 If consent to sue the MVA Fund is obtained, either from the Fund itself or from the Minister, the Fund shall not incur any liability unless the summons is properly served on the MVA Fund within two years and 90 days from the date of the occurrence which gave rise to the claim. (Regulation 8 (2)(c)(i)) However, prescription shall not run against the claimant during the period reckoned from the date on which the claimant's representations reached the Minister until the date on which the Minister's decision (whether the claimant may or may not sue the MVA Fund) is conveyed by written notification to the claimant or his representative. (Regulation 8 (2) (c)(i))

8.6.6 The consent of the MVA Fund to be sued, or a certificate by the Minister to that effect, establishes a claimant's right to sue. The issues before the Court shall thereupon, subject to the provisions of Regulation 8, mutatis mutandis be the same as they would have been if the motor vehicle had been identified. But the MVA Fund's consent or a certificate issued to this effect by the

Minister, shall not constitute an admission of liability by the MVA Fund in respect of the claim concerned. Nor does the granting of the right to sue the MVA Fund obviate the requirement regarding physical contact as contained in Regulation 8 (1)(a)(iv). (Verster vs Motor Vehicle Assurance Fund, 1978 (3) SA 691 A)

8.6.7 If so required by the MVA Fund, and provided the Fund grants the claimant full indemnity as regards costs, the claimant suing the MVA Fund under Regulation 8 shall sue in the same action all such other persons as the MVA Fund may require him to sue. (Regulation 8 (4))

8.7 RIGHTS OF THE MVA FUND

Regulation 8 bestows upon the Fund certain rights in respect of claims brought against it:

8.7.1 At any time after having received an MV3 claim form, the Fund shall be entitled to require the person whose injuries gave rise the claim:

(a) To submit, at the expense of the MVA Fund to a medical examination by a medical practitioner appointed by the MVA Fund, provided that if the person to be so examined contends that any requirements in this regard are unreasonable, he

shall be entitled to appeal to the Minister, whose decision shall be final (Regulation 8 (5)(a)).

(b) To submit, at the request of the MVA Fund or its representative, to interrogation at a venue indicated by the MVA Fund and to make a sworn statement setting out fully the circumstances relating to the occurrence on which the claim is based (Regulation 8 (5)(b)).

(c) To supply the MVA Fund in writing with such further particulars regarding the circumstances of the occurrence as the Fund may require (Regulation 8 (5)(c)).

(d) To supply the MVA Fund with copies of all medical reports, X-rays or other reports and accounts which have a bearing on the claim and which are in possession of the claimant or his representative (Regulation 8 (5)(d)).

(e) To give the MVA Fund written authorisation for inspection of all records concerning the claimant which are in possession of any hospital or any medical practitioner (Regulation 8 (5)(e)).

(f) Section 8 (5) of the Act is applicable also to claims against the MVA Fund under Regulation 8, with the

result that the MVA Fund has the right to issue an Undertaking as envisaged in that Section (Regulation 8 (1)(e)).

8.7.3 After effecting payment to the claimant in settlement of the claim under Regulation 8, whether in terms of a judgment or otherwise, the MVA Fund shall be entitled, in consideration of such payment, to cession of any claim which the claimant may have against the owner or driver of the unidentified vehicle or any person responsible in law for the acts of such owner or driver (Regulation 8 (6)).

8.7.4 If any dispute arises regarding any matter relating to the provisions of Regulation 8, such dispute shall be referred to the Minister whose decision shall be final (Regulation 8 (7)).

8.7.5 Neither the Minister nor the MVA Fund shall be obliged to give reasons for any decision taken in terms of:

(a) Regulation 8 (2)(b) (consent or refusal to sue);

(b) Regulation 8 (5)(a) (appeal to the Minister regarding the alleged unreasonableness of the MVA Fund's request that the claimant shall submit himself to a medical examination by a doctor appointed by the Fund);

(c) Regulation 8 (7) (any dispute under Regulation 8 referred to the Minister) (Regulation 8 (8)).

8.8 ANNEXURES TO THE MV3 SUBMITTED TO THE MVA FUND UNDER REGULATION 8: CHECKLIST

The following may serve as a checklist of the annexures to be appended to the MV3 submitted to the MVA Fund under Regulation 8:

8.8.1 Readers are in the first instance referred to the checklist of annexures to the MV3 submitted to an Appointed Agent in paragraph 7.4.2.3, all of which remains applicable.

8.8.2 Paragraph 3(d) of the MV3 claim requires a description of the unidentified vehicle, if known.

8.8.3 Paragraph 3(d)(ii) of the MV3 claim form requires that it should be stated on a separate statement attached to the form what efforts were made to establish the identity of the owner or driver of the vehicle.

8.8.4 Proof, in some acceptable form, must be attached to the claim form regarding the following:

(a) that the bodily injury or death arose from the negligent

or unlawful driving of the unidentified motor vehicle (Regulation 8 (1)(a)(i); and

(b) That the unidentified motor vehicle had come into physical contact with the injured or deceased person as required by Regulation 8 (1)(a)(iv).

8.9 PRESCRIPTION OF CLAIMS UNDER REGULATION 8

8.9.1 It has already been pointed out that the MV3 must be despatched (by registered mail) or delivered (by hand) within two years from the date of the occurrence which gave rise to the claim, i.e. the date of the accident. In the case of claims by dependants, prescription starts to run on the date of the accident and not on the date of the deceased's death as is the case with such claims lodged against an Appointed Agent under the Act.

8.9.2 It has likewise been mentioned that these prescriptive provisions apply to all third parties and claimants, irrespective of whether they are subject to any legal disability, and consequently minors, persons under curatorship and patients under the Mental Health Act of 1973 do not enjoy the benefits afforded to them by Section 14 (1)(b) in claims against an Appointed Agent.

8.9.3 Summons must be served on the MVA Fund within two years

and 90 days of the date of the accident which gave rise to the claim, provided that prescription shall not run against the claimant during the period reckoned from the date on which the claimant's representations reached the Minister (where the MVA Fund refused consent to be sued) until the date on which the Minister's decision whether the claimant may or may not sue the MVA Fund is conveyed in writing to the claimant or his representative.

8.9.4 No machinery exists for condonation of prescribed claims, since the Regulations are not subject to judicial relaxation. (Kunene vs Union National South British Insurance Company Limited, 1976 (4) SA 782 D at page 785 H).

Readers are also referred to Chapter 3, more particularly paragraph 3.14.7.

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CHAPTER 9

DAMAGES: PRINCIPLES AND ASSESSMENT

9.1 South African practitioners are fortunate in having available a number of excellent sources of assistance with regard to the principles and assessment of damages in cases of bodily injury and death under our MVA legislation. No practitioner dabbling in MVA work can be without the invaluable work of Corbett, Buchanan and Gauntlett, and the MVA Handbook (particularly Chapter 10 and appendicies V - X) is also of inestimable assistance. Hodes, although not devoting a specific Chapter to quantum as such, nevertheless constitutes a further source of reference regarding many aspects of quantum. The work of R J Koch is a comprehensive and welcome addition. Against this background, and considering that all four works mentioned above are of relatively recent publication and that the promulgation of Act 84 of 1986 has not made significant inroads on the status quo, the production of yet another comprehensive treatise on this subject is neither necessary nor desirable. It would however be useful to practitioners to deal in a brief but practical manner with those everyday aspects which the MVA lawyer requires to know about run-of-the-mill and relatively uncomplicated claims; without it a work of this nature would not be complete.

9.2 SPECIAL DAMAGES

9.2.1 HOSPITAL EXPENSES

9.2.1.1 The MV3 claim form distinguishes between accounts incurred in provincial hospitals and accounts incurred in private hospitals. The reason for this is that there is an agreement in existence between the MVA Fund and the various provincial administrations (and the administration of South West Africa) whereby the MVA Fund pays certain agreed lump sums annually to the provincial administrations concerned in respect of all patients treated in provincial hospitals for injuries sustained in motor accidents. In return the provincial administrations agree:

(a) That where evidence is produced to the satisfaction of the administration concerned that the patient or his duly authorised representative has instituted an MVA claim, to suspend all proceedings against the patient for the recovery of any hospital charges; and

(b) That where evidence is produced to the satisfaction of the administration concerned that the patient's MVA claim has been accepted by the Appointed Agent or by the MVA Fund itself, to waive or write-off

all charges for hospital services rendered in respect of such patient, and to refund to the patient concerned all payments already made by him in respect of his hospitalisation.

For a synopsis of the Agreement in question see MVA Handbook, Appendix X.

9.2.1.2 Since claimants are not parties to the aforementioned agreement they are entitled, vis-à-vis the wrongdoer, to claim and recover the hospital expenses concerned. The existence of the agreement between the MVA Fund and any particular provincial authority may not be pleaded against the claimant, and if an Appointed Agent excludes provincial hospital accounts from any payment into court, such payment will be inadequate even if the amounts offered in respect of other items of damages are fair and adequate. The claimant should accordingly include all his provincial hospital accounts in his claim even if he knows that the account in question will be reversed as soon as the claim has been accepted by the Appointed Agent.

9.2.1.3 A claimant who has received treatment in a provincial hospital should be advised by his legal representative that he need not pay the account in respect of such hospitalisation; the attorney should simply write to

the medical superintendent of the hospital concerned advising him that an MVA claim has or will be lodged, whereupon the medical superintendent will confirm that the account may stand over until the claim has either been accepted or rejected by the Appointed Agent in question. The medical superintendent is however authorised by the agreement with the MVA Fund "to take such action as may be deemed necessary to ensure that such accounts do not become prescribed", and he consequently writes to the claimant's attorney from time to time in this regard, seeking a waiver of prescription in appropriate cases. This waiver should be given, otherwise the hospital will be entitled to sue the claimant if the latter had been treated as a so-called "private case", as opposed to a so-called "hospital case". (Broadly speaking, "hospital cases" are those where the patient, by virtue of the fact that his annual income is less than a specific amount, is entitled to free hospitalisation.)

9.2.1.4 As soon as the claim has been settled or judgment has been given by a court against an Appointed agent, the claimant's attorney should notify the superintendent of the provincial hospital concerned and furnish him with "evidence ... to the satisfaction of the administration concerned that the patient's claim in terms of the Act has been accepted by the (Appointed Agent) or the Fund itself". In practice the Appointed Agent furnishes to

the claimant or his representative a certificate to the effect that the claim has been accepted, and this certificate is in turn submitted to the superintendent of the hospital concerned. Where the claimant has already paid the hospital account the administration will now refund the claimant, and where the hospital account is still unpaid, the medical superintendent of the hospital concerned will confirm that the necessity for payment of the account has been waived. Where the hospital account was paid by the patient's medical aid fund, the provincial administration will refund the amount concerned only if the medical aid fund itself applies for a refund; in practice it usually refuses to pay this amount to the claimant himself.

9.2.1.5 Private hospitals

Since the agreement between the MVA Fund and the various provincial administrations in no way affects private hospitals, accounts incurred by claimants in such hospitals should simply be claimed in the ordinary course. These accounts are normaly substantially higher than accounts incurred with provincial hospitals, but with regard to past (as opposed to future) hospital accounts, there are no reported cases to the effect that the claimant ought to have had himself admitted to a provincial hospital rather than to the more expensive private hospital, and that he is in consequence of his

duty to mitigate his damages entitled to recover only the lesser amount which the provincial hospital would have charged him. Nevertheless, the remarks of Baker J in Williams vs Oosthuizen, 1981 (4) SA 182 C at pages 184 - 185 are apposite:

> "In this country a plaintiff is obliged to mitigate his damages: and I am of opinion that, where he is able to choose between medical treatment at two institutions equally good, he is obliged to choose the less expensive in the case where the defendant has to pay for the treatment."

The same applies to the remarks of Van Den Heever J (again with regard to the cost of future hospitalisation) in the case of Dyssel NO vs Shield Insurance Company Limited, 1982 (3) SA 1084 C at pages 1086 - 1087:

> "The father cannot at the insurer's expense choose a more expensive way of life for his child, that he did not consider earlier."

But before a court will be called upon to consider this problem in relation to past hospital accounts, the Appointed Agent (or the MVA Fund) will have to produce evidence to the effect that the facilities at the provincial hospital in respect of the type of injury in question were such that the patient could have received equally good treatment in the provincial hospital and

that he acted unreasonably in choosing to be admitted to a private hospital. In this regard the following remarks in the MVA Handbook (paragraph 10.32, page 154) are endorsed:

> "A plaintiff's obligation is only to take reasonable steps towards mitigating his damages and, in determining this reasonableness, all surrounding circumstances should be taken into account. If it should be recommended to a plaintiff that he receive treatment from a specialist who works only in a private institution (and there are quite a number of them), he will not necessarily be obliged to accept treatment by another equivalent specialist at a provincial hospital or be entitled to recover only the cost of this less expensive treatment; regard must be paid to the seriousness of the condition from which the plaintiff suffers, the specialised nature of the treatment, the reputation of the specialist, the confidence which the patient is entitled to have in his doctor and any other relevant circumstances."

It is submitted that the patient's financial standing and general standard of living would also be a relevant circumstance.

9.2.2 PAST MEDICAL EXPENSES

9.2.2.1 Just as in the case of hospital accounts, all medical expenses claimed should be properly vouched. See paragraph 7.1.8 above. But the medical expenses claimed in the summons need not coincide with those claimed in the MV3 claim form. See paragraph 7.6.4 above.

Nor is it necessary to file a new MV3 claim form in respect of accounts incurred subsequent to the accounts claimed in the original claim form. (Boti vs Unie & Nasionale Versekeringsmaatskappy Beperk, 1968 (4) SA 567 O) In fact, even where the claimant indicated in his claim form that he was claiming "nil" in respect of medical expenses, he may still claim such expenses in his summons. (Lampert-Zakiewicz vs Marine & Trade Insurance Company Limited, 1975 (4) SA 597 C) And amendments may be made to pledings to introduce matters not covered by the MV3 claim form. (Boti vs Unie & Nasionale Versekerings-maatskappy Beperk, 1969 (4) SA 550 O)

9.2.2.2 Such past medical expenses may be claimed as were reasonably incurred as a result of the injuries sustained in the accident in question. The Appointed Agent or its legal representative should therefore take care to eliminate any medical accounts which may have been incurred in connection with a pre-existing condition. This aspect can sometimes be very confusing where the pre-existing condition was merely aggravated by the accident in question. Medical evidence should be obtained as to whether the expenses in question would have been incurred even if the accident had not intervened. In cases of uncertainty it should of course always be borne in mind that the claimant carries the

onus of proof.

9.2.2.3 Problems are sometimes encountered in practice with regard to claims by patients who were classified as "hospital cases" or free patients in respect of the treatment for the injuries in question. This aspect is adequately dealt with in the MVA Handbook. (Paragraphs 10.33 and 10.34)

9.2.2.4 Since the Act relates to the recovery of damages for bodily injury only (as opposed to damage to property), care should be taken to ensure that the medical accounts are allowable under the Act. The cost of spectacles broken in the accident are not recoverable as they do not relate to bodily injury; on the other hand the cost of eye-tests and prescribed spectacles resulting from injuries to the eye sustained in the accident are indeed recoverable. The same applies to dentures: the cost of dentures broken in the accident would normally not be recoverable, but the cost of dental expenses and dentures are recoverable if the injured person's teeth were damages to such an extent that dentures were prescribed and made in consequence of those injuries. (Oberholzer vs Santam Insurance Company Limited, 1970 (1) SA 337 N) Obviously if different spectacles or dentures are prescribed and supplied as a result of the injuries sustained in the accident concerned, the additional costs will be recoverable. See also

paragraph 3.8.8.1.

9.2.2.5 The Appointed Agent or its legal representative should also be on the lookout for accounts claimed as damages but which actually constitute medico-legal costs and which are therefore recoverable only as part of the claimant's bill of costs. Accounts for the cost of medical or medico-legal reports and incidental X-rays are frequently included in the MV3 claim form as part of the claimant's damages; they are not recoverable as such and should therefore be eliminated although they may subsequently be allowed as part of the claimant's party and party costs.

9.2.3 FUTURE HOSPITAL AND MEDICAL EXPENSES

9.2.3.1 Reference has already been made to the fact that the claimant cannot simply demand to have his future hospital and medical expenses allowed on the basis of treatment in a private hospital if equally good facilities and treatment are available in a less expensive provincial hospital. See paragraph 9.2.1.5 above. The claimant is only entitled to the cost of such future medical treatment as will reasonably have to be incurred as a result of the injuries sustained in the accident in question, and the claimant has a duty to mitigate his damages.

9.2.3.2 Since the hospital and medical expenses presently being considered will only be incurred at some future date, the estimated costs (at current rates) will have to be capitalised over the period in question so that the claimant receives at the time of settlement an amount which, if invested for the intervening period, will give the claimant the amount of the cost of the required treatment when it is eventually administered at the rates then applicable. This naturally involves at least two enquiries, namely firstly the rates at which money will be capable of being invested during the period in question, and secondly the rate at which the cost of the treatment in question is likely to rise up to the time the treatment is administered. These are aspects which will not be dealt with in detail in this work since they are adequately covered by the authorities mentioned in paragraph 9.1 above. For purposes of this work, these aspects will simply be referred to as the exercise of capitalisation, or simply "capitalisation". (See, by way of example paragraphs 10.37 and 10.38 of the MVA Handbook.)

9.2.3.3 It is for the claimant to establish the likelihood of future hospitalisation or medical treatment becoming necessary in respect of the injuries sustained in the accident. This is a factual exercise which depends on

expert evidence. In more practical terms it means that the claimant must furnish the necessary medical certificates or reports or medico-legal reports wherein the claim for future hospitalisation and medical treatment is substantiated. (See R J Koch, paragraph 8.10.2 at page 173.)

9.2.4 UNDERTAKINGS UNDER SECTION 8 (5)(a) OF THE ACT

9.2.4.1 Whether or not the injured person will at some future date (and for some uncertain period) require medical treatment in respect of the injuries sustained in the accident and, if so, what the nature, extent, duration and cost thereof will be, are questions which frequently are not easily resolved at the time of disposal of a claim. The life expectancy of the injured person is also often a matter of much debate and argument. It was to meet these problems, and others, that the legislature enacted Section 8 (5) of the Act, of which Sub-Section (a) relates specifically to claims for future hospitalisation and future medical expenses. This Section enables the Appointed Agent to elect to issue an Undertaking "to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof". In other words the Appointed Agent (or the MVA Fund (see Regulation 8 (1)(e)) may take upon itself the general liability to pay for any future

hospitalisation and/or future medical treatment as and when the future costs in respect thereof are incurred and proved. As stated by Trollip J A in Marine & Trade Insurance Company Limited vs Katz NO, 1979 (4) SA 961 A at 970 C to 971 B:

> "The purpose of the provisions was to innovate a departure from the common law. This was mainly for the benefit of authorised insurers. Under the common law a person injured by an act of negligence is accorded only a single cause or right of action to recover damages for all his loss or damages, whether accrued or still prospective ... Conformably to that principle Section 21 (1) of the Act also embodies in a single cause or right of action all such injured person's rights to recover compensation for his loss or damage, whether accrued or prospective ... Hence, in any such action, the trial court has to determine the quantum of damages or compensation for past and future loss or damages. It determines the latter by reasoned estimate, but sometimes by sheer speculation or even mere guesswork, doing the best it can on the available testimony. The amount it so determines is awarded once and for all, no matter whether or not the envisaged basis for calculating the future loss or damage subsequently eventuates, the contemplated contingencies materialise, or any unforeseen events overtake the claimant, for example his death earlier than expected. .... Now paragraph (a) of the amendment is designed for the benefit of authorised insurers and has the effect, if invoked, of eliminating the uncertainties and imponderables inherent in having to adjudicate once and for all the quantum for the future loss or damage mentioned therein. Its provisions however only apply if the insurer concerned elects to invoke them. .... The claimant (the third party) cannot himself claim or insist that the insurer shall furnish the Undertaking, nor can the trial court mero motu direct the insurer to furnish it. For the election lies entirely

> with the insurer. The insurer's election must of course be conveyed to the claimant. He can do that by furnishing the claimant with an Undertaking after the claim for compensation has been submitted under Section 25 (1) of the Act. If the claimant accepts it, cadit quaestio in respect of such future loss or damage. If he does not accept it, or if no such Undertaking is then furnished, the litigation ensues. The insurer can at the trial furnish it, or tender to furnish it, or otherwise convey his election to the claimant and the trial court. In that event, if the claimant is successful in the litigation, the trial court must by its order direct, and the claimant must submit to that direction, that the insurer shall furnish the Undertaking to the claimant. The reason and need for the judicial direction is to render the Undertaking binding on both parties for the future."

As to the contents of such an Undertaking, the learned Judge pointed out at page 972 that the insurer's liability:

> "... is to compensate the claimant for any costs that are incurred by or for him in the future under these broad categories:
>
> (i) his accommodation in any hospital or nursing home,
>
> (ii) treatment of him,
>
> (iii) the rendering of any service to him, or
>
> (iv) the supplying of any goods to him, on proof that such costs have been incurred.
>
> The Undertaking need only simply state or record in those terms the insurer's assumption of that liability. Without the consent of the insurer, nothing more than that can be included in the Undertaking, either at the instance of the claimant or by

> the direction of the trial court. Hence, without such consent, the trial court cannot direct that the Undertaking should specify or detail any particular kind of hospital accommodation, treatment, services or goods covered by those categories."

It is of course inevitable that the question will arise from time to time whether specific costs incurred by the claimant at some future date after the issue of an Undertaking are recoverable thereunder and in this regard the court pointed out (at 972 F) "that the Undertaking only indeminifies the claimant against the reasonable cost of any of those categories of items".

Such an Undertaking benefits both the Appointed Agent (or MVA Fund) as well as the claimant. As pointed out so aptly by Trollip J A (at 972 H to 973 A):

> "By means of the above Undertaking, accepted by the claimant or entrenched in the trial court's order, the insurer is benefited by being relieved of the need to pay the claimant immediately for the estimated or assessed future costs of the categorised items; payment thereof is deferred until the cost of any such items is actually incurred in the future; and for various reasons that cost may never be incurred, as where, for example, the claimant suffers an early death, when such liability would of course cease. On the other hand, the claimant may also benefit in some situations. He may incur costs for hospitalisation, treatment, services or goods in the future that were not foreseen and for which no provision would therefore have been made if a lump sum had been awarded for general damages at the trial, but they would be recoverable under the Undertaking provided for by the amendment."

It should be noted particularly that an Undertaking under Section 8 (5)(a) may be issued on an apportioned basis; in other words the Appointed Agent (or MVA Fund) may issue an Undertaking to pay only a specified percentage of the cost of the future hospitalisation and medical expenses or supplies.) (Majele vs Guardian National Insurance Company Limited, 1986 (4) SA 326 T)

9.2.4.2 Contingency awards where eventualities are uncertain

In cases where an Undertaking has not been issued, it goes without saying that the onus rests on the plaintiff to prove the quantum of his claim in respect of future hospitalisation and/or medical expenses on a balance of probabilities. But this does not mean that the claimant must prove that certain future medical expenses will indeed materialise. In this regard the following statement by Colman J in the case of Burger vs Union National South British Insurance Company Limited, 1975 (4) SA 72 W at page 75 D - F are widely applied in practice:

> "A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is

> called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 % chance that an injury to a leg will lead to amputation, that possibility is not ignored because 30 % is less than 50 % and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."

(See also Kwele vs Rondalia Assurance Corporation of SA Limited, 1976 (4) SA 149 W at 152 H - 153, and Blyth vs Van den Heever, 1980 (1) SA 191 A at 225 E - 226.

In the light of the aforegoing it is advisable that medical experts be requested to express the likelihood of certain future treatment becoming necessary, in the form of a percentage.

9.2.4.3 Hospital certificates for future hospitalisation

The practice has arisen whereby Appointed Agents (presumably at the suggestion of the MVA Fund) seek to settle claims for future medical and hospital expenses by simply issuing a so-called hospital certificate to the effect that any future hospitalisation or treatment relating to the injuries in question may be obtained free of charge at any provincial hospital. In this manner the Appointed Agent (or the MVA Fund) attempts to

bring the future costs of hospitalisation and medical treatment within the ambit of the agreement between the MVA Fund and the various provincial authorities to which reference was made in paragraph 9.2.1.1 above. If an offer in this regard is accepted, it means that the injured person may simply at any future date report to any provincial hospital, produce his certificate and demand free hospitalisation and treatment. But it unfortunately also means that the claimant divests himself of the right to have his treatment administered by his own private general practitioner or specialist; he must resign himself to treatment by medical staff employed by the provincial hospital in question. Where the injured person was upon his first admission to hospital after the accident treated as a "hospital case", i.e. a free patient, he can hardly later be heard to insist on the future treatment being administered by a private doctor, and/or in an expensive private hospital, unless of course the nature of the future treatment is such that it cannot adequately be administered in a provincial hospital. But where the injured person was originally treated as a "private case" and was treated by his own private doctor or specialist, he will be doing himself an injustice if he should accept one of these so-called hospital certificates entitling him to free hospitalisation and treatment in a provincial hospital. The claimant's

legal representatives should therefore give careful consideration to any offer of settlement which seeks to dispose of the claim for future hospital and medical treatment on the basis of such a certificate. Where the claimant is quite entitled to have his injuries attended to in future by the same private practitioner who treated him after the accident, or by a specialist of his own nomination, he should be wary of being lured into a settlement which entails a hospital certificate in respect of future hospitalisation and medical expenses; there is no obligation on him to accept such a certificate, and he should insist on payment of the full anticipated future medical and hospital expenses (as estimated by available medical evidence) or he should invite the Appointed Agent to issue an Undertaking under Section 8 (5)(a), which was devised for just such an eventuality. Of course, he may be prepared to accept such a certificate in respect of future hospitalisation only, whilst rejecting it insofar as it relates to treatment as such; thereby he would retain his right to employ his own private doctor or specialist whilst getting his hospitalisation free of charge under such a certificate.

9.2.5 LOSS OF EARNINGS

9.2.5.1 A claim in respect of loss of earnings should, just like

a claim in respect of hospital and medical expenses, be properly vouched. It will also facilitate disposal of the claim if the manner in which the amount claimed has been calculated is clearly set out. After all, loss of earnings is a factual enquiry involving the pre-accident earnings applied to the period of absence from work owing to the injuries sustained, subject however to certain qualifications relating to the injured person's terms of employment. Without the relevant facts and an indication as to the calculation of the amount claimed, the Appointed Agent (or the MVA Fund) will be unable to satisfy itself as to the validity of the claim or the quantum thereof. (See paragraph 7.4.2.1) Moreover, documentary substantiation of a claim in respect of earnings is necessary not only for purposes of complying with Section 15 (1) of the Act, read together with Regulation 9 (1)(a); it is necessary also for purposes of trial. As state by Ogilvie Thompson, J in Van der Heuwel vs S A National Trust and Assurance Company Limited (reported in Corbett & Buchanan, Vol I at page 447):

> "No books, no documents and no corroboration has been advanced in support of this claim. This is a circumstance which is all too common in these damages claims. Plaintiffs who come before the court to seek damages for personal injury are not entitled to proceed in the sanguine expectation that the court will award them something. Evidence in substantiation of the claim made should be put before the court. Alternatively, if it is not possible to put such evidence before the court, the reasons why that is the case should be established in evidence."

9.2.5.2 Payments received by claimants in respect of the period of absence from work

(a) It was held in Santam Versekeringsmaatskappy Beperk vs Byleveldt, 1973 (2) SA 146 A that where the employer paid the employee's remuneration, or part thereof, in respect of the period of absence from work, and did so without obligation, purely as a gesture of goodwill or benevolence, the employee may nevertheless recover from the wrongdoer (the Appointed Agent) the full amount he would have received from his employer had he not been injured, since the wrongdoer (Appointed Agent) is in such circumstances not entitled to the benefits accruing from the employer's benevolence or goodwil. In such a case the claimant in fact receives double compensation.

(b) Similarly, where the employee has recovered his actual loss of earnings from some other source (i.e. other than from the wrongdoer), such as by virtue of the provisions of a contract of insurance taken out by him prior to the loss, the full loss is nevertheless also recoverable from the wrongdoer in question, since the proceeds of the claimant's own insurance policy are regarded as res inter

alios actae, and the wrongdoer is not entitled to benefits accruing from the claimant's policy of insurance (Santam Versekeringsmaatskappy Beperk vs Byleveldt (Supra) at page 152 E - H).

(c) But where wages have been paid to the employee as of right by virtue of the terms of his contract of employment, in the sense that the employer was obliged thereunder to make payment of such wages in respect of the period of absence, such wages are not recoverable from the third party insurer. (Dippenaar vs Shield Insurance Company Limited, 1979 (2) SA 904 A; Serumela vs S A Eagle Insurance Company Limited, 1981 (1) SA 391 T at 392 C - 393 E; Krugell vs Shield Versekerings-maatskappy Beperk, 1982 (4) SA 95 T at 102 A - 104 F) The claimant's precise terms of employment and his rights with regard to periods of absence from work owing to incapacity are consequently of prime importance. It should be noted that the Regulations governing the terms of employment of certain employees of the state (notably members of the SA Police) were adjusted in response to the case of Dippenaar vs Shield Insurance Company Limited, 1979 (2) SA 904 A. Where such Regulations (or the terms of a contract of employment) are to the effect that the employer retains a discretion as to whether he will compensate the employee in

respect of certain losses in the event of the employee's incapacity, it cannot be said that the employee in question enjoys a right to receive such compensation from his employer. In this regard the following was stated by De Kock J in the case of Gehring vs Unie Nasionaal Suid-Britse Versekeringsmaatskappy Beperk, 1983 (2) SA 266 C at 273 G:

> "Op albei stelle Regulasies is dit duidelik dat die eiser geen reg onder sy dienskontrak het op siekteverlof gedurende die tydperke wat hy in die toekoms van sy werk afwesig sal wees nie. Siekteverlof bly 'n voorreg wat in die diskresie van die kommissaris berus. Aangesien daar dus geen verpligting op die werkgewer rus om siekteverlofvoordele te betaal nie, kom dit my voor dat enige voordele wat eiser in hierdie verband mag kry, beskou moet word as nie aftrekbaar nie. Eiser kan dus wel die skade wat hy onder hierdie item ly van verweerder verhaal."

The Court was dealing here with the S A Police regulations in relation to so-called sick-leave. In the same case the Court also considered the police regulations with regard to medical expenses and found that policemen are entitled thereunder to receive payment of such medical expenses, with the result that such expenses, contrary to sick-leave benefits, could not be claimed again from the wrongdoer. But the relevant Regulations operative at the time of the accident must be scrutinised in

every case to allow for amendments affected to them from time to time. See also R J Koch, Chapter 7, page 117 et seq.

9.2.5.3 As at what date must the loss be calculated?

The vexed question as to whether damages must be calculated as at the date of delict or whether they may be calculated as at the date of trial, will hopefully be resolved by the Appeal Court shortly. In Wigham vs British Traders Insurance Company Limited, 1963 (3) SA 151 W; Summers vs General Accident Insurance Company SA Limited, 1985 (3) SA 410 C; Carstens NO vs Southern Insurance Associated Limited, 1985 (3) SA 1010 C it was held that the Court was at liberty to calculate the loss as at date of trial rather than at the date on which the delict was committed. On the other hand it was held in Majele vs Guardian National Insurance Company Limited, 1986 (4) SA 326 T that the damages should be calculated as from the date of delict. It is submitted that the three first-mentioned cases are to be preferred. (See also R J Koch, Chapter 6, at page 104 et seq).

9.2.5.4 Illegal income

(a) Claims for loss of earnings (or future loss of earnings) based on income derived from illegal activities are unfortunately still subject to much

uncertainty. For a proper appreciation of this uncertainty, it is essential to refer to an article by Prof J Y Claasen which appeared under the heading "Weereens skadevergoeding weens die verlies van toekomstige verdienste of onderhoud, en onwettige inkomste in die verlede" in 1986 (49) THRHR at page 343. This followed an earlier article by the same learned author which appeared in 1984 (47) THRHR at pages 439 - 447.

(b) In the case of Dlamini vs Protea Assurance Company Limited, 1974 (4) SA 906 A the Appeal Court (per Rumpff C J) confirmed the dismissal of the plaintiff's claim for loss of earnings derived from the illegal (unlicensed) street-selling of fruit. The matter had unfortunately been brought before the Court a quo as a stated case, and the learned Chief Justice was at pains to point out (at page 915 G - page 916 A) that the court laboured at a disadvantage owing to the lack of evidence in certain respects. The judgment consequently had to be given on the basis of the rather threadbare facts set out in the stated case. Against this background the conclusion of the Court at 917 D - E was as follows:

> "Na my mening het die wetgewer beoog dat daar geen handeldryf mag plaasvind deur 'n marskramer sonder lisensie nie. Om

> dit wel te doen is nie alleen strafbaar nie, maar, weens belangrike oorwegings van publieke beleid, behoort die gevolge van so 'n handeldryf ook nie regsgeldig te wees nie. Na my mening was die inkomste van die eerste appellante dus nie-regmatige inkomste."

The dismissal by the Court a quo of the plaintiff's claims for past and future loss of earnings was consequently upheld, and in the earlier of the two articles by Claasen referred to above, the learned author firstly pointed out (at page 441) that:

> "Die eise word myns insiens tereg afgewys weens openbare beleidsoorwegings omdat die skade reeds gely enkel en alleen op 'n onregmatige optrede in die verlede gebaseer is en die toekomstige skade op die voortsetting van die onregmatige bedrywigheid gefundeer is. Die reg is op die feite korrek toegepas."

But he proceeded to warn as follows:

> "Waarteen ek egter wil maan, is 'n foutiewe aanname dat die blote feit van onwettige bedrywighede in die verlede 'n persoon se eis om toekomstige verdienste sal fnuik. Dit behoort duidelik te wees dat indien die pleitstukke en getuienis nie die toekomstige skade se realisering op die onregmatige optrede gefundeer het nie, maar op die potensiële realisering van die eiseres se vorderingsregte .... in die normale arbeidsmark, die bevinding in die guns van die eiseres kon gewees het. Logieserwys kon haar onwettige bedrywighede 'n aanduiding van haar arbeidspotensiaal wees. Natuurlik kan 'n verweerder beweer dat 'n eiser waarskynlik ad infinitum met onregmatige bedrywighede sal voortgaan. In sodanige

> gevalle sal die eiser om suksesvol te wees, die Hof op 'n oorwig van waarskynlikhede tot die teendeel moet oortuig. Die prosesregtelike faktor doen egter nie afbreek aan die beginsel nie. Die Dlamini-saak moet myns insiens nooit verstaan word as sou dit 'n streep deur 'n eiser se eis om toekomstige verdienste trek waar hy in die verlede op 'n onregmatige wyse sy inkomste verdien het nie. Dit is beslis aanduidend van welke omsigtigheid van pleitbesorgers in die voorbereiding van hul kliënte se eise in soortgelyke feitekomplekse geverg word." (page 441)

And at page 445 the learned author added:

> "Ek is van mening dat dit onrealisties en 'n mosie van wantroue in ons regspleging as geheel (sal) wees indien 'n Hof sou aanvaar dat 'n persoon vir altyd met onwettige bedrywighede kan voortgaan."

(c) In Mba vs Southern Insurance Association Limited, 1981 (1) SA 122 Tk Rose-Innes J was concerned with an exception by the plaintiff against the defendant's plea wherein the point was taken that since the deceased's income had been derived illegally from the running of a so-called pirate taxi, the claim for loss of support by the plaintiff-widow could not be sustained in Law. After referring to Booysen vs Shield Insurance Company Limited, 1980 (3) SA 1211 SE and to Dlamini vs Protea Assurance Company Limited, 1974 (4) SA

906 A the learned Judge stated the following at 124 C - H:

"The exception raises the question whether a dependant's claim for loss of support and maintenance due to the death of a breadwinner caused by the fault of another, and for which, in the circumstances of this case, a compulsory insurer may otherwise be liable in terms of Section 21 of Act 56 of 1972, is precluded where the income of the deceased from which the maintenance and support was provided, and would in future have been provided, was derived from activities which are illegal or contrary to good morals ... The law propounded in these decisions is that in a delictual claim for damages for loss of earnings due to injury, or for a dependant's loss of support and maintenance resulting from the death of a breadwinner, damages or compensation are not recoverable in respect of loss of earnings or loss of support and maintenance which were derived from an activity which was illegal. An illegal activity in this context refers to an activity which is prohibited by statute, or is criminal either at common law or by statute, or which is categorised as contra bonos mores by common law. In the case of a statutory prohibition or offence, however, the prohibited conduct is not illegal and void where the intention of the legislature was merely to penalise the conduct without nullifying it and depriving it of legally enforceable consequences as, for example, in the case of a penalty which is imposed solely or predominantly for fiscal and revenue producing reasons, and not in order to protect the public interest or for other grave considerations of public policy ... Plaintiff would be precluded from recovering compensation for loss of support and maintenance for herself and her children if the support and maintenance was, or would in future have been, derived from the deceased's

illegally earned income."

The learned Judge also pointed out that it was specifically averred in the plea that the maintenance and support had been furnished "and would in future have been furnished" (at page 125 H) from income which the deceased had derived from illegal activities, and added (at page 126 A):

> "It may very well be that plaintiff at a trial, and if necessary with an appropriate amendment of her particulars of claim, may be able to prove a loss of support unaffected by any illegal earnings of the deceased, but that is not the question before me on exception and I am unable to make any comment in that regard."

On the pleadings as they stood, which did not base the claim for future losses on any prospect that the deceased may have discontinued his illegal activities and reverted to some lawful source of income, the plaintiff's exception to the plea was dismissed with costs.

(d) In Fortuin vs Commercial Union Assurance Company of SA Limited, 1983 (2) SA 444 C the deceased had been a hawker who earned his living by cutting and selling firewoord for which he did not possess the required hawker's licence prescribed by the relevant Ordinance. But the case for the

plaintiff-widow was firstly that an application for the necessary hawker's licence would have been lodged and that such application would have been successful, and secondly the case for the plaintiff was that the deceased was the type of man who would have earned a living anyway either as a lawful hawker or from some other lawful occupation. On the evidence the Court found that, as a probability, the application for a hawker's licence would have succeeded and that the deceased's earnings would then have been lawful. In the circumstances the agreed quantum in respect of the plaintiff's claim for loss of support was awarded.

(e) The point came up for determination once again in the case of Santam Insurance Limited vs Ferguson, 1985 (4) SA 843 A. The Court a quo (see Ferguson vs Santam Insurance Limited, 1985 (1) SA 207 C) had chosen to differ from the Booysen and Mba cases, and had reasoned as follows at 208 F - I:

> "I am of the opinion that to say that the deceased person was carrying on an illegal business is to beg the question. If his conduct or business were such that he could lawfully recover the price of the goods sold or services rendered, I think his conduct cannot be classified as illegal for present purposes. But if his conduct or business were such that he could not in law recover, e.g. living by robbing people, it could be called illegal. This, to my mind, is an

> important test ... in my view the Roman-Dutch Law has advanced far beyond the principle that the sins of the fathers are visited upon the next generations. Whereas a plaintiff who personally has lost (illegal) income may be frowned upon by the Court and non-suited on that account, non constat that a plaintiff who has lost earning capacity, i.e. future loss of income, must be frowned upon. He has been injured and, if the injuries are permanent, his earning capacity is affected .... But it does not follow that in the future he is necessarily going to carry on his illegal business or activities. A fortiori his dependants cannot be non-suited for what is their loss after the deceased's "illegal" acitivities have ceased. To non-suit a widow or child or in the extreme case an unborn child, because the deceased husband or father was making a living out of the sale of lucerne seed to unauthorised buyers is, in my opinion unjust and on principle unsound. The widow or child may know nothing about the deceased's activities and, if the illegality was discovered and stopped, it is obvious that the pater familias would have resorted to some other form of livelihood."

But on appeal this judgment was reversed, Joubert J A stating the following at page 851 E:

> "Dit is na my mening onteenseglik so dat die berekening van die kwantum van haar skadevergoeding noodwendig gebaseer moet word op die nie-regmatige inkomste wat die oorledene as broodwinner uit die onwettige beoefening van sy ongelisensieerde besigheid van duikklopwerk verdien het."

It was this dictum which prompted Claasen to write the second of his two articles referred to in sub-

paragraph (a) above. In response to the judgment he had obtained and perused "die volledige pleitstukke en verslag van die verhoorverrigtinge", which brought him to the conclusion that "daar met die resultaat van die Appêlhof se beslissing saamgestem word", but he criticised the above-quoted dictum as being in conflict with the following two statements of Trollip J A in the case of Shield Insurance Company Limited vs Booysen, 1979 (3) SA 953 A:

(i) At page 964 D the learned Judge stated that "even though some of the activities (carried out by the deceased to earn an income) had ceased before his death and others were found by the Court a quo to be illegal, they can nevertheless be relied upon as some indication of his earning capacity";

(ii) At page 965 C - D the learned Judge stated that "having regard to (the deceased's) energetic and enterprising personality I agree with the Court a quo that he would probably have found other ways of replacing the income from any of those side-lines that could not be continued."

Relating these two statements of Trollip J A to the above-quoted dictum of Joubert J A in the Ferguson appeal, Claasen then commented as follows:

> "Hierdie uitspraak (referring to Booysen's case)trek baie duidelik nie 'n streep deur 'n eiser of sy afhanklikes se eise weens verlies van toekomstige verdienste of onderhoud bloot omdat sy inkomste in die verlede op 'n onwettige manier verkry is nie. Oënskynlik het 'n mens dus nou twee teenstrydige presedente. Die oplossing van die dilemma is waarskynlik ôf om die jongste beslissing as 'n beslissing per incuriam te beskou ôf om dit vanweë die besondere feite daarvan te onderskei."

But it is respectfully submitted that the remarks of Joubert J A must be related solely to the context in which they were made, i.e. against the background of the particular pleadings, the agreement between the parties, and the narrow issue submitted to the Appellate Division for decision; it was thus in respect of that particular plaintiff's case that the learned Judge made the remark (at page 851 E):

> "Dat die berekening van die kwantum van haar skadevergoeding noodwendig gebaseer moet word op die nie-regmatige inkomste wat die oorledene as broodwinner uit die onwettige beoefening van sy ongelisensieerde besigheid van duikklopwerk verdien het."

If the learned Judge had intended this remark to

apply as a general rule he would undoubtedly have commented upon the contrary pronouncements in the cases to which both counsels' heads of argument drew his attention.

(f) Indeed, the whole topic of income derived from an illegal source again raised its ugly head in Mankebe NO vs AA Mutual Insurance Association Limited, 1986 (2) SA 195 D & C. This was again a stated case, the nature of which was described as follows by Wilson J at page 199 G - H:

> "To rephrase the question, what I am asked to decide is whether a court should refuse to entertain an action for damages brought by an innocent claimant whose claim for damages is based on a loss of support where the deceased's income from which the support was derived, was acquired or derived from an illegal source."

Commenting on the judgment of Joubert J A in Santam Insurance Limited vs Ferguson (Supra) the learned Judge stated the following at page 201 E - F:

> "It is clear from this judgment that the question to be decided is not only whether the activity carried on was illegal but, in addition, whether, on the basis of important questions of public policy, the consequences of the carrying on of such an activity ought to be invalid. In Dlamini's case the Court found that the potential danger to the members of the public where footstuffs

were sold by an unlicensed hawker who did not have the requisite medical certificate, constituted such a basis; in Santam Insurance Limited vs Ferguson the danger arose from the nature of the trade carried on."

In the absence of the necessary evidence, the learned Judge found himself unable to establish whether the plaintiff-widow could recover damages for loss of support despite the fact that the deceased's income had been illegal:

"In the light of the aforegoing, it is not possible to answer the question posed by counsel; I am satisfied that, in certain circumstances, a plaintiff can recover such damages even where the maintenance was derived illegally or from an illegal source. Where the illegality is such as to constitute a danger to the public or even, perhaps, of such a nature as to cause general public opprobrium, public policy would demand that the plaintiff be deprived of the right to recover damages where the maintenance lost was obtained from such sources. This is a question of fact and can only be decided after hearing evidence, or in suitable cases, on admissions made, as to the nature and degree of the illegality and of the effect of such illegality on the transactions entered into by the deceased." (At page 203 J)

The Court accordingly ruled that the matter should be set down for further hearing "as to the nature of the trade carried on by the deceased".

(g) Nowhere in the Mankebe judgment is reference made

to the crux of the message which Claasen has attempted to put across to practitioners on at least two occasions, namely that the single fact of the illegality of the earnings does not by itself necessarily put paid to the claim of the injured person or of the dependants of a deceased person. In principle there is nothing to stop a pleader from alleging that the illegality would have ceased and that the earnings thereafter would have become lawful. Either the same trade or occupation could have become legalised (for example by the necessary permit or licence being obtained) or it could be alleged that the injured person or the deceased would have terminated his illegal activities and reverted to a lawful occupation, in which event the extent of the former illegal income might even be taken as an indication of the earning capacity of the person concerned (as per Booysen's case at page 964 D). It is of course not simply a matter of making appropriate allegations along these lines in the pleadings; the evidence must of course be available to substantiate these allegations. But as Claasen says: "Die prosesregtelike faktor doen egter nie afbreek aan die beginsel nie." The point is simply made that it is unnecessary and often fatal to base a claim for future loss of earnings or future loss of support

on an allegation that the person concerned would have continued for the duration of the loss to make his living out of the illegal activities he practised prior to the accident. The true position should be carefully canvassed in order to establish whether such a claim could not be founded on lawful earnings. In this respect Claasen warned practitioners (1986 (49) THRHR at page 343) "om nie hul pleitstukke so op te stel dat die eis vir verlies aan toekomstige verdienste op die verbode inkomste in die verlede en op die voortsetting daarvan gebaseer word nie", and he reiterated his message (at page 346) as follows:

> "Die billike en regverdige afhandeling van 'n eiser se eis vir verlies van geskiktheid om inkomste te verdien of van 'n afhanklike se eis vir verlies aan toekomstige onderhoud in die bespreekte omstandighede, sou wees dat pleitbesorgers hul kliënte se pleitstukke korrek opstel en, afhangende van die feite, dat 'n persentasievermindering op grond van 'n moontlike voortsetting van die onwettige aktiwiteit ten opsigte van so 'n eis toegelaat word. Dit is onrealisties om te aanvaar dat mense in Suid-Afrika ongestoord sal voortgaan met 'n onwettige bedrywigheid of dat 'n broodwinner of eiser as redelike persoon nie 'n wettige manier om inkomste te verdien sou kon vind as sy onwettige bedrywigheid stopgesit sou word nie."

9.2.6 FUTURE EARNINGS AND LOSS OF EARNING CAPACITY

9.2.6.1 Much of what has been said above in connection with past

loss of earnings, applies with equal force to claims for future loss of earnings. The calculation of future loss of earnings is seldom uncomplicated; such claims are often the subject of speculation, conjecture and somewhat arbitrary assumptions. Sometimes the available medical evidence will make a fairly precise calculation of the future loss of earnings possible, in which event the future losses can be calculated by an actuary or by the claimant's attorney himself, following the method of calculation which has been set out with great clarity on a step-for-step basis in the MVA Handbook, paragraphs 10.59 to 10.73 and Corbett, Buchanan & Gauntlett (3rd Edition) at pages 62- 73. See also R J Koch, Chapter 8, page 131 et seq.

9.2.6.2 Undertakings under Section 8 (5)(b) of the Act

To meet the difficulties relating to the making of a reliable calculation despite numerous imponderables, the legislature enacted Section 8 (5) of the Act, of which Sub-Section (b) entitles the Appointed Agent (or the MVA Fund) to furnish an Undertaking to pay the amount for which it is liable "by instalments as agreed upon". (Under Section 21 (1C)(b) the last-quoted words were followed by "or directed by the court".) Just as in the case of Section 8 (5)(a), Section 8 (5)(b) (which, with the exception just mentioned, substantially re-enacts its predecessor, Section 21 (1C) (b) of the 1972 Act)

has been definitively interpreted and explained in Marine & Trade Insurance Company Limited vs Katz NO, 1979 (4) SA 961 A, and particularly at 973 G - 980. Material features of the functioning of Section 8 (5)(b) are stated in the judgment to be the following:

(a) The object of the Section is to avoid the quantum of compensation for future loss of income or support being a contentious issue at the trial, and to eliminate some of the uncertainties and imponderables which the trial court would have in determining, capitalising and awarding once and for all a lump sum for such future loss (at 974 B).

(b) Section 8 (5)(b) was enacted mainly for the benefit of Appointed Agents. The choice of invoking them lies entirely with the Appointed Agent concerned. (At page 974 C)

(c) It gives the trial court discretionary powers which it does not enjoy under Section 8 (5)(a); in the absence of any agreement between the parties the trial court must, in the exercise of its discretion, determine and fix the details concerning the instalments which have to be incorporated into the Appointed Agent's Undertaking. (At page 974 D, 971 F - G and 975 H)

(It is to be noted that the deletion of the words "or directed by the court" has now emasculated the court's role by removing the discretionary powers to which Trollip J A was here referring, thus leaving the court with only the same insignificant powers as it enjoys under Section 8 (5)(a). See in this regard paragraph 9.2.4 above. The court thus no longer has the power to determine and fix any details concerning instalments which have to be incorporated into the Undertaking; this must now be determined by agreement. It would seem that the position of the Appointed Agent (or the MVA Fund, as the case may be) is now somewhat weaker in relation to the election to issue an Undertaking under Section 8 (5)(b). Previously it had the right to elect to issue such Undertaking and in the absense of agreement between the parties as to the instalments payable, the court would determine such instalments and the election to issue the Undertaking could thus be enforced by the Fund. Now the court's role has been deliberately excised in this respect, and if the election is made by the Appointed Agent (or MVA Fund) to issue an Undertaking but the parties fail to reach agreement as to the instalments which will be payable, the Undertaking cannot be enforced and will fall away; in such a case quantum will have to be determined by the court in the normal lump sum manner.)

(d) The instalments will cease on the death of the patient, even if this occurs before the expiration of the period of the patient's anticipated life expectancy which formed the basis of the calculation of the future loss. On the other hand, if the patient should continue living beyond that period, the instalments must continue until the patient reaches the age where he would ordinarily have retired (at page 980 D - E).

(e) By his Undertaking the Appointed Agent has to compensate the claimant for his future loss of income or support to substantially the same extent as he would actually have received it but for the event in question. (At page 976 E) It should again be noted that an Undertaking may be issued on an apportioned basis. (Majele vs Guardian National Insurance Company Limited, 1986 (4) SA 326 T).

9.2.6.3 Loss of earning capacity

It happens quite frequently that the claimant finds himself in a situation wherein his prospects are that he may well manage to hold down his former (or some comparable) job (in which event he will suffer no future

loss), but the prospects are equally consistent with a possibility that his physical disability may well persuade his employer during bad economic times to retrench staff, in which case such a semi-disabled employee would be the first to be dismissed. By virtue of his disability he would then find himself at a disadvantage in the exercise of competing with others for jobs on the open labour market. In short, he may suffer no loss at all, but on the other hand he may find himself unemployed and incapable of finding employment for lengthy periods, if not permanently. The actual permanent loss, if any, is not capable of calculation. In such cases our Courts would be inclined (if the Appointed Agent does not elect to issue an Undertaking under Section 8 (5)(b)) to award a lump sum in respect of the claimant's diminished earning capacity. In such cases a strict mathematical calculation would be unsuitable, but the Court should nevertheless try to ascertain the value of what was lost on some logical basis and not on impulse or by guesswork. (Goldie vs City Council of Johannesburg, 1948 (2) SA 913 W at 920)

The leading case on this aspect is Southern Insurance Association Limited vs Bailey NO, 1984 (1) SA 98 A, of which the head-note really says it all. (Owing to its length, it is not repeated here.) This judgment succintly sets out, at pages 111 C - 117 G, all the relevant principles and guidelines relating to the

assessment of damages for loss of earning capacity, and all the relevant authorities are collated by Nicholas J A with his usual impeccable clarity.

9.2.7 LOSS OF SUPPORT

9.2.7.1 The basis of any claim for damages for loss of support arising from the death of someone else is the existence of a legal duty owed by the deceased during his lifetime to provide such support to the plaintiff. (Corbett, Buchanan and Gauntlett, Third Edition, at page 77). Such a duty exists between husband and wife, parent and child (and vice versa), and even in certain circumstances between brother and sister as well as grandparents and grandchildren (See Corbett, Buchanan and Gauntlett, Third Edition, at pages 78 - 83, and R J Koch, paragraph 9.2 at page 182).

9.2.7.2 As has already been stated it is not the object of this work to embark upon a comprehensive exposition of the wide field relating to the assessment of damages for loss of income and support. The extent of this field is after all indicated by R J Koch's Damages For Lost Income. The evidence required, the methods of calculation, the principles relating to capitalisation and the deductions for contingencies are all areas which are most adequately served by the available authorities

on those topics. See for instance Corbett, Buchanan & Gauntlett at page 83 - 96; R J Koch, Chapter 9 at page 179 et seq.

9.2.8 FUNERAL AND INCIDENTAL EXPENSES

9.2.8.1 There is unfortunately a dearth of judicial authority on the recoverability of certain items of damages incidental to the funerals of person who died as a result of injuries sustained in motor accidents and since the items of damages in question are normally fairly conservative, the prospects of further judicial pronouncements are poor. The case of Rondalia Assurance Corporation of SA Limited, vs Britz, 1976 (3) SA 243 T constitutes the sole source of South African judicial authority relating to funeral and incidental expenses as damages under the MVA legislation, and it is therefore necessary to refer briefly to the significant features of this case.

9.2.8.2 Firstly it was pointed out by Margo J that funeral expenses may be claimed by:

(a) The executor of the deceased's estate (at page 246 C);

(b) The heirs of the deceased (page 245 H - 246 A and

246 D);

(c) A member of the deceased's immediate family, such as his spouse or parent or child, who is not an heir but who has borne the cost of the funeral (page 246 E - G).

9.2.8.3 What may be claimed?

As to the extent to which funeral and incidental expenses may be recovered, the learned Judge said the following:

> "The funeral arrangements which are to be expected from one who stands in such relationship to the deceased would not ordinarily be limited to the bare act of interment, but would include such incidental items as are reasonable in the circumstances. Prima facie that would indicate the extent to which the expenses would be recoverable. However, the test of what is reasonable in the circumstances may vary not only with the means and status of the deceased, but also according to the legal ground upon which the right of recovery is exercised."

Applying these principles the learned Judge then dealt with a number of incidental items individually:

(a) Ceremonial expenses

Ceremonial expenses incurred out of respect for the dead or the expenses of mourning are not normally recoverable as "funeral expenses" (at page 248 B);

(b) Expenses incidental to the burial or cremation

Expenses forming part of or being reasonably incidental to the actual burial or cremation are part of the funeral despite the fact that there might be an element of ceremony or mourning involved therein. Thus, for example, the reasonable cost of preparing the body for burial, of an appropriate coffin, of a hearse to convey the body to the place of burial, of the services of a Minister of Religion to conduct the funeral, and of appropriate means of marking and completing a proper grave would all prima facie fall within the ambit of funeral expenses (at page 248 B - C);

(c) Funeral clothes

Funeral clothes cannot be justified (at page 248 D - E);

(d) Floral tributes

Although floral tributes such as a wreath on the coffin would not ordinarily constitute allowable expenses, the distinguishing factor in casu was that, on the evidence, the solitary wreath was an entirely reasonable adornment of the coffin which could therefore be regarded as a substitute for a more ornate and probably more expensive coffin

exterior, and since it was well within the bounds of what was reasonable, the cost of the wreath on the coffin was allowed (at page 248 F - G);

(e) Glass wreath on grave

The cost of a glass wreath on the grave was allowable on the facts of the particular case because, in the absence of a claim for a headstone, it served to mark the grave (at page 248 G);

(f) Telephone calls

The cost of telephone calls relating to the telephonic advice to relatives of the arrangements for the funeral were allowed since "it must be acknowledged that a funeral cannot reasonably be expected to take place without notification at least to the members of the deceased's family" (at page 248 H);

(g) Travelling expenses relating to the funeral

The "reasonable and necessary travelling expenses to enable a funeral to take place were also allowed, in particular the cost of petrol consumed by the claimant to transport members of the family to the funeral from the airport to which they had flown in. It was also pointed out that in Young vs

Hutton, 1918 WLD 90 the cost of an heir incurred in travelling to the funeral was allowed, and that in Schneider vs Eisovitch (1960) 2 QB 430 the plaintiff was held entitled to recover the cost of reimbursing a relative for his travelling expenses in coming to help with the arrangements for the transportation of the body to the country where it was to be buried (at page 248 H - 249 B). (In the Britz case the cost of an airticket for the deceased's grandmother to attend the funeral was disallowed in the Court a quo and there was no appeal against this ruling.)

(h) Refreshments

In general "the disposal of the earthly remains of a deceased person" is a matter for his family to arrange, and ordinarily the occasion is marked by a religious service and traditional forms of mourning:

> "Expense is commonly incurred not only in the actual interment or reduction of the body to ashes by fire, but also in providing for the religious ceremony, in sentimental expressions of respect and mourning, in the provision after the funeral of refreshments for relatives and friends, some of whom may have travelled long distances to attend the funeral, and in the subsequent erection of a tombstone". (At 245 A)

It would seem therefore that the cost of

refreshments for relatives and friends would normally also be allowable, (at page 244 H - 245 A) but the cost of "the subsequent erection of a tombstone" requires special consideration. (But the cost of an elaborate funeral feast, such as is customary amongst some sections of the South African population would not, it is submitted, be recoverable - compare the remarks at page 244 H.)

(i) The cost of a tombstone

For many years the MVA Fund (and therefore also the Appointed Agents) have been at loggerheads with MVA practitioners as to the recoverability of the cost of a tombstone as damages under the MVA legislation. Although there is no authority directly in point on this issue, it is respectfully submitted that there are strong indications in Britz's case that the reasonable cost of such a tombstone on the grave is indeed recoverable:

(i) Firstly in the last-quoted extract from the judgment (at page 245 A) Margo J specifically pointed out that "expense is commonly incurred ... in the subsequent erection of a tombstone".

(ii) After pointing out (at page 247 E) that the

cost of a tombstone lies, for estate duty purposes, outside the concept of reasonable funeral expenses, the learned Judge immediately adds (at page 247 F) that:

> "We are not concerned with funeral expenses recoverable on any of those grounds, but with the delictual liability under the lex Aquilia, of a wrongdoer ... to compensate another for funeral expenses."

He thus draws a deliberate distinction between the cost of a tombstone for purposes of estate duty, and the cost thereof for purposes of Aquilian damages.

(iii) Mentioning that English cases on this topic are instructive, and that the test of recoverability in England is "whether the expenditure incurred was reasonable in the circumstances", (at page 247 H), the learned Judge points out that whilst a monument to be erected over the grave is not allowed in English Law, "a stone of some kind ..... necessary to complete the grave" is allowed. (Hart vs Griffiths-Jones (1948) 2 AER 729) There is of course a world of difference between a "monument" (or a memorial) as is

often found in Europe, and a headstone or a tombstone ("a stone of some kind") as is traditionally used in South Africa.

(iv) The learned Judge mentions (at page 248 C) that "appropriate means of marking and completing a proper grave would .... prima facie be within the ambit of funeral expenses", and he allowed a glass wreath "to mark the grave" because there was no claim in casu for the cost of a headstone (at page 248 G).

It is submitted that the aforegoing extracts from the judgment afford convincing and persuasive authority for the proposition that the reasonable cost of a tombstone (or headstone) are indeed recoverable as damages under Act 84 of 1986. The cost of a headstone "to mark the grave" is after all a reasonable and necessary expense in the traditional South African funeral.

9.2.9 TRAVELLING EXPENSES

The cost of transporting the injured person to some place, such as a hospital or a doctor's surgery, for the purpose of having necessary medical treatment administered, is unquestionably recoverable as damages under the MVA Act, (Mrwarwaza NO vs Rondalia Assurance Corporation of SA

Limited (Corbett & Buchanan, Vol II, page 760), but the same does not apply with regard to travelling costs incurred for mere visits to an injured person in hospital. In this regard the following was stated by Harcourt J in Broom and Another vs The Administrator, Natal, 1966 (3) SA 505 D & C at page 526, in relation to a claim by parents for the cost of visiting their injured son in hospital:

> "I do not suggest that the second plaintiff and his wife did anything other than that which would be expected of solicitous parents. They are to be commended for their desire and determination to be with their son in his distress. This is not to say, however, that they can look to the wrongdoer for reimbursement unless the expenses involved can properly be said to be causally connected with the injuries inflicted on their son. Their presence in Durban was not necessary; they could have given any necessary consent to the operation by telephone ... There is no rational basis for holding that their presence was medically necessary ... even Mr Joubert declined an invitation to say that the presence of the parents was medically necessary. He contented himself with saying that the first plaintiff was seriously ill and that he, Mr Joubert, would have hated them to have been four hundred miles away, particularly at the time of the operation. Thus, in my view, these travelling expenses are irrecoverable in so far as they relate to the travelling undertaken by the second plaintiff and his wife."

(See also Lowndes vs President Insurance Company, Corbett & Buchanan, Vol II, page 683 at page 692.)

It would seem to follow that the position would be different where there is satisfactory medical evidence to

the effect that the presence of a parent (or spouse) was medically or therapeutically necessary in relation to the treatment of a child (or spouse). It is submitted also that in a case where the personal consenting signature of a father or spouse is demanded before essential treatment will be administered, the consequent travelling expenses will have to be allowed.

It goes without saying that estimated future travelling expenses which may be necessary to have future medical treatment administered, are also allowable.

In appropriate cases the cost of an attendant or some other person accompanying the injured person will also be allowable (including the incidental costs of accommodation and subsistence) i.e. where the injured person's condition or age renders this necessary. (See also R J Koch, paragraph 8.10.4.3 at page 175.)

9.2.10 THE COST OF AN ATTENDANT/ASSISTANT

In Mostert vs Shield Insurance Company Limited, (Corbett & Buchanan, Vol II, page 751) the cost of employing a personal attendant to attend to the injured person for the balance of the latter's life expectancy (where the injured person's wife had died) was allowed. (See also Fredericks vs Union and South West Africa Insurance

Company Limited (Corbett & Buchanan, Vol II 335 at page 342.)

In Erdmann vs Santam Insurance Company Limited, 1985 (3) SA 402 C a housewife had become incapable of managing the household without assistance, because of injuries sustained in a collision. The plaintiff-housewife was married to her husband out of community of property, and the husband had provided the money for the running of the household. The plaintiff herself claimed a substantial amount in respect of the employment of an assistant "to help her run the home" which she could no longer fully cope with as a result of her injuries. She did not claim that she required assistance in caring for herself; she needed the services of a servant for an additional four days per week "to help her run the house which was occupied by herself, her husband, and their two younger children". (At page 404 C) The Court held that the need for employing such an assistant had been established, but the question then arose as to whether this expense was claimable by the plaintiff herself or whether it should have been claimed by the husband as head of the household. (Page 408 B) It has been held (Plotkin vs Western Assurance Company Limited and Another, 1955 (2) SA 385 W) that where a husband has been deprived, through the negligence of a wrongdoer, of the essential services of his wife, he has the right to sue for damages, and counsel for the defendant in Erdmann's case submitted the

plaintiff-housewife could not herself claim the expenses relating to the employment of the assistant. The evidence revealed that the pre-trial costs of the assistant had been paid by the husband and the Court held (at page 409 F - H) that the plaintiff's claim for the pre-trial costs of the assistant was unfounded, but the post-trial costs relating to such assistant were awarded to the plaintiff since she was entitled to claim for these. In this regard Fagan J said at page 409 C - E:

> "The submission of (defendant's counsel) that plaintiff's husband suffered a loss when her homemaking functions were impaired, is correct. But plaintiff and the children suffered a loss too. The loss was that of the family unit. Plainiff's husband's loss was no different to the loss suffered by the other members of the family. I agree with the views expressed by Cooper-Stephenson and Saunders that the primary claim for the loss of her housekeeping ability should be the wife's, and that that is in accord with modern social ideas."

Whilst the judgment therefore states that the plaintiff-housewife <u>does</u> have a right of action in such circumstances, it makes it equally clear that where the expenses in question have been paid by the husband, not out of pure benevolence or liberality, but by virtue of his legal duty to support his wife and family, only he can claim the damages thus paid by him.

9.3 GENERAL DAMAGES

9.3.1 The assessment of general damages (for pain and suffering, shock, inconvenience, loss of amenities of life, disfigurement, etc) is an exercise for which a practitioner obtains a "feel" as a result of experience. (See Sigournay vs Gillbanks, 1960 (2) SA 552 A at 556 B) It was pointed out in Sandler vs Wholesale Coal Supplies Limited, 1941 AD 194 at 199 that "the amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case".

9.3.2 PREVIOUS COMPARABLE AWARDS

Nevertheless, there can be no denying of the fact that previous comparable awards are invariably either the starting-point in the determination of an amount for general damages, or a check of the initial "feel" which a practitioner's experience gives him in a particular case. Obviously any reference to previous awards must be undertaken with caution (Marine & Trade Insurance Company Limited vs Goliath, 1968 (4) SA 329 A at 334 D), not only because care should be taken not to fetter the Court's discretion, but also because the facts in previous cases are so seldom similar in all material respects. In Protea Assurance Company Limited vs Lamb, 1971 (1) SA 530 A,

Potgieter J A stated, at page 535 to 536 B:

> "It should be emphasised ... that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration."

But where it is sought to establish general damages in a particular case by referring to previous awards (as opposed to merely assessing general damages as being somewhere between awards which clearly justify higher and lower awards) the golden rule as stated by Wessels J A in Capital Assurance Company Limited vs Richter, 1963 (4) SA 901 A at 908 A is the following:

> "Comparison can only be usefully undertaken where the circumstances are clearly shown to be broadly similar in all material respects. To give any wider degree of recognition to a rule of this nature would render the difficult task of determining the quantum of damages even more burdensome and liable to error than is already the case, without any

real advantage to the court or the litigants."

9.3.3 ALLOWANCE FOR CHANGES IN THE VALUE OF MONEY

Even where the facts in a previous case were "broadly similar in all material repects", it goes without saying that the award in such previous case may not be blindly followed, because obviously the value of money will probably in the interim have been eroded, and allowance should be made for this fact:

"If there has been a marked change in the value of money since earlier, otherwise comparable, awards were made, this should be taken into account, but not with such an adherence to mathematics as may lead to an unreasonable result."

(Sigournay vs Gillbanks, 1960 (2) SA 552 A at 556 C)

Our Courts have persistently refused to lay down hard and fast rules as to the basis on which adjustments should be made to previous awards so as to allow for the erosion in the value of money. As regard the application of the Consumer Price Index the Appeal Court stated in AA-Onderlinge Assuransie-Assosiasie Beperk vs Sodoms, 1980 (3) SA 134 A at 141:

"Wat ('n suiwer rekenkundige grondslag) betref, is ek van oordeel dat dit in die algemeen nie gerade is om 'n aanpassing vir die verminderde waarde van geld te maak deur

> die slaafse navolging van syfers wat in 'n verbruikersprysindeks voorkom nie. Dit kan die beweegruimte van 'n verhoorhof by die vasstelling van die kwantum van algemene skadevergoeding te veel aan bande lê."

This of course makes it difficult for the practitioner whose duty it is to up-date old previous awards in order that they may be meaningfully related to present-day cases. Thus in Protea Assurance Company Limited vs Matinise, 1978 (1) SA 963 A the Appellate Division had been referred to four previous similar awards, and Muller J A stated at 974 D that "if due allowance is made for the depreciation of money over the last six years then, in order to compare the awards, the sum awarded in each of the said four cases would have to be increased substantially." But how does one then go about to effect such increase in order that the previous award becomes meaningful under current circumstances? A "rule of thumb" is suggested in the MVA Handbook (paragraph 10.22, page 150) that "a not unreasonable result is obtained by applying a 5 % annual increase to awards made up to and including 1972, and applying a flat 10 % increase from 1973 onwards, but it must be stressed that this is only for the purpose of establishing a pattern." The author even suggests "that awards which are more than ten years old should be disregarded", except for a certain limited purpose. This perhaps goes too far, because in some instances the only reported cases which are broadly similar in all material respects are more than ten years

old. The case of Erdmann vs Santam Insurance Company Limited, 1985 (3) SA 402 C is only partially reported and for a consideration of the Court's reasoning in respect of general damages reference should be made to Corbett and Buchanan, Vol III, page 516 at pages 523 - 525. It is interesting to note that the "most relevant" case relied upon by Fagan J was an award made as far back as 1953. That was the case of Mercer vs Franke reported in Corbett & Buchanan, Vol I, at page 510. In that case an award of 1 000 pounds (R2 000) was made, and Fagan J mentioned that a copy of the Consumer Price Index, 1910 - 1984 had been handed in "to assist the court in evaluating the awards in the decisions referred to". He then simply stated that the award was now (when judgment was given early in February 1985) worth R17 500 without indicating the precise method employed by him in the up-dating process. Indeed he proceeded to award the sum of R17 500 to the plaintiff although (or perhaps because) the description of the disability suffered and pain endured in the earlier case indicated a condition less serious than that of the plaintiff in the case he was considering. It is of course interesting to speculate how the sum of R2 000 awarded in 1953 was up-dated in 1985. The intervening period was 32 years and if one applies the "rule of thumb" suggested by the MVA

Handbook (5 % per annum, simple interest, on awards up to and including 1972 and 10 % per annum from 1973 onwards) one arrives at a figure of only R6 500, to which an additional amount should be added to allow for the fact that Mrs Erdmann's "disability suffered and pain endured" was more serious than those of Mrs Mercer. But one still comes nowhere near R17 500. However, if one applies compound interest (at 5 % per annum up to 1972 and 10 % per annum thereafter) to the award of R2 000 made in 1953, it amounts to about R17 440 in 1985. The Consumer Price Index, which the learned judge appears to have applied as a guide, gives an equivalent of roughly R14 500.

But the learned Judge also up-dated two other reported awards:

(a) In Pasquallie vs Shield Insurance Company Limited, 1979 (2) SA 997 C an amount of R1 750 had been awarded in 1979 which the learned Judge equated (again without indicating how he did so) to an amount of R3300 as at the date of the judgment in 1985. At a flat 10 % per annum an amount of R1750 awarded in 1979 would in 1985 amount to about R2800; at compound interest it amounts to about R3100; according to the Consumer Price Index the figure is very close to R3 300.

(b) In Walker vs S A Eagle Insurance Company Limited, Corbett & Buchanan, Vol III, page 256 an amount of R6500 was awarded in 1981 and the learned Judge equated this with about R9500 in 1985. Taking again a flat 10 % per annum one achieves an increased award of some R9100; at compound interest the amount is about R9500; the Consumer Price Index gives an amount just slightly below R9 500.

It is a pity that the learned Judge was not a little more specific but the conclusion is inevitable that he followed the Consumer Price Index with a fair amount of accuracy; he clearly appears to have had a substantially more agressive approach than is suggested in the MVA Handbook. In fact, there is a startling resemblance between the learned Judge's updates and not only the Consumer Price Index but also the compound interest calculations taken at 5 % per annum up to 1972 and 10 % per annum thereafter. It is respectfully pointed out that the award of R17500 in the Erdmann case was way out of line in 1985 with other comparable awards and it has caused a great deal of confusion in the minds of those who have to assess damages in cases relating to ankle injuries. But it is submitted that the application of the Consumer Price Index is, despite the cautionary remarks of the Appellate Divion in the Sodoms case, the most reliable and most often resorted to guide - but only a guide

in the updating process. For a copy of the Consumer Price Index and its application, see R J Koch, page 294.

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CHAPTER 10

APPORTIONMENT OF DAMAGES

10.1 INDIRECT APPORTIONMENT AND JOINDERS

The practice of our MVA system requires a thorough knowledge of the Apportionment of Damages Act, Nr 34 of 1956, its ramifications and implementation. For this reason it was considered appropriate to include this chapter. However, in order to grasp the implications of the Apportionment of Damages Act it is necessary to deal with certain aspects of that Act which are totally unrelated to MVA work and probably more suited to a discussion of civil actions instituted for the recovery of damages arising from physical damage done to vehicles in collisions. But since claims arising from bodily injuries as well as from physical damage to vehicles are part and parcel of the broad field of damages arising from motor collisions, and since this whole field is so inextricably interwoven with the apportionment of blame, it was felt that an elucidation of Act 34 of 1956 by reference - at least in part - to vehicle damage would not be wholly inappropriate.

Although the full text of the Apportionment of Damages Act, No 34 of 1956 is included in this work as Appendix IV, the

main features of that Act will nevertheless, by way of introduction, be briefly described.

10.2 THE MAIN FEATURES OF THE APPORTIONMENT OF DAMAGES ACT, NO 34 OF 1956

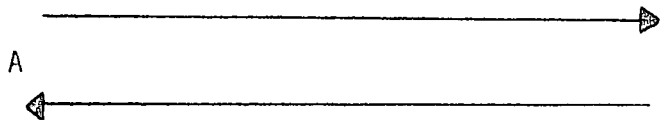
10.2.1 SECTION 1(1)(a)

Section 1(1)(a) of Act 34 of 1956 ("the Act") provides that where any person ("the claimant") suffers damage which is caused partly by his own fault and partly by the fault of the person from whom he seeks to claim such damages, the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable, having regard to the degree in which the claimant was at fault in relation to the damage.

This provides the platform for the simple situation where both plaintiff and defendant were partly to blame and the defendant pleads that the plaintiff's recoverable damages should be reduced pro rata to the degree of the plaintiff's own negligence in relation to the damages. This situation also allows the defendant to file a counterclaim for his damages caused in the same occurrence, and naturally for the plaintiff, in turn, to plead a direct apportionment on the

counterclaim. This situation may therefore be represented in the following simple diagram:

DIAGRAM A



(Plaintiff) (Defendant)

Since what follows is directed at indirect apportionments and not at the relatively simple and uncomplicated application of direct apportionments, the aforegoing illustration is given merely as a contrast to what follows below.

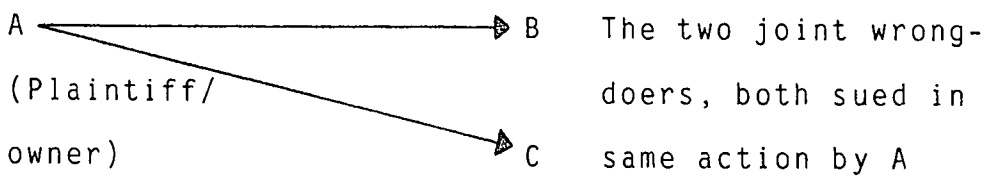
10.2.2 SECTION 2(1)

Section 2(1) of the Act creates the notion of "joint wrongdoers". It provides that where a plaintiff alleges that two or more persons are jointly or severally liable in delict to him for the same damages, such persons are referred to as "joint wrongdoers", and may be sued in the same action.

This envisages the situation where, for instance, A is the owner of the vehicle which, while driven by B (who could be his wife, a friend, a thief, etc) has collided with a vehicle driven by C. In terms of Section 2(1) A

elects to sue both wrongdoers, B and C, in the same action, which may be illustrated in the following simple diagram:

DIAGRAM B



In this situation A is not a wrongdoer in relation to the damages sustained by him. If we exclude for the moment any relationship between A and B creating vicarious liability on the part of A, neither B nor C can plead a direct apportionment on A's claim, nor can C counterclaim against A; he simply has no cause of action against him. (B, of course, sustained no damages; the vehicle belonged to A.) This situation sets the scene for the classic implementation of Section 2 (8) of the Act, with which it is appropriate to deal at this stage despite the fact that it receives attention out of sequence with the sections which are to be dealt with.

10.2.3 SECTION 2 (8)(a)

Section 2 (8)(a) of the Act provides that if judgment is

given in an action in favour of the plaintiff against two or more joint wrongdoers, the court may:

(a) order that such joint wrongdoers pay the damages awarded jointly and severally, the one paying the other to be absolved; or

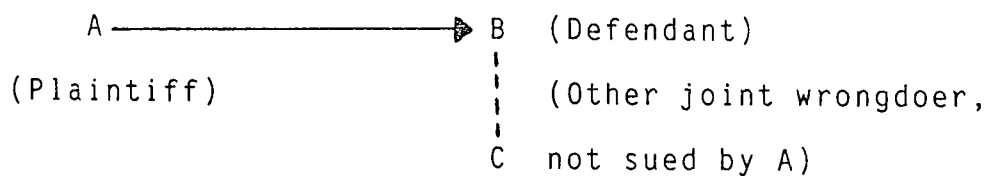
(b) if it is satisfied that all the joint wrongdoers have been joined in the action, apportion the damages and give separate judgments against each of the defendants in proportion to their respective degrees of fault in relation to the plaintiff's damages.

(The further provisions of Section 2 (8) are not recorded here, since they are not relevant to the present enquiry.)

10.2.4 But naturally an innocent plaintiff does not always elect to sue both joint wrongdoers. In many instances he will choose to sue one wrongdoer only, particularly where the wrongdoer not sued is his wife, or child, or perhaps a friend. Hence the provisions of Sections 2 (2), 2 (4)(b) and 2 (6)(a) of the Act, all of which, for purposes of this discussion, envisage the situation wherein innocent plaintiff A sues the one joint wrongdoer B who, in turn, seeks a contribution under Section 2 (6)(a) from the other wrongdoer, not sued in the action, namely C. This

may be illustrated as follows:

DIAGRAM C



Related to this situation, as already stated above, are the abovementioned three Sub-Sections which will now be briefly referred to.

10.2.5 SECTION 2 (6)(a)

It should first of all be noted that the first proviso to this Sub-Section was deleted with effect from the 1st of November 1984 by Section 33 of the Matrimonial Property Act, Nr 88 of 1984, as was the reference to it in Section 2 (1A); and see also Section 18 of the Matrimonial Property Act. For prescription with regard to actions for contributions between Joint Wrongdoers, see paragraph 3.14.8.

Section 2 (6)(a) provides that if judgment is given against any (one) joint wrongdoer for the full amount of the plaintiff's damages, the said wrongdoer may, if the judgment debt has been paid in full, recover from any

(other) joint wrongdoer a contribution proportionate to such other joint wrongdoer's blame in relation to the damages paid to the plaintiff, subject to the notice dealt with in the next subparagraph having been duly given.

10.2.6 SECTION 2 (2)

Section 2 (2) provides, for purposes hereof, that any (one) joint wrongdoer who is sued by the plaintiff may give notice of the action before close of pleadings to any (other) joint wrongdoer not sued in the action, and the latter may thereupon intervene as a defendant in the action.

10.2.7 SECTION 2 (4)(b)

Section 2 (4)(b) states that failure to give the aforementioned notice will preclude the wrongdoer sued in the action from instituting proceedings against a wrongdoer not sued, for a contribution under Section 2 (6)(a), unless the leave of the court on good cause shown as to why notice was not given, is obtained.

10.3 PRACTICAL IMPLEMENTATION OF THE PROVISIONS OF THE ACT

10.3.1 Against the background of the relevant features of the Act as sketched above it is necessary now to identify and discuss the rules of court utilised in practice to implement those provisions.

10.3.2 SUPREME COURT

The Supreme Court entertains an interplay involving principally Rule 13 on the one hand and Sections 2 (6) and 2 (8) of the Act on the other hand, as will appear below.

10.3.2.1 In the Supreme Court a joint wrongdoer not sued by the plaintiff may in practice be brought before the Court in the same action in one of two ways: either he intervenes voluntarily after being invited to do so by the wrongdoer sued (the defendant) in terms of Section 2 (2) of the Act, or he is joined at the instigation of the defendant by means of the machinery provided by Rule 13.

10.3.2.2 A joint wrongdoer not originally sued but who accedes to a request to intervene in terms of Sectin 2 (2), must bring an application to Court, on notice to all parties, which, if successful, renders him a

"defendant" in the action, and the Court is entitled to "give such direction as to the further procedure in the action as to it may seem meet". On the other hand, a joint wrongdoer joined through the medium of Rule 13 at the instigation of an existing defendant, becomes a "third party".

10.3.2.3 It is to be noted that joinder in terms of Rule 13 is not by application through motion proceedings; the third party is automatically joined as such after a third party notice (Form 7) is served on him together with the relevant particulars of claim and copies of all pleadings filed to date between the plaintiff and the defendant. The third party notice and annexures must be served before the close of pleadings (Rule 13 (1)) whereafter he becomes "a party to the action" (Rule 13 (5)) and the rules relating to summonses and to pleadings shall mutatis mutandis apply (Rule 13 (2)).

10.3.2.4 In terms of Rule 13 (1) a person (the third party) may thus be joined at the instigation of the existing litigant (for our purposes the defendant) who claims to be entitled to a contribution from such third party, or an indemnification, in respect of the relief claimed by the plaintiff from the defendant (Rule 13 (1)(a)); or the third party may thus be joined at the instigation of the defendant if the question or issue between them

is substantially the same as the question or issues involved between the plaintiff and the defendant so that such issues "should properly be determined not only as between any parties to the action but also as between (the defendant) and the third party or between any of them ...".

10.3.2.5 There can be no doubt whatsoever that Rule 13 was intended and designed to avoid a multiplicity of actions. There is therefore a necessary implication that one of the objects of the rule was to ensure that the issues between the plaintiff, the defendant and the third party, often arising from the same occurrence, should be resolved in one single action. The provisions of the rule, in the mind of the legislature, must surely have been intended to be complementary to the provisions of Section 2 (6) of the Act and also, it is submitted, to the provisions of Section 2 (8) of the Act. (See Wapnick v Durban City Garage, 1984 (2) SA 414 D at 423 F.) In fact, Rule 13 appears to have been ideally created as the enabling machinery for the practical implementation of the said provisions of the Act.

10.3.2.6 In view of the aforegoing, and with due deference to the bench, the approach of our Courts, as appears from a number of decisions is disappointing. It appears

that with reference to the situation featured in diagram C above, i.e. where plaintiff A has sued defendant B who, in turn, has joined third party C in terms of Rule 13, our Courts are normally only prepared to apply the provisions of Section 2 (6)(a) of the Act, but not the provisions of Section 2 (8)(a). The fact of the matter is that Section 2 (6)(a) is not ideally suited to this situation since the defendant's right under that Section to recover a contribution from the third party arises only after the defendant has actually paid the plaintiff's damages.

10.3.2.7 The provisions of Section 2 (8)(a), by contrast, are indeed ideally suited to the situation if one but accepts that all the joint wrongdoers are now before the Court. It seems hardly relevant whether the joint wrongdoers were initially sued by the plaintiff or whether they chose to intervene voluntarily in terms of Rule 12, or whether they were joined involuntarily in terms of Rule 13; the fact remains that they are all before Court. Bearing in mind that Section 2 (8)(a) specifically provides that if judgment is given in favour of the plaintiff "against two or more joint wrongdoers", the Court may either order such joint wrongdoers to pay the damages jointly and severally (the one paying the other to be absolved), or apportion the damages and give separate judgments against the wrongdoers in proportion to their degrees of fault, our

Courts' reluctance to utilise these provisions in the situation under consideration, is debatable.

10.3.2.8 As far back as Windrum vs Neunborn, 1968 (4) SA 286 T at 292 D, Trollip J (as he then was) held that the precise terms of Section 2 (8)(a) indicated:

> "Those provisions were designed to apply in those cases where the plaintiff under Section 2 (1) sues two or more joint wrongdoers in the same action, or sues one and the other or others intervene (see Section 2 (2)) or are joined as co-defendants, and judgment is given in the plaintiff's favour against all of them."

10.3.2.9 With the greatest respect, it is difficult to understand why the provisions of Section 2 (8)(a) apply where a second defendant has voluntarily joined himself to the action, but do not apply where the wrongdoer who was originally not sued is joined in terms of Rule 13. Nevertheless, a similar judgment was given in Du Raan vs Maritz, 1973 (4) SA 39 (SWA). The point was deliberately left open in Rondalia Assurance Corporation of SA Limited vs Page, 1975 (1) SA 708 A.

10.3.2.10 The Courts' attitude concerning the implications of Rule 13 is generally in similar vein. In Shield Insurance Company Limited vs Zervoudakis, 1967 (4) SA 735 E at 739 B the Court stated:

> "A study of the provisions of Rule 13 satisfies me that the trial court could not, in a case like the present, give a judgment against the third party in favour of the plaintiff. Vis-à-vis each other they are not plaintiff and defendant. All the trial court could do is to apportion the degree of fault between the defendant and the third party in the form of a declaratory order."

(See also Hart vs Santam Insurance Company Limited, 1975 (4) SA 275 E; Laubscher vs Commercial Union Assurance Company of SA Limited, 1976 (1) SA 908 E at 913 E and 914 H.)

10.3.2.11 Much of the reasoning behind the Courts' unwillingness to utilise the provisions of Section 2 (8) of the Act against a third party who has been joined in terms of Rule 13 revolves around the contention that a plaintiff cannot be obliged to seek or take a judgment against a person whom he chose not to sue. On this basis the Courts persistently hold that after such a joinder (under Rule 13) the plaintiff's action continues solely against the defendant and that the latter must look to the third party for a contribution. This slavish adherence to the provisions of Section 2 (6) of the Act carries with it the complication that the contribution which the defendant seeks from the third party may be recovered only after the defendant has paid the plaintiff's damages, hence the fact that the relief which the

defendant obtains against the third party is couched in the form of a declaratory order; in practice the Court will issue an order declaring

(a) the third party to be a joint wrongdoer in relation to the damages awarded against the defendant in favour of the plaintiff;

(b) the third party to be liable for a contribution to such damages;

(c) the extent (percentage) of such contribution; and

(d) granting leave to the defendant to approach the court again, on the same papers, duly supplemented (obviously by proof that the defendant has paid the plaintiff's damages), for an order in favour of the defendant against the third party for payment of such contribution, plus costs.

10.3.2.12 The rather clumsy procedure outlined above has various elements of unfairness to the defendant, one of these being that he must pay the plaintiff's full costs of the entire action and that he cannot recover a contribution towards those costs from the third party. (Marine & Trade Insurance Company Limited, vs Haug,

1961 (3) SA 658 W at 661 A - D; Unie Nasionaal Suid-Brits Versekeringsmaatskappy Beperk vs Hollenbach, 1979 (1) PH J6 NC) He can recover only the costs arising from the third party proceedings from the third party, and this will be scant consolation. Were the Courts prepared to apply the provisions of Section 2 (8)(a) after a joinder in terms of Rule 13, the undoubted objects of both enactments would have been ideally achieved inasmush as the Court could simply either have awarded judgment against the two joint wrongdoers jointly and severally, or apportioned the plaintiff's damages in separate judgments against them, each of them also being ordered to pay a proportionate or fair part of the plaintiff's costs. This was incidentally done by the Court, albeit without argument on the point, in Viljoen vs Cloete, 1978 (3) SA 23 0, wherein the innocent plaintiff (the driver's mother) had sued only one joint wrongdoer, electing not to sue the other joint wrongdoer who happened to be her daughter who had been the driver of her car when it collided with a vehicle driven by the defendant. In that case fairness and justice were well served by virtue of the fact that the Court utilised the provisions of Section 2 (8)(a)(ii) by orderineg the defendant and the daughter each to pay 50 % of the plaintiff's damages and 50 % of the plaintiff's costs, with appropriate alternative relief in the event of

the plaintiff being unable to recover any amount from either of the parties. (It is to be noted that this was an appeal from a trial in the Magistrate's Court, with the result that Rule 13 was not relevant.) Admittedly there is an Appeal Court case, Grobbelaar vs Federated Employers Insurance Company Limited & Ander, 1974 (2) SA 225 A which tends to suggest that a Court may indeed make an order under Section 2 (8)(a) of Act 34 of 1956 in a case where a third party has been joined to the action at the instance of the Defendant, but there are a number of cogent reasons why this case may not be taken as the final word on this topic:

(a) Firstly it appears from the parties' heads of argument that the point was not argued at all and the Appellate Division could hardly have intended to wipe out a formidable list of decided cases without even the slightest reference to any of those cases in the entire judgment.

(b) It is by no means certain from the report that the third party in Grobbelaar's case was joined under Rule 13 at the instance of the defendant. At page 230 E Van Blerk J A simply states that "Die bestuurder van die motorkar (i.e. the person to whom he refers elsewhere in the judgment as "die derde party") het tot die geding toegetree as 'n derde party as gevolg van 'n kennisgewing wat aan hom bestel is deur die respondent waarin laasgenoemde kennis gee van sy reg van regres teen die derde party." Admittedly the reference to a "derde party" suggests that Rule 13 was indeed employed by the defendant, otherwise reference to the joined person should have been to "die tweede verweerder", but the earlier part of the quoted sentence ("die bestuurder van die

motorkar het tot die geding toegetree") suggests on the contrary, that the joined wrongdoer not originally sued responded to an invitation under Section 2 (2) of the Act by voluntarily acceding to the Defendant's request to join the proceedings. If this is indeed what happened, then the situation would fall squarely within the ambit of what was envisaged by Trollip J in Windrim's case (see paragraph 10.3.2.8 above), and the implementation of Section 2 (8)(a) of the Act would not cause a ripple. In short, the reference to "die derde party" instead of to "die tweede verweerder" in Grobbelaar's case may either have been a simple terminological error, or the party seeking to join the proceedings voluntarily may simply on the papers have chosen to refer to himself as a third party rather than as a second defendant. The report of the case does not clarify this issue conclusively, but it is submitted that the text to the effect that the driver of the vehicle "het tot die geding toegetree as 'n derde party as gevolg van 'n kennisgewing wat aan hom bestel is deur die respondent waarin laasgenoemde kennis gee van sy reg van regres teen die derde party", is more susceptible to a voluntary joinder by the invitee than to an enforced joiner under Rule 13 at the instance of the defendant.

(c) Judgment in Grobbelaar's case was given during November 1973. The very same point was subsequently fully argued in Rondalia Assurance Corporation of SA Limited vs Page, 1975 (1) SA 708 A. This latter case was only

decided by the Appellate Division in December 1974 and it is significant to note that the appellants' counsel submitted in his heads of argument (see page 710 G) the following: "In Grobbelaar's case ... it appears that the third party was joined in terms of Act 34 of 1956, the third party presumably having intervened "as a defendant" in terms of Section 2 (2) of that Act." This was obviously based on the statement of Van Blerk J A in Grobbelaar's case (at page 227 H) that "Die bestuurder van die Renault is later, ooreenkomstig die Wet op Verdeling van Skadevergoeding, 34 van 1956, as derde party gevoeg ....". This again suggests a voluntary joinder in response to an invitation by the defendant under Section 2 (2) of the Act rather than an enforced joinder under Rule 13; after all, nowhere in the judgment is Rule 13 mentioned at all.

(d) Herbstein and Van Winsen (3rd Edition published in 1979) at page 177 state the law as follows:

> "Where in terms of Section 2 of Act 34 of 1956 action has been instituted against two or more joint wrongdoers or where a joint wrongdoer who was not sued by the plaintiff initially, intervenes in the action pursuant to a notice having been given him in terms of Section 2 (2), the Court may order such joint wrongdoers to pay any damages awarded to the plaintiff .... jointly and severally ...."

And for this proposition they rely (see footnote 80 on page 177) on Grobbelaar's case. The learned authors therefore also interpret the facts in Grobbelaar's case on the basis that there was a voluntary joinder in response to an invitation

under Section 2 (2) of Act 34 of 1956, and not that there was an involuntary joinder (at the instance of the defendant) under Rule 13.

In the circumstances it is submitted that Grobbelaar's case referred to the situation where the joint wrongdoer not sued intervened voluntarily under Act 34 of 1956 (and not to the situation where Rule 13 was employed at the instance of the defendant), and that it has always been interpreted in this light.

10.3.2.13 The reasoning that a plaintiff cannot be obliged to take judgment under Section 2(8) against a third party whom he chose not to sue, but who was subsequently joined by the defendant in terms of Rule 13, becomes totally unconvincing if one considers the objects of the two enactments concerned and the classic justice emanating from the judgments given in the cases of Viljoen vs Cloete (Supra) and Grobbelaar vs Federated Employers Insurance (Supra). In Gross vs Commercial Union Assurance Company Limited, 1974 (1) SA 631 A at 643 E Wessels J A said of Rule 13:

> "It is complementary to the provisions of the Apportionment of Damages Act 34 of 1956, which contemplated procedure of the kind regulated by the rule in question."

If it is also accepted, as it must be, that the relevant enactments were designed for the purposes of avoiding a multiplicity of actions, then it follows that the legislature must have had the very intention of compelling the plaintiff to take judgment against all the wrongdoers before the court who had caused his damages, including those not sued by him.

10.3.2.14 The reasoning and submissions made above accord broadly with the following comments of Wessels J A in S A Onderlinge Brand & Algemene Versekeringsmaatskappy Beperk vs Van den Berg, 1976 (1) SA 602 A at 607 H:

> "Waar al die partye dus reeds by die gedingvoering betrek was, was dit klaarblyklik dienstig om oor al hul onderskeie regte en verpligtinge uitsluitsel te gee. Na my mening blyk uit die bepalings van die reeds-genoemde Wet op Verdeling van Skadevergoeding 34 van 1956, soos gewysig, dat die wetgewer dit ook so bedoel het. Dit skakel opeenhoping van gedinge en die daarmee-gepaardgaande vertraging uit, en bespaar ook gedingkoste vir die partye."

Unfortunately these remarks, though eminently persuasive, cannot be taken as direct authority for the proposition that the provisions of Section 2 (8)(a) ought to be applied in the situation under discussion. The Court was there concerned with the question of whether a provisional counterclaim (which sought a declaratory order) was receivable or not; neither Section 2 (8)(a) of the Act nor the relevant rules were directly involved with the quoted remarks.

10.3.2.15 Contrary to the views of Munnik J (as he then was) in Shield Insurance Company Limited v Zervoudakis, 1967 (4) SA 735 E at 739 B as quoted in paragraph 10.3.2.10 above, it is respectfully submitted that there are strong indications in the wording of Rule 13 that a Court can indeed apply the provisions of Section 2

(8)(a) of the Act between a plaintiff and a third party joined under Rule 13 by giving judgment for the plaintiff against such third party. To mention only a few of these indications:

(a) First, Rule 13 (5) specifically provides that the third party shall "be a party to the action" after service upon him of the third party notice.

(b) Secondly, Rule 13 (1)(b) specifically provides that a joinder may be effected where the circumstances are such that the question or issue which has arisen "should properly be determined not only as between any parties to the action, but also as between such parties and the third party or between any of them" (own underlining).

Any counter-indications (such as the provision in Subrule 6 that the third party may not counterclaim against the plaintiff) are, it is submitted, outweighed by the considerable cogency of the arguments relating to the legislature's intention as outlined above.

10.3.2.16 Nevertheless, for the moment it should be conceded that the following remarks of Herbstein & Van Winsen (at 177) are representative of the bulk of the

authorities relating to this question:

> "The provisions of (Rule 13) are complementary to those of Section 2 of the Apportionment of Damages Act 34 of 1956, which section, it has been held, contemplated a procedure of the kind regulated by the rule. There is, however, an important distinction to be borne in mind between the effect of these two provisions. Where in terms of Section 2 of Act 34 of 1956 action has been instituted against two or more wrongdoers, or where a joint wrongdoer who was not sued by the plaintiff initially, intervenes in the action pursuant to a notice having been given him in terms of Section 2 (2), the court may order such joint wrongdoers to pay any damages awarded to the plaintiff either jointly and severally or in such proportions as the court may deem just and equitable. On the other hand, when a litigant joins a third party by serving a notice upon him in terms of Rule 13, such third party does not become a joint defendant vis-à-vis the plaintiff and the court cannot give a judgment against the third party for the payment of a sum of money in respect of the amount being claimed in the action, but can merely make a declaratory order apportioning the degree of fault between the various wrongdoers."

10.3.3 THE PROBLEM IN RELATION TO MVA ACTIONS

10.3.3.1 Since the problem discussed above relates to a defendant's inability to plead a direct apportionment against an innocent plaintiff, it crops up in MVA actons where the plaintiff was not himself a wrongdoer, for instance where he claims payment in his personal capacity of certain medical expenses incurred by him in connection with injuries sustained by his minor son who was

himself contributorily to blame in relation to those damages. The defendant cannot plead a direct apportionment to the plaintiff's damages and he must therefore adopt one of two procedures in order to achieve an indirect apportionment, viz:

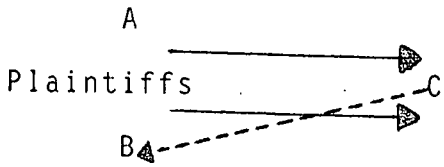
(a) The most usual practice is for the defendant to file a conditional counterclaim against the minor son (or, stated differently, against the father in his other (representative) capacity as father and natural guardian of the son) wherein he seeks a contribution from the son in respect of the father's <u>personal</u> damages against which no opportionment may be pleaded. This practice stems from Rule 24 (4) which sanctions the use of a conditoinal counterclaim.

(b) Alternatively, the defendant may utilise Rule 13 by serving a third party notice, with the necessary annexures, on the son, whereby he is joined in the action (wherein he already appears as a plaintiff) as a third party, i.e. in a different capacity.

10.3.3.2 These two situations are represented by the

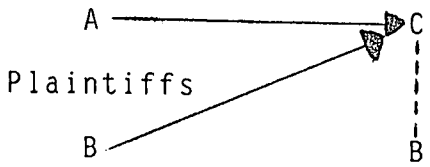
following two diagrams, wherein A is the innocent father, B his minor son and C the defendant:

DIAGRAM D1



(Conditional counter-claim by C against B)

DIAGRAM D2



(Second plaintiff joined by C as third party)

10.3.3.3 Each of these two procedures will be preceded in practice by the usual notice in terms of Section 2 (2) of the Act, although this notice may arguably not be a prerequisite in a case where the party from whom a contribution is sought is already before court. (Compare Becker vs Kellerman, 1971 (2) SA 172 T) The first-mentioned procedure is preferable and has been specifically approved by our courts. (See S A Onderlinge Brand & Algemene Versekerings-maatskappy Beperk vs Van den Berg,

1976 (1) SA 602 A; Van Wyk vs Netherlands Insurance Company of SA Limited, 1971 (2) SA 264 W at 273 H - 274 B) Nevertheless the alternative procedure in terms of Rule 13 in such a case has also been sanctioned. (Hart vs Santam Insurance Company Limited, 1975 (4) SA 275 E.)

10.3.4 RELIEF SOUGHT

10.3.4.1 Whether a defendant utilises the procedure of a conditional counterclaim against that plaintiff who is alleged to have been a joint wrongdoer, or whether a defendant utilises the procedure envisaged by Rule 13, the object of the exercise remains the same; the defendant wishes to avoid having to carry all the damages claimed from him by that plaintiff who, as a non-wrongdoer, cannot have his damages reduced under Section 1 (1)(a) of the Act. The defendant must therefore employ the provisions of either Section 2 (6) of the Act or Section 2 (8) of the Act (in conjunction with the relevant rules of court) to endeavour to ensure that the other party who contributed to the causation of the innocent plaintiff's damages will assume responsibility for a pro rata share of those damages. Having this end in mind, and

considering the attitude of our courts as outlined above, what relief should the defendant seek in his papers; how should he couch his prayers?

10.3.4.2 Let us assume again that A is the plaintiff father who seeks damages in his personal capicity for medical expenses paid in respect of injuries sustained by his minor son after the latter was struck by a vehicle while cycling; B, the second plaintiff, is again the father, but this time in his representative capacity as father and natural guardian of the minor son, claiming general damages for pain and suffering sustained by the latter (stated differently, B could be the minor son, duly assisted by his father, the effect being precisely the same); and C is the defendant, the wrongdoer sued in the action, i.e. the Appointed Agent. Since C is unable to plead an apportionment against A's personal claim (A having not been a wrongdoer in the causation of those damages), C naturally must look to B, who was the other joint wrongdoer, to shoulder his pro rata portion of A's personal damages which he (B) helped to cause. In this situation one would be hard-pressed to argue that the defendant could seek relief in terms of Section 2 (8) of the Act. After all, the latter Section reads that "if judgment is in any action given in favour of the

plaintiff against two or more joint wrongdoers, the court may ..." order the joint wrongdoers to pay the plaintiff's damages jointly and severally, or alternatively the court may apportion the damages against the joint wrongdoers and give judgment against each of them separately for the amount so apportioned. In our example, the defendant C will be hard-pressed to argue with conviction that the court is at large to employ Section 2 (8) by ordering defendant C and fellow-plaintiff B to pay A's damages jointly and severally, or alternatively to apportion A's damages and give separate judgments against C and B for the amounts so apportioned. There certainly seems to be substance in the argument that Section 2 (8) was not designed to authorise the court to give a judgment in favour of one plaintiff against a fellow-plaintiff. (An amendment to Act 34 of 1956 is necessary to achieve this.) On the other hand, the fact remains that both joint wrongdoers, C and B, are before the court and if the avoidance of a multiplicity of actions is the very object of the exercise and if this object cannot be achieved on the present wording of Section 2 (8)(a), then the legislature should be urged to effect an appropriate amendment.

10.3.4.3 But assuming for the moment that the provisions of Section 2 (8)(a) cannot be employed in the example under consideration, and that the defendant C must therefore rely solely on the provisions of Section 2 (6)(a) (which requires C to pay A's damages in full before he can recover payment of a contribution), the prayers in C's conditional counterclaim against B should be couched along the following lines:

Wherefore defendant claims:

1 an order declaring the minor son B to be a joint wrongdoer in respect of any damages proven to have been suffered by A, and declaring B to be liable for payment to defendant C of a contribution towards such damages, in terms of Section 2 (6)(a) of Act 34 of 1956;

2 an order determining the extent of such contribution, having regard to the degree in which B was at fault in relation to A's damages;

3 an order granting leave to the defendant C to approach the court again on the same papers, duly supplemented with proof of payment by defendant of all damages awarded to plaintiff A on the claim in convention, for an order against B for payment of the amount of the contribution determined in 2 above;

4 an order against B for payment of such costs (including a portion of plaintiff's costs, as well as defendant's costs on the counterclaim) as the court may consider just and equitable.

10.3.4.4 Another type of case frequently encountered in practice

should also be considered, namely where plaintiff A, a passenger in a vehicle driven by C, sues B (Appointed Agent in relation to the other vehicle involved). Again B cannot plead a direct apportionment against plaintiff A because the latter was not a party to the causation of the collision. B therefore proceeds to employ the machinery of Rule 13 and brings C into the action as a third party. In these circumstances the question arises again as to what relief defendant B should seek against third party C in the annexure to the third party notice. As previously pointed out, Rule 13 (5) now provides that "the third party shall, after service upon him of a third party notice, be a party to the action ..." and Rule 13 (1)(b) envisages the avoidance of a multiplicity of actions by having the court determine the issues "not only as between any parties to the (original) action but also as between such parties and the third party or between any of them ..."; hence the submission that the door is now open for the court to utilise the provisions of Section 2 (8)(a) of the Act. Consequently it is recommended that the prayers in the annexure to the defendant's third party notice should be couched along the following lines:

Wherefore defendant claims

1 that judgment in favour of plaintiff A for

any damages proven to have been suffered by him should be given exclusively against the third party C; alternatively:

2 that any damages proven to have been suffered by plaintiff A be apportioned and that separate judgments be given against defendant B and third party C in terms of the provisions of Section 2 (8)(a) (ii) of Act 34 of 1956; alternatively:

3 (a) an order declaring third party C to be a joint wrongdoer in relation to any damages shown to have been sustained by plaintiff A, and to be liable for a contribution to defendant B in respect of such damages; and

(b) an order determining the extent of such contribution, having regard to the degree in which third party C was at fault in relation to plaintiff A's damages; and

(c) an order granting leave to defendant B to approach the court again on the same papers, duly supplemented with proof of payment by B to A of the latter's proven damages, for an order against C for payment of the amount of the contribution determined in (b) above; and

4 payment of such costs,including a portion of plaintiff's costs as well as defendant's costs consequent upon the joinder of third party C,as may be just and equitable.

It should be noted, incidentally, that driver C (in the example above) can be held liable in his personal capacity by the defendant B only insofar as he (C) does not enjoy cover under Act 84 of 1986 in respect of plaintiff A's damages, i.e. only for those damages exceeding the limited amount which A could have

recovered from C's Appointed Agent. In respect of that part of A's damages which the latter could have recovered from driver C's Appointed Agent, the MVA Fund will not happily tolerate Appointed Agent B taking action against driver C's Appointed Agent under Rule 13 for the recovery of a contribution because all the damages are ultimately paid out of the same Fund.

10.3.4.5 The whole question of whether Section 2 (8)(a) could be implemented by the court in circumstances such as those just considered (where the joinder of a third party was effected under Rule 13), was fully argued in the appeal court in Rondalia Assurance Company of SA Limited vs Page (1975 (1) SA 708 A and the following submission was made by counsel for respondents in support of their cross-appeal: (see page 712 F of the report)

> "Whether a joint wrongdoer intervenes in an action after service upon him of a third party notice under Rule 13, or pursuant to a notice served upon him in terms of Section 2 (2) of the Apportionment of Damages Act, such a joint wrongdoer becomes a party to the action, and it is competent for a court to grant a judgment against the defendant and such joint wrongdoer, jointly and severally in terms of Section 2 (8) of the Act."

10.3.4.6 It was also submitted that the dictum of Munnik J in Shield Insurance Company Limited vs Zervoudakis, 1967 (4) SA 735 E at 739 B is wrong. Unfortunately this question was deliberately left open in the appellate

divisions's judgment, Holmes J A stating the following: (at 721 H)

> "Whether the trial court could have ordered the third respondent (the joint wrongdoer joined under Rule 13 by the defendant) to pay a portion of the plaintiff's damages does not arise in this case, since the trial court did not so order and this has not been challenged on appeal."

The whole topic, which is one of so much practical importance, therefore still slumbers uneasily, regularly bringing frustrating nightmares to the practitioner involved therein.

10.3.5 MAGISTRATE'S COURT

The problem under discussion is even more unsatisfactory in the Magistrate's Court since the rules here contain no provisions corresponding with

Supreme court Rule 13, nor is there a rule sanctioning the use of a conditional counterclaim, as is the case in the Supreme Court. As to the question whether a conditional counterclaim is receivable in the Magistrate's Court despite the absence of such a rule, there is a great deal of uncertainty. In Rondalia Bank Beperk vs Pieter Nel Motors (Edms) Beperk, 1979 (4) SA 467 T at 472 E Van Reenen J said:

> "Ek kan geen rede sien waarom, veral as die hedendaagse gees waarin daar nie meer so streng op die vorm van pleitstukke gelet word nie, 'n voorwaardelike teeneis nie ook in die Landdroshof ingestel kan word nie."

One good reason could, of course, be that the Magistrate's Court is a creature of Statute and there is simply no authority to be found in the rules for such a pleading; and the Magistrate's Court does not have the same inherent powers as the Supreme court. But before the promulgation of the present Supreme Court Rule 24 (4) the Free State could held (Pilcher & Conways (Pty) Limited, vs Van Heerden, 1963 (3) SA 205 O) that a conditional counterclaim was not receivable even in the Supreme Court. The Natal Court (Munro vs Tayfield, 1928 NPD 4 1) came to a similar conslusion. (This was followed in British Oak Insurance Company Limited vs Gopali, 1955 (4) SA 344 N at 348 H. See also Jones & Buckle, Volume II, page 244). In view of this uncertainty, and as Magistrates in the various provinces are clearly precluded from allowing conditional counterclaims, the further discussion will proceed on the basis that conditional counterclaims are not receivable in the Magistrate's Court. (In those provinces where they are receivable, the further problem may be encountered that the Magistrate's Court probably cannot issue a declaratory order.) Owing to the exclusion of conditional counterclaims in the Magistrate's Court and the futility of joinders (as

will appear below) the problem will be related exclusively to vehicle damage, not to MVA actions. The reason why joinders in MVA actions in the Magistrate's Court are considered to be futile will in any event become apparent from the paragraphs which follow.

10.3.5.1 In order to effect a joinder of a joint wrongdoer who has not been sued by the plaintiff, the defendant must necessarily employ the provisions of Rule 28 (2) which simply provides that "the Court may, on application by any party to any proceedings, order that another person shall be added either as a plaintiff or applicant or as a defendant or respondent, on such terms as may be just". The lack of any provisions relating to pleadings to be exchanged between the defendant and the person thus joined (who incidentally comes in as a defendant (vis-à-vis the plaintiff?) and not as a third party), is immediately evident. The issues between the various parties are consequently not clearly defined and the entire exercise is fraught with uncertainty.

10.3.5.2 It is submitted that an application under Rule 28 (2) (if one is brave enough to undertake such an exercise) should be by notice of motion supported by affidavit wherein the defendant indicates that the plaintiff has chosen to sue only one of the joint wrongdoers and that the person sought to be joined is the other joint

wrongdoer, the purpose of the application being to bring all the joint wrongdoers together in the pending action, thus obviating a multiplicity of actions by having the issues resolved between all the parties in the (same) pending action. The magistrate has a discretion as to whether he should allow the application or not, but it is submitted that if the defendant's affidavit covers all the necessary allegations (similar to those contained in the particulars of claim attached to a Rule 13 Notice in the Supreme Court), the Magistrate ought not to refuse the application. (In Wapnick vs Durban City Garage, 1984 (2) SA 414 D at 425 C it was stated also that the factual allegations should generally not consist of hearsay, and where they do, the Court should at least be assured that such evidence does exist, and an explanation should be given as to the reason for the failure to put up the best evidence.) Such a refusal (to order a joinder) was reversed on appeal in the case of Khumalo vs Wilkens, 1972 (4) SA 470 N.

10.3.5.3 The last-mentioned case illustrates various aspects of uncertainty involving this procedure in the Magistrate's Court. Having reversed the Magistrate's refusal to order the joinder sought, it almost seems as though the Court was at a loss as to what it should do with the new co-defendant who finds himself suddenly before Court without any pleadings defining the issues

at stake against him. Milne J endeavoured to grope his way out of the proverbial tangled web by the following series of findings:

(a) He first stated:

> "It is quite clear that neither the Magistrate's Court Act nor the rules of those courts empower the court to allow a defendant to make a claim against a co-defendant in the same action."

(b) In response to an invitation from counsel that he should order the joinder of the (new) defendant in terms which would oblige the magistrate to make an apportionment in terms of Section 2 (8)(a) fo the Act, he declined such invitation on the following basis:

> "I think it is clear that the power of the court to order the joinder of the defendant cannot and does not encompass a power to compel a plaintiff to claim relief against a defendant whom he has not sued and does not wish to sue. That being so, the joinder sought by the defendant cannot have the effect of compelling the plaintiff to make a claim against the second (defendant) (in spite of the fact that the magistrate apparently thought that this is the effect that a joinder would necessarily have). If the joinder is allowed therefore it will only be upon the basis that the plaintiff's claim continues to be one against the defendant only. The wording of Section 2 (8)(a) of the Apportionment of Damages Act makes it clear that that Section is not applicable to the situation where the plaintiff

claims against one wrongdoer only."

(For the last sentence the Judge relied upon the earlier quoted remarks of Trollip J in Windrum vs Neunborn, 1968 (4) SA 286 T at 292 D.)

(c) The learned Judge pointed out (at 477 E of Kumalo's case) that one of the grounds upon which the defendant had sought the joinder was to enable a finding to be made (which would be binding on the (new) defendant) concerning the respective degrees of fault of the two defendants, and consequently considered that "a finding by the magistrate as to the respective degrees of fault of the (defendant) and the second (defendant) would make a successful claim for a contribution in terms of Section 2 (6)(a) of the Apportionment of Damages Act by the (defendant) against the second (defendant) virtually a foregone conclusion". Here, with the greatest respect, the learned judge clearly erred: if, despite the joinder of a second defendant, the plaintiff's action "continues to be one against (defendant) only", an apportionment of damages remains entirely irrelevant to that action, since the defendant remains precluded from pleading such apportionment against the innocent plaintiff. As to the suggestion that the magistrate could nevertheless make a finding regarding the

respective degrees of negligence of the first defendant and the second defendant this would, it is submitted, require the magistrate to make a declaratory order, but a Magistrate's Court, being a creature of statute, "bound by the four corners of the Act", does not appear to have authority to make a declaratory order. Nor is it understood how such an order made in the action as between plaintiff and first defendant only, could be binding on second defendant in a subsequent action for a contribution. That the learned Judge entertained doubts himself in this regard is indicated by his use of the words "virtually a foregone conclusion".

(d) Moreover, having been informed that the defendant in any event contemplated a further (separate) action for his own damages against the second defendant, the learned Judge remarked (at 477 H) that a finding by the magistrate as to the two defendants' respective degrees of fault "would confine the issue in any (separate) action by the defendant for his own damages against the second (defendant) to the quantum of the (defendant's) damages". Again it is not clear how an irrelevant finding of the magistrate in one action could be binding on the second defendant in a subsequent action which might conceivably receive different

evidence regarding the collision to the evidence tendered in the first action.

(e) Having thus commented on the various problems besetting him, the Judge upheld the appeal; joined the second defendant to the action; gave leave to the defendant (who brought the application) "to amend the pleadings so as to reflect such joinder"; ordered the defendant to serve copies of the pleadings, thus amended, on the joined second defendant; leave to request further particulars to the plaintiff's particulars of claim and/or to the first defendant's plea in so far as they related to him, and to file a plea after receiving answers to those requests.

10.3.5.4 Once a joinder has been effected in the Magistrate's Court in terms of Rule 28 (2), what relief can now be sought?

(a) Considering that both defendants are now before Court, the magistrate could be asked to implement the provisions of Section 2 (8) (a) by either granting judgment in favour of the plaintiff against both defendants jointly and severally, or apportioning the plaintiff's damages in separate judgments against the two defendants with an appropriate and fair award as to costs. But in

the light of the bulk of the prevailing authorities, such a request must be doomed to fail unless of course the magistrate concerned is unaware of those authorities or unless the appellate division pronounces positively on the applicability of Section 2 (8) in such a situation.

(b) Alternatively, the magistrate could be asked to implement Section 2 (6)(a) of the Act in the following manner: the Court should grant judgment in favour of the plaintiff against the first defendant for the full amount of the plaintiff's proven damages, plus costs. Furthermore, that the Court issue a conditional order in favour of the first defendant against the second defendant for a contribution proportionate to the latter's degree of fault, on the condition that the first defendant produces to court within a given number of days proof of payment of the plaintiff's damages awarded in the main action (or on the condition that the issue of the order will be suspended until such proof is produced to Court).

While conditional orders are not unknown to our courts (compare Custom Credit Corporation (Pty) Limited vs Shembe, 1972 (3) SA 462 A at 475 C - E; Western Bank

Limited vs Honneywell, 1974 (4) SA 148 D at 153 E), the difficulty inherent in the last proposed type of order is that a magistrate cannot make an order in favour of one defendant against another defendant in the absence of any rules sanctioning such procedure. (Khumalo vs Wilkens, 1972 (4) SA 470 N at 476 G) In British Oak Insurance Company Limited vs Gopali, 1955 (4) SA 344 N Caney J held that not even the Supreme Court could make such an order. Admittedly the judgment is contrasted to some extent by Hughes vs Transvaal Associated Hide & Skin Merchants (Pty) Limited, 1955 (2) SA 176 T but in this case Roper J, having at the instance of the defendant wrongdoer ordered the joinder (as second defendant) of the other wrongdoer, made a declaratory order "declaring against second defendant that he is liable to refund to first defendant one half of any damages awarded to plaintiff against first defendant". So again we are confronted with the situation that a magistrate does not appear to have jurisdiction to make a declaratory order.

10.3.5.5 On balance therefore it would seem that a joinder in the Magistrate's Court with a view to thereby implementing the provisions of Section 2 (6)(a) of the Act would be futile. Only if the courts could be persuaded to implement the provisions of Section 2 (8)(a) in those cases in which the second wrongdoer is joined to the action at the instance of the wrongdoer

initially sued, would there be any real benefit derived from such joinder.

10.3.5.6 The only clear point which emerges from the legal quagmire presently prevailing with regard to this problem in the Magistrate's Court, is that the provisions of Section 28 (2) are unsuited to and inadequate for the implementation of the provisions of Section 2 (6)(a) and/or Section 2 (8)(a) of the Act, and that it is high time that the legislature took steps to correct the situation by introducing a rule similar to Supreme Court Rule 13, designed for the avoidance of a multiplicity of actions, and the terms of which should be sufficiently clear to achieve this object. Of course, if the appellate division holds that Section 2 (8)(a) of the Act can indeed be implemented in cases where a joint wrongdoer not sued by the plaintiff is joined at the instance of the defendant, the battle for an avoidance of a multiplicity of actions will have been substantillay won.

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APPENDIX I

GOVERNMENT GAZETTE, 10 SEPTEMBER 1986 No. 10419 3

GENERAL EXPLANATORY NOTE:

Words underlined with solid line indicate insertions in existing enactments.

ACT

To provide for the payment of compensation for certain loss or damage unlawfully caused by the driving of certain motor vehicles; and to provide for incidental matters.

(English text signed by the State President.)
(Assented to 29 August 1986.)

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

Definitions.

1. In this Act, unless the context indicates otherwise—

(i) "appointed agent" means an agent appointed under section 6 (1) *(a)*; (i)

(ii) "Black authority" means—

(a) the government of any territory which by or under any law has been or is declared to be a self-governing territory within the Republic;

(b) the government of any area for which a legislative assembly has been or is established under the National States Constitution Act, 1971 (Act No. 21 of 1971); (xiii)

(iii) "business" does not include any unlawful business; (ii)

(iv) "convey", in relation to the conveyance of a person in a motor vehicle, includes—

(a) entering or mounting the motor vehicle in question for the purpose of being so conveyed; and

(b) alighting from the motor vehicle in question after having been so conveyed; (xv)

(v) "Director-General" means the Director-General: Transport; (iii)

(vi) "lift club" means any club of which—

(a) every member shall have a turn to convey or cause to be conveyed by means of a motor car the members of such club or other persons designated by such members to or from a specified place for a specified purpose; or

(b) every member is the owner of a motor car and of which one or some of its members shall by means of a motor car of which he is the owner or they are the owners, as the case may be, convey or cause to be conveyed the members of such club or other persons designated by such members to or from a specific place for a specific purpose; (xi)

(vii) "local authority" means any institution or body contemplated in section 84 (1) *(f)* of the Provincial Government Act, 1961 (Act No. 32 of 1961); (ix)

(viii) "Minister" means the Minister of Transport Affairs; (v)

(ix) "motor car" means a motor vehicle designed or adapted for the conveyance of not more than ten persons (including the driver); (vi)

(x) "motor vehicle" means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel or electricity and includes a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle; (vii)

(xi) "MVA Fund" means the Motor Vehicle Accident Fund mentioned in section 3; (viii)

(xii) "owner", in relation to—

(a) a motor vehicle which a motor dealer has in his possession during the course of his business and which may in terms of any law relating to the licensing of motor vehicles not be driven or used on a public road except under the authority of a motor dealer's licence of which the motor dealer concerned is the holder, means that motor dealer;

(b) a motor vehicle which has been received for delivery by a motor transport licence holder in the course of his business of delivering new motor vehicles and which has not yet been delivered by him, means that motor transport licence holder;

(c) a motor vehicle which is the subject of a hire purchase agreement, means the purchaser under the hire purchase agreement concerned;

(d) a motor vehicle under an agreement of lease for a period of at least 12 months, means the lessee concerned; (iv)

(xiii) "prescribe" means prescribe by regulation; (xvi)

(xiv) "regulation" means a regulation made under section 17; (x)

(xv) "reward", with reference to the conveyance of any person in or upon a motor vehicle, does not include any reward rendering such conveyance illegal in terms of any provision of the Road Transportation Act, 1977 (Act No. 74 of 1977); (xiv)

(xvi) "special circumstances" does not include any neglect, omission or ignorance. (xii)

Tokens of identification.

2. (1) *(a)* Subject to the provisions of subsection (2), no person shall drive a motor vehicle in any place unless one token of identification only in the prescribed form is attached to that vehicle in the prescribed manner.

(b) Application for a token of identification referred to in paragraph *(a)* shall be made on the prescribed form to the appointed agent concerned, who shall supply such token, duly completed, free of charge to the applicant.

(c) The cost of printing the said tokens of identification and the forms of application therefor shall be defrayed by the MVA Fund.

(2) The provisions of subsection (1) shall not apply in relation to a motor vehicle—

(a) of which any state or government or a provincial administration or the Administration of the territory of South West Africa or the National Transport Commission or a local authority or a Black authority or the South African Development Trust or the State President is the owner; or

(b) which is registered at a place in a territory outside the Republic, but subject to the provisions of paragraph *(c)*; or

(c) which is registered at a place in Botswana, Lesotho, Swaziland or in any territory which formerly formed part of the Republic and subsequently became independent and is insured in terms of any law relating to the compulsory insurance of motor vehicles in force at any

such place and in respect of which a prescribed undertaking has been furnished to pay compensation for any such loss or damage as is mentioned in section 8 (1) which may be caused by or arises out of the driving of the insured motor vehicle in the Republic; or

(d) which is used in accordance with a motor dealer's licence or a motor transport licence, as defined in any law relating to the licensing of motor vehicles;

(e) which is not required to be licensed in terms of any such law;

(f) which is a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by a motor vehicle; or

(g) referred to in section 5 (2) *(b)*.

(3) Any person who contravenes subsection (1) *(a)* shall be guilty of an offence and on conviction liable to a fine not exceeding R100.

Establishment of MVA Fund.

3. (1) There is hereby established a juristic person to be known as the Motor Vehicle Accident Fund.

(2) The income of the MVA Fund, including income from investments, shall be exempt from income tax.

(3) As from the commencement of this Act the Motor Vehicle Assurance Fund mentioned in section 5 of the Compulsory Motor Vehicle Insurance Act, 1972 (Act No. 56 of 1972), shall cease to exist, all amounts credited to that fund immediately before such commencement shall vest in the MVA Fund and all liabilities and rights, existing as well as accruing, of the said Motor Vehicle Assurance Fund shall devolve upon the MVA Fund.

Manager, assistant manager and staff of MVA Fund.

4. (1) *(a)* Subject to the laws governing the public service, the Minister may from time to time—

(i) appoint a person to be the manager of the MVA Fund, who, under the control of the Director-General and subject to such general or special directions as the Director-General may give from time to time, shall manage the affairs of the MVA Fund and, for that purpose, may exercise the powers and shall perform the duties of the MVA Fund;

(ii) appoint a person to be the assistant manager of the MVA Fund, who may perform such of the functions of the manager as may be assigned to the assistant manager by the Director-General or by the manager acting with the concurrence of the Director-General.

(b) When the manager is for any reason absent or unable to perform his functions, the assistant manager shall act in the place of the manager, and when both the manager and the assistant manager are absent or unable to perform their functions, the Director-General may in writing designate a member of his staff to act in the place of the manager for a specified period not exceeding 30 days.

(2) Subject to the laws governing the public service, the Director-General may appoint such persons as are in his opinion necessary to enable the manager to manage the MVA Fund: Provided that the Director-General may, with the approval of the Minister and with the concurrence of the Minister of Finance, enter into an agreement with any person for the rendering of any particular service.

(3) Such amounts in respect of expenses incurred by the Director-General under this section as may be determined by him from time to time with the concurrence of the Secretary to the Treasury, shall be paid out of the funds of the MVA Fund to the State at such times as may be so determined, and shall be paid into the State Revenue Fund.

Moneys in MVA Fund.

5. (1) There shall be paid into the MVA Fund quarterly all moneys received by that fund by virtue of the provisions of section 1 (2) *(a)* (ii) of the Central Energy Fund Act, 1977 (Act No. 38 of 1977), and section 25 (2) of the National Road Safety Act, 1972 (Act No. 9 of 1972), for the latest quarter for which such sum can be calculated.

(2) The moneys in the MVA Fund shall, subject to the provisions of subsection (3) of section 3, subsection (3) of this section and section 20, be utilized to defray the expenses incurred by the manager of that fund in the exercise of his powers and the performance of his duties in terms of this Act, except in the case of claims for compensation contemplated in section 8 arising out of the driving in the Republic of motor vehicles—

(a) registered in Bophuthatswana, Botswana, Ciskei, Lesotho, Swaziland, Transkei and any other territory which formerly formed part of the Republic and subsequently became independent, and insured under the provisions of any law relating to the compulsory insurance of motor vehicles in force in those territories and in respect of which prescribed provision has been made for payment of the said compensation; or

(b) which are the property of any owner who has made the prescribed provision for the payment of compensation provided for in section 8.

(3) The manager of the MVA Fund shall cause the amount contemplated in section 25 (1) of the National Road Safety Act, 1972, to be paid over once every month from the MVA Fund to the National Road Safety Council established by section 2 of that Act.

Powers and duties of MVA Fund.

6. (1) The MVA Fund—

(a) (i) shall, subject to the Minister's approval, appoint as many agents as may apply for appointment and comply with the requirements determined by the advisory committee in terms of section 7 (1) *(d)*, on conditions agreed upon, to investigate or settle, subject to the provisions of the regulations, on its behalf claims referred to in section 8 arising from the driving of a motor vehicle in the case where the identity of either the owner or driver thereof has been established or to commence, conduct, defend or abandon legal proceedings in connection with such claims; and

(ii) shall, after approval by the Minister, cause the names of the said agents and the claims in respect of which those agents shall be liable, to be published in the *Gazette*;

(b) shall, subject to the provisions of the regulations, investigate or settle claims referred to in section 8 arising from the driving of a motor vehicle in the case where the identity of neither the owner nor driver thereof can be established or to commence, conduct, defend or abandon legal proceedings in connection with such claims;

(c) may, subject to the Minister's approval in every case, purchase or otherwise acquire goods, equipment, land, buildings, shares, debentures, stock, securities and all other kinds of movable or immovable property;

(d) may, subject to the Minister's approval in every case, sell, lease, mortgage, encumber, dispose of, exchange, work, develop, build upon, improve or in any other way deal with its property;

(e) may invest any moneys not immediately required for the conduct of its business, in such manner as may from time to time be determined by the Minister, and realize, alter or reinvest such investments or otherwise deal with such moneys or investments in such manner

as may from time to time be determined by the Minister;

(f) may, subject to the Minister's approval in every case, borrow money and secure the payment thereof in such manner as it may deem fit;

(g) may, subject to the Minister's approval, make donations for research in connection with any matter relating to injuries sustained in motor vehicle accidents, on such conditions as it may deem advisable;

(h) may draw, draft, accept, endorse, discount, sign and issue promissory notes, bills and other negotiable or transferable instruments, with the exception of share certificates;

(i) shall utilize its funds for any purpose connected with or resulting from the exercise of its powers or the performance of its duties;

(j) shall reimburse the State for services rendered to the MVA Fund by persons in the service of the State;

(k) may do all such other things as are incidental or conducive to the exercise of its powers or the performance of its duties;

(l) may accept liability towards any other government for payment of compensation in terms of any law relating to the compulsory insurance of motor vehicles in force in such government's territory caused by or arising out of the driving in that territory of any motor vehicle registered in the Republic.

(2) The MVA Fund shall—

(a) keep proper records of all its financial transactions and its assets and liabilities;

(b) as soon as may be after each audit in terms of subsection (3), submit to the Minister audited balance sheets and the report of the Auditor-General in respect of such audit together with a report on the MVA Fund's activities during the year to which the audit relates.

(3) The accounts of the MVA Fund shall be audited annually by the Auditor-General.

(4) The Minister shall lay upon the Table copies of the reports submitted to him in terms of subsection (2) in Parliament within 30 days after receipt thereof if Parliament is then in session or, if Parliament is not then in session, within 30 days after the commencement of its next ensuing session.

Advisory committee.

7. (1) The Minister shall establish an advisory committee to advise him in regard to—

(a) the financial position of the MVA Fund;

(b) the financing of the MVA Fund;

(c) the investment of the moneys of the MVA Fund;

(d) the conditions under which agents of the MVA Fund should be appointed;

(e) disciplinary steps to be taken against appointed agents who do not comply with the provisions of the Act or the conditions of any agreement concluded with the MVA Fund;

(f) any amount which shall be required to be deposited as security with the MVA Fund by an owner of a motor vehicle referred to in section 5 (2) *(b)*; and

(g) any matter from time to time referred to the advisory committee by the Minister.

(2) The members of the advisory committee shall be appointed by the Minister, and the committee shall consist of—

(a) one officer of the Department of Transport, who shall be chairman of the committee;

(b) one officer of the Department of Finance;

(c) one officer of the Central Statistical Services;

(d) one officer of the Department of Mineral and Energy Affairs;

(e) one person to represent the Actuarial Society of South Africa;

(f) one person to represent the Automobile Association of South Africa;

(g) one person to represent the Association of Law Societies of South Africa;

(h) one person to represent the Southern African Bus Operators Association, the Public Carriers Association, the National Association for Private Transport Operators and the Passenger Transport Association; and

(i) the manager of the MVA Fund.

(3) A member of the advisory committee shall be appointed for a period of two years and on such conditions (including conditions relating to the allowances, if any, payable to him in respect of services rendered by him as such a member) as the Minister may determine with the concurrence of the Minister of Finance.

(4) The advisory committee may demand the production to it of statistics, books, accounts or other documents of the MVA Fund for the purpose of examination or making extracts therefrom or copies thereof.

(5) The advisory committee shall after the thirtieth day of April in each year prepare a report on all matters dealt with during the preceding year and submit it to the Minister, who shall lay it upon the Table in Parliament.

(6) The manager of the MVA Fund shall provide all such persons as may be necessary to undertake all secretarial and administrative work arising out of the performance of the functions of the advisory committee.

Liability of MVA Fund and appointed agent.

8. (1) The MVA Fund or its appointed agent, as the case may be, shall, subject to the provisions of this Act and on the prescribed conditions, be obliged to compensate any person whomsoever (in this Act called the third party) for any loss or damage which the third party has suffered as a result of—

(a) any bodily injury to himself;

(b) the death of or any bodily injury to any person,

in either case caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place in the Republic, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Act called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty.

(2) The provisions of subsection (1) also apply in respect of loss or damage resulting from or arising out of the driving of a motor vehicle in a territory which formed part of the Republic and became an independent state in terms of a law passed by Parliament, if an agreement has been or is entered into between the Government of the Republic and the government of the state concerned, in accordance with which the MVA Fund or its appointed agent accepts liability to apply the provisions of subsection (1) in that territory for a period as agreed upon.

(3) No interest shall be payable on the amount of any compensation which a court awards to any third party by virtue of the provisions of subsection (1), unless 14 days have elapsed from the date of the court's relevant order.

(4) In issuing any order as to costs on making such award, the court may take into consideration any written offer in settlement of the claim concerned against it or him, made by the MVA Fund or its appointed agent before the relevant summons was served on it or him.

(5) Where a claim for compensation under subsection (1)—

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, the MVA Fund or its appointed agent shall be entitled, after furnishing the third party con-

cerned with an undertaking to that effect or a competent court has directed the MVA Fund or its appointed agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof;

(b) includes a claim for future loss of income or support, the MVA Fund or its appointed agent shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed the MVA Fund or its appointed agent to furnish such undertaking, to pay the amount payable by it or him in respect of the said loss, by instalments as agreed upon.

(6) 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 or 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.

(7) The MVA Fund or its appointed agent with the approval of the MVA Fund may make an advance payment to the claimant out of the amount to be awarded in terms of subsection (1) to the claimant in respect of medical costs and loss of income.

Liability limited in certain cases.

9. (1) The liability of the MVA Fund or the appointed agent, as the case may be, in connection with any one occurrence to compensate a third party for any loss or damage contemplated in section 8 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall be limited, except where the person concerned was conveyed in or on the motor vehicle concerned during a period in which he rendered military service or underwent military training in terms of the Defence Act, 1957 (Act No. 44 of 1957), and while dressed in a uniform of the South African Defence Force—

(a) to the sum of R25 000 in respect of any bodily injury to or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in the motor vehicle in question—

(i) for reward; or

(ii) in the course of the business of the owner of that motor vehicle; or

(iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his employment; or

(iv) for the purposes of a lift club where that motor vehicle is a motor car; or

(b) in the case of a person who was being conveyed in the motor vehicle concerned under circumstances other than the circumstances referred to in paragraph *(a)*, to the sum of R25 000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of one such person, excluding the payment of compensation in respect of any other loss or damage,

but exclusive of the cost of recovering the said compensation.

(2) Where the loss or damage contemplated in section 8 is suffered as a result of bodily injury to or the death of an employee

of the driver or owner of the motor vehicle concerned and the third party is entitled to compensation under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), in respect of such injury or death—

(a) the liability of the MVA Fund or the appointed agent, as the case may be, in respect of the bodily injury to or the death of any one such employee shall be limited in total to the sum representing the difference between the amount which that third party could, but for the provisions of this paragraph, have claimed from the appointed agent or the amount of R25 000 (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act; and

(b) the appointed agent shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder,

without, however, any liability of the appointed agent to pay costs awarded against him in any legal proceedings being affected by anything in this subsection contained.

Liability excluded in certain cases.

10. An appointed agent shall not be obliged to compensate any person in terms of section 8 for any loss or damage—

(a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable if section 12 had not been enacted; or

(b) suffered as a result of bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death—

(i) was being conveyed for reward on a motor vehicle which is a motor cycle; or

(ii) is a person referred to in section 9 (1) *(b)* and a member of the household, or responsible in law for the maintenance, of the driver of the motor vehicle concerned, and was being conveyed in or upon the motor vehicle concerned; or

(c) suffered as a result of bodily injury to or the death of a member of the South African Police, the South African Defence Force or the South African Railways Police Force, caused by or arising from the driving of a motor vehicle in which the member was conveyed in the course of his employment and owned by the South African Police, the South African Defence Force or the South African Transport Services; or

(d) if the claim concerned has not been instituted and prosecuted by the claimant, or on behalf of the claimant by—

(i) any person entitled to practise as an attorney within the Republic; or

(ii) any person who is in the service, or who is a representative, of a state or government or a provincial administration or the Administration of the territory of South West Africa or any local authority.

Presumptions regarding driving of motor vehicle.

11. (1) For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle.

(2) For the purposes of this Act a person who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle while it moves from that place as a result of gravity, or while it is stationary at that place or at a place to which it moved from the first-mentioned place as a result of gravity.

(3) Whenever any motor vehicle has been placed or left at any place, it shall, for the purposes of this Act, be presumed, until

the contrary is proved, that such vehicle was placed or left at such place by the owner of such vehicle.

Claim for compensation lies against MVA Fund or appointed agent only.

12. When a third party is entitled under section 8 to claim from the MVA Fund or its appointed agent any compensation in respect of any loss or damage resulting from any bodily injury to or the death of any person caused by or arising out of the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party shall not be entitled to claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as a servant in the execution of his duty, from his employer, unless the MVA Fund or its appointed agent is unable to pay the compensation.

Submission of information to MVA Fund or appointed agent and third party.

13. (1) When, as the result of the driving of a motor vehicle, any person other than the driver of that motor vehicle has been killed or injured, the owner and the driver, if he is not the owner, of the motor vehicle shall (if reasonably possible, within 14 days after the occurrence) furnish an appointed agent or the MVA Fund, as the case may be, on the prescribed form with particulars of the occurrence and also the prescribed statements.

(2) Any person who fails to comply with any provision of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R200, unless he is unable to comply with the provision concerned and his inability is not due to his own action or default.

(3) The appointed agent shall within 14 days after the third party has complied with the provisions of section 15 (2) *(b)*, furnish the third party or his agent with a copy of the information and statements which the said owner or driver furnished in terms of subsection (1) of this section, as well as all statements which were obtained from witnesses to the occurrence.

(4) Any person who furnishes false information in connection with a token of identification issued in terms of section 2 (1) and attached, at the time of an occurrence out of which a claim in terms of section 8 arises, to a motor vehicle to which it relates and which is involved in that occurrence, shall be guilty of an offence and liable on conviction to a fine not exceeding R250.

Prescription of claim.

14. (1) *(a)* Notwithstanding the provisions of any other law relating to prescription, but subject to the provisions of paragraph *(b)* of this subsection, the right to claim compensation under section 8 from an appointed agent in respect of claims referred to in section 6 (1) *(a)* (i) shall become prescribed upon the expiration of a period of two years from the date upon which the claim arose: Provided that prescription shall be suspended during the periods referred to in subsection (2) of this section and section 15 (2).

(b) Prescription of a claim for compensation under sections 6 (1) *(a)* and 8 shall not run against—

(i) a minor;

(ii) any person detained as a patient in terms of the provisons of the Mental Health Act, 1973 (Act No. 18 of 1973); or

(iii) a person under curatorship.

(2) If an appointed agent does not within 60 days after receipt of a claim as set out in section 15 (1) object to the validity thereof, prescription shall, notwithstanding the provisions of subsection (1), be interrupted until after the expiration of a period of 90 days from the date on which the appointed agent delivers to the claimant or his representative per registered post or by hand a notice to—

(a) repudiate liability; or

(b) convey an offer of settlement of the claim to the claimant or his representative.

(3) If a third party's claim for compensation has become prescribed under subsection (1) of this section and a court having jurisdiction in respect of such claim is satisfied, upon application by the third party concerned—

(a) where the claim became prescribed before compliance by the third party with the provisions of section 15 (1), that by reason of special circumstances he or, if he instructed any other person to comply with those provisions on his behalf, such person could not reasonably have been expected to comply with the said provisions before the date on which the claim became prescribed; or

(b) where the claim became prescribed after compliance by him with the said provisions, that by reason of special circumstances he or, if he instructed any other person to act on his behalf in this connection, such person could not reasonably have been expected to serve any process by which the running of prescription could have been interrupted, on the appointed agent before that date; and

(c) that the appointed agent is not prepared to waive its right to invoke the prescription,

the court may grant leave to the third party to comply with the said provisions and serve process in any action for enforcement of the claim on the appointed agent in accordance with the provisions of section 15 (2) before a date determined by the court, or, as the case may be, to serve such process on the appointed agent before a date so determined.

(4) The court shall not grant an application referred to in subsection (3) unless—

(a) the application is made within a period of 90 days after the date on which the claim became prescribed in terms of subsection (1); and

(b) the third party has given security to the satisfaction of the court for the costs of the appointed agent in connection with the application.

(5) A plea of prescription in terms of subsection (1) shall not be upheld in any action in which the relevant process was served on the appointed agent by virtue of leave granted under subsection (3).

(6) Notwithstanding the provisions of section 8 of the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), any right under subsection (1) *(b)* of that section to recover an amount which under that Act is required to be paid to a third party in circumstances other than those mentioned in section 9 (2) of this Act, shall for the purposes of subsection (1) (excluding the proviso) and subsection (3) of this section be deemed to be a right to claim compensation under section 8 of this Act arising on the same date as the claim of such third party under the last-mentioned section: Provided that if the recovery of any such amount has been debarred under this subsection, any compensation thereafter awarded to the third party under this Act shall be reduced by the amount concerned.

Procedure.

15. (1) A claim for compensation under section 8 shall—

(a) be set out in the prescribed manner on a prescribed form which shall include provision for a medical report or reports, completed by the prescribed person or persons, in regard to the cause of the death or the nature and treatment of the bodily injury in connection with which the claim is instituted and for the prescribed supporting proof and particulars;

(b) be sent by registered post or delivered by hand, at his registered office or local branch office, to the appointed agent who issued the token of identification attached to the vehicle concerned or the appointed agent who in

terms of the regulations must handle the claim, and who shall, in the case of delivery by hand, at the time of the delivery acknowledge receipt thereof and the date of such receipt in writing.

(2) No such claim shall be enforceable by legal proceedings commenced by a summons served on the appointed agent—

(a) before the expiration of a period of 90 days as from the date on which the claim was sent or delivered by hand, as the case may be, to the appointed agent as provided for in subsection (1); and

(b) before all the prescribed requirements of the appointed agent have been complied with:

Provided that if the appointed agent repudiates in writing liability for the claim before the expiration of the said period, the claimant may at any time after such repudiation serve summons on the appointed agent.

(3) An action to enforce such a claim may be brought in any court of otherwise competent jurisdiction within whose area of jurisdiction the occurrence which caused the injury or death took place.

Appointed agent's right of recourse.

16. When an appointed agent has paid any compensation under section 8 he may, under the prescribed circumstances, without having obtained a formal cession of the right of action, recover from the owner of the motor vehicle concerned or from any person whose negligence or other unlawful act caused the loss or damage concerned, so much of the amount paid by way of compensation as the third party concerned could, but for the provisions of section 12, have recovered from the owner or from the person whose negligence or other unlawful act caused the loss or damage, as the case may be, if the appointed agent had not paid any such compensation.

Regulations.

17. (1) The Minister may make regulations as to—

(a) matters in respect of which statistics are to be kept by appointed agents, the manner in which such statistics shall be compiled and the furnishing of information in connection therewith;

(b) any matter which in terms of this Act is required or permitted to be prescribed by regulation;

(c) in general, any matter which he may consider necessary or expedient to prescribe in order to attain or promote the objects of this Act.

(2) A regulation made under subsection (1) may prescribe penalties not exceeding a fine of R500 or not exceeding imprisonment for a period of three months, for any contravention of or failure to comply with its provisions.

Application of Act in South West Africa.

18. This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel.

Repeal and amendment of laws.

19. Subject to the provisions of section 20, the laws mentioned in the Schedule are hereby repealed or amended to the extent indicated in the third column of the Schedule.

Savings.

20. Subject to the provisions of section 3 (3)—

(a) the provisions of this Act shall not apply with reference to a claim for compensation which arose prior to the commencement of this Act under a law repealed by section 19, and any such claim shall be dealt with as if this Act had not been passed; and

(b) the liability for all agreements and undertakings concluded by—

(i) the Motor Vehicle Assurance Fund in terms of a law repealed by section 19; or

(ii) authorized insurers in terms of section 21 (1C) of the Compulsory Motor Vehicle Insurance Act, 1972 (Act No. 56 of 1972),

shall, where applicable, remain in force as if this Act had not been passed.

Short title and commencement.

21. This Act shall be called the Motor Vehicle Accidents Act, 1986, and shall be deemed to have come into operation on 1 May 1986.

DEPARTEMENT VAN VERVOER

No. 1869 **12 September 1986**

AANSTELLING VAN AGENTE VAN DIE MOTORVOERTUIGONGELUKKEFONDS

Ingevolge artikel 6 (a) van die Motorvoertuigongelukkewet, 1986 (Wet 84 van 1986), word vir algemene kennisname bekendgemaak dat die versekeringsmaatskappye wie se name in Bylae A hiervan verskyn met ingang van 1 Mei 1986 as agente van die Motorvoertuigongelukkefonds aangestel is om gedurende die tydperk eindigende 30 April 1988 eise om skadevergoeding ingevolge artikel 8 van voormelde Wet te hanteer.

Elke sodanige agent moet die eise hanteer wat voortspruit uit die bestuur van—

(a) 'n motorvoertuig waaraan 'n uitkenningsteken wat deur hom uitgereik is en wat op daardie voertuig betrekking het; ingevolge artikel 2 (1) (a) van voormelde Wet geheg is; en

(b) 'n motorvoertuig waaraan 'n uitkenningsteken soos bedoel in artikel 2 (1) (a) van voormelde Wet nie geheg is nie maar waarvan die identiteit van die eienaar of bestuurder bekend is, in welke geval elke agent die eise moet hanteer wat ontstaan het op die datums van die ongelukke wat in Bylae B hiervan teenoor sy naam verskyn.

BYLAE A

Allianz Versekering Beperk.

Commercial Union Versekeringsmaatskappy van Suid-Afrika Beperk.

Federated Versekeringsmaatskappy Beperk.

General Accident Versekeringsmaatskappy Suid-Afrika Beperk.

Guardian National Versekeringsmaatskappy Beperk.

Mutual & Federale Versekeringsmaatskappy Beperk.

National Employers' General Versekeringsmaatskappy Beperk.

President Versekeringsmaatskappy Beperk.

Santamversekering Beperk.

Sentraboer (Koöperatief) Beperk.

South African Eagle Versekeringsmaatskappy Beperk.

Standard General Versekeringsmaatskappy Beperk.

DEPARTMENT OF TRANSPORT

No. 1869 **12 September 1986**

APPOINTMENT OF AGENTS OF THE MOTOR VEHICLE ACCIDENTS FUND

In terms of section 6 (a) of the Motor Vehicle Accidents Act, 1986 (Act 84 of 1986), it is notified for general information that the insurance companies whose names appear in Schedule A hereto have been appointed with effect from 1 May 1986 as agents of the Motor Vehicle Accidents Fund to handle claims for compensation in terms of section 8 of the aforementioned Act during the period ending 30 April 1988.

Each such agent shall handle the claims arising from the driving of—

(a) a motor vehicle to which a token of identification issued by him and relating to such vehicle is attached in terms of section 2 (1) (a) of the aforementioned Act; and

(b) a motor vehicle to which a token of identification referred to in section 2 (1) (a) of the aforementioned Act is not attached but of which the identity of the owner or driver is known, in which case each agent shall handle the claims that arose on the dates of the accidents indicated in Schedule B hereto against his name.

SCHEDULE A

Allianz Insurance Limited.

Commercial Union Assurance Company of South Africa Limited.

Federated Insurance Company Limited.

General Accident Insurance Company South Africa Limited.

Guardian National Insurance Company Limited.

Mutual & Federal Insurance Company Limited.

National Employers' General Insurance Company Limited.

President Insurance Company Limited.

Santam Insurance Limited.

Sentraboer (Co-operative) Limited.

South African Eagle Insurance Company Limited.

Standard General Insurance Company Limited.

SCHEDULE B

CLAIMS MUST BE SERVED ON THE AGENTS CONCERNED IN ACCORDANCE WITH THE ACCIDENT DATES INDICATED HEREUNDER

Appointed agent	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	Total
Sentraboer	1	1	1–2	1	1	1	1	1–2	1	1	1–2	1	15
Commercial Union	2–3	2–3	3	2–4	2–3	2	2–3	3–4	2–3	2–3	3–4	2	22
President	4–6	4–6	4–6	5–7	4–6	3–6	4–6	5–7	4–6	4–6	5–7	3–5	37
Santam	7–15	7–15	7–15	8–16	7–15	7–15	7–15	8–16	7–15	7–14	8–16	6–14	107
Mutual & Federal	16–18	16–18	16–18	17–19	16–17	16–18	16–18	17–19	16–18	15–16	17–19	15–17	34
General Accident	19–20	19–20	19–20	20–21	18–19	19–20	19–20	20–21	19–20	17	20–21	18–19	23
Guardian Nat.	21–22	21–22	21–23	22–23	20–21	21–23	21–23	22–23	21–22	18–20	22–23	20–22	29
Federated	23	—	24	24	22	24	—	24	23	21	24	23	10
Allianz	24–25	23–24	25–26	25	23–24	25–26	24–25	25	24–25	22–23	25–26	24	21
National Employers'	26–28	25–26	27–28	26–27	25–27	27–28	26–27	26–27	26–28	24–25	27–28	25–26	27
Standard Gen.	—	27	—	28	—	29	—	28	—	26	—	27	6
S.A. Eagle	29–31	28–30	29–31	29–31	28–30	30–31	28–30	29–31	29–31	27–29	29–31	28–30	35
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REGULATIONS UNDER 1986 ACT

No. 1870 **12 September 1986**

MOTORVOERTUIGONGELUKKEREGULASIES, 1986

Die Minister van Vervoerwese het kragtens artikel 17 van die Motorvoertuigongelukkewet, 1986, die regulasies in die Bylae hiervan vervat met ingang van 1 Mei 1986 uitgevaardig.

BYLAE

WOORDOMSKRYWING

1. In hierdie regulasies beteken die uitdrukking "die Wet" die Motorvoertuigongelukkewet, 1986, en tensy uit die samehang anders blyk, het elke uitdrukking wat in hierdie regulasies gebruik word en waaraan in die Wet 'n betekenis geheg word, die betekenis aldus daaraan geheg.

AANSOEK OM 'N UITKENNINGSTEKEN

2. 'n Aansoek om 'n uitkenningsteken ingevolge artikel 2 (1) (b) van die Wet moet wees in die Vorm MV1 soos in die Aanhangsel hiervan uiteengesit.

UITKENNINGSTEKEN

3. Die uitkenningsteken bedoel in artikel 2 (1) (a) van die Wet moet wees soos in Vorm MV2 in die Aanhangsel hieran uiteengesit en moet op so 'n wyse op 'n opvallende plek an die voorkant van die motorvoertuig waarop dit betrekking het geheg word dat die hele teks te alle tye van die uitekant van sodanige motorvoertuig van die linkerkant af naklik en duidelik sigbaar is en sodanige teken moet aldus eheg gehou word totdat daardie motorvoertuig vir gebruik s 'n motorvoertuig permanent ongeskik raak: Met dien stande dat 'n benoemde agent op versoek 'n bestaande, skadigde of verlore teken kosteloos moet vervang.

MOTORVOERTUIE WAT BUITE DIE REPUBLIEK GEREGISTREER IS

4. Vergoeding is betaalbaar, met uitsluiting van enige nspreeklikheid van die kant van die MVO-fonds, vir veres of skade soos bedoel in artikel 8 van die Wet, wat ntstaan uit die bestuur op enige plek in die Republiek van n motorvoertuig wat geregistreer is in—

(a) **Botswana** en **Lesotho** en verseker is kragtens die bepalings van enige wet met betrekking tot verpligte motorvoertuigversekering wat in daardie gebiede

No. 1870 **12 September 1986**

MOTOR VEHICLE ACCIDENTS REGULATIONS, 1986

The Minister of Transport Affairs has, in terms of section 17 of the Motor Vehicle Accidents Act, 1986, made the regulations contained in the Schedule hereto with effect from 1 May 1986.

SCHEDULE

DEFINITIONS

1. In these regulations "the Act" means the Motor Vehicle Accidents Act, 1986, and, unless the context otherwise indicates, any expression used in these regulations to which a meaning has been assigned in the Act bears the meaning so assigned.

APPLICATION FOR A TOKEN OF IDENTIFICATION

2. An application in terms of section 2 (1) (b) of the Act for a token of identification shall be in the Form MV1, as set out in the Annexure hereto.

TOKEN OF IDENTIFICATION

3. The token of identification referred to in section 2 (1) (a) of the Act shall be in the Form MV2, as set out in the Annexure hereto, and shall be attached to the front part of the motor vehicle to which it relates in a conspicuous place so that the whole of the text is at all times conveniently and plainly visible from outside such motor vehicle from its left-hand side, and such token shall remain so attached until such time as such motor vehicle becomes permanently unfit for use as a motor vehicle: Provided that an appointed agent shall on request replace an existing, damaged or lost token without charge.

MOTOR VEHICLES REGISTERED OUTSIDE THE REPUBLIC

4. Compensation shall be payable, exclusive of any liability on the part of the MVA Fund, for loss or damage as contemplated in section 8 of the Act which arises out of the driving at any place in the Republic of a motor vehicle registered in—

(a) **Botswana** and **Lesotho** and insured under the provisions of any law relating to the compulsory insurance of motor vehicles in force in those territories, by an

geld, deur 'n versekeringsmaatskappy wat kragtens sodanige wetsbepalings gemagtig is om versekeringsverklarings uit te reik: Met dien verstande dat sodanige versekeringsverklarings uitgereik word behoudens 'n onderneming deur sodanige versekeringsmaatskappy om vergoeding te betaal ten opsigte van verlies of skade wat deur sodanige motorvoertuig aan enigiemand, wie ook al, veroorsaak word in die omstandighede en op die voorwaardes soos voorgeskryf in die Wet; of

(b) **Swaziland** en verseker is kragtens die bepalings van enige wet met betrekking tot verpligte motorvoertuigversekering wat in daardie gebied geld, deur die Swaziland Royal Insurance Corporation wat gemagtig is om versekeringsverklarings ingevolge sodanige wetsbepalings uit te reik: Met dien verstande dat sodanige versekeringsverklaring uitgereik word behoudens 'n onderneming deur sodanige Corporation om vergoeding te betaal ten opsigte van verlies of skade wat deur sodanige motorvoertuig aan enigiemand, wie ook al, veroorsaak word in die omstandighede en op die voorwaardes soos voorgeskryf in die Wet; of

(c) **Bophuthatswana** en verseker is kragtens die bepalings van enige wet met betrekking tot verpligte motorvoertuigversekering wat in daardie gebied geld: Met dien verstande dat die Bophuthatswana Motor Vehicle Assurance Fund 'n onderneming verstrek om die voormelde skadevergoeding te betaal indien 'n bevoegde versekeraar versuim of weier om vergoeding te betaal ten opsigte van verlies of skade wat deur sodanige motorvoertuig aan enigiemand, wie ook al, veroorsaak word in die omstandighede en op die voorwaardes soos voorgeskryf in die Wet; of

(d) **Ciskei** en verseker is kragtens die bepalings van enige wet met betrekking tot verpligte motorvoertuigversekering wat in daardie gebied geld, deur die Motorvoertuigassuransiefonds van Ciskei wat gemagtig is om versekeringsverklarings ingevolge sodanige wetsbepalings uit te reik: Met dien verstande dat sodanige versekeringsverklaring uitgereik word behoudens 'n onderneming deur genoemde Fonds om vergoeding te betaal ten opsigte van verlies of skade wat deur sodanige motorvoertuig aan enigiemand, wie ook al, veroorsaak word in die omstandighede en op die voorwaardes soos voorgeskryf in die Wet; of

(e) **Transkei** en verseker is kragtens die bepalings van enige wet met betrekking tot verpligte motorvoertuigversekering wat in daardie gebied geld: Met dien verstande dat die Transkeian Motor Vehicle Assurance Fund 'n onderneming verstrek om die voormelde skadevergoeding te betaal indien 'n bevoegde versekeraar versuim of weier om vergoeding te betaal ten opsigte van verlies of skade wat deur sodanige motorvoertuig aan enigiemand, wie ook al, versoorsaak word in die omstandighede en op die voorwaardes soos voorgeskryf in die Wet.

VOORSIENING VAN SEKURITEIT DEUR IEMAND OM INGEVOLGE ARTIKEL 5 (2) (b) VAN DIE WET OP TE TREE

5. (1) Ten einde voorsiening te maak vir die betaling van vergoeding ingevolge artikel 5 (2) (b) van die Wet moet die eienaar van een of meer motorvoertuie—

(a) by die MVO-fonds 'n som deponeer van R500 000 of enige deur die MVO-fonds goedgekeurde sekuriteit wat nie minder as die voormelde bedrag werd is nie of 'n som geld en sodanige sekuriteit wat tesame volgens die oordeel van die MVO-fonds nie minder as die voormelde bedrag werd is nie; en

insurance company authorised under such legal provisions to issue declarations of insurance: Provided that such declarations of insurance shall be issued subject to an undertaking by such insurance company to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by the Act; or

(b) **Swaziland** and insured under the provisions of any law relating to compulsory motor vehicle insurance in force in that territory, by the Swaziland Royal Insurance Corporation, which is authorised under such legal provisions to issue declarations of insurance: Provided that such declaration of insurance shall be issued subject to an undertaking by the said Corporation to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by the Act; or

(c) **Bophuthatswana** and insured under the provisions of any law relating to compulsory motor vehicle insurance in force in that territory: Provided that the Bophuthatswana Motor Vehicle Assurance Fund shall furnish an undertaking to pay the aforesaid compensation in the event of an authorised insurer failing or refusing to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by the Act; or

(d) **Ciskei** and insured under the provisions of any law relating to compulsory motor vehicle insurance in force in that territory by the Motor Vehicle Assurance Fund of Ciskei, which is authorised under such legal provisions to issue declarations of insurance: Provided that such declaration of insurance shall be issued subject to an undertaking by the said Fund to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by the Act; or

(e) **Transkei** and insured under the provisions of any law relating to compulsory motor vehicle insurance in force in that territory: Provided that the Transkeian Motor Vehicle Assurance Fund furnishes an undertaking to pay the aforesaid compensation in the event of an authorised insurer failing or refusing to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by the Act.

PROVISION FOR SECURITY BY A PERSON TO ACT IN TERMS OF SECTION 5 (2) (b) OF THE ACT

5. (1) For the purpose of providing for the payment of compensation in terms of section 5 (2) (b) of the Act the owner of one or more vehicles shall—

(a) deposit with the MVA Fund a sum of R500 000 or any security approved by the MVA Fund of a value of not less than the aforementioned amount or any sum of money and such security which together are in the opinion of the MVA Fund not less than the aforementioned amount; and

(b) aan elke motorvoertuig waarvan hy die eienaar (wat in hierdie regulasies die deponeerder genoem word) is 'n behoorlik ingevulde vrystellingsteken in die Vorm MV2A soos in die Aanhangsel hiervan uiteengesit, heg op die wyse in regulasie 3 voorgeskryf.

(2) Die MVO-fonds moet op versoek aan 'n deponeerder wat aan die bepalings van subregulasie (1) (a) voldoen het voldoende vrystellingstekens gratis uitreik.

(3) Voordat 'n deponeerder 'n motorvoertuig vervreem of abandonneer moet hy die vrystellingsteken wat aan sodanige voertuig geheg is, verwyder en vernietig.

(4) 'n Deponeerder wat versuim om aan die voorskrifte van subregulasies (1) (b) en (3) te voldoen, is aan 'n misdryf skuldig en by skuldigbevinding strafbaar met 'n boete van hoogstens R100.

(5) Indien die waarde van 'n in subregulasie (1) (a) bedoelde deposito volgens die MVO-fonds se oordeel benede die waarde wat by daardie subregulasie ten opsigte van die betrokke deposito vereis word (hieronder die vereiste waarde genoem) gedaal het, moet die MVO-fonds die bokke deponeerder in 'n brief aan hom afgelewer, of in 'n geregistreerde brief wat deur die pos gestuur is, gelas om 'n [illegible]n geld of verdere sekuriteit te deponeer ten einde die tekort te vergoed, en indien die deponeerder versuim om aan sodanige lasgewing gevolg te gee binne 'n tydperk van veertien dae vanaf die dag waarop sodanige brief aan hom afgelewer of gepos is, verval die voorsiening om ingevolge artikel 5 (2) (b) van die Wet op te tree en word elke vrystellingsteken ingevolge subregulasie (2) aan hom uitgereik nietig.

(6) Indien die waarde van sodanige deposito volgens die MVO-fonds se oordeel die vereiste waarde te bowe gaan, moet die MVO-fonds op versoek van die betrokke deponeerder soveel van die deposito as wat die vereiste waarde te bowe gaan, aan hom teruggee.

(7) 'n Deponeerder kan 'n sekuriteit wat hy ingevolge subregulasie (1) (a) gedeponeer het, of 'n deel daarvan, vervang deur 'n ander sekuriteit deur die MVO-fonds goedgekeur, mits die totale waarde van die deposito na die vervanging volgens die MVO-fonds se oordeel nie minder as die vereiste waarde is nie.

(8) By ontvangs van 'n kennisgewing van 'n deponeerder dat hy betaling van vergoeding ingevolge artikel 5 (2) (b) van die Wet staak en by teruggawe deur hom van alle vrystellingstekens wat ingevolge subregulasie (2) aan hom verstrek is en wat hy in sy besit het, moet die MVO-fonds sy deposito aan hom teruggee, tensy die MVO-fonds rede het om te glo—

(a) dat iemand teen die deponeerder 'n *bona fide*-eis ingestel het om skadevergoeding weens verlies of skade wat die eiser kon gely het as gevolg van liggaamlike besering van homself of van die dood of liggaamlike besering van iemand anders, wat veroorsaak is deur of voortgespruit het uit die bestuur van 'n motorvoertuig waarvan die deponeerder die eienaar was en dat aan sodanige eis nie voldoen is nie; of

(b) dat iemand voornemens is om so 'n eis teen die deponeerder in te stel,

en by teruggawe van die deposito aan die deponeerder verval die bepalings van artikel 5 (2) (b) van die Wet en word elke vrystellingsteken wat aan hom verstrek is nietig.

(9) Behoudens die bepalings van subregulasie (8) moet die MVO-fonds 'n deposito wat ingevolge subregulasie (1) (a) gemaak is, behou as sekuriteit vir die betaling van skadevergoeding bedoel in artikel 8 van die Wet waarvoor die betrokke deponeerder aanspreeklik mag word, en vir enige koste van invordering van sodanige skadevergoeding, en geen ander vordering teen die deponeerder as 'n vordering om sodanige skadevergoeding en sodanige koste word uit sodanige deposito betaal nie, behalwe vir sover die waarde daarvan die vereiste waarde oorsky.

(b) attach to any motor vehicle of which he is the owner (who is referred to in these regulations as the depositor) a properly completed token of exemption in the Form MV2A as set out in the Annexure hereto in the manner provided for in regulation 3.

(2) The MVA Fund shall, on request, furnish a depositor who has complied with the provisions of subregulation (1) (a) with sufficient tokens of exemption free of charge.

(3) A depositor shall before alienating or abandoning any motor vehicle remove and destroy the token of exemption attached to such vehicle.

(4) A depositor who fails to comply with the requirements of subregulations (1) (b) and (3) shall be guilty of an offence and liable on conviction to a fine not exceeding R100.

(5) If in the opinion of the MVA Fund the value of a deposit referred to in subregulation (1) (a) has fallen below the value required by that subregulation in respect of the deposit in question (hereinafter referred to as the required value) the MVA Fund shall direct the depositor concerned by a letter delivered to him, or by a registered letter sent through the post, to deposit a sum of money or further security to make up the deficiency, and if the depositor fails to comply with such directive within a period of 14 days from the date on which such letter was delivered or posted to him, the provision to act in terms of section 5 (2) (b) of the Act shall lapse and every token of exemption issued to him in terms of subregulation (2) shall become void.

(6) If in the opinion of the MVA Fund the value of any such deposit exceeds the required value, the MVA Fund shall, at the request of the depositor concerned, return to him so much of the deposit as exceeds the required value.

(7) A depositor may substitute for any security which he has deposited in terms of subregulation (1) (a), or for any part thereof, any other security approved by the MVA Fund, provided that the total value of the deposit after the substitution is, in the opinion of the MVA Fund, not less than the required value.

(8) On receipt of a notice from a depositor that he is stopping payment of compensation in terms of section 5 (2) (b) of the Act and on return by him of all tokens of exemption supplied to him in terms of subregulation (2) which are in his possession, the MVA Fund shall return his deposit to him, unless the MVA Fund has reason to believe—

(a) that any person has preferred against the depositor a *bona fide* claim for compensation for any loss or damage which the claimant may have suffered as a result of any bodily injury to himself or the death of or bodily injury to any other person, which was caused by or arose out of the driving of a motor vehicle of which the depositor was the owner, and that such claim has not been satisfied; or

(b) that any person intends to prefer such a claim against the depositor, and upon the return of the deposit to the depositor the provisions of section 5 (2) (b) of the Act shall lapse and every token of exemption which was furnished to him shall become void.

(9) Subject to the provisions of subregulation (8), the MVA Fund shall hold a deposit made in terms of subregulation (1) (a) as security for the payment of compensation referred to in section 8 of the Act for which the depositor concerned may become liable and for any costs incurred in recovering such compensation, and no claim against the depositor other than a claim for such compensation and such costs shall be paid out of such deposit, except in so far as its value exceeds the required value.

(10) Indien 'n eis of 'n deel van 'n eis uit so 'n deposito betaal is en die waarde van die deposito na sodanige betaling minder as die vereiste waarde is, verval die deponeerder se reg om terugbetaling van die heffing op brandstof vir gebruik in sy motorvoertuie van die MVO-fonds ingevolge regulasie 6 te eis en moet die MVO-fonds die balans van die deposito, indien enige, aan die deponeerder teruggee, tensy die MVO-fonds rede het om te glo dat iemand 'n eis ingevolge artikel 8 van die Wet teen die deponeerder ingestel het en dat aan sodanige eis nie voldoen is nie of dat iemand voornemens is om so 'n eis teen die verweerder in te stel.

(11) Indien die MVO-fonds te eniger tyd daarvan oortuig is dat die deponeerder in gebreke gebly het om sy aanspreeklikheid ingevolge artikel 8 van die Wet ten volle na te kom gaan die betrokke sekuriteit vir die doeleindes van die deponeerder se aanspreeklikheid ingevolge die Wet oor op die MVO-fonds: Met dien verstande dat indien die deposito in die vorm van sekuriteit is, sodanige sekuriteit of 'n gedeelte daarvan gerealiseer moet word in so 'n mate dat 'n bedrag beskikbaar is wat gelyk is aan die bedrag van skadevergoeding en die koste van invordering daarvan waarvoor die deponeerder nog aanspreeklik is en dat die bedrag of sekuriteit wat gedeponeer is, geag moet word met daardie bedrag verminder te wees.

(12) Wanneer sodanige deposito onvoldoende is om ten volle aan al die eise vir skadevergoeding en die koste van alle persone te voldoen, moet die waarde van die deposito onder die verskillende persone wat op sodanige skadevergoeding en koste geregtig is, verdeel word in verhouding tot hulle onderskeie eise.

(13) Wanneer 'n deponeerder se reg verval om ingevolge artikel 5 (2) (b) van die Wet op te tree moet die MVO-fonds die deponeerder gelas om alle vrystellingstekens in sy besit aan die MVO-fonds terug te gee.

(14) 'n Deponeerder wat versuim om aan 'n lasgewing kragtens subregulasie (13) te voldoen, is aan 'n misdryf skuldig en by skuldigbevinding strafbaar met 'n boete van hoogstens een honderd rand (R100).

(15) Die MVO-fonds moet 'n som geld wat ingevolge subregulasie (1) (a) of (5) gedeponeer is, belê op die wyse waarop geld wat ingevolge die Versekeringswet deur versekeraars as sekuriteit by die Tesourie gestort is gewoonlik belê word en moet aan die betrokke deponeerder die rente betaal wat so 'n belegging oplewer asook die rente wat 'n ander sekuriteit as geld, wat hy aldus gedeponeer het, inbring.

EIS OM TERUGBETALING VAN HEFFING OP BRANDSTOF DEUR 'N DEPONEERDER

6. (1) Enige persoon wat ingevolge artikel 5 (2) (b) van die Wet aan die vereistes van regulasie 5 voldoen het, is behoudens die bepalings van subregulasies (2) en (3) van hierdie regulasie geregtig om van die MVO-fonds terugbetaling te eis van die heffing wat ingesluit is in die koopprys van brandstof wat gebruik is deur motorvoertuie wat aan sodanige persoon behoort.

(2) 'n Aansoek om terugbetaling van die heffing op brandstof deur 'n deponeerder moet—

(a) kwartaalsgewys, halfjaarliks of jaarliks aan die MVO-fonds gerig word en moet van geouditeerde state en stawende bewyse van aankoop en gebruik van brandstof vergesel wees; en

(b) afsonderlik ingedien word ten opsigte van petrol, diesel vir handelsvoertuie, diesel vir passasiersdiensvoertuie en diesel vir landbouwerktuie.

(3) Beamptes van die MVO-fonds of persone deur die MVO-fonds aangewys, is geregtig om te eniger tyd van 'n deponeerder te eis dat alle dokumente met betrekking tot die aankoop en gebruik van brandstof ten opsigte waarvan 'n terugbetaling van die heffing geëis word, aan hulle voorgelê word.

(10) If a claim or part of a claim has been paid out of such a deposit and the value of the deposit after such payment is less than the required value the depositor's right to claim a refund of the levy on fuel used in his motor vehicles from the MVA Fund in terms of regulation 6 shall lapse and the MVA Fund shall return the balance of the deposit, if any, to the depositor, unless the MVA Fund has reason to believe that any person has preferred a claim in terms of section 8 of the Act against the depositor and such claim has not been satisfied or that any person intends to prefer such a claim against the depositor.

(11) If at any time the MVA Fund is satisfied that the depositor has failed to meet his liabilities under section 8 of the Act the security concerned shall vest in the MVA Fund for the purpose of the liabilities of the depositor under the Act: Provided that where the deposit was in the form of security such security or portion thereof shall be realised to such an extent that an amount is available that is equal to the amount of the compensation and the cost of recovery thereof for which the depositor is still liable and that the amount or the security which has been deposited shall be deemed to have been reduced by that amount.

(12) When such deposit is insufficient to meet in full all claims for compensation and costs from all persons the value of the deposit shall be apportioned between the different persons entitled to such compensation and costs in proportion to their respective claims.

(13) When a depositor's right to act in terms of section 5 (2) (b) of the Act has lapsed the MVA Fund shall direct the depositor to return to it all tokens of exemption in his possession.

(14) A depositor who fails to comply with a directive issued under subregulation (13) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand (R100).

(15) The MVA Fund shall invest any sum of money deposited in terms of subregulation (1) (a) or (5) in the manner in which moneys deposited with the Treasury as security given by insurers under the Insurance Act are ordinarily invested, and shall pay over to the depositor concered the interest derived from such investment and any interest earned by any security other than money which he may have so deposited.

CLAIM FOR REFUND OF LEVY ON FUEL BY A DEPOSITOR

6. (1) Any person who has in terms of section 5 (2) (b) of the Act complied with the requirements of regulation 5 shall, subject to the provisions of subregulations (2) and (3) of this regulation be entitled to claim from the MVA Fund a refund of the levy included in the purchase price of fuel used by motor vehicles of which such person is the owner.

(2) A claim for refund of the levy on fuel by a depositor shall—

(a) be submitted to the MVA Fund quarterly, half-yearly or yearly and shall be accompanied by audited statements and supporting evidence of the purchase and use of fuel; and

(b) be made separately in respect of petrol, diesel for commercial vehicles, diesel for passenger service vehicles and diesel for agricultural implements.

(3) Officials of the MVA Fund or persons appointed by the MVA Fund shall at any time be entitled to demand of a depositor that all documents and books relating to the purchase and use of fuel in respect of which a refund of the levy is made be produced to them.

AANSPREEKLIKHEID VAN BENOEMDE AGENTE TEN OPSIGTE VAN EISE VIR VERLIES OF SKADE DEUR SEKERE MOTORVOERTUIE VEROORSAAK

7. (1) 'n Benoemde agent is aanspreeklik op die voorwaardes soos met die Minister en die MVO-fonds ooreengekom vir die hantering van eise kragtens artikel 8 van die Wet wat voortvloei uit die bestuur van 'n motorvoertuig—

(a) waaraan 'n uitkenningsteken soos bedoel in artikel 2 (1) (a) van die Wet geheg is en wat deur sodanige benoemde agent uitgereik is; en

(b) waaraan 'n uitkenningsteken nie geheg is nie maar waarvan die identiteit van die eienaar of bestuurder bekend is, in welke geval elke benoemde agent die eise behandel wat uiteengesit word in die kennisgewing wat ingevolge die bepalings van artikel 6 (1) (a) (ii) van die Wet in die *Staatskoerant* afgekondig is.

(2) 'n Benoemde agent is nie verplig om—

(a) iemand ingevolge artikel 8 van die Wet vir verlies of skade te vergoed nie wat gely is as gevolg van die liggaamlike besering van iemand wat—

(i) onredelik weier of versuim om hom op versoek van die benoemde agent op koste van dié agent te onderwerp aan enige mediese ondersoek of ondersoeke deur geneeshere aangewys deur genoemde agent;

(ii) weier of versuim om die benoemde agent op sy versoek en koste te voorsien van afskrifte van alle mediese verslae wat in sy besit is en wat betrekking het op die tersaaklike eis om skadevergoeding; of

(iii) weier of versuim om die benoemde agent op sy versoek toe te laat om insae te hê in alle aantekeninge met betrekking tot homself wat in die besit van enige hospitaal of sy geneesheer is; of

(b) iemand ingevolge artikel 8 van die Wet vir verlies of skade te vergoed nie indien die betrokke eiser weier of versuim—

(i) om aan die benoemde agent tesame met sy MV3-eisvorm of binne 14 dae nadat hy daartoe in staat is, 'n beëdigde verklaring voor te lê waarin die besonderhede van die voorval wat tot die betrokke eis aanleiding gegee het, volledig uiteengesit word;

(ii) om binne 14 dae nadat hy daarvan besit verkry het afskrifte van alle verklarings en dokumente met betrekking tot die voorval wat tot die betrokke eis aanleiding gegee het aan die benoemde agent te verstrek; of

(iii) om sodanige verdere besonderhede van genoemde voorval wat die bogenoemde agent verlang, skriftelik te verstrek.

AANSPREEKLIKHEID VAN DIE MVO-FONDS TEN OPSIGTE VAN SEKERE VERLIES OF SKADE VEROORSAAK DEUR ONGEÏDENTIFISEERDE MOTORVOERTUIE

8. (1) Die aanspreeklikheid van die MVO-fonds ingevolge die Wet ten opsigte van eise vir liggaamlike besering of dood wat ontstaan uit die bestuur van 'n motorvoertuig waarvan nòg die eienaar, nòg die bestuurder se identiteit vasgestel kan word, hieronder die ongeïdentifiseerde motorvoertuig genoem, is onderworpe aan die volgende voorwaardes:

(a) Die MVO-fonds loop geen aanspreeklikheid op nie tensy—

(i) genoemde liggaamlike besering of dood uit die nalatige of onregmatige bestuur van die ongeïdentifiseerde motorvoertuig voortgespruit het en bewys daarvan ten genoeë van die MVO-fonds voorgelê word;

LIABILITY OF APPOINTED AGENT IN RESPECT OF CLAIMS FOR LOSS OR DAMAGE CAUSED BY CERTAIN MOTOR VEHICLES

7. (1) An appointed agent shall be liable on the conditions agreed upon with the Minister and the MVA Fund for handling claims for compensation under section 8 of the Act which arise out of the driving of a motor vehicle—

(a) to which a token of identification referred to in section 2 (1) (a) of the Act is attached and which was issued by such appointed agent; and

(b) to which a token of identification is not attached but of which the identity of the owner or driver is known, in which event each appointed agent shall deal with the claims set out in the notice published in the *Gazette* in terms of section 6 (1) (a) (ii) of the Act.

(2) An appointed agent shall not be obliged to compensate—

(a) any person in terms of section 8 of the Act for any loss or damage suffered as a result of bodily injury to any person who—

(i) unreasonably refuses or fails to subject himself, at the request of the appointed agent and at the cost of that agent, to any medical examination or examinations by medical practitioners designated by the said agent;

(ii) refuses or fails to furnish the appointed agent, at his request and cost, with copies of all medical reports in his possession that relate to the relevant claim for compensation; or

(iii) refuses or fails to allow the appointed agent at his request to inspect all records relating to himself that are in the possession of any hospital or his medical practitioner; or

(b) any person in terms of section 8 of the Act for any loss or damage if the claimant concerned refuses or fails—

(i) to submit to the appointed agent, together with his MV3 claim form or within 14 days after being in a position to do so, an affidavit in which particulars of the occurrence that gave rise to the claim concerned are fully set out;

(ii) to furnish the appointed agent with copies of all statements and documents relating to the occurrence that gave rise to the claim concerned, within 14 days after having come into possession thereof; or

(iii) to furnish in writing such further particulars of the said occurrence as the appointed agent may require.

LIABILITY OF THE MVA FUND IN RESPECT OF CERTAIN LOSS OR DAMAGE CAUSED BY UNIDENTIFIED MOTOR VEHICLES

8. (1) The liability of the MVA Fund in terms of the Act in respect of claims for bodily injury or death arising from the driving of a motor vehicle of which neither the owner's nor the driver's identity can be established, hereinafter referred to as the unidentified motor vehicle, shall be subject to the following conditions:

(a) The MVA Fund shall not incur any liability unless—

(i) the said bodily injury or death arose from the negligent or unlawful driving of the unidentified motor vehicle and proof thereof to the satisfaction of the MVA Fund is produced;

(ii) bewys ten genoeë van die MVO-fonds gelewer word dat die eiser alle redelike pogings aangewend het om die identiteit van die eienaar of bestuurder van die ongeïdentifiseerde motorvoertuig vas te stel;

(iii) die eiser se onvermoë om vonnis ingevolge artikel 8 van die Wet te verkry, nie aan enige daad of versuim van die eiser toe te skryf is nie; en

(iv) die ongeïdentifiseerde motorvoertuig (met inbegrip van enigiets daarop, daarbinne of daaraan geheg) in fisiese kontak was met die beseerde of oorledene of met 'n ander persoon, voertuig, vervoermiddel of 'n ander voorwerp of voorwerpe wat regstreeks of onregstreeks die besering of dood veroorsaak het of daartoe bygedra het.

(b) die MVO-fonds is in geen geval aanspreeklik vir 'n groter bedrag as die bedrag waarvoor 'n benoemde agent aanspreeklik sou gewees het indien die motorvoertuig geïdentifiseer was nie.

(c) Die MVO-fonds is nie ingevolge hierdie regulasie verplig om enige bedrag te betaal aan enige departement van die Regering van die Republiek van Suid-Afrika, met inbegrip van die Suid-Afrikaanse Vervoerdienste, enige provinsiale administrasie, die Administrasie van Suidwes-Afrika, die Ongevallekommissaris, die Nasionale Vervoerkommissie, 'n Swart owerheid, enige plaaslike owerheid genoem in artikel 70 van die Ongevallewet, 1941 (Wet 30 van 1941), soos gewysig, of aan enige ander werkgewer deur wie vergoeding ingevolge laasgenoemde Wet betaalbaar is nie.

(d) Die MVO-fonds is nie aanspreeklik vir die geld betaal of betaalbaar aan enige mediese praktisyn vir mediese dienste deur hom gelewer waar sodanige dienste gelewer is deur die mediese praktisyn handelende in die loop en bestek van sy diens by enige provinsiale hospitaal, liggaam of owerheid genoem in paragraaf (c), waar en vir sover sodanige provinsiale hospitaal, liggaam of owerheid aanspreeklik is vir die betaling van sodanige mediese dienste nie.

(e) Die bepalings van artikels 8 (5) en 10 van die Wet en van regulasie 7 (2) is *mutatis mutandis* van toepassing ten opsigte van die aanspreeklikheid van die MVO-fonds ingevolge hierdie regulasie.

(2) Die aanspreeklikheid van die MVO-fonds ten opsigte van eise wat uit die bepalings van hierdie regulasie voortspruit, is onderworpe aan die volgende verdere voorwaardes:

(a) (i) 'n Eis om skadevergoeding vir verlies of skade gely deur die eiser moet binne twee jaar vanaf die datum van die voorval wat genoemde liggaamlike besering of dood tot gevolg gehad het, aan die MVO-fonds gelewer word, *mutatis mutandis* ooreenkomstig die bepalings van artikel 15 (1) van die Wet.

(ii) Die bepalings van subparagraaf (i) is ook van toepassing op alle derde partye en eisers, afgesien van enige regsonbevoegdheid waaronder hulle mag verkeer.

(b) Die MVO-fonds moet binne 90 dae vanaf die datum van ontvangs van 'n eis in paragraaf (a) vermeld die eiser skriftelik in kennis stel of hy aanspreeklikheid vir die eis aanvaar of verwerp, of dat hy toestem om in die saak gedagvaar te word. Indien die MVO-fonds aanspreeklikheid vir die eis verwerp of versuim om die eiser binne 90 dae van sy besluit te verwittig, is die eiser geregtig om skriftelike vertoë tot die Minister

(ii) evidence to the satisfaction of the MVA Fund is produced that the claimant took all reasonable steps to identify the owner or driver of the unidentified motor vehicle;

(iii) the claimant's inability to obtain judgment in terms of section 8 of the Act is not due to any act or omission on his part; and

(iv) the unidentified motor vehicle (including anything on, in or attached to it) came into physical contact with the injured or deceased person or with any other person, vehicle, conveyance or any other object or objects which directly or indirectly caused or contributed to the injury or death.

(b) The liability of the MVA Fund shall in no case exceed the amount for which an appointed agent would have been liable had the motor vehicle been identified.

(c) The MVA Fund shall not by virtue of this regulation be obliged to make any payment to any department of the Government of the Republic of South Africa, including the South African Transport Services, any provincial administration, the Administration of South West Africa, the Workmen's Compensation Commissioner, the National Transport Commission, a Black authority, any local authority mentioned in section 70 of the Workmen's Compensation Act, 1941 (Act 30 of 1941), as amended, or to any other employer by whom compensation is payable in terms of the last-mentioned Act.

(d) The MVA Fund shall not be liable for any money paid or payable to any medical practitioner for medical services rendered by him where such services were rendered by the medical practitioner acting in the course and within the scope of his service with any provincial hospital, body or authority referred to in paragraph (c), where and in so far as such provincial hospital, body or authority is liable for the payment of such medical services.

(e) The provisions of sections 8 (5) and 10 of the Act and of regulation 7 (2) shall *mutatis mutandis* apply to the liability of the MVA Fund in terms of this regulation.

(2) The liability of the MVA Fund in respect of claims which arise in terms of this regulation shall be subject to the following further conditions:

(a) (i) A claim for compensation for loss or damage suffered by the claimant shall be delivered to the MVA Fund within two years from the date of the occurrence which gave rise to the said bodily injury or death, *mutatis mutandis* in accordance with the provisions of section 15 (1) of the Act.

(ii) The provisions of subparagraph (i) shall also apply to all third parties and claimants, irrespective of whether they are subject to any legal disability.

(b) The MVA Fund shall, within 90 days of receipt of the claim referred to in paragraph (a), notify the claimant in writing whether it accepts or rejects liability for the claim, or whether it consents to be sued in the matter. If the MVA Fund rejects liability for the claim or fails to notify the claimant of its decision within 90 days, the claimant shall be entitled to submit written representations to the Minister for consent to sue the MVA

te rig om toestemming om die MVO-fonds te dagvaar, en 'n afskrif van die vertoë moet aan die MVO-fonds verskaf word. Sodanige vertoë moet ook volledige besonderhede bevat van die omstandighede wat tot die betrokke eis aanleiding gegee het. Die Minister is geregtig om sodanige verdere inligting van die eiser of die MVO-fonds te vra of om te eis dat die eiser sodanige verdere navrae doen of sodanige verdere stappe doen as wat die Minister mag gelas. Die Minister se beslissing of die eiser die MVO-fonds kan dagvaar of nie is finaal en bindend vir alle betrokke partye.

(c) (i) Die MVO-fonds loop geen aanspreeklikheid op nie tensy die dagvaarding wat uit die bepalings van paragraaf (b) hierbo voortspruit binne twee jaar en 90 dae vanaf die datum van die gebeurtenis wat genoemde liggaamlike besering of dood tot gevolg gehad het, behoorlik aan die MVO-fonds beteken is: Met dien verstande dat verjaring nie teen die eiser loop nie gedurende die tydperk bereken vanaf die datum waarop die eiser se vertoë die Minister bereik het tot die datum waarop die Minister se beslissing of die eiser die MVO-fonds mag dagvaar of nie, skriftelik aan die eiser of sy verteenwoordiger oorgedra word.

(ii) Die bepalings van subparagraaf (i) is ook van toepassing op alle derde partye en eisers, afgesien van enige regsonbevoegdheid waaronder hulle mag verkeer.

(3) In enige geding kragtens hierdie regulasie is die toestemming van die Minister of die skriftelike toestemming van die MVO-fonds ingevolge subregulasie (2) (b) bewys van die reg van die eiser om die MVO-fonds te dagvaar, en die geskilpunte voor die hof is dan behoudens die bepalings van hierdie regulasie *mutatis mutandis* dieselfde as wat dit sou gewees het indien die motorvoertuig geïdentifiseer was. Die toestemming van die Minister of die toestemming van die MVO-fonds geld nie as 'n erkenning van aanspreeklikheid deur die MVO-fonds ten opsigte van die betrokke eis nie.

(4) Indien die MVO-fonds dit verlang en mits hy die eiser 'n volle vrywaar ten opsigte van koste, moet die eiser wat die MVO-fonds kragtens hierdie regulasie dagvaar, in dieselfde geding al die ander persone dagvaar wat die MVO-fonds van hom mag vereis om te dagvaar.

(5) Die MVO-fonds is geregtig om te eniger tyd na ontvangs deur hom van 'n eis ingevolge subregulasie 2 (a) te vereis dat enige persoon wat liggaamlike beserings opgedoen het wat aanleiding gee tot die eiser se eis—

(a) hom op koste van die MVO-fonds onderwerp aan 'n mediese ondersoek of ondersoeke deur geneeshere benoem deur die MVO-fonds: Met dien verstande dat indien 'n persoon wat aldus ondersoek moet word, beweer dat enige vereistes in dié opsig onredelik is, hy geregtig is om hom te beroep op die Minister wie se beslissing finaal is;

(b) hom op versoek van die MVO-fonds of enige van sy verteenwoordigers of enige persoon gelas deur die MVO-fonds onderwerp aan ondervraging deur sodanige partye op 'n plek deur die MVO-fonds aangewys, en op versoek van die MVO-fonds of van sodanige verteenwoordiger of sodanige ander persoon, 'n beëdigde verklaring aflê waarin hy die omstandighede van die beweerde voorval waarop sy eis gebaseer is, volledig weergee;

(c) die MVO-fonds skriftelik voorsien van sodanige verdere besonderhede wat die MVO-fonds mag verlang ten opsigte van die voorval of ongeluk en hoe dit plaasgevind het;

Fund, and a copy of such representations shall be supplied to the MVA Fund. Such representations shall also contain full details of the circumstances which gave rise to the claim in question. The Minister shall be entitled to request such further information from the claimant or the MVA Fund or to require the claimant to institute such further enquiries or to take such further steps as the Minister may direct. The Minister's decision as to whether or not the claimant may sue the MVA Fund shall be final and binding on all parties concerned.

(c) (i) The MVA Fund shall not incur any liability unless the summons arising from the provisions of paragraph (b) above has been properly served on the MVA Fund within two years and 90 days from the date of the occurrence which gave rise to the aforesaid bodily injury or death: Provided that prescription shall not run against the claimant during the period reckoned from the date on which the claimant's representations reached the Minister until the date on which the decision of the Minister as to whether the claimant may or may not sue the MVA Fund is conveyed by written notification to the claimant or his representative.

(ii) The provisions of subparagraph (i) shall also be applicable to all third parties and claimants, irrespective of whether they are subject to any legal disability.

(3) In any action in terms of this regulation, the consent of the Minister or the written consent of the MVA Fund in terms of subregulation (2) (b) shall establish the claimant's right to sue the MVA Fund, whereupon the issues before the court shall, subject to the provisions of this regulation, *mutatis mutandis* be the same as they would have been if the motor vehicle had been identified. The consent of the Minister or the consent of the MVA Fund shall not constitute an admission of liability by the MVA Fund in respect of the claim concerned.

(4) If so required by the MVA Fund and provided it grants the claimant full indemnity as regards costs, the claimant suing the MVA Fund in terms of this regulation shall sue in the same action all such other persons as the MVA Fund may require him to sue.

(5) The MVA Fund shall at any time after having received a claim in terms of subregulation (2) (a) be entitled to require any person who has suffered bodily injury giving rise to the claimant's claim—

(a) to submit, at the expense of the MVA Fund, to a medical examination or examinations by medical practitioners appointed by the MVA Fund: Provided that, if a person to be so examined contends that any requirements in this regard are unreasonable, he shall be entitled to appeal to the Minister, whose decision shall be final;

(b) to submit, at the request of the MVA Fund or any of its representatives or any person so instructed by the MVA Fund, to interrogation by such parties at a place indicated by the MVA Fund and, at the request of the MVA Fund or such representative or such other person, to make a sworn statement setting out in full the circumstances of the alleged occurrence on which his claim is based;

(c) to supply the MVA Fund in writing with such further particulars as it may require in respect of the occurrence or accident, and of how it occurred;

(d) die MVO-fonds voorsien van afskrifte van alle mediese verslae, X-straalfoto's of ander verslae en rekenings wat in sy besit of in besit van sy agente is en wat betrekking het op die eis; en

(e) die MVO-fonds skriftelik magtiging verleen tot die inspeksie deur of namens die MVO-fonds van alle aantekeninge met betrekking tot homself in besit van enige hospitaal of in besit van sy geneeshere.

(6) Die MVO-fonds is te eniger tyd nadat hy 'n bedrag ter vereffening van 'n eis ooreenkomstig hierdie regulasie, hetsy ingevolge 'n vonnis of andersins, aan die eiser betaal het, en as teenprestasie vir genoemde betaling, geregtig op die sessie van enige eis wat die eiser mag hê teen die eienaar of bestuurder van die ongeïdentifiseerde motorvoertuig of enigeen wat regtens verantwoordelik is vir die handeling van sodanige eienaar of bestuurder.

(7) Indien daar 'n geskil ontstaan oor enige saak in verband met die bepalings van hierdie regulasie, moet sodanige geskil na die Minister verwys word, wie se beslissing finaal is.

(8) Nòg die Minister nòg die MVO-fonds is verplig om enige redes te gee vir enige beslissing ingevolge subregulasies (2) (b), (5) (a) en (7) van hierdie regulasie.

EISVORM EN MEDIESE VERSLAG

9. (1) (a) Die eisvorm en mediese verslag waarvoor in artikel 15 (1) van die Wet voorsiening gemaak word, moet saamgevat word in die Vorm MV3 soos in die Aanhangsel hiervan uiteengesit, en moet betreffende al die besonderhede ingevul word. 'n Duidelike antwoord moet op elke vraag verstrek word en waar 'n vraag nie van toepassing is nie, moet die woorde "nie van toepassing nie" ingevoeg word. 'n Vorm wat aftikmerkies, strepies, skrappings en veranderings bevat wat nie deur 'n handtekening bevestig is nie, word geag nie behoorlik ingevul te wees nie. Noukeurige besonderhede moet ten opsigte van elke item onder die hoof "Skadevergoeding geëis" verstrek word en moet waar toepaslik van stawende bewyse vergesel gaan.

(b) (i) Die mediese verslag op die Vorm MV3 moet deur die geneesheer wat die oorledene of beseerde persoon behandel het vir die liggaamlike beserings wat hy opgedoen het in die voorval waaruit die eis voortspruit, of deur die superintendent (of sy verteenwoordiger) van die hospitaal waar die oorledene of beseerde vir sodanige liggaamlike beserings behandeling ontvang het, ingevul word: Met dien verstande dat indien die betrokke geneesheer of die superintendent (of sy verteenwoordiger) versuim om op versoek die tersaaklike mediese verslag binne 'n redelike tyd in te vul en dit blyk dat as gevolg van die tydsverloop verjaring van die betrokke eis kan intree, 'n ander geneesheer wat hom ten volle vergewis het van die oorsaak van die dood of van die aard en behandeling van die liggaamlike beserings ten opsigte waarvan die eis ingestel is, die mediese verslag kan invul.

(ii) Waar 'n persoon op slag in 'n motorongeluk gedood is, is die invul van genoemde mediese verslag nie 'n vereiste nie, maar in so 'n geval moet die Vorm MV3 vergesel gaan van 'n afskrif van die verslag oor die geregtelike doodsondersoek of in die geval van 'n vervolging van die persoon wat die oorledene se dood veroorsaak het, 'n afskrif van die betrokke klagstaat, waarin duidelik aangedui word dat sodanige persoon se dood voortgespruit het uit die ongeluk waarop die eis betrekking het.

(2) 'n Eis deur 'n verskaffer om die betaling van bykomstige koste ingevolge artikel 8 van die Wet moet wees in die Vorm MV4 soos in die Aanhangsel hiervan uiteengesit en die voorskrifte van subregulasie (1) (a) is *mutatis mutandis* van toepassing in verband met die invul van hierdie vorm.

(3) Enige vorm wat in hierdie regulasie voorgeskryf is en nie volgens die voorskrifte ingevul is nie, is nie as 'n eis ingevolge die Wet aanvaarbaar nie.

(d) to supply the MVA Fund with copies of all medical reports, X-ray photographs or other reports and accounts which have a bearing on the claim and which are in his possession or in the possession of his agents; and

(e) to give the MVA Fund written authorisation for an inspection by or on behalf of the MVA Fund of all records concerning himself which are in the possession of any hospital or any of his medical practitioners.

(6) At any time after making payment to the claimant in settlement of a claim under this regulation, whether in terms of a judgment or otherwise, and in consideration of the said payment, the MVA Fund shall be entitled to the cession of any claim which the claimant may have against the owner or driver of the unidentified motor vehicle, or any person responsible in law for the acts of such owner or driver.

(7) If any dispute should arise regarding any matter relating to the provisions of this regulation, such dispute shall be referred to the Minister, whose decision shall be final.

(8) Neither the Minister nor the MVA Fund shall be obliged to give reasons for any decision taken in terms of subregulations (2) (b), (5) (a) and (7) of this regulation.

CLAIM FORM AND MEDICAL REPORT

9. (1) (a) The claim form and medical report provided for in section 15 (1) of the Act shall be combined in the Form MV3, as set out in the Annexure hereto, which shall be completed in all its particulars. A clear reply shall be given to each question and if a question is not applicable the words "not applicable" shall be inserted. A form on which ticks, dashes, deletions and alterations have been made that are not confirmed by a signature shall not be regarded as properly completed. Precise details shall be given in respect of each item under the heading "Compensation claimed" and shall, where applicable, be accompanied by supporting vouchers.

(b) (i) The medical report on the Form MV3 shall be completed by the medical practitioner who treated the deceased or injured person for the bodily injuries that he sustained in the occurrence from which the claim arises, or by the superintendent (or his representative) of the hospital where the deceased or injured person was treated for such bodily injuries: Provided that if the medical practitioner or the superintendent (or his representative) concerned fails to complete the medical report on request within a reasonable time and it appears that as a result of the passage of time the claim in question may become prescribed, the medical report may be completed by another medical practitioner who has fully satisfied himself regarding the cause of the death or the nature and treatment of the bodily injuries in respect of which the claim is made.

(ii) Where a person is killed outright in a motor accident the completion of the said medical report shall not be a requirement, but in such an event the Form MV3 shall be accompanied by a copy of the inquest report or, in the case of a prosecution of the person who caused the deceased's death, a copy of the relevant charge sheet in which it is clearly indicated that such person's death resulted from the accident to which the claim relates.

(2) A claim by a supplier for the payment of incidental expenses in terms of section 8 of the Act shall be in the Form MV4, as set out in the Annexure hereto, and the provisions of subregulation (1) (a) shall *mutatis mutandis* apply in connection with the completion of this form.

(3) Any form provided for in this regulation and not completed as prescribed shall not be acceptable as a claim under the Act.

VERSTREKKING VAN INLIGTING DEUR DIE EIENAAR OF BESTUURDER VAN 'N MOTORVOERTUIG

10. Wanneer as gevolg van die bestuur van 'n motorvoertuig iemand anders as die bestuurder van sodanige motorvoertuig beseer of gedood is, moet die eienaar, en die bestuurder indien hy nie die eienaar is nie, die Vorm MV5 soos in die Aanhangsel hiervan uiteengesit, invul en binne 14 dae vanaf die datum van die voorval aan die benoemde agent wie se naam op die uitkenningsteken wat ingevolge artikel 2 (1) (a) van die Wet aan die motorvoertuig geheg is, verskyn, of indien so 'n teken nie aan die motorvoertuig geheg is nie, aan die MVO-fonds, Posbus 2743, Pretoria, 0001, stuur.

BENOEMDE AGENT SE VERHAALSREG

11. (1) 'n Benoemde agent se verhaalsreg teen die eienaar van 'n motorvoertuig kragtens artikel 16 van die Wet is slegs van toepassing—

(a) in 'n geval waar die motorvoertuig ten tyde van die voorval wat tot die betaling van die skadevergoeding aanleiding gegee het, deur 'n ander persoon as die eienaar bestuur is, en

(i) genoemde persoon in so 'n mate onder die invloed van bedwelmende drank of van 'n dwelmmiddel was dat sy toestand die enigste oorsaak van bedoelde voorval was, en die eienaar hom toegelaat het om die motorvoertuig te bestuur wetende dat hy onder die invloed van bedwelmende drank of 'n dwelmmiddel is; of

(ii) genoemde persoon die motorvoertuig bestuur het sonder dat hy in besit is van 'n lisensie wat kragtens enige wet op die lisensiëring van bestuurders van motorvoertuie uitgereik is en wat hy moes besit het, of genoemde persoon, terwyl hy die besitter was van 'n leerling- of ander beperkte lisensie kragtens sodanige wet uitgereik, versuim het toe hy die motorvoertuig bestuur het om aan die voorskrifte of voorwaardes van bedoelde leerling- of beperkte lisensie te voldoen, en die eienaar hom toegelaat het om die motorvoertuig te bestuur wetende dat hy nie so 'n lisensie besit nie of dat hy versuim om aan die voorskrifte of voorwaardes van bedoelde leerling- of beperkte lisensie te voldoen, na gelang van die geval; of

(b) in 'n geval waar die motorvoertuig ten tyde van sodanige voorval deur die eienaar bestuur is, en—

(i) hy so onder die invloed van bedwelmende drank of van 'n dwelmmiddel was dat sy toestand die enigste oorsaak van sodanige voorval was; of

(ii) hy die motorvoertuig bestuur het sonder dat hy in besit is van 'n lisensie wat kragtens enige wet op die lisensiëring van bestuurders van motorvoertuie uitgereik is, of terwyl hy die besitter is van 'n leerling- of ander beperkte lisensie kragtens sodanige wet uitgereik, versuim het toe hy die motorvoertuig bestuur het om aan die voorskrifte of voorwaardes van bedoelde leerling- of beperkte lisensie te voldoen; of

(iii) hy versuim het om aan 'n voorskrif van artikel 13 (1) van die Wet met betrekking tot genoemde voorval te voldoen (die onus om te bewys dat kennis van die voorval en van waar en wanneer dit plaasgevind het, nie redelikerwys binne 14 dae na die voorval aan die benoemde agent of die MVO-fonds, na gelang van die geval, gegee kon gewees het nie, berus by die betrokke eienaar), of wetens aan die MVO-fonds of die benoemde agent vals inligting betreffende sodanige voorval verstrek het.

GIVING OF INFORMATION BY OWNER OR DRIVER OF MOTOR VEHICLE

10. When as a result of the driving of a motor vehicle any person other than the driver of such motor vehicle has been injured or killed the owner, and the driver if he is not the owner, shall complete the Form MV5, as set out in the Annexure hereto, and forward the form to the appointed agent whose name appears on the token of identification attached to the motor vehicle in terms of section 2 (1) (a) of the Act, or if such a token is not attached to the vehicle, to the MVA Fund, P.O. Box 2743, Pretoria, 0001, within 14 days from the date of the occurrence.

RIGHT OF RECOURSE BY APPOINTED AGENT

11. (1) Any appointed agent's right of recourse against the owner of a motor vehicle under section 16 of the Act shall only be applicable—

(a) in any case where the motor vehicle was being driven at the time of the occurrence which gave rise to the payment of the compensation by a person other than the owner and—

(i) the said person was under the influence of intoxicating liquor or of a drug to such a degree that his condition was the sole cause of such occurrence and the owner allowed him to drive the motor vehicle knowing that he was under the influence of intoxicating liquor or of a drug; or

(ii) the said person was driving the motor vehicle without holding a licence issued under any law relating to the licensing of drivers of motor vehicles, which he was required to hold, or the said person, being the holder of a learner's or other restricted licence issued under such law, failed, while he was driving the motor vehicle, to comply with the requirements or conditions of such learner's or restricted licence, and the owner allowed him to drive the motor vehicle knowing that he did not hold such a licence or that he failed to comply with the requirements or conditions of such learner's or restricted licence, as the case may be; or

(b) in any case where, at the time of such occurrence, the motor vehicle was being driven by the owner and—

(i) he was under the influence of intoxicating liquor or of a drug to such a degree that his condition was the sole cause of such occurrence; or

(ii) he was driving the motor vehicle without holding a licence issued under any law relating to the licensing of drivers of motor vehicles or, being the holder of a learner's or other restricted licence issued under such law, failed, while he was driving the motor vehicle, to comply with the requirements or conditions of such learner's or restricted licence; or

(iii) he failed to comply with any requirement of section 13 (1) of the Act with reference to the said occurrence (the onus of proving that the MVA Fund or the appointed agent, as the case may be, could not reasonably within 14 days after the occurrence have been informed of the occurrence and of the place and time thereof, shall be on the owner concerned) or knowingly furnished the MVA Fund or the appointed agent with false information relating to such occurrence.

(2) Die bepalings van subregulasie (1) (b) (i), (ii) en (iii) is *mutatis mutandis* van toepassing ten opsigte van 'n verhaalsreg van die benoemde agent teen enigiemand wat ten tyde van die voorval wat tot die betaling van die skadevergoeding aanleiding gegee het, die betrokke motorvoertuig met of sonder die toestemming van die eienaar daarvan bestuur het.

TOEPASSING VAN DIE REGULASIES IN SUIDWES-AFRIKA

12. Hierdie regulasies en enige wysigings daarvan is ook van toepassing in die gebied Suidwes-Afrika, met inbegrip van die Oostelike Caprivi Zipfel.

STATISTIEKE

13. (1) Elke benoemde agent moet aan die MVO-fonds—

(a) binne 14 dae na die einde van elke maand besonderhede van eise wat gedurende die maand ten opsigte van skadevergoeding ingevolge die bepalings van die Wet deur hom ontvang is in die Vorm MV6 soos in die Aanhangsel hiervan uiteengesit, verstrek;

(b) weekliks besonderhede van betalings wat die vorige week ten opsigte van sodanige eise gemaak is, in die Vorm MV7 soos in die Aanhangsel hiervan uiteengesit, verstrek;

(c) binne ses weke na die einde van elke boekjaar van die MVO-fonds 'n beraming van uitstaande aanspreeklikheid ten opsigte van alle eise wat aan die einde van die betrokke boekjaar op hande is en nog nie afgehandel is nie, in die Vorm MV8 soos in die Aanhangsel hiervan uiteengesit, verstrek; en

(d) binne ses weke na 30 April en 31 Oktober van elke jaar besonderhede van die verhaling van vergoeding ingevolge artikel 16 van die Wet gedurende die voorafgaande ses maande, in die Vorm MV9 soos in die Aanhangsel hiervan uiteengesit, verstrek.

(2) Die Minister kan enige benoemde agent skriftelik aansê om sodanige inligting in verband met sodanige statistieke as wat die Minister wenslik ag, aan die MVO-fonds beskikbaar te stel, en 'n benoemde agent moet binne 30 dae na die ontvangs van die skriftelike versoek van die Minister die inligting verstrek waarom daar gevra is.

(3) 'n Benoemde agent wat versuim om aan enige bepaling van hierdie regulasie te voldoen is aan 'n misdryf skuldig en by skuldigbevinding strafbaar met 'n boete van hoogstens R100.

HERROEPING VAN DIE MOTORVOERTUIGVERSEKERINGSREGULASIES, 1972

14. Die Motorvoertuigversekeringsregulasies, 1972, afgekondig by Goewermentskennisgewing R. 1710 van 29 September 1972, soos gewysig by Goewermentskennisgewings R. 544 van 29 Maart 1974, R. 1223 van 19 Julie 1974, R. 152 van 27 Januarie 1978, R. 1453 van 14 Julie 1978, R. 1749 van 1 September 1978, R. 337 van 22 Februarie 1980, R. 1074 van 30 Mei 1980, R. 932 van 1 Mei 1981, R. 905 van 6 Mei 1983, R. 1205 van 10 Junie 1983 en R. 2536 van 23 September 1984, word hierby herroep.

VOORBEHOUD

15. Die bepalings van die Motorvoertuigversekeringsregulasies, 1972, wat hierby herroep word, bly van toepassing ten opsigte van aangeleenthede wat betrekking het op eise wat voor die inwerkingtreding van hierdie regulasies ontstaan het.

TITEL

16. Hierdie regulasies heet die Motorvoertuigongelukkeregulasies, 1986.

(2) The provisions of subregulation (1) (b) (i), (ii) and (iii) shall apply *mutatis mutandis* in respect of any right of recourse by the appointed agent against any person who, at the time of the occurrence which gave rise to the payment of the compensation, was driving the motor vehicle in question with or without the consent of its owner.

APPLICATION OF REGULATIONS IN SOUTH-WEST AFRICA

12. These regulations and any amendments thereto shall also apply in the Territory of South-West Africa, including the Eastern Caprivi Zipfel.

STATISTICS

13. (1) Every appointed agent shall furnish the MVA Fund—

(a) within 14 days after the close of every month with particulars of claims received by him during the month in respect of compensation in terms of the Act, in the Form MV6, as set out in the Annexure hereto;

(b) weekly with particulars of payments made during the previous week in respect of such claims, in the Form MV7, as set out in the Annexure hereto;

(c) within six weeks after the close of each financial year of the MVA Fund with an estimate of undischarged liabilities in respect of all claims which were on hand at the end of the financial year in question and not yet finalised, in the Form MV8, as set out in the Annexure hereto; and

(d) within six weeks after 30 April and 31 October of each year with particulars of the recovery of compensation in terms of section 16 of the Act during the preceding six months, in the Form MV9, as set out in the Annexure hereto.

(2) The Minister may in writing call upon any appointed agent to make available to the MVA Fund such information in connection with such statistics as the Minister may deem desirable and an appointed agent shall, within 30 days of the date of receipt of the written request of the Minister, supply the information called for.

(3) An appointed agent who fails to comply with any provision of this regulation shall be guilty of an offence and liable on conviction to a fine not exceeding R100.

WITHDRAWAL OF THE MOTOR VEHICLE INSURANCE REGULATIONS, 1972

14. The Motor Vehicle Insurance Regulations, 1972, published by Government Notice R. 1710 dated 29 September 1972, as amended by Government Notices R. 544 dated 29 March 1974, R. 1223 dated 19 July 1974, R. 152 dated 27 January 1978, R. 1453 dated 14 July 1978, R. 1749 dated 1 September 1978, R. 337 dated 22 February 1980, R. 1074 dated 30 May 1980, R. 932 dated 1 May 1981, R. 905 dated 6 May 1983, R. 1205 dated 10 June 1983 and R. 2536 dated 23 September 1984, are hereby withdrawn.

SAVINGS

15. The provisions of the Motor Vehicle Insurance Regulations, 1972, which are hereby withdrawn, shall remain applicable in respect of matters relating to claims which arose prior to the commencement of these regulations.

TITLE

16. These regulations shall be called the Motor Vehicle Accidents Regulations, 1986.

ANNEXURE

PRESCRIBED FORMS

Form No.	*Purpose*
MV1	Application for a token of identification.
MV2	Token of identification.
MV2A	Token of exemption.
MV3	Claim for loss or damage and medical report.
MV4	Claim for medical services.
MV5	MVA report form (motor accidents).
MV6	Statistics: Claims received.
MV7	Statistics: Claims paid.
MV8	Statistics: Estimates of outstanding liabilities.
MV9	Statistics: Right of recourse.

MV1

APPLICATION FOR A TOKEN(S) OF IDENTIFICATION

(Motor Vehicle Accidents Act, 1986)

Application for a token(s) of identification in terms of section 2 of the above-mentioned Act in respect of the motor vehicle(s) described below:

1. Name of owner .....

   Address .....

2. Particulars of motor vehicle(s):

Make and type of body	*Registration letters and number*	*Token of identification number*
.....	.....	.....
.....	.....	.....
.....	.....	.....

MV2

TOKEN OF IDENTIFICATION

Token number .....

Name of appointed agent .....

Registration letters and number .....

The Form MV2 shall be overprinted in red ink with the figure and words "3rd Party" and shall provide for the particulars stated above and shall be printed in non-fading ink within a circle 70 millimetres in diameter on a card of suitable thickness.

MV2A

TOKEN OF EXEMPTION

Token number .....

Registration letters and number .....

Name of owner .....

Address .....

.....

Date issued .....

The Form MV2A shall be overprinted in red ink with the figure and words "3rd Party" and shall provide for the particulars stated above and shall be printed in non-fading ink within a rectangle of 50 millimetres by 100 millimetres on a card of suitable thickness.

MV3

CLAIM FOR LOSS OR DAMAGE AND MEDICAL REPORT

(Claim in terms of section 8 of the Motor Vehicle Accidents Act, 1986 and Regulations 7 and 8)

Notes:

(i) A separate form must be completed and lodged in respect of each person or deceased person for whose injury or death compensation is claimed.

(ii) In order to deal with this claim at an early date it is essential that all the required supporting vouchers and statements should accompany this form and in the case of paragraph 9 of this form it is desirable to also—

(a) attach all medico-legal reports in the possession of the claimant, and
(b) indicate, in regard to a claim for future loss of earnings, on a separate statement how such loss is calculated.

(iii) Written authority for inspection by or on behalf of the MOTOR VEHICLE ACCIDENTS FUND or its appointed agent of all records regarding the injured or deceased person which may be in the possession of any hospital or medical practitioner must accompany this form.

(iv) Paragraphs 2 to 5 as well as paragraph 6 (a) below must be completed before this form is submitted to the medical practitioner for completion of the Medical Report.

(v) Where blocks are provided for the purpose of replying to a question, place a cross in the appropriate block.

1. PARTY LIABLE FOR THE CLAIM .....
   (appointed agent or Motor Vehicle Accidents Fund)
2. CLAIMANT:
   (a) (i) FULL NAME AND RESIDENTIAL ADDRESS OF CLAIMANT .....
   .....
   (ii) Citizenship ..... (iii) Identity/Passport No. ..... (iv) Telephone No: Home .....
   Work .....
   (b) If the claiment is claiming compensation on behalf of a person(s) other than himself/herself, state—
   (i) Capacity in which claimant is acting .....

(ii) Name and address of person(s) on whose behalf compensation is being claimed .....

(iii) Identity/Passport number of such person(s) .....

(iv) Relationship of claimant to such person(s) .....

(In the event of a claim for loss of support or on behalf of another person, photocopies of relevent marriage and/or birth certificates, as the case may be, should accompany this form.)

PARTICULARS OF MOTOR VEHICLE WHICH CAUSED THE LOSS OR DAMAGE:

(a) Registration letters and number ..... (i) Make ..... (ii) Type of body ..... (iii) Token number .....

(b) Name and address of owner .....

(c) Name and address or driver at time of accident .....

(d) IF THE CLAIM IS MADE IN TERMS OF REGULATION 8:

(i) Description of unidentified vehicle (if known) .....

(ii) State on a separate statement attached to this form what efforts were made to establish the identity of the owner or driver of the vehicle.

PARTICULARS OF ACCIDENT IN WHICH THE VEHICLE DESCRIBED IN PARAGRAPH 3 WAS INVOLVED:

(a) Date ..... Time ..... (b) Place .....

(c) Police station at which reported and Police reference number (if known) .....

(d) Detailed account of the accident, including a rough sketch of the scene of the accident supported by sworn statements by claimant and eyewitnesses (if any) (must be furnished on a separate statement attached to this form). Also attach copies of the Police report and plan, if available.

PARTICULARS OF ANY OTHER VEHICLES INVOLVED IN ACCIDENT (if known):

		(i)	(ii)
(a)	Registration letters and number		
(b)	(i) Name of owner (if known)		
	(ii) Address (if known)		
	(iii) Occupation (if known)		
(c)	(i) Name of driver at time of accident		
	(ii) Address (if known)		

(If more than two vehicles are involved the particulars should be set out on a separate statement attached to this form.)

PARTICULARS OF PERSON IN RESPECT OF WHOSE BODILY INJURY OR DEATH COMPENSATION IS CLAIMED:

(a) Full name and address .....

(b) Identity/Passport No. .....

(c) Sex ..... (d) Date of birth ..... (e) Race .....

(f) Marital status at date of accident: never married ☐ married ☐ divorced ☐ widowed ☐ legally separated ☐

(g) If married: in community of property ☐ out of community of property ☐ by customary union ☐

(h) Business or occupation .....

(i) At the time of the accident was he/she travelling in one vehicle described in either paragraph 3 or paragraph 5? YES ☐ NO ☐

(j) If YES, state: (i) Registration letters and number of vehicle ..... and (ii) whether as a passenger or driver

(k) If he/she was not travelling as a passenger or driver in one of the vehicles described in either paragraph 3 or 5, (i) what was his/her mode of conveyance? ..... or (ii) was he/she a pedestrian YES ☐ NO ☐.

(l) Name and address of usual medical practitioner (if any) .....

(m) Names and addresses of all medical practitioners who attended him/her after the accident (if known) .....

(n) (i) At which hospital or nursing home or other place (if any) did he/she receive treatment after the accident? ..... ; and

(ii) For what period as in-patient (from ..... to .....) and/or out-patient (from ..... to .....)?

(iii) Classification for hospital purposes: hospital patient ☐ private patient ☐

(iv) Hospital reference number (if known) .....

(o) Was he/she suffering from any physical defect or infirmity immediately prior to the accident? YES ☐ NO ☐

(p) If YES, give details .....

(q) (i) Name and address of employer at date of accident (if more than one employer, state names and addresses of all) .....

(ii) Period in his employment, from ..... to .....

(iii) Nature of work .....

(iv) Date of resumption of work .....

(r) Was he/she injured or killed in the course of his/her employment? YES ☐ NO ☐

(s) State his/her income for the 12 months immediately preceding the accident—

	R
(i) from employment	
(ii) from any other source (give details)	
TOTAL	R

7. IF THE PERSON MENTIONED IN PARAGRAPH 6 WAS FATALLY INJURED THE FOLLOWING ADDITIONAL INFORMATION IS REQUIRED IN RESPECT OF SUCH PERSON:

(a) Place where death occurred..... (b) Date of death .....

(c) Is it known whether an inquest was held? YES ☐ NO ☐

(d) If known, state in what court ..... date.....

and reference number.....(attach a copy of report on the post mortem examination, if available)

(e) Name and address of the executor of the deceased's estate.....

.....

8. IF THE PERSON MENTIONED IN PARAGRAPH 6 WAS FATALLY INJURED AND COMPENSATION IS CLAIMED BY OR ON BEHALF OF DEPENDANTS OF THAT PERSON THE FOLLOWING INFORMATION IS REQUIRED IN RESPECT OF EACH SUCH DEPENDANT: (if compensation is claimed by or on behalf of more than one dependant the information required by this paragraph in respect of each dependant should be set out on a separate statement, which should be attached to this form.)

(a) Full name and address.....

.....

(b) (i) Identity/Passport No. .....

(c) Sex ..... (d) Date of birth ..... (e) Race.....

(f) Relationship to deceased person .....
(Attach a photocopy of relevant marriage and/or birth certificates, as the case may be)

(g) Marital status at date of accident: never married ☐ married ☐ divorced ☐ widowed ☐ legally separated ☐

(h) If married: in community of property ☐ out of community of property ☐ by customary union ☐

(i) Business or occupation.....

(j) Is he/she suffering from any physical defect or infirmity? YES ☐ NO ☐

(k) If YES, give full particulars .....

.....

(l) Name and address of employer at date of accident and how long employed by such employer (if more than one employer, state names and addresses of all) .....

.....

.....

(m) State his/her income for the 12 months immediately preceding the accident—

	R
(i) from employment	.....
(ii) from any other source (give details)	.....
TOTAL.....	R.....

(n) Details and amount of any inheritance or any other benefits received from the estate of the deceased or accruing from any other source as a result of the death of the person referred to in paragraph 6 other than insurance and/or pension moneys.....

.....

.....

.....

9. COMPENSATION CLAIMED:

Precise details must be given in respect of the following items and must be supported by vouchers, where applicable. (If necessary, the information required by this section may be set out on a separate statement duly signed and attached to this form.) [See also Note (ii) at top of form.]

ITEM	AMOUNT R
(i) Hospital expenses (provincial hospitals).....	.....
(ii) Hospital expenses (other hospitals).....	.....
(iii) Medical expenses	.....
(iv) Estimated future medical expenses	.....
(v) Loss of earnings (from date of accident to date hereof).....	.....
(vi) Estimated future loss of earnings	.....
(vii) Estimated loss of support	.....
(viii) General damages (pain and suffering, permanent disability, etc)	.....
TOTAL.....	R.....

10. IF THE PERSON MENTIONED IN PARAGRAPH 6 ABOVE WAS KILLED OR INJURED IN THE COURSE OF HIS/HER EMPLOYMENT STATE:

(i) Whether the claimant is entitled to compensation under the Workmen's Compensation Act, 1941 (Act 30 of 1941), as amended: YES ☐ NO ☐

(ii) If the claimant has already been compensated in terms of the Workmen's Compensation Act, state amount received .....
..... and Workmen's Compensation Commissioner's reference .....

I hereby declare that to the best of my knowledge and belief the information contained in this form is true and correct.

Signed at ..... this.....day of.....19.....

As witnesses:

1. .....

2. .....

.....
Signature of claimant (mentioned in paragraph 2) or his/her authorised representative. (If the above signature is not that of the claimant, proof in writing that he is authorised to act as representative of the claimant must accompany this form.)

MEDICAL REPORT

Notes:

(i) Regulation 9 (1) (b) provides that this report shall be completed by the medical practitioner who treated the deceased or injured person for the bodily injuries sustained by him in the occurrence from which this claim arises or by the superintendent (or his representative) of the hospital in which the deceased or injured person was treated for such bodily injuries.

(ii) Where blocks are provided for the purpose of replying to a question, place a cross in the appropriate block.

1. (a) Name of person to whom this report relates .....

.....

(b) Are you satisfied that this is the person mentioned in paragraph 6 of the claim form? YES ☐ NO ☐

2. Date when first seen after accident .....

3. Did you treat him/her at any time before the accident? YES ☐ NO ☐

If YES, give date of last such treatment and nature of ailment.....

.....

4. Parts of body injured and degree of injuries:

	Head	Chest	Neck	Abdomen	Back	Upper limbs	Lower limbs	Pelvis
Minor	☐	☐	☐	☐	☐	☐	☐	☐
Fairly severe	☐	☐	☐	☐	☐	☐	☐	☐
Severe	☐	☐	☐	☐	☐	☐	☐	☐

5. (a) Give full details of the nature of the injuries and any complications (e.g. fractured ribs with haemothorax, compound fracture left tibia, disfigurement, etc.).....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(b) State treatment give to date .....

.....

.....

.....

.....

.....

.....

.....

.....

.....

6. Is permanent disability expected? YES ☐ NO ☐

If YES, give full details .....

.....

If NO, has his/her condition stabilised?.....

7. Is specialist treatment being given? YES ☐ NO ☐

If YES, give name and address of specialist.....

.....

8. (a) Is future medical treatment foreseen? YES ☐ NO ☐

(b) IF YES:

(i) What will the probable nature of such treatment be and in respect of which injuries?.....

.....

(ii) Expected date thereof.....

(iii) Expected duration thereof.....

(iv) Estimated cost thereof (if possible) R .....

(c) Is hospitalisation foreseen in connection with the future treatment referred to in (a) above?

YES ☐ NO ☐

(d) If YES, state:

(i) Expected date of such hospitalisation .....

(ii) Expected duration thereof.....

9. Have the injuries aggravated any pre-existing pathological condition? YES ☐ NO ☐

10. Has any such pro-existing pathological condition aggravated the effects of trauma? YES ☐ NO ☐

11. If the answer to either 9 or 10 above is YES, give full details.....

.....

12. Has the person been confined to a hospital/nursing home? YES ☐ NO ☐

If YES, state:

(a) Name and address of hospital/nursing home .....

.....

(b) Hospital reference number (if known) .....

(c) Date when discharged or when discharge is expected.....

13. If in employment at date of accident, state date when return to employment is expected .....
14. In the case of a fatality, state:
    (a) Date of death..... (b) Cause .....
    (c) Did any pre-existing pathological condition contribute to death? YES ☐ NO ☐
    (d) If YES, give full details .....
    .....
    .....

Name of medical practitioner..... Qualifications.....
Signature ..... Date .....
Address.....
.....

MV4

CLAIM FOR MEDICAL SERVICES

[Section 8 (6) of The Motor Vehicle Accidents Act, 1986]

Notes:

(i) A separate form must be completed and lodged with the MVA Fund or its appointed agent, as the case may be, in respect of each third party to whom goods have been supplied or services rendered.

(ii) Section 8 (6) read with section 15 of the Act provides, *inter alia*, that a claim under section 8 (6) shall contain the particulars set out in a form prescribed by regulation. In view of this provision of the Act this form must be completed in all its particulars. A clear reply must be given to each question, and if a question is not applicable to the claim "not applicable" must be inserted. A form that contains ticks, dashes, deletions and alterations which are not confirmed by a signature will not be regarded as being properly completed.

(iii) The said sections further provide that such claim shall be sent by registered post or delivered by hand to the MVA Fund or its appointed agent.

(iv) Where blocks are provided for the purpose of replying to a question, place a cross in the appropriate block.

1. *Party liable for the claim*.....
   (appointed agent or Motor Vehicle Accident Fund)
2. *Claimant:* (medical or dental practitioner/nurse/supplier/pharmacist/hospital/nursing home)
   (a) Full name.....
   (b) Registered qualifications (if applicable) .....
   (c) Address.....
   .....
3. *Third party* (to whom service has been rendered or is being rendered)
   (a) Full name.....
   (b) Registration letters/No. of motor vehicle which caused his/her injuries.....
   (c) Injuries sustained: (i) Date ..... (ii) Time .....
   (iii) Place .....
   (d) Nature of injuries.....
   (e) Names of hospitals/institutions in which he/she was treated or is being treated: .....
   (f) Classification for hospital purposes:
   Private patient ☐ Hospital patient ☐
   (g) Hospital reference number: .....
4. *Claim for treatment/services rendered/goods supplied:*
   (a) Dates/duration of treatment/services rendered/goods supplied:
   From ..... to .....
   ....
   (b) Nature/details of treatment/services rendered/goods supplied (specify each item):

.....	R.....
.....	R.....
.....	R.....
.....	R.....
.....	R.....
TOTAL.....	R.....

5. *Claim for treatment in hospital(s)/nursing home(s):*
   (a) Period of treatment—
   from..... to .....
   (b) Number of days ..... at R..... per day. R.....
   (c) Out-patient treatment—
   Number..... at R..... each..... R.....
   (d) Operating theatre fee ..... R.....
   (e) Other (specify) ..... R.....
   ..... R.....
   ..... R.....
   ..... R.....
   ..... R.....
   TOTAL..... R.....

....
Signature *Date*

MV5

MVA REPORT FORM

(Notice of an accident in terms of section 13 of the Motor Vehicle Accidents Act, 1986)

N.B. (i) If a motor vehicle accident in which a person is injured or killed is not reported to the Motor Vehicle Accidents Fund or its appointed agent within 14 days, a penalty of R200 may be imposed or the compensation paid to the third party may be recovered from the owner or driver (sections 13 and 16 of the Act).

(ii) Where blocks are proviced for the purpose of replying to a question, place a cross in the appropriate block.

Postage paid

THE MANAGER
MVA FUND
P.O. BOX 2743
PRETORIA
0001

Date of accident .....
Token No .....
Appointed agent .....

1. *Motor vehicle:*
   (a) Registration letters/No. ..... Type of body .....
   (b) Propulsion: Petrol ☐ Diesel ☐ Gas ☐ Electricity ☐ Other ☐ None ☐
   (c) Classification: Goods vehicle the gross vehicle mass of which exceeds 3 500 kg ☐ Passenger bus for conveyance of more than 12 persons ☐ Agricultural implement, self-propelled ☐ Government vehicle ☐ Other ☐

2. *Owner:*
   Name ..... Occupation .....
   Postal address: .....
   Telephone No.: Business ..... Home .....

3. *Driver:*
   Name ..... Occupation .....
   Postal address .....
   .....
   Telephone No.: Business ..... Home .....
   Driver's Licence No. ..... Date issued .....
   Endorsements (if any) .....
   Physical/Mental defects (if any) .....
   .....

4. *Other vehicle(s) involved in accident concerned:*

	(i)	(ii)	(iii)
(a) Registration No.	.....	.....	.....
(b) Name of owner	.....	.....	.....
(c) Address of owner	.....	.....	.....
(d) Name of driver	.....	.....	.....
(e) Address of driver	.....	.....	.....
.....	.....	.....	.....

5. *Witness(es) of accident:*

	(i)	(ii)	(iii)
(a) Name	.....	.....	.....
(b) Address	.....	.....	.....
.....	.....	.....	.....

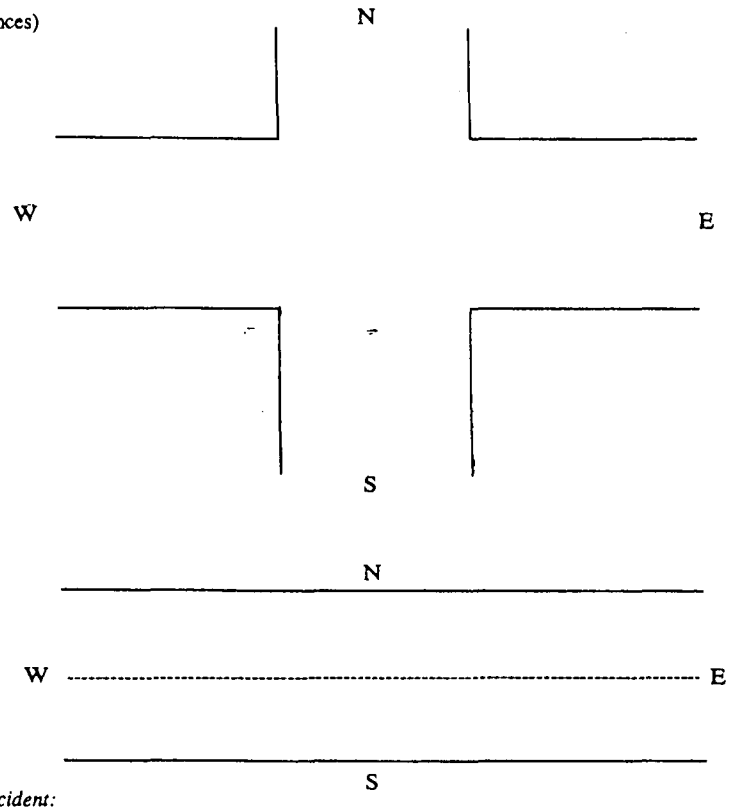
6. *Person(s) injured of killed:*

	(i)	(ii)	(iii)
(a) Name	.....	.....	.....
(b) Address	.....	.....	.....

7. *Accident:*
   (a) Date ..... (b) Time .....
   (c) Place .....
   (d) Police station at which reported .....
   (e) Police reference number .....

8. *Conditions during accident:*
   (a) Weather conditions: Sunny ☐ Dark ☐ Cloudy ☐ Rain ☐
   (b) Visibility: Good ☐ Reasonable ☐ Bad ☐
   (c) Road surface: Gravel ☐ Sand ☐ Tar ☐
   (d) Street lights: On ☐ Off ☐
   (e) Own vehicle lights: Bright ☐ Dim ☐ None ☐
   (f) Other vehicles' lights: Bright ☐ Dim ☐ None ☐
   (g) Speed at time of accident ..... k.p.h.

9. *Sketch plan of accident:*
(Furnish approximate distances)



10. *Detailed description of accident:*

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I declare that to the best of my knowledge the information contained in this form is true and correct.

Date .....

.....
Signature of driver

.....
Signature of owner

MV6

CLAIMS RECEIVED

(Section 15 of the Motor Vehicle Accidents Act, 1986)

Name of appointed agent.....

Return No. ..... month ending .....19.....
(To be submitted in duplicate)

Financial year during which claims arose.....

Claim No.	No. of token of identification	Remarks
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		
21.		
22.		
23.		
24.		
25.		

Administration costs:

Number of claims: ..... at R .....per claims = R .....

..... Certified correct.....

Date *Signature*

MV7

CLAIMS PAID

(Section 8 of the Motor Vehicle Accidents Act, 1986)

Name of appointed agent.....

Return No. .....Week ending 19.....

Financial year during which claims arose.....

Claim No.	Amount paid							Agent's attorneys (code)	Type of vehicle (code)	Remarks (indicate F if final or R/O if reopened)
	Total	Compen-sation	Hospital and medical fees	Agent's legal fees	Claimant's legal fees	Assessor's fees	Other payments			

Date..... Certified correct.....

Signature

MV8

ESTIMATES OF OUTSTANDING LIABILITIES

(Section 8 of the Motor Vehicle Accidents Act, 1986)

Name of appointed agent.....

Return No. ..... Year ending.....19.....

Financial year during which claims arose.....

Claim No.	No. of token of identification	Estimate R	c	Remarks (if reopened claim indicate with R/O)

APPENDIX IV

APPORTIONMENT OF DAMAGES ACT NO. 34 OF 1956

[ASSENTED TO 16 MAY, 1956] [DATE OF COMMENCEMENT: 1 JUNE, 1956]

(English text signed by the Governor-General)

as amended by

Apportionment of Damages Amendment Act, No. 58 of 1971
Matrimonial Property Act, No. 88 of 1984

ACT

To amend the law relating to contributory negligence and the law relating to the liability of persons jointly or severally liable in delict for the same damage, and to provide for matters incidental thereto.

CHAPTER I

CONTRIBUTORY NEGLIGENCE

1. Apportionment of liability in case of contributory negligence.—(1) (*a*) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(*b*) Damage shall for the purpose of paragraph (*a*) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

(2) Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said subsection, be entitled to recover damages from that claimant.

(3) For the purposes of this section "fault" includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.

CHAPTER II

JOINT OR SEVERAL WRONGDOERS

2. Proceedings against and contributions between joint and several wrongdoers.—(1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.

(1A) A person shall for the purposes of this section be regarded as a joint wrongdoer if he would have been a joint wrongdoer but for the fact that he is married in community of property to the plaintiff.

(1B) Subject to the provisions of the second proviso to subsection (6) (*a*), if it is alleged that the plaintiff has suffered damage as a result of any injury to or the death of any person and that such injury or death was caused partly by the fault of such injured or deceased person and partly by the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person shall for the purposes of this section be regarded as joint wrongdoers.

(2) Notice of any action may at any time before the close of pleadings in that action be given—

(*a*) by the plaintiff;

(*b*) by any joint wrongdoer who is sued in that action,

to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action.

(3) The court may on the application of the plaintiff or any joint wrongdoer in any action order that separate trials be held, or make such other order in this regard as it may consider just and expedient.

(4) (*a*) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (*a*) of subsection (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

(*b*) If no notice is under paragraph (*a*) or (*b*) of subsection (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under subsection (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (*b*) of subsection (2).

(5) In any subsequent action against another joint wrongdoer, any amount recovered from any joint wrongdoer in a former action shall be deemed to have been applied towards the payment of the costs awarded in the former action in priority to the liquidation of the damages awarded in that action.

(6) (*a*) If judgment is in any action given against any joint wrongdoer for the full amount of the damages suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (*b*) of subsection (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was

at fault in relation to the damage suffered by the plaintiff, and to the damages awarded: Provided that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in subsection (1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

(*b*) The period of extinctive prescription in respect of a claim for a contribution shall be twelve months calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal: Provided that if, in the case of any joint wrongdoer, the period of extinctive prescription in relation to any action which may be instituted against him by the plaintiff, is governed by a law which prescribes a period of less than twelve months as the period within which legal proceedings shall be instituted against him or within which notice shall be given that proceedings will be instituted against him, the provisions of such law shall apply *mutatis mutandis* in relation to any action for a contribution by a joint wrongdoer, the period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action.

(*c*) Any joint wrongdoer from whom a contribution is claimed may raise against the joint wrongdoer who claims the contribution any defence which the latter could have raised against the plaintiff.

(7) (*a*) If judgment is in any action given against one or more joint wrongdoers in respect of the damage suffered by the plaintiff, any joint wrongdoer who in pursuance of such judgment pays to the plaintiff in respect of his responsibility for such damage an amount in excess of the amount (hereinafter referred to as the amount apportioned to the firstmentioned joint wrongdoer) which the court deems just and equitable having regard to the degree in which he was at fault in relation to the damage suffered by the plaintiff and to the full amount of the damages awarded to the plaintiff, may, subject to the provisions of paragraph (*b*) of subsection (4), recover from any other joint wrongdoer a contribution in respect of the latter's responsibility for damage of an amount not exceeding so much of the amount which the court deems just and equitable having regard to the degree in which such other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and to the full amount of the damages awarded to the plaintiff, as has not been paid by such other joint wrongdoer to the plaintiff or to any other joint wrongdoer, or so much of the amount paid by the firstmentioned joint wrongdoer as exceeds the amount apportioned to him whichever is less.

(*b*) The provisions of paragraphs (*b*) and (*c*) of subsection (6) shall apply *mutatis mutandis* to any claim for a contribution under paragraph (*a*) of this subsection.

(8) (*a*) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may—

(i) order that such joint wrongdoers pay the amount of the damages awarded jointly and severally, the one paying the other to be absolved;

(ii) if it is satisfied that all the joint wrongdoers have been joined in the action, apportion the damages awarded against the said joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and give judgment separately against each joint wrongdoer for the amount so apportioned: Provided that any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given (including any costs incurred by the plaintiff in an attempt to recover the said amount and not recovered from the said joint wrongdoer) whether by reason of the said joint wrongdoer's insolvency or otherwise, may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff;

(iii) where it gives judgment against the joint wrongdoers joint and severally as aforesaid, at the request of any one of the joint wrongdoers, apportion, for the purposes of paragraph (*b*), the damages payable by the joint wrongdoers *inter se*, amongst the joint wrongdoers, in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff;

(iv) make such order as to costs as it may consider just, including an order that the joint wrongdoers against whom it gives judgment shall pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers pays more than his *pro rata* share of the plaintiff's costs, that he shall be entitled to recover from each of the other unsuccessful joint wrongdoers his *pro rata* share of such excess.

(*b*) Any joint wrongdoer who pays more than the amount apportioned to him under subparagraph (iii) of paragraph (*a*) may recover from any joint wrongdoer who has paid less than or nothing of the amount so apportioned to him, a contribution of an amount not exceeding so much of the amount so apportioned to the lastmentioned joint wrongdoer as had not been paid by him, or so much of the amount paid by the firstmentioned joint wrongdoer as exceeds the amount so apportioned to him, whichever is less.

(*c*) The provisions of paragraph (*b*) of subsection (6) shall apply *mutatis mutandis* to any claim for a contribution under paragraph (*b*) of this subsection.

(9) If judgment is given in favour of any joint wrongdoer or if any joint wrongdoer is absolved from the instance, the court may make such order as to costs as it may consider just, including an order—

(*a*) that the plaintiff pay such joint wrongdoer's costs; or

(*b*) that the unsuccessful joint wrongdoers pay the costs of the successful joint wrongdoer jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers pays more than his *pro rata* share of the costs of the successful joint wrongdoer, that he shall be entitled to recover from each of the other unsuccessful joint wrongdoers his *pro rata* share of such excess, and that if the successful joint wrongdoer

is unable to recover the whole or any part of his costs from the unsuccessful joint wrongdoers, that he shall be entitled to recover from the plaintiff such part of his costs as he is unable to recover from the unsuccessful joint wrongdoers.

(10) If by reason of the terms of an agreement between a joint wrongdoer and the plaintiff the former is exempt from liability for the damage suffered by the plaintiff or his liability therefor is limited to an agreed amount, so much of that portion of the damages which, but for the said agreement and the provisions of paragraph (*c*) of subsection (6) or paragraph (*b*) of subsection (7), could have been recovered from the said joint wrongdoer in terms of subsection (6) or (7) or could have been apportioned to him in terms of subparagraph (ii) of (iii) of paragraph (*a*) of subsection (8) as exceeds the amount, if any, for which he is liable in terms of the said agreement, shall not be recoverable by the plaintiff from any other joint wrongdoer.

(11) (*a*) Whenever a joint wrongdoer who is entitled under any provision of this section to recover a contribution from another joint wrongdoer, is unable to recover that contribution or any amount thereof from that other joint wrongdoer, whether by reason of the latter's insolvency or otherwise, he may recover from any other joint wrongdoer such portion of that contribution or that amount thereof as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and to the full amount of the said contribution or the said amount thereof, as the case may be.

(*b*) Any costs incurred by a joint wrongdoer in an attempt to recover any contribution from any other joint wrongdoer, and not recovered from that joint wrongdoer, shall for the purpose of paragraph (*a*), be added to the amount of that contribution.

(12) If any joint wrongdoer agrees to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, the provisions of subsection (6) shall apply *mutatis mutandis* as if judgment had been given by a competent court against such joint wrongdoer for that sum of money, or, if the court is satisfied that the full amount of the damage actually suffered by the plaintiff is less than that sum of money, for such sum of money as the court determines to be equal to the full amount of the damage actually suffered by the plaintiff, and in the application of the provisions of paragraph (*b*) of the said subsection (6), any reference therein to the date of the judgment shall be construed as a reference to the date of the agreement.

(13) Whenever judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or whenever any joint wrongdoer has agreed to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, and the judgment debt or the said sum of money has been paid in full, every other joint wrongdoer shall thereby also be discharged from any further liability towards the plaintiff.

(14) A person shall for the purposes of this section be regarded as a joint wrongdoer notwithstanding the fact that another person had an opportunity of avoiding the consequences of his wrongful act and negligently failed to do so.

3. **Application of provisions of section 2 to liability imposed in terms of Act 29 of 1942.**—The provisions of section *two* shall apply also in relation to any liability imposed in terms of the Motor Vehicle Insurance Act, 1942 (Act No. 29 of 1942), on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.

CHAPTER III

GENERAL

4. Savings.—(1) The provisions of this Act shall not—

(*a*) apply in respect of any wrongful act committed before the commencement of this Act;

(*b*) operate to defeat any defence arising under a contract;

(*c*) operate to increase the amount of damages beyond any maximum prescribed in any agreement or any law applicable in respect of any claim for damages.

(2) Nothing in this Act contained shall derogate in any matter from the provisions of any law relating to collisions or accidents at sea, or of any rule of court promulgated before the commencement of this Act under section *one hundred and eight* of the South Africa Act, 1909, or under section *three* of the Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919), of the territory of South-West Africa.

5. This Act binds the State.—This Act binds the State.

6. Application of Act to South-West Africa.—This Act and any amendment thereof shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel.

7. Short title.—This Act shall be called the Apportionment of Damages Act, 1956.

APPENDIX V

REFERENCE IN TEXT TO SECTIONS OF ACT

(NB The paragraphs appearing in the right-hand column indicate only the starting-point of the consideration of the Section in question, they do not indicate all the paragraphs in the text containing references to that Section.)

SECTION NUMBER	PARAGRAPH IN TEXT
1	3.1
2 (1)	3.2
2 (2)	3.2.1.2
3	3.3
4	3.4
5 (1)	3.5.1
5 (2)(a)	3.5.2
5 (2)(b)	3.5.3
6 (1)(a)	3.6.2
6 (1)(b)	3.6.5; 8.1
6 (1)(c) - (k)	3.6.1
6 (1)(l)	3.6.1; 5.5.2
6 (2)	3.6.1
6 (3)	3.6.1
6 (4)	3.6.1
7	3.7.1
8(1)	3.8.1
8(2)	5.8.2
8(3)	3.8.13
8(4)	3.8.14
8(5)(a)	3.8.15; 9.2.4
8(5)(b)	3.8.15; 9.2.6.2
8(6)	3.8.16
8(7)	3.8.17
9(1)	3.9.1
9(2)	3.9.14
9(2)(b)	3.9.14.3
10(a)	3.10.1
10(b)	3.10.2
10(c)	3.10.3
10(d)	3.10.4
11(1)	3.11.1
11(2)	3.11.2

SECTION NUMBER	PARAGRAPH IN TEXT
11(3)	3.11.3
12	3.12.1
13 (1)	3.13.1
13 (2)	3.13.1.1
13 (3)	3.13.2
13 (4)	3.13.3
14 (1)(a)	3.14.1
14 (1)(b)	3.14.2
14 (2)	3.14.3
14 (3)	3.14.4
14 (4)	3.14.4
14 (5)	3.14.4
14 (6)	3.14.5
15 (1)	3.15.1; 7.4.6
15 (2)	3.15.2; 7.5.1
15 (3)	3.15.3
16	3.16.1
17	3.17
18	3.18
19	3.19
20	3.20
21	3.21

APPENDIX VI

REFERENCES IN THE TEXT TO THE MOST IMPORTANT REGULATIONS

REGULATION	PARAGRAPH
Date Schedule	3.2.1.3; 3.6.3
4	5.6.3; 5.6.4
5	3.1.3; 3.5.3.1; 3.5.3.2; 3.5.3.4; 3.5.3.6; 3.5.3.7; 3.14.1.1
6	3.5.3.1; 3.5.3.3; 3.5.3.4; 3.14.1.1
7 (1)	3.2.1.3; 3.6.3; 3.6.4.1; 3.6.4.2; 3.6.4.3; 3.8.1.3; 3.15.1.1; 7.3.4.1; 7.3.4.3; 8.1
7 (2)	3.8.5.1
7 (2)(a)	3.10.5.1; 3.13.2.5; 3.8.5.1
7 (2)(b)	3.8.3; 3.8.4; 3.13.2.1; 3.13.2.3; 3.13.2.4; 3.13.2.5; 3.14.1.3; 7.4.2.2; 3.8.5.1
7 (2)(b)(i)	3.8.3; 3.8.4; 3.8.5; 3.13.2.1; 3.13.2.5; 3.14.1.7; 7.1.3; 7.1.3.2; 7.4.2.3 (l); 7.4.2.3 (m)
7 (2)(b)(ii)	3.8.3; 3.8.4; 3.8.5; 3.13.2.5; 3.14.1.7; 7.3.2 2.4.2.3 (l); 7.4.2.3 (m)
7 (2)(b)(iii)	3.8.3; 3.8.4; 3.8.5; 3.13.2.1; 3.13.2.3; 3.13.2.4; 3.13.2.6; 3.14.1.3; 3.14.1.7; 7.2.10; 7.5.1
8	3.14.7; 8.1 - 8.9; 9.2.4.1
9	3.8.5.1; 7.4.2.1; 7.4.2.3 (k); 7.4.2.3 (m); 7.4.3; 7.4.3.2; 7.4.3.5; 7.4.3.6; 7.4.3.7;

	7.4.4; 7.4.5; 7.4.5.5; 9.2.5.1
10	3.13.1.1
11	3.16.1.1 - 3.16.1.10

COMPULSORY MOTOR VEHICLE INSURANCE ACT NO. 56 OF 1972

[ASSENTED TO 19 MAY, 1972] [DATE OF COMMENCEMENT: 2 JUNE, 1972]

(English text signed by the State President)

as amended by

Compulsory Motor Vehicle Insurance Amendment Act, No. 22 of 1974
Second General Law Amendment Act, No. 94 of 1974
[with effect from 20 November, 1974 — see title GENERAL LAW AMENDMENT ACTS.]
Compulsory Motor Vehicle Insurance Amendment Act, No. 87 of 1976
Compulsory Motor Vehicle Insurance Amendment Act, No. 69 of 1978
Compulsory Motor Vehicle Insurance Amendment Act, No. 23 of 1980
Compulsory Motor Vehicle Insurance Amendment Act, No. 2 of 1982
Compulsory Motor Vehicle Insurance Amendment Act, No. 4 of 1983

ACT

To provide for the compulsory insurance of certain motor vehicles in order to ensure the payment of compensation for certain loss or damage unlawfully caused by the driving of such motor vehicles; for the payment of compensation where the loss or damage is caused by the driving of an uninsured or unidentified motor vehicle; and for incidental matters.

1. Definitions.—(1) In this Act, unless inconsistent with the context—

"**applicable tariff**", in relation to the insurance of any motor vehicle, means the tariff of insurance premiums determined and published in the *Gazette* in terms of section 9 and applicable to the insurance of such motor vehicle;

"**authorized insurer**" means an insurance company which is a party to an agreement entered into under section 10 (1), and—

(*a*) in relation to a motor vehicle which is to be insured under this Act, an insurance company which is a party to such an agreement relating to the class of motor vehicles to which such motor vehicle belongs;

(*b*) in relation to a motor vehicle insured under this Act, the insurance company which, while a party to the relevant agreement referred to in paragraph (*a*), issued the declaration of insurance by virtue of which such vehicle is insured, in terms of section 12, 13 or 14, as the case may be;

"**Black authority**" means—

(*a*) the government of any territory which by or under any law has been or is declared to be a self-governing territory within the Republic;
[Para. (*a*) substituted by s. 1 (*a*) of Act No. 69 of 1978.]

(*b*) the government of any area for which a legislative assembly has been or is established under the National States Constitution Act, 1971 (Act No. 21 of 1971), or for which a legislative council has been or is established under the Development of Self-government for Native Nations in South-West Africa Act, 1968 (Act No. 54 of 1968);

(*c*) any Black territorial authority which has been or is established under the Black Authorities Act, 1951 (Act No. 68 of 1951), or by or under any other law;

"**business**" does not include any unlawful business;

[Definition of "business" inserted by s. 1 (*a*) of Act No. 23 of 1980.]

"**insurance company**" means a person who or an association of persons which is entitled to carry on compulsory third party business or compulsory third party insurance business (as defined in the applicable law relating to insurance) in the Republic;

"**insurance period**", in relation to—

(*a*) any motor vehicle other than a motor vehicle operated under a special permit or a temporary permit, means the period from the first of May in any year to the thirtieth of April in the following year;

(*b*) any motor vehicle operated under a special permit or a temporary permit, means the period of validity of the special permit or temporary permit in question;

"**lift club**" means any club of which—

(*a*) every member shall have a turn to convey or cause to be conveyed by means of a motor car the members of such club or other persons designated by such members to or from a specified place for a specified purpose; or

(*b*) every member is the owner of a motor car and of which one or some of its members shall by means of a motor car of which he is the owner or they are the owners, as the case may be, convey or cause to be conveyed the members of such club or other persons designated by such members to or from a specific place for a specific purpose;

[Definition of "lift club" inserted by s. 1 (*b*) of Act No. 23 of 1980.]

"**Minister**" means the Minister of Transport;

"**motor car**" means a motor car as defined in section 1 (1) of the Road Transportation Act, 1977 (Act No. 74 of 1977);

[Definition of "motor car" inserted by s. 1 (*c*) of Act No. 23 of 1980.]

"**motor dealer**" means a person who, as a business or trade, manufactures, assembles or repairs motor vehicles or builds bodies onto motor vehicles or deals in motor vehicles;

"**motor transport licence**" means a motor transport licence issued as such in terms of any law relating to the licensing of motor vehicles;

"**motor vehicle**" means any vehicle designed or adapted for propulsion or haulage on a road by means of any power (not being exclusively human or animal power) without the aid of rails, and includes any trailer of such a vehicle, but does not include a vehicle weighing not more than 230 kilograms, which is specially constructed for the use of a person who suffers from a physical defect or disability, and which is designed to carry only one person;

"**MVA Fund**" means the Motor Vehicle Assurance Fund referred to in section 5;

"**owner**", in relation to—

(*a*) a motor vehicle which a motor dealer has in his possession during the course of his business and which may in terms of any law relating to the licensing of motor vehicles not be driven or used on a public road except under the authority of a motor dealer's licence of which the motor dealer concerned is the holder, means that motor dealer;

(*b*) a motor vehicle which has been received for delivery by a motor transport licence holder in the course of his business of delivering new motor vehicles and which has not yet been delivered by him, means that motor transport licence holder;

(*c*) a motor vehicle which is the subject of a hire purchase agreement, means the purchaser under the hire purchase agreement in question;

(*d*) a motor vehicle leased under an agreement of lease for a period of at least twelve months, means the lessee concerned;

"**prescribed**" means prescribed by regulation;

"**regulation**" means a regulation made under section 32;

"**Republic**" includes the territory of South-West Africa;

"**reward**", with reference to the conveyance of any person in or upon a motor vehicle, does not include any reward rendering such conveyance illegal in terms of any provision of the Road Transportation Act, 1977 (Act No. 74 of 1977);

[Definition of "reward" substituted by s. 1 (*b*) of Act No. 69 of 1978.]

"**Secretary**" means the Secretary for Transport;

"**special circumstances**" does not include any neglect, omission or ignorance;

[Definition of "special circumstances" inserted by s. 1 (*c*) of Act No. 69 of 1978.]

"**special permit**", in relation to a motor vehicle, means a special permit issued as such in respect of such motor vehicle in terms of any law relating to the licensing of motor vehicles;

"**specifically insured**", in relation to a motor vehicle, means insured by means of a declaration of insurance issued in terms of section 12 which relates to that particular motor vehicle;

"**temporary permit**", in relation to a motor vehicle, means a temporary permit issued as such in respect of such motor vehicle in terms of any law relating to the licensing of motor vehicles;

"**trailer**" does not include an agricultural implement not designed or adapted for the conveyance of persons or goods.

(2) For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle.

(3) For the purposes of this Act a person who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle while it moves from that place as a result of gravity, or while it is stationary at that place or at a place to which it moved from the first-mentioned place as a result of gravity.

(4) Whenever any motor vehicle has been placed or left at any place, it shall, for the purposes of this Act, be presumed, until the contrary is proved, that such vehicle was placed or left at such place by the owner of such vehicle.

(5) .....

[Sub-s. (5) added by s. 1 of Act No. 22 of 1974, amended by s. 1 (*d*) of Act No. 69 of 1978 and deleted by s. 1 (*d*) of Act No. 23 of 1980.]

2. Prohibition against driving of uninsured motor vehicle.—(1) Subject to the provisions of subsection (2), no person shall drive or permit any other person to drive a motor vehicle on a public road or street or in any other place to which the public has access, unless that motor vehicle is insured as provided in section 12, 13 or 14.

(2) The provisions of subsection (1) shall, subject to the provisions of section 3, not apply in connection with a motor vehicle—

(*a*) of which any state or government or a provincial administration or the administration of the territory of South-West Africa or the National Transport Commission or a Black Authority or the South African Development Trust or the State President is the owner; or

(*b*) which is registered at a place outside the Republic in terms of a law in force at that place, if the person who drives or permits another person to drive such motor vehicle has made such provision as may have been prescribed, to ensure that compensation will be paid for any such loss or damage as is mentioned in section 21, which may be caused by or arise out of the driving of such motor vehicle in the Republic by its owner or by his servant or agent; or

(*c*) whose owner is the holder of a valid certificate of exemption issued in terms of section 29 (1) and applicable in respect of such motor vehicle.

(3) Any person who contravenes subsection (1) shall be guilty of an offence and shall, subject to the provisions of subsection (4), on conviction be liable to a fine not exceeding one hundred rand, and if he was, within a period of three years immediately preceding the date on which the offence was committed, convicted of contravening subsection (1) or the corresponding provision of a law repealed by this Act, the court convicting him may suspend, for a period not exceeding two years, his licence to drive a motor vehicle or, if he does not hold such a licence, declare him to be disqualified for a period not exceeding two years from acquiring such a licence.

(4) If a person who has been convicted more than once of an offence mentioned in subsection (3) or who has been convicted of both offences mentioned in that subsection, is again convicted of contravening subsection (1), he shall be liable to a fine of not less than fifty rand and not exceeding two hundred rand or to imprisonment for a period not exceeding six months without the option of a fine, and, if he holds a licence to drive a motor vehicle, it shall become void, and whether he does or does not hold such a licence, he shall be disqualified for a period of four years from acquiring such a licence.

(5) If a court has under subsection (3) suspended a licence to drive a motor vehicle or has convicted a person whose licence to drive a motor vehicle has become void under subsection (4) as a result of the conviction, the court shall direct the person concerned to produce that licence and shall cause the suspension to be endorsed on it or shall cause the licence to be impounded, as the case may be, and if the said person without reasonable excuse fails to comply with that direction, he shall be guilty of contempt of court: Provided that if a licence, which has become void as aforesaid, was issued at a place outside the

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Republic, the court shall not cause it to be impounded but shall cause it to be endorsed to the effect that it has become invalid in the Republic and in the territory of South-West Africa.

(6) When a court has taken any action under subsection (5) with reference to a licence issued in the Republic, the court shall cause a notice of the suspension or lapsing of the licence to be given to the authority which issued the licence.

(7) If a licence to drive a motor vehicle has been suspended or has become void under this section, it shall, for the purposes of any law relating to the licensing of drivers of motor vehicles, be deemed to have been suspended or cancelled, as the case may be, under such law, and a disqualification under subsection (4) from acquiring a licence to drive a motor vehicle shall, for the purposes of that law, be deemed to be a disqualification under that law from obtaining or holding any such licence.

3. Liability of owner of uninsured motor vehicle for loss or damage.—(1) Any person who or any state, government, authority or body of persons which is the owner of a motor vehicle (other than a motor vehicle mentioned in subsection (2) (*b*) of section 2 to which the provisions of subsection (1) of that section do not apply) which is not insured under this Act shall be liable *mutatis mutandis* in accordance with the provisions of sections 21 to 26 inclusive for any loss or damage caused by or arising out of the driving of that motor vehicle by any person whatsoever at any place in the Republic, as if that person, state, government, authority or body of persons were an authorized insurer which has issued a declaration of insurance under section 12 with reference to that motor vehicle.

(2) The provisions of subsection (1) shall not derogate from any right which any person may have under any other law to recover compensation from any person for any loss or damage referred to in that subsection.

4. Suspension of sections 2 and 3 by proclamation.—(1) The State President may from time to time by proclamation in the *Gazette*, from a date mentioned in the proclamation and for a period defined in the proclamation or until the proclamation is withdrawn by a further proclamation, suspend the operation of sections 2 and 3 entirely or in relation to motor vehicles of a class specified in the first-mentioned proclamation.

(2) When the State President issues a proclamation which suspends the operation of sections 2 and 3 in relation to motor vehicles of a particular class, he shall by regulation prescribe the manner of determining and identifying the motor vehicles which fall within that class.

5. Continued existence of MVA Fund.—(1) The Motor Vehicle Assurance Fund established by section 25B of the Motor Vehicle Insurance Act, 1942 (Act No. 29 of 1942), shall, notwithstanding the repeal of that Act by this Act, continue to exist as a body corporate and to be entitled or subject to any rights or obligations which were conferred or imposed on it in terms of subsection (2) of that section.

(2) The Insurance Act, 1943 (Act No. 27 of 1943), shall not apply in respect of the MVA Fund: Provided that reinsurance by the MVA Fund under section 7 (1) (*a*) shall be regarded as approved reinsurance for the purposes of that Act in its application to an authorized insurer.

(3) The income of the MVA Fund, including income from investments, shall be exempt from income tax.

(4) The State President may by proclamation in the *Gazette* apply to the MVA Fund any provision of the Companies Act, 1926 (Act No. 46 of 1926), or any other law relating to companies, not inconsistent with the provisions of this Act, with such modifications as may be specified in the proclamation, and may amend or repeal any such proclamation.

(5) The Registrar of Companies shall for the purposes of section 10 (1) and (2) of the said Companies Act, 1926, record the names and abbreviations "Motor Vehicle Assurance Fund", "MVA Fund", "Motorvoertuigassuransiefonds" and "MVA-fonds" in the register of companies kept by him in terms of that Act.

6. Manager, assistant manager and staff of MVA Fund.—(1) (*a*) Subject to the laws governing the public service, the Minister may from time to time—

(i) appoint a person to be the manager of the MVA Fund who, under the control of the Secretary and subject to such general or special directions as the Secretary may give from time to time, shall manage the affairs of the MVA Fund and, for that purpose, may exercise the powers and shall perform the duties of the MVA Fund;

(ii) appoint a person to be the assistant manager of the MVA Fund, who may perform such of the functions of the manager as may be assigned to the assistant manager by the Secretary or by the manager acting with the concurrence of the Secretary.

(*b*) When the manager is for any reason absent or unable to perform his functions, the assistant manager shall act in the place of the manager, and when both the manager and the assistant manager are absent or unable to perform their functions, the Secretary may in writing designate a member of his staff to act in the place of the manager for a specified period not exceeding thirty days.

(2) Subject to the laws governing the public service, the Secretary may appoint such persons as are in his opinion necessary to enable the manager to manage the MVA Fund: Provided that, subject to the approval of the Minister in every case, the Secretary may acquire the services of any person on such conditions as may be determined by agreement with the person in question.

(3) (*a*) The Minister shall appoint six persons in accordance with paragraph (*b*) as a committee which the Secretary may in his discretion consult about any business of the MVA Fund and which may make representations to the Secretary in connection with any such business.

(*b*) Each member of the committee shall be a person nominated by an authorized insurer, after a request to that effect made by the Minister to each authorized insurer, as a person suitable to represent authorized insurers on the committee, and shall be appointed for such period and on such conditions (if any), including a condition as to the payment of allowances out of the MVA Fund, as the Minister may determine.

(4) Such amounts in respect of expenses incurred by the Secretary under this section, as may be determined by him from time to time in consultation with the Secretary to the Treasury, shall be paid out of the funds of the MVA Fund to the State at such times as may be so determined, and shall be paid into the Consolidated Revenue Fund.

7. Powers and duties of MVA Fund.—(1) The MVA Fund shall have the power—

(*a*) to reinsure any insurance or risk which any authorized insurer has undertaken pursuant to the provisions of this Act;

(*a*A) where any authorized insurer has undertaken to pay compensation, on the ground of insurance by it of any motor vehicle in terms of this Act, for such loss or damage as is contemplated in section 21 which arises out of the driving of that motor vehicle at any place outside the Republic where that insurance by virtue of that undertaking is of force and effect in terms of the law applicable at that place, to reinsure the risks and obligations of that authorized insurer arising out of such undertaking and to guarantee such obligations;

[Para. (*a*A) inserted by s. 1 (1) (*a*) of Act No. 87 of 1976.]

(*b*) to indemnify authorized insurers against claims, lawsuits, losses, costs and damage which may flow from the application of this Act;

(*c*) to cause any risk which it has undertaken to be reinsured in whole or in part;

(*d*) to investigate or settle claims made against it or to commence, conduct, defend or abandon legal proceedings;

(*e*) to guarantee or insure the obligations of authorized insurers arising from the application of this Act;

(*f*) subject to the Minister's approval in every case, to purchase or otherwise acquire goods, equipment, land, buildings, shares, debentures, stock, securities and all other kinds of movable or immovable property;

(*g*) subject to the Minister's approval in every case, to sell, lease, mortgage, encumber, dispose of, exchange, work, develop, build upon, improve or in any other way deal with its property;

(*h*) to invest any moneys not immediately required for the conduct of its business, in such manner as may from time to time be determined by the Minister, and to realize, alter or reinvest such investments, or otherwise deal with such moneys or investments in such manner as may from time to time be determined by the Minister;

(*i*) subject to the Minister's approval in every case, to borrow money and secure the payment thereof in such manner as it may deem fit;

(*j*) subject to the Minister's approval in every case, to lend money, and to make donations for research in connection with any matter relating to injuries sustained in motor vehicle accidents, on such conditions as it may deem advisable;

[Para. (*j*) substituted by s. 1 of Act No. 2 of 1982.]

(*k*) to draw, draft, accept, endorse, discount, sign and issue promissory notes, bills and other negotiable or transferable instruments with the exception of share certificates;

(*l*) to utilize its funds for any purpose connected with or resulting from the exercise of its powers or the performance of its duties and functions;

(*m*) to reimburse the State for services rendered to the MVA Fund by persons in the service of the State;

(*n*) to do all such other things as are incidental or conducive to the exercise of its powers or the performance of its duties and functions.

(2) The MVA Fund may, subject to the provisions of the regulations and on such terms and conditions as may be prescribed, utilize its funds to compensate any person for any loss or damage suffered by him as a result of bodily injury to himself or the death of or bodily injury to any other person caused by or arising out of the driving of any motor vehicle if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle or of the owner of the motor vehicle or his servant in the execution of his duty, and if—

(*a*) such motor vehicle, although required to be insured in terms of this Act, was not so insured; or

(*b*) the identity of the driver or owner of such motor vehicle and that of any authorized insurer which may have insured such motor vehicle under this Act, cannot be established.

(2A) The provisions of subsection (2) shall *mutatis mutandis* apply also in respect of any loss or damage referred to in that subsection caused by or arising out of the driving of a motor vehicle in any territory referred to in subsection (2) of section 21, before or during any period in respect of which an agreement contemplated in the last-mentioned subsection has been entered into and is in force in respect of that territory.

[Sub-s. (2A) inserted by s. 1 (1) (*b*) of Act No. 87 of 1976.]

(3) The MVA Fund shall—

(*a*) keep proper records of all its financial transactions and its assets and liabilities;

(*b*) as soon as may be after each audit in terms of subsection (4) submit to the Minister audited balance sheets and the report of the Controller and Auditor-General in respect of such audit together with a report on the MVA Fund's activities during the year to which the audit relates.

(4) The accounts of the MVA Fund shall be audited annually by the Controller and Auditor-General.

(5) The Minister shall lay copies of the reports submitted to him in terms of subsection (3), on the Tables of the Senate and the House of Assembly within thirty days after the submission of such reports to him, if Parliament is then in ordinary session or, if Parliament is not then in ordinary session, within thirty days after the commencement of its next ensuing ordinary session.

8. Committee on Motor Vehicle Insurance Premiums.—(1) The Minister shall establish a committee to be known as the Committee on Motor Vehicle Insurance Premiums (hereinafter referred to as the premiums committee) whose functions and manner of conduct of business shall, subject to the provisions of this section, be as prescribed.

(2) The members of the premiums committee shall be appointed by the Minister and the committee shall consist of one official of the Department of Transport, one official of the Department of Finance, one official of the Department of Statistics, one official of the MVA Fund and three persons appointed, after consultation with authorized insurers in such manner as may be prescribed, to represent authorized insurers.

(3) The premiums committee shall advise the Minister as to—

(*a*) any matter relating to tariffs of premiums for the insurance of motor vehicles under this Act;

(*b*) the classification of motor vehicles or demarcation of areas for premium purposes; and

(*c*) any matter prescribed or from time to time referred to the committee by the Minister.

(4) The Minister shall designate a member of the premiums committee who is an official of the Department of Transport as the chairman of the committee.

(5) A member of the premiums committee shall be appointed for such period and on such conditions (including, in respect of such a member who is not in the full-time service of the State, conditions relating to the remuneration and allowances, if any, payable to him in respect of services rendered by him as such a member) as the Minister may determine from time to time in consultation with the Minister of Finance.

(6) The Secretary shall, subject to the laws governing the public service, provide all such officers as may be necessary to assist the premiums committee in the performance of its functions and to undertake all secretarial and administrative work arising out of the performance thereof, and such officers shall be under the control of the Secretary.

(7) The Minister may, for the purpose of obtaining any information relating to statistics to be kept or made available by authorized insurers in terms of the regulations, assign to any such officer, in such manner as may be prescribed, such powers, duties and functions as may be prescribed, including the power to demand the production, after such notice as may be prescribed, of books, accounts or other documents and to examine and make extracts therefrom or copies thereof or, with the prior approval of the Minister in each case, to enter any premises of an authorized insurer and demand the production of books, accounts or other documents or to take possession of books, accounts or other documents found on the premises and to remove books, accounts or other documents so produced or found for the purpose of examination or making extracts therefrom or copies thereof.

9. Premium for insurance in terms of this Act.—(1) The premium to be paid to an authorized insurer for the insurance of any motor vehicle of a class to which the relevant agreement under section 10 relates, shall be a premium calculated in accordance with a tariff determined by the Minister from time to time, after consultation with the premiums committee, in respect of the class of motor vehicles in question.

(2) Such tariff shall be published by notice in the *Gazette*.

10. Agreement and authorization to undertake insurance.—(1) The State President may, in his discretion and without prior notice to any person, from time to time enter into an agreement with one or more insurance companies and authorize any insurance company which is a party to the agreement, to insure in terms of this Act, to the exclusion of all insurers who are not parties to the agreement, all motor vehicles or all motor vehicles of a class specified in the agreement, during a period defined in the agreement and at premiums in accordance with the tariff determined under section 9.

(2) An agreement contemplated in subsection (1) shall provide for the circumstances in which an insurance company shall cease to be a party to it and, if two or more insurance companies are parties, for the acceptance, by all or any one or more of them, of any liability incurred in respect of insurance undertaken in terms of this Act, while a party to the agreement, by an insurance company which has ceased to be such a party.

(3) Such agreement may provide for the risks borne by insurance companies in respect of insurance under this Act, to be reinsured by the MVA Fund on such terms and conditions as may be determined by further agreement among the MVA Fund, the insurance companies which are parties to the agreement and the Minister.

(4) Any agreement entered into under subsection (1) may be amended by the parties to it.

(5) The State President may from time to time at his discretion admit any insurance company, which is not a party to an agreement entered into under subsection (1), as a party to such agreement.

(6) The agreement entered into by the State President and certain insurance companies and published in the *Gazette* of the ninth day of March, 1966, under Government Notice No. 376, as amended, shall be deemed to provide, as contemplated in subsection (3), for the reinsurance by the MVA Fund of the risks referred to in that subsection, and the agreement which immediately before the commencement of this Act governed the terms and conditions of such reinsurance, in terms of the provisions of a law repealed by this Act, shall, without derogating from the powers of the parties to amend or rescind it, be deemed to be the further agreement contemplated in that subsection.

11. Notice of conclusion or amendment of agreement.—(1) When the State President has entered into an agreement in terms of section 10 (1), the Minister shall publish in the *Gazette* a notice of the conclusion of that agreement together with the terms of that agreement, and after the date of commencement of any insurance period fixed in the said notice for the purposes of this section, no motor vehicle of a class to which the said agreement and the said insurance period relate shall, while the said agreement is in force, be deemed to be insured for the purposes of this Act unless an insurance company while a party to that agreement has issued a declaration of insurance under section 12, 13 and 14 which relates to that motor vehicle.

(2) The Minister shall publish in the *Gazette* a notice of every amendment of an agreement under section 10 (4) and of the terms of the amendment, and of every admission of an insurance company as a party to an agreement under section 10 (5).

(3) As from the date of the publication of the notice referred to in subsection (1), any insurance company, which immediately prior to that date was an authorized insurer in respect of motor vehicles to which the relevant agreement relates and whose name is not set out in such notice, shall cease to be an authorized insurer in respect of such motor vehicles except for the purposes of any insurance undertaken by it before that date.

12. Authorized insurer obliged to insure.—(1) (*a*) Subject to the provisions of paragraph (*b*) of this subsection and section 17, an authorized insurer shall be obliged to insure under this Act any particular motor vehicle if—

(i) application is made in a prescribed form to the authorized insurer for the insurance of that motor vehicle over the whole of an insurance period for that motor vehicle or over the remaining part of such an insurance period

reckoned as from a date specified in the application, not being earlier than the date on which such application is actually made to the authorized insurer; and

(ii) the premium for such insurance in accordance with the applicable tariff is paid or tendered to the authorised insurer.

[Para. (*a*) substituted by s. 2 (*a*) of Act No. 69 of 1978.]

(*b*) An authorized insurer shall not be obliged to effect such insurance if the application for it is made earlier than a date thirty days before the commencement of the period over which the insurance is to extend or, in the case of a motor vehicle operated under a special permit or a temporary permit, if the special permit or the temporary permit is not exhibited to the authorized insurer.

(2) Such insurance shall be effected by means of a written declaration of insurance in a prescribed form which the authorized insurer shall issue to the applicant.

(3) Such a declaration shall—

(*a*) contain such particulars of the insured motor vehicle as may be necessary to identify it; and

(*b*) contain a statement that the authorized insurer has insured the said vehicle; and

(*c*) state the duration of the insurance, which shall extend from the date on which the insurance is to take effect to the end of the insurance period for the class of motor vehicle in question, but subject to the provisions of section 19; and

(*d*) contain the name and address of the person indicated in the application in question as the owner of the vehicle concerned: Provided that the validity of the declaration shall not be affected by that person not being in fact the owner of the vehicle.

[Para. (*d*) added by s. 2 (*c*) of Act No. 69 of 1978.]

(4) If an applicant for the insurance of a motor vehicle under this Act makes a false statement in respect of any material particular in his application which he knows to be false, he shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand.

(5) If an authorized insurer fails to fulfil any obligation imposed upon it by this section, it shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand.

13. Insurance of certain motor vehicles of motor dealer.—(1) The provisions of section 12 shall, *mutatis mutandis* and subject to the provisions of subsection (2), apply in connection with an application made by a motor dealer who is the holder of a motor dealer's licence, for the insurance of all motor vehicles—

(*a*) of which he is the owner in connection with his business as a motor dealer; and

(*b*) which, in terms of any law relating to the licensing of motor vehicles, may under the authority of his motor dealer's licence be driven or operated on a public road or street or in any other place to which the public has access; and

(*c*) which, when so driven or operated, shall in terms of such law display his dealer's registration number plates.

(2) The declaration of insurance issued by the authorized insurer to the applicant in respect of motor vehicles contemplated in subsection (1) shall not refer to any particular motor vehicle but to all motor vehicles contemplated in that subsection.

(3) Upon the issue of such a declaration of insurance the authorized insurer shall be deemed to have insured under this Act every motor vehicle contemplated in subsection (1) which is not specifically insured.

14. Insurance of motor vehicles operated under motor transport licence.—(1) The provisions of section 12 shall, *mutatis mutandis* and subject to the provisions of subsection (2), apply in connection with an application made by the holder of a motor transport licence for the insurance of all motor vehicles—

(*a*) of which he is the owner in terms of paragraph (*b*) of the definition of "owner" in section 1 (1); and

(*b*) which, in terms of any law relating to the licensing of motor vehicles, may under the authority of his motor transport licence be driven or operated on a public road or street or in any place to which the public has access; and

(*c*) which, when so driven or operated, shall in terms of such law display his registration number plates as holder of a motor transport licence.

(2) The declaration of insurance issued by the authorized insurer to the applicant in respect of motor vehicles contemplated in subsection (1) shall not refer to any particular motor vehicle but to all motor vehicles contemplated in that subsection.

(3) Upon the issue of such a declaration of insurance the authorized insurer shall be deemed to have insured under this Act every motor vehicle contemplated in subsection (1).

15. Tokens of insurance, and proof of insurance.—(1) When an authorized insurer issues a declaration of insurance in terms of this Act—

(*a*) he shall in respect of a specifically insured motor vehicle issue to the applicant a duly completed token of insurance in a prescribed form for the relevant insurance period;

[Para. (*a*) substituted by s. 3 of Act No. 69 of 1978.]

(*b*) to a motor dealer or the holder of a motor transport licence in respect of motor vehicles referred to in section 13 or 14, he shall issue to such dealer or holder, as the case may be, in respect of every valid clearance certificate held by him in connection with his motor dealer's licence or motor transport licence, as the case may be, a duly completed token of insurance in a prescribed form for the relevant insurance period.

(2) The Secretary shall cause forms for the insurance tokens referred to in subsection (1) to be printed and to be issued to any authorized insurer at its request.

(3) If it is proved that any token of insurance or token of identity issued in connection with any motor vehicle in accordance with the provisions of this Act or the regulations, has been lost or destroyed, or if any such token which has been defaced or of which the text has become illegible, is surrendered, a duplicate thereof may be issued.

(4) A declaration of insurance or token of insurance referred to in subsection (1), which has been issued by an authorized insurer, shall be *prima facie* proof that a motor vehicle to which it relates has been duly insured by that insurer under this Act.

16. Identification of insured vehicles.—(1) The owner of a motor vehicle in respect of which a token of insurance has been issued in terms of section 15 (1) (*a*), shall attach the token to the motor vehicle in the prescribed manner and shall keep it so attached throughout the duration of the insurance in connection with which it was issued.

[Sub-s. (1) substituted by s. 4 of Act No. 69 of 1978.]

(2) A motor dealer or motor transport licence holder to whom a token of insurance has been issued in terms of section 15 (1) (*b*) in respect of the insurance of any motor vehicle, shall attach the token to such motor vehicle in the prescribed manner before, and shall keep the token so attached while, such vehicle is driven or operated during the period of insurance in connection with which the token was issued, on a public road or street or in any other place to which the public has access.

(3) Any person who fails to comply with the provisions of subsection (1) or (2) shall be guilty of an offence and liable on conviction to a fine not exceeding fifty rand.

(4) If it is proved that at a particular time a motor vehicle did not bear, in the manner prescribed, such a token of insurance as aforesaid which relates to that motor vehicle, that motor vehicle shall for the purposes of section 2 (1) be deemed not to have been insured under this Act at that time, unless it is proved that the vehicle was in fact so insured at that time.

17. Refusal to insure unroadworthy motor vehicle.—(1) When application is made to an authorized insurer for the insurance under this Act of a particular motor vehicle not operated under a special permit or a temporary permit, the authorized insurer may refuse to insure that motor vehicle if he has reasonable grounds to believe that it is not roadworthy, or, if he doubts its roadworthiness, he may demand that the applicant submit the motor vehicle for examination and testing to a person indicated by the authorized insurer at any place upon which the parties may agree, or failing such agreement, any place indicated by the authorized insurer in the town or village in which the applicant resides, or if he resides outside a town or village, at any place indicated by the authorised insurer in the principal town of the district in which the applicant resides.

[Sub-s. (1) substituted by s. 5 of Act No. 69 of 1978.]

(2) If the applicant has failed to comply with the authorized insurer's demand, the authorized insurer may refuse to insure the motor vehicle in question (irrespective of whether it is or is not roadworthy) until the applicant has complied with the demand.

18. Use or alteration of insured motor vehicle.—(1) Before the owner of a specifically insured motor vehicle, during the period covered by the insurance, uses that vehicle or permits it to be used in such a manner or for such a purpose or in such circumstances, or after it has been altered in such a manner, that as a result of such use or alteration, it will fall into a class of motor vehicles for which a higher insurance premium than the premium which was paid for the insurance is provided in the applicable tariff, the said owner shall give notice in writing to the authorized insurer concerned of the proposed change of use or alteration: Provided that for the purposes of this subsection a motor vehicle which, on the date on which the insurance was effected, was within a particular class of motor vehicles, shall not be deemed to fall into any other class merely by reason of its registration (under any law relating to the registration of motor vehicles) at a place other than the place where it was registered on that date, or by reason of the fact that the owner of that vehicle has since that date taken up his residence or commenced to carry on business elsewhere than at the place where he resided or carried on business on that date.

(2) When the owner of a motor vehicle has notified an authorized insurer in terms of subsection (1) with reference to a motor vehicle which will, after the proposed change of use or alteration, fall into a class of motor vehicles mentioned in subsection (1), he shall be liable to pay to the authorized insurer the difference between the premium actually paid and the aforesaid higher premium in respect of the remainder of the insurance period in question reckoned as from the date upon which the occurrence, of which notice was given, takes place.

(3) Any person who fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or to imprisonment without the option of a fine for a period not exceeding three months, and shall in addition be liable to pay to the authorized insurer concerned an amount equal to three times the difference between the insurance premium which he actually paid and any higher premium for the payment whereof he would have been liable if he had complied with the said provision.

(4) If a motor dealer uses a motor vehicle which is insured under a declaration of insurance issued to him in terms of section 13, or allows such motor vehicle to be used, otherwise than in accordance with the provisions of the applicable law relating to the use of motor vehicles under a motor dealer's licence, he shall be guilty of an offence and liable

on conviction to a fine not exceeding one hundred rand, and shall in addition be liable to pay to the authorized insurer with whom the motor vehicle is insured as aforesaid, a sum equal to three times the amount which is payable under the applicable tariff for a full year's insurance under this Act in respect of the class of motor vehicle in question.

(5) When a specifically insured motor vehicle has, during the period covered by the insurance, been altered in such a manner or is, during that period, to be used in such a manner or for such a purpose or in such circumstances that, as a result of that alteration or use, it has fallen or will fall into a class of motor vehicles in respect of which a lower insurance premium is provided in the applicable tariff than the premium which was paid for the insurance of that motor vehicle, the authorized insurer shall refund to the owner of that motor vehicle at his request, an amount equal to the difference between the premium actually paid and the aforesaid lower premium, in respect of the remainder of the insurance period for the said motor vehicle reckoned as from the date upon which that vehicle has fallen or will fall into the said lower-rated class of motor vehicles: Provided that the authorized insurer shall not be obliged to make such a refund merely by reason of the fact that the motor vehicle in question has been registered (under the law relating to the registration of motor vehicles) at a place other than the place where it was registered on the date on which the insurance premium was paid as aforesaid or merely by reason of the fact that the owner of that vehicle has since that date taken up his residence or commenced to carry on business elsewhere than at the place where he resided or carried on business on that date.

19. Termination of insurance and transfer of motor vehicle.—(1) The insurance of a motor vehicle which is insured under this Act shall terminate—

(*a*) on the expiration of the current insurance period for that motor vehicle: Provided that if a motor vehicle operated under a special permit or a temporary permit and insured under this Act for the period of validity of such permit, is before the expiration of such permit registered in terms of the law under which such permit was issued, the relevant insurance period shall be deemed to have expired on the registration in question;

(*b*) when the insured motor vehicle ceases permanently to be capable of being driven.

(2) When the owner of a specifically insured motor vehicle transfer his ownership in that motor vehicle to another person, he shall, before delivering it, inform the authorized insurer who insured the vehicle, on the prescribed form of the name and address of the transferee and of the number of the token of insurance attached to the vehicle in accordance with the provisions of section 16.

(3) When the insurance of a specifically insured motor vehicle terminates under the circumstances mentioned in subsection (1) (*b*), the authorized insurer concerned shall, subject to any agreement between itself and the owner of the motor vehicle, refund to that owner an amount which bears to the amount of the insurance premium paid the same ratio as the period reckoned from the date on which the token of insurance is returned to the authorized insurer to the termination of the insurance period in question, bears to the whole insurance period: Provided that of the amount to be so refunded not more than twenty-five cents may be retained by way of an office fee.

(4) When the owner of a specifically insured motor vehicle transfers his ownership in that motor vehicle to another person, as mentioned in subsection (2), the person to whom the ownership is so transferred shall forthwith inform the authorized insurer on the prescribed form of the said transfer and of the number of the token of insurance attached to the vehicle in terms of section 16.

(5) Any person who fails to comply with the provisions of subsection (2) or (4) shall be guilty of an offence and on conviction liable to a fine not exceeding 50 rand.

[S. 19 substituted by s. 6 of Act No. 69 of 1978.]

20. Giving of information to insurer and third party.—(1) When, as the result of the driving of a motor-vehicle insured under this Act, any person other than the driver of that motor vehicle has been killed or injured, the owner and the driver, if he is not the owner, of the motor vehicle shall (if reasonably possible, within fourteen days after the occurrence) furnish the authorized insurer which insured the motor vehicle with—

(*a*) particulars of the occurrence, the place and time of the occurrence, the name and address (if known) of any person who was killed or injured and of every person who was upon the vehicle in question at the time of the occurrence, a description of any other vehicle involved in the occurrence, and the name and address (if known) of the driver of every such other vehicle and of any other person who witnessed the occurrence;

(*b*) any other reasonable information at his disposal which the authorized insurer may from time to time request him to furnish.

(2) When, as a result of the driving of a motor vehicle insured under this Act, any person other than the driver of that motor vehicle has been killed or injured, the owner of the motor vehicle shall—

(*a*) at the request of any person, or of the agent of any person, who has suffered any loss or damage as a result of the death of the person so killed; or

(*b*) at the request of the person so injured or of his agent; or

(*c*) at the request of any supplier entitled in terms of subsection (1) (*b*) of section 26 to recover costs referred to in that section from the authorized insurer, or the agent of such supplier,

produce to the person making the request, the prescribed proof of insurance of the motor vehicle at the time of the occurrence in question, and a copy of any information which the said owner furnished in terms of subsection (1) (*a*) of this section to the authorized insurer concerned, and permit that person to make a copy of any such information or take an extract from it.

[Sub-s. (2) amended by s. 7 of Act No. 69 of 1978.]

(3) Any person who fails to comply with any provision of subsection (1) within a reasonable time after having become aware of the occurrence which caused the injury or death contemplated in that subsection, or who fails to comply with any provision of subsection (2), shall be guilty of an offence and liable on conviction to a fine not exceeding fifty rand unless he is unable to comply with the provision in question and his inability is not due to his own action or default.

21. Liability arising from insurance under this Act.—(1) An authorized insurer which has insured or is deemed to have insured a motor vehicle in terms of section 12, 13 or 14 shall, subject to the provisions of this Act, be obliged to compensate any person whatsoever (in this Act called the third party) for any loss or damage which the third party has suffered as a result of—

(*a*) any bodily injury to himself;

(*b*) the death of or any bodily injury to any person,

in either case caused by or arising out of the driving of the insured motor vehicle by any person whatsoever at any place in the Republic during the period over which the insurance extends, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Act called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty.

(1A) No interest shall be payable on the amount of any compensation which a court awards to any third party by virtue of the provisions of subsection (1), unless 14 days have elapsed from the date of the court's relevant order.

[Sub-s. (1A) inserted by s. 8 of Act No. 69 of 1978.]

(1B) In issuing any order as to costs on making such award, the court may take into consideration any written offer in settlement of the claim in question against him, made by the authorized insurer before the relevant summons was served on him.

[Sub-s. (1B) inserted by s. 8 of Act No. 69 of 1978.]

(1C) Where a claim for compensation under section 21—

(*a*) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, the authorized insurer concerned shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed him to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof;

(*b*) includes a claim for future loss of income or support, the authorized insurer concerned shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed him to furnish such undertaking, to pay the amount payable by him in respect of the said loss, by instalments as agreed upon or directed by the court.

[Sub-s. (1C) inserted by s. 8 of Act No. 69 of 1978.]

(2) In the application of subsection (1), a territory which formed part of the Republic and became an independent State in terms of a law passed by Parliament shall be deemed to be part of the Republic—

(*a*) in so far as it concerns the insurance of a motor vehicle which is insured in terms of this Act prior to the date on which that territory so became independent, in respect of the insurance period during which that territory so became independent; and

(*b*) in so far as it concerns the insurance of a motor vehicle which is insured in terms of this Act in the Republic after the said date, if, on the date on which the insurance has been effected, an agreement existed and has been published in the *Gazette* which has been entered into between the Government of the Republic of South Africa and the Government of the State concerned and in accordance with which authorized insurers may exercise and perform in respect of the insurance period for which the insurance in question has been effected, the powers and functions which, in terms of the law applicable in that State, are conferred upon or assigned to persons who in terms of that law are authorized to insure motor vehicles in and in respect of that territory for such purposes as are contemplated in this Act.

[Sub-s. (2) added by s. 2 of Act No. 87 of 1976.]

(3) The insurance of a motor vehicle effected by an authorized insurer in a territory and by virtue of an agreement contemplated in subsection (2), shall be effective in the Republic as if it were insurance under this Act in the Republic.

[Sub-s. (3) added by s. 2 of Act No. 87 of 1976.]

22. Liability limited in certain cases.—(1) The liability of an authorized insurer in connection with any one occurrence to compensate a third party for any loss or damage contemplated in section 21 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death—

(*a*) was being conveyed in the motor vehicle in question—
  (i) for reward; or
  (ii) in the course of the business of the owner of that motor vehicle; or
  (iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his employment; or
  (iv) for the purposes of a lift club where that motor vehicle is a motor car insured in the prescribed manner in terms of this Act for those purposes; or

(*b*) was in the act of entering or mounting the motor vehicle in question for the purpose of being conveyed as referred to in paragraph (*a*); or

(*c*) was in the act of alighting from the motor vehicle in question after having been conveyed as referred to in paragraph (*a*); or

(*d*) was being conveyed in the motor vehicle in question under circumstances other than the circumstances referred to in paragraph (*a*) or was in the act of entering or mounting the motor vehicle in question for the purpose of being so conveyed or was in the act of alighting from the motor vehicle in question after having been so conveyed,

shall be limited, except where the person concerned was conveyed in or was in the act of entering or mounting or alighting from the motor vehicle in question while proceeding on authorized leave or returning to his base from such leave during any period in which he rendered military service or underwent military training in terms of the Defence Act, 1957 (Act No. 44 of 1957), or while dressed in a uniform of the South African Defence Force during such period, or under circumstances where the owner or driver of the motor vehicle believed upon reasonable grounds that he was a person rendering such service or undergoing such training and dressed in such a uniform—

(*aa*) in any case referred to in paragraph (*a*), (*b*) or (*c*), to the sum of twelve thousand rand in respect of any bodily injury to or the death of any one such person;

(*bb*) in any case referred to in paragraph (*d*), to the sum of twelve thousand rand in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from the death of or bodily injury to any one such person, excluding the payment of compensation in respect of any other loss or damage,

but exclusive of the cost of recovering the said compensation.

[Sub-s. (1) amended by s. 9 of Act No. 69 of 1978, substituted by s. 2 (*a*) of Act No. 23 of 1980 and amended by s. 1 of Act No. 4 of 1983.]

(2) Where the loss or damage contemplated in section 21 is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the motor vehicle and the third party is entitled to compensation under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), in respect of such injury or death—

(*a*) the liability of the authorized insurer to that third party shall be limited to the sum representing the difference between the amount which that third party could, but for the provisions of this paragraph, have claimed from the insurer or the amount of twelve thousand rand (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act; and

[Para. (*a*) substituted by s. 2 (*b*) of Act No. 23 of 1980.]

(*b*) . . . . . .

[Para. (*b*) deleted by s. 2 (*c*) of Act No. 23 of 1980.]

(*c*) the authorized insurer shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder,

without, however, any liability of the authorized insurer to pay costs awarded against it in any legal proceedings being affected by anything in this subsection contained.

23. Liability excluded in certain cases.—An authorized insurer shall not be obliged to compensate any person in terms of section 21 for any loss or damage—

(*a*) for which neither the driver nor the owner of the motor vehicle in question would have been liable if section 27 had not been enacted; or

(*b*) suffered as a result of bodily injury to or the death of any person who at the time of the occurrence which caused that injury or death—

(i) was being conveyed for reward on a motor vehicle which is a motor cycle;

(ii) is a person referred to in section 22 and a member of the household, or responsible in law for the maintenance, of the driver of the motor vehicle in question, and was being conveyed in or upon the motor vehicle in question;

or was in the act of entering or mounting that vehicle for the purpose of being so conveyed, or was in the act of alighting from that vehicle after having been so conveyed.

[Para. (*b*) amended by s. 10 (1) (*a*), (*b*) and (*c*) of Act No. 69 of 1978 and substituted by s. 3 of Act No. 23 of 1980.]

(*c*) suffered as a result of bodily injury to any person who—

(i) unreasonably refuses or fails to subject himself at the request of the authorized insurer and at the cost of that insurer, to any medical examination or examinations by medical practitioners designated by the said insurer;

(ii) refuses or fails to furnish the authorized insurer at his request and cost with copies of all medical reports in his possession, relating to the relevant claim for compensation; or

(iii) refuses or fails to allow the authorized insurer at his request to inspect all records relating to himself and in the possession of any hospital or his medical practitioner; or

[Para. (*c*) added by s. 10 (1) (*e*) of Act No. 69 of 1978.]

(*d*) if the claim in question has not been instituted by the claimant, or on behalf of the claimant by—

(i) any person entitled to practise as an attorney within the Republic; or

(ii) any person who is in the service, or who is a representative, of a state or government or a provincial administration or the administration of the territory of South West Africa or any institution or body contemplated in section 84 (1) (*f*) of the Republic of South Africa Constitution Act, 1961 (Act No. 32 of 1961).

[Para. (*d*) added by s. 10 (1) (*e*) of Act No. 69 of 1978.]

24. Prescription of claim.—(1) (*a*) Notwithstanding the provisions of any other law relating to prescription, but subject to the provisions of paragraph (*b*) of this subsection, the right to claim compensation under section 21 from an authorized insurer shall become prescribed upon the expiration of a period of two years from the date upon which the claim arose: Provided that prescription shall be suspended during the period of ninety days referred to in section 25 (2).

(*b*) Prescription of a claim for compensation under section 21 shall not run against—

(i) a minor;

(ii) any person detained as a patient in terms of the provisions of the Mental Health Act, 1973 (Act No. 18 of 1973); or

(iii) a person under curatorship.

[Sub-s. (1) substituted by s. 11 (1) (*a*) of Act No. 69 of 1978.]

(2) (*a*) If a third party's claim for compensation has become prescribed under subsection (1) of this section and a court having jurisdiction in respect of such claim is satisfied, upon application by the third party concerned—

(i) where the claim became prescribed before compliance by the third party with the provisions of section 25 (1), that by reason of special circumstances he or, if he instructed any other person to comply with those provisions on his behalf, such person could not reasonably have been expected to comply with the said provisions before the date on which the claim became prescribed; or

[Sub-para. (i) substituted by s. 11 (1) (*b*) of Act No. 69 of 1978.]

(ii) where the claim became prescribed after compliance by him with the said provisions, that by reason of special circumstances he or, if he instructed any other person to act on his behalf in this connection, such person could not reasonably have been expected to serve any process, by which the running of prescription could have been interrupted, on the authorized insurer before that date; and

[Sub-para. (ii) substituted by s. 11 (1) (*c*) of Act No. 69 of 1978.]

(iii) that the authorized insurer is not prepared to waive its right to invoke the prescription,

the court may grant leave to the third party to comply with the said provisions and serve process in any action for enforcement of the claim on the authorized insurer in accordance with the provisions of section 25 (2) before a date determined by the court, or, as the case may be, to serve such process on the authorized insurer before a date so determined.

(*b*) The court shall not grant an application referred to in paragraph (*a*) unless—

(i) the application is made within a period of ninety days after the date on which the claim became prescribed; and

(ii) the third party has given security to the satisfaction of the court for the costs of the authorized insurer in connection with the application.

(*c*) A plea of prescription in terms of subsection (1) shall not be upheld in any action in which the relevant process was served on an authorised insurer by virtue of leave granted under this subsection.

[Sub-s. (2) substituted by s. 50 (1) of Act No. 94 of 1974.]

(3) Notwithstanding the provisions of section 8 of the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), any right under subsection (1) (*b*) of that section to recover from an authorized insurer an amount which under that Act is required to be paid to a third party in circumstances other than those mentioned in section 22 (2) of this Act, shall for the purposes of subsection (1) (excluding the proviso) and subsection (2) of this section be deemed to be a right to claim compensation under section 21 of this Act arising on the same date as the claim of such third party under the last-mentioned section: Provided that if the recovery of any such amount has been debarred under this subsection, any compensation thereafter awarded to the third party under this Act shall be reduced by the amount in question.

25. **Procedure.**—(1) (*a*) A claim for compensation under section 21 shall be set out in the prescribed manner on a prescribed form which shall include provision for a medical report or reports, completed by the prescribed person or persons, in regard to the cause of the death or the nature and treatment of the bodily injury in connection with which the claim is instituted and for the prescribed supporting proof and particulars, and shall be sent by registered post or delivered by hand to the authorized insurer at its registered office or local branch office, and the authorized insurer shall, in the case of delivery by hand, at the time of the delivery acknowledge receipt thereof and of the date of such receipt in writing.

[Para. (*a*) substituted by s. 2 of Act No. 4 of 1983.]

(*b*) If an authorized insurer does not within 60 days after receipt of a claim so set out which was sent or delivered to the authorized insurer in terms of paragraph (*a*) within six months after the date of the occurrence causing the relevant bodily injury or death, object to the validity thereof, the claim shall be deemed to be valid in law in all respects.

[Sub-s. (1) substituted by s. 12 (1) (*a*) of Act No. 69 of 1978.]

(2) No such claims shall be enforceable by legal proceedings commenced by a summons served on the authorized insurer before the expiration of a period of ninety days as from the date on which the claim was sent or delivered by hand, as the case may be, to the authorized insurer as provided in subsection (1): Provided that if the authorized insurer repudiates in writing liability for the claim before the expiration of the said period,

the claimant may at any time after such repudiation serve summons on the authorized insurer.

[Sub-s. (2) amended by s. 12 (1) (*b*) of Act No. 69 of 1978.]

(3) An action to enforce such a claim may be brought in any court of otherwise competent jurisdiction within whose area of jurisdiction the occurrence which caused the injury or death took place.

26. Direct payment and recovery of certain incidental expenses.—(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 a hospital or nursing home or the treatment of or any service rendered or goods supplied to any person—

(*a*) the authorized 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 to as the 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 determined and the authorized insurer has not in terms of any agreement been released from its

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obligation to compensate the third party in respect of such costs, 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.

(2) (*a*) The right of action conferred by subsection (1) (*b*) may be exercised by the supplier by intervening in any legal proceedings instituted by the third party or, if no such proceedings have been instituted and subject *mutatis mutandis* to the provisions of section 25, by instituting legal proceedings at any time at which such proceedings 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.

(*b*) Where a supplier is by virtue of an agreement with a hospital authority precluded from recovering from a third party the costs due to him in respect of the treatment of or any service rendered or goods supplied to any person, the supplier shall, subject *mutatis mutandis* to the provisions of section 25, be entitled to recover from the authorized insurer concerned so much of such costs as the third party would have been entitled to recover from that insurer if the said impediment had not existed, and the right of action hereby conferred may be exercised by the supplier by instituting legal proceedings at any time when such legal proceedings could have been instituted by the third party.

[Para. (*b*) added by s. 13 of Act No. 69 of 1978.]

(3) Where—

(*a*) any person has claimed compensation under section 21 from an authorized insurer; and

(*b*) the compensation claimed could, if the insurer were liable for the payment thereof, have included any costs referred to in subsection (1); and

(*c*) the insurer has, without admitting any liability to compensate such person under that section, entered into an agreement to make any payment in respect of such claim whereby it has been released from any such liability; and

(*d*) the supplier has not, at the date of such agreement, exercised his right in respect of such costs in the manner prescribed by subsection (2),

the authorized insurer shall, subject to the provisions of subsections (4) and (5), pay to the supplier the amount of such costs incurred prior to the said date and due to the supplier, or the amount of two hundred rand, whichever is the lesser.

(4) If the authorized insurer has given notice in the prescribed manner that it has entered into the agreement referred to in subsection (3), it shall not in terms of that subsection be obliged to pay any amount in respect of such costs to any supplier who has not lodged a claim in writing with the authorized insurer prior to the expiration of a period of sixty days after the date of the notice.

(5) If claims whereof the amounts are not in dispute and exceed in the aggregate the sum of two hundred rand, have been lodged with the authorized insurer as contemplated in subsection (4) by two or more suppliers, the insurer shall pay to each claimant an amount which bears the same ratio to the sum of two hundred rand as the amount of his claim bears to the amount representing the aggregate of the amounts of all such claims.

27. Claim for compensation lies against authorized insurer only.—When a third party is entitled under section 21 to claim from an authorized insurer any compensation in respect of any loss or damage resulting from any bodily injury to or the death of any person caused by or arising out of the driving of a motor vehicle insured under this Act by the owner thereof or by any other person with the consent of the owner, that third party shall not be entitled to claim compensation in respect of that loss or damage from the owner or from the

person who drove the vehicle as aforesaid, or if that person drove the vehicle as a servant in the execution of his duty, from his employer, unless the authorized insurer concerned is unable to pay the compensation.

28. Right of recourse by insurer.—(1) When an authorized insurer has paid any compensation under section 21 or 26 it may, subject to the provisions of subsections (2) and (3) of this section, without having obtained a formal cession of the right of action, recover from the owner of the insured motor vehicle in question, or from any person whose negligence or other unlawful act caused the loss or damage in question, so much of the amount paid by way of compensation as the third party concerned could, but for the provisions of section 27, have recovered from the owner or from the person whose negligence or other unlawful act caused the loss or damage, as the case may be, if the authorized insurer had not paid any such compensation.

(2) The authorized insurer shall not have any such right of recourse against the owner of the insured motor vehicle—

(*a*) in any case where, at the time of the occurrence which gave rise to the payment of the compensation, the motor vehicle was being driven by a person other than the owner, unless—

(i) the said person was under the influence of intoxicating liquor or of a drug to such a degree that his condition was the sole cause of the said occurrence and the owner allowed him to drive the motor vehicle knowing that he was under the influence of intoxicating liquor or of a drug; or

(ii) the said person was driving the motor vehicle without holding a licence issued under the law relating to the licensing of drivers of motor vehicles, which he was required to hold, or the said person, being the holder of a learner's or other restricted licence issued under such law, failed, while he was driving the motor vehicle, to comply with the requirements or conditions of such learner's or restricted licence, and the owner allowed him to drive the motor vehicle knowing that he did not hold such a licence or that he failed to comply with the requirements or conditions of such learner's or restricted licence, as the case may be; or

(iii) .....

[Sub-para. (iii) deleted by s. 14 of Act No. 69 of 1978.]

(*b*) in any case where, at the time of the said occurrence, the said motor vehicle was being driven by the owner, unless—

(i) he was under the influence of intoxicating liquor or of a drug to such a degree that his condition was the sole cause of that occurrence; or

(ii) he was driving the motor vehicle without holding a licence issued under the law relating to the licensing of drivers of motor vehicles or, being the holder of a learner's or other restricted licence issued under such law, failed, while he was driving the motor vehicle, to comply with the requirements or conditions of such learner's or restricted licence; or

(iii) .....

[Sub-para. (iii) deleted by s. 14 of Act No. 69 of 1978.]

(*c*) in any case where neither paragraph (*a*) nor paragraph (*b*) applies, unless—

(i) the owner or his representative, in the said application, knowingly made a false statement in respect of any particular which would have justified the authorized insurer in refusing, on any ground referred to in section 17, to issue the declaration of insurance, and the unroadworthiness of the motor vehicle was the sole cause of the said occurrence; or

(ii) the owner has failed to comply with any requirement of section 20 (1) with reference to the said occurrence (the onus of proving that the authorized insurer could not reasonably within fourteen days after the occurrence have been informed of the occurrence and of the place and time thereof, shall be on the owner concerned), or has knowingly furnished the authorized insurer with false information relating to that occurrence.

(3) The provisions of subsection (2) (*b*) (i) and (ii) and (*c*) (ii) shall apply *mutatis mutandis* in respect of any right of recourse by the authorized insurer under subsection (1) against any person who, at the time of the occurrence which gave rise to the payment of the compensation, was driving the insured motor vehicle with the consent of its owner.

(4) When any person, state, government or body of persons referred to in section 3 (1) has paid compensation under section 21 or 26, he or it may, subject to the provisions of subsection (5), without having obtained a formal cession of the right of action, recover the amount of compensation so paid from any person whose negligence or other unlawful act caused the loss or damage in question.

(5) The provisions of subsection (4) shall not apply in respect of any right of recourse against any person who at the time of the occurrence which gave rise to the payment of compensation was driving the motor vehicle in the circumstances described in subsection (2) (*a*) (i) or (ii).

29. Security in lieu of insurance.—(1) For the purpose of being exempted from the provisions of section 2 (1), any person may deposit with the Minister a sum of—

(*a*) one hundred thousand rand if he is to be exempted in respect of a motor vehicle designed for the conveyance of more than eight persons, including the driver, which is used for the conveyance of persons for reward, or in respect of two or more such vehicles; or

(*b*) fifty thousand rand if he is to be exempted in respect of any other motor vehicle or two or more other motor vehicles,

or any security approved by the Minister which is in the opinion of the Minister of a value of not less than one hundred thousand rand or fifty thousand rand, as the case may be, or any sum of money and such security which together are in the opinion of the Minister of a value of not less than one hundred thousand rand or fifty thousand rand, as the case may be, and thereupon the Minister shall, upon payment by the said person of the sum of two rand, issue to him a certificate of exemption from the said provisions in respect of the class of vehicles in question.

(2) A person who has made such a deposit of a value of one hundred thousand rand shall be exempt in respect of all motor vehicles of which he is the owner.

(3) At the request of the holder of a valid certificate of exemption mentioned in subsection (1) (who is hereinafter referred to as a depositor), the Secretary shall furnish the depositor with a token of exemption from the provisions of section 2 (1), in a prescribed form and duly completed, for every motor vehicle which he owns or proposes to acquire, on payment by him of a fee of twenty-five cents for each such token.

(4) A depositor shall in the prescribed manner affix to every motor vehicle of which he is the owner and which is in use, a token mentioned in subsection (3) and shall keep it so affixed, and before alienating or abandoning a motor vehicle bearing such a token, he shall remove the token and as soon as may be thereafter, return it to the Secretary: Provided that if a motor vehicle of which a depositor is the owner bears any marking by which it can be identified as being owned by him, he may apply to the Minister for exemption from the requirement of affixing to it any token as aforesaid, and if the Minister grants the application the depositor shall be so exempted and shall, before alienating or abandoning any such motor vehicle, remove such marking.

(5) A depositor who fails to comply with any requirement of subsection (4) shall be guilty of an offence and liable on conviction to a fine not exceeding fifty rand.

(6) If in the opinion of the Minister the value of a deposit referred to in subsection (1) has fallen below the value required by that subsection in respect of the deposit in question (hereinafter referred to as the required value) the Minister shall direct the depositor concerned by a letter delivered to him or by a registered letter sent through the post, to deposit a sum of money or further security to make up the deficiency, and if the depositor fails to comply with that direction within a period of ten days as from the date upon which the said letter was delivered or posted to him, his certificate of exemption mentioned in that subsection and every token of exemption mentioned in subsection (3) which was issued to him shall become void.

(7) If in the opinion of the Minister the value of any such deposit exceeds the required value, the Minister shall, at the request of the depositor concerned, return to him so much of the deposit as exceeds the required value.

(8) A depositor may substitute for any security which he has deposited in terms of subsection (1) or for any part thereof, any other security approved by the Minister, provided the total value of the deposit after the substitution is, in the opinion of the Minister, not less than the required value.

(9) At the request of a depositor and upon the return by him of the certificate of exemption mentioned in subsection (1) and of every token of exemption furnished to him in terms of subsection (3), which he has in his possession, and (in the case of a depositor who has been exempted under subsection (4) from the requirements of affixing any token to any motor vehicle which bears any marking referred to in that subsection) upon proof to the satisfaction of the Minister that such marking has been removed, the Minister shall return his deposit to him, unless the Minister has reason to believe—

(*a*) that any person has preferred against the depositor a *bona fide* claim for compensation for any loss or damage which the claimant may have suffered as a result of any bodily injury to himself or the death of or bodily injury to any other person, which was caused by or arose out of the driving of a motor vehicle of which the depositor was the owner, and that the said claim has not been satisfied; or

(*b*) that any person intends to prefer such a claim against the depositor,

and upon the return of the deposit to the depositor, his exemption from the provisions of section 2 (1) shall cease and every token of exemption mentioned in subsection (3) of this section which was furnished to him shall become void.

(10) Subject to the provisions of subsection (9), the Minister shall hold a deposit made in terms of subsection (1) as security for the payment of compensation mentioned in section 3 (1) for which the depositor concerned may become liable and for any costs incurred in recovering such compensation, and no claim against the depositor other than a claim for such compensation and such costs shall be paid out of the said deposit, except in so far as its value exceeds the required value.

(11) The manner in which such a deposit shall be made available for the payment of the compensation and costs mentioned in subsection (10), and the method of apportioning the deposit between different persons entitled to such compensation and costs, shall be as prescribed.

(12) If a claim or part of a claim has been paid out of such a deposit in the prescribed manner and the value of the deposit is after such payment less than the required value, the certificate of exemption mentioned in subsection (1) and every token of exemption mentioned in subsection (3) which was issued to the depositor concerned shall become void.

(13) When a certificate of exemption has become void in terms of subsection (6) or (12), the Minister shall direct the depositor concerned to return to him the said certificate

and every token of exemption which is in his possession and (in the case of a depositor who has been exempted under subsection (4) from the requirement of affixing any token to any motor vehicle which bears any marking referred to in that subsection) to remove such marking from that motor vehicle.

(14) A depositor who fails to comply with a direction given under subsection (13) shall be guilty of an offence and liable on conviction to a fine not exceeding fifty rand.

(15) The Minister shall invest any sum of money deposited in terms of subsection (1) or (6) in the manner in which moneys deposited with the Treasury as security given by insurers under the law relating to insurance, are ordinarily invested, and shall pay over to the depositor concerned the interest derived from such investment and any interest earned by any security other than money which he may have so deposited.

30. Unauthorized insurer bound by his undertaking.—Any person who is not an authorized insurer and who has issued to the owner of a motor vehicle a declaration of insurance relating to that vehicle and purporting to have been issued in terms of section 12, 13 or 14, shall for the purposes of sections 21 to 26 inclusive and section 28 be deemed to be an authorized insurer and to have insured that motor vehicle under this Act.

31. Appointment of inspectors.—The Minister may, subject to the laws governing the public service, appoint any persons to act as inspectors in connection with the administration of this Act, and such persons shall have such powers, duties and functions as may be prescribed.

32. Regulations.—(1) The Minister may make regulations—

(*a*) prescribing the powers and duties in connection with the administration of this Act, which may be exercised or shall be performed by any person who is an authorized officer as defined in section 1 of the Road Transportation Act, 1977 (Act No. 74 of 1977);

[Para. (*a*) substituted by s. 15 of Act No. 69 of 1978.]

(*b*) in consultation with the Minister of Social Welfare and Pensions, prescribing circumstances under which compensation payable to any person under section 21 shall be paid by the authorized insurer concerned to the Secretary for Social Welfare and Pensions, and the manner in which any moneys so paid to the said Secretary shall be dealt with by him;

(*c*) after consultation with the Administrators of the four provinces and the territory of South-West Africa, the Medical Association of South Africa and the Dental Association of South Africa, prescribing the tariff of fees in respect of the accommodation of any person in a hospital or nursing home or any treatment of or service rendered or goods supplied to any person, which may be claimed under section 21 or 26 from any authorized insurer obliged in terms of section 21 to compensate any person for the costs of such accommodation or treatment or of the rendering of such service or the supply of such goods;

(*d*) prescribing matters in respect of which statistics are to be kept by authorized insurers, the manner in which such statistics shall be compiled, and the body or State Department to which and the time when statistics so kept and such information in connection therewith as the Minister may call for from time to time, shall be made available;

(*e*) substituting for any insurance period or any month specified in this Act, any other insurance period or month, or for the amount mentioned in section 26 (3) and (5), any other amount;

(*f*) including the name or description of any person, body of persons, authority or institution in paragraph (*a*) of subsection (2) of section 2 for the purpose of exempting him or it from the provisions of subsection (1) of that section;

(*g*) in connection with the payment of compensation by the MVA Fund to any person under subsection (2) of section 7, including regulations prescribing the circumstances under which, or the conditions or restrictions subject to which or the cases in which, the MVA Fund shall be obliged to make a payment under that subsection, or the manner in which any dispute in regard to such an obligation shall be settled, or conditions or requirements for the vesting of any right to institute legal proceedings against the MVA Fund in connection with such an obligation;

(*h*) prescribing the forms provided for in this Act, the persons by whom such forms shall be completed, the form of a token to identify any motor vehicle referred to in section 2 (2) (*a*) or (*b*) and the manner in which such form is to be attached to any such motor vehicle,

[Para. (*h*) substituted by s. 3 of Act No. 4 of 1983.]

or prescribing or otherwise dealing with any matter which may in terms of any provision of this Act be prescribed or otherwise dealt with by regulation.

(2) Any regulation made under subsection (1) may provide for penalties not exceeding a fine of fifty rand or imprisonment for a period of three months for any contravention thereof or failure to comply therewith or with any order or direction given thereunder.

33. Delegation of powers.—The Minister may delegate any power conferred on him by this Act, to the Secretary or to any deputy secretary in the Department of Transport or to the manager or the assistant manager of the MVA Fund.

34. Application of certain laws.—The provisions of any law in force in any area which deals with the production to a proper authority, or with the falsification, fabrication, alteration, defacement or improper use, in any such area, of licences, certificates, tokens or marks relating to motor vehicles, shall *mutatis mutandis* apply in that area in connection with the production, falsification, fabrication, alteration, defacement or improper use of declaration of insurance, token of insurance or token of exemption issued under this Act or a token issued in terms of any regulation, and apart from any such provision, any person who attaches to a motor vehicle, or who drives a motor vehicle to which is attached, any such token as aforesaid which does not relate to that motor vehicle, or a false or a fabricated or altered token, shall be guilty of an offence and liable *mutatis mutandis* to the penalties prescribed in section 2 (3) and (4).

35. Application of Act in South-West Africa.—This Act and any amendment thereof shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel.

36. Repeal of laws.—Subject to the provisions of section 37, the laws specified in the Schedule are hereby repealed.

37. Savings.—(1) Subject to the provisions of subsection (2), any motor vehicle which at the commencement of this Act is insured under a provision of a law repealed by section 36, shall be deemed to be duly insured under the corresponding provisions of this Act until the insurance of that motor vehicle terminates under section 19, and any other thing done in terms of a law so repealed shall be presumed to have been done in terms of the corresponding provision of this Act.

(2) The provisions of this Act shall not apply with reference to a claim for compensation which arose before the commencement of this Act under a law repealed by section 36, and any such claim shall be dealt with as if this Act had not been passed: Provided that—

(*a*) if payment of such claim has not before such commencement been demanded in terms of any provision of a law so repealed corresponding to subsection (1) of section 25 of this Act, the provisions of the said section 25 and the proviso to section 24 (1) of this Act shall apply with reference to that claim as if it were a claim under section 21 of this Act;

(*b*) section 24 (2) shall apply with reference to any such claim which has not become prescribed before such commencement, as if it were a claim under the said section 21.

38. Short title.—This Act shall be called the Compulsory Motor Vehicle Insurance Act, 1972.

Schedule

Number of Act and Year	Short Title
Act No. 29 of 1942	Motor Vehicle Insurance Act, 1942.
Act No. 27 of 1952	Motor Vehicle Insurance Amendment Act, 1952.
Act No. 31 of 1959	Motor Vehicle Insurance Amendment Act, 1959.
Act No. 60 of 1964	Motor Vehicle Insurance Amendment Act, 1964.
Act No. 14 of 1966	Motor Vehicle Insurance Amendment Act, 1966.
Act No. 46 of 1966	Motor Vehicle Insurance Further Amendment Act, 1966.
Act No. 30 of 1969	Motor Vehicle Insurance Amendment Act, 1969.

APPENDIX VIII

1972 REGULATIONS

SCHEDULE

INDEX

Regulation No. — *Subject*

1. Title.
2. Definitions.
3. Savings.
4. Insurance of motor vehicles registered at a place outside the Republic.
5. MVA Fund's liability in respect of certain loss or damage caused by uninsured motor vehicles.
6. MVA Fund's liability in respect of certain loss or damage caused by unidentified motor vehicles.
7. Appointment to Premiums Committee of members to represent authorised insurers.
8. Manner of conduct of business of the Premiums Committee.
9. Assigning of powers, duties and functions to officers of the Premiums Committee.
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16. Claim form and medical report.
17. Notice by an authorised insurer of an agreement to pay an amount without admission of liability in respect of a claim.
18. Security in lieu of insurance.
19. Duties and powers of inspectors and authorised officers.
20. Statistics.

TITLE

1. These regulations shall be cited as the Motor Vehicle Insurance Regulations, 1972.

DEFINITIONS

2. In these regulations "**the Act**" means the Compulsory Motor Vehicle Insurance Act, 1972 (Act 56 of 1972), and, unless the context otherwise indicates, any expression used in these regulations to which a meaning has been assigned in the Act, bears the meaning so assigned, and—

(*a*) **"authorised officer"** means an authorised officer as defined in section 1 of the Road Transportation Act, 1977 (Act 74 of 1977);

(*b*) **"inspector"** means a person appointed in terms of section 31 of the Act.

(*c*) . . .

SAVINGS

3. (1) Anything done or deemed to have been done in terms of or by virtue of any provision of the Motor Vehicle Insurance Regulations, 1964, shall be deemed to have been done in terms of or by virtue of the corresponding provision in these regulations.

(2) The provisions of regulations 5 and 6 are not applicable to claims which arose out of the provisions of the agreement between the Minister of Transport and the Motorvoertuigassuransiefonds as published in Government Notice R.911, dated 10 June, 1966, prior to the commencement of the Act: Provided that if payment of such claims has not before the commencement of these regulations been demanded, the provisions of regulations 5 and 6 shall apply to such claims.

INSURANCE OF MOTOR VEHICLES REGISTERED AT A PLACE OUTSIDE THE REPUBLIC

4. (1) In accordance with the provisions of section 2 (2) (*b*) of the Act no motor vehicle registered at a place outside the Republic in terms of any law in force at that place shall be driven in the Republic unless—

(*a*) the owner thereof or any other person permitted by him to drive the said vehicle is in possession of a declaration of insurance in the Form MVA 10 set out in the Annex hereto, issued by an authorised insurer or group of authorised insurers in terms of section 12 of the Act for the whole of the period during which the motor vehicle is to be driven in the Republic; or

(*b*) the owner thereof or any other person permitted by him to drive the said vehicle is in possession of a declaration of insurance issued in respect of such vehicle in—

(i) Botswana under and by virtue of the provisions of any law relating to compulsory motor vehicle insurance similar to that in force in the Republic of South Africa, in operation in that territory; or

(ii) Lesotho under and by virtue of the provisions of any law relating to compulsory motor vehicle insurance similar to that in force in the Republic of South Africa, in operation in that territory;

by an insurance company authorised to issue such declaration of insurance under the said legal provisions: Provided that such declaration of insurance shall be issued subject to an undertaking by such insurance company to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by the Act; or

(iii) Swaziland under and by virtue of the provisions of any law relating to compulsory motor vehicle insurance similar to that in force in the Republic of South Africa, in operation in that territory, by the Swaziland Royal Insurance Corporation: Provided that such declaration of insurance shall be issued subject to an undertaking by the said Corporation to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by the Act;

(iv) Transkei by virtue of the provisions of any law relating to compulsory motor vehicle insurance similar to that in force in the Republic of South Africa in operation in that territory: Provided that the Transkeian Motor Vehicle Assurance Fund furnishes an undertaking guaranteeing the obligations of authorised insurers arising out of the use in the Republic of South Africa of motor vehicles insured in Transkei in terms of such law;

(v) Bophuthatswana by virtue of the provisions of any law relating to compulsory motor vehicle insurance similar to that in force in the Republic of South Africa in operation in that territory: Provided that the Bophuthatswana Motor Vehicle Assurance Fund furnishes an undertaking guaranteeing the obligations of authorised insurers arising out of the use in the Republic of South Africa of motor vehicles insured in Bophuthatswana in terms of such law;

(vi) the Ciskei under and by virtue of the provisions of any law relating to compulsory motor vehicle insurance similar to that in force in the Republic of South Africa, in operation in that territory, by the Motor Vehicle Assurance Fund of the Ciskei: Provided that such declaration of insurance shall be issued subject to an undertaking by the said Fund to pay compensation in respect of loss or damage caused by such motor vehicle to any person whomsoever in the circumstances and subject to the conditions prescribed by the Act.

(*c*) the owner is the holder of a valid certificate of exemption issued in terms of any law referred to in paragraph (*b*) above in respect of the said vehicle and has undertaken that the deposit made by him in respect of such certificate of exemption shall *mutatis mutandis* be regarded as a deposit made in terms of section 29 (1) of the Act while the said vehicle is in the Republic.

(2) When an authorised insurer or group of authorised insurers issues an insurance declaration in respect of a motor vehicle in terms of subregulation (1) (*a*) above it shall issue together with that declaration a token of insurance in the Form MVA 8 set out in the Annex hereto.

(3) A token of exemption in the Form MVA 6 set out in the Annex hereto shall be issued in respect of a motor vehicle owned by the holder of a valid certificate of exemption referred to in subregulation (1) (*c*) above.

(4) An application to an authorised insurer or a group of authorised insurers for a declaration of insurance referred to in subregulation (1) (*a*) above shall be in the Form MVA 9 set out in the Annex hereto.

MVA Fund's Liability in respect of Certain Loss or Damage caused by Uninsured Motor Vehicles

5. (1) In terms of section 7 (2) of the Act the MVA Fund may utilise its funds to compensate any person for loss or damage suffered by him as a result of the death of or bodily injury to any person caused by or arising out of the driving of a motor vehicle which is not insured as required by the Act (hereinafter referred to as "the uninsured motor vehicle") and in respect of which compensation would have been payable in terms of section 21 of the Act, had such vehicle been so insured, under the following circumstances and conditions:

(*a*) When judgment is obtained against the owner or driver of an uninsured motor vehicle in respect of death or bodily injury for which compensation would have been payable in terms of section 21 of the Act had such vehicle been so insured and the judgment is not satisfied in full within 21 days of the date upon which the person or persons in whose favour the judgment was given became entitled to enforce it, the MVA Fund shall, subject to the provisions of paragraph (*b*) hereunder and subregulations (2), (3) and (4) of this regulation, pay to the person or persons in whose favour the judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid death or bodily injury, including taxed costs (or such proportion thereof as relates to the aforesaid death or bodily injury) whatever may be the cause of the failure of the judgment debtor to satisfy the judgment: Provided that—

(i) the liability of the MVA Fund shall not in any case exceed the amount for which an authorised insurer would have been liable had the motor vehicle been so insured;

(ii) no liability shall attach to the MVA Fund unless the judgment referred to herein is obtained as a result of a summons served within two years and 90 days of the date of the occurrence which gave rise to the aforesaid death or bodily injury, which period shall be applicable to all claimants irrespective of whether they are subject to any legal disability;

(iii) the MVA Fund shall not by virtue of this regulation be obliged to make any payment to the Government of the Republic of South Africa in any department, including the South African Railways and Harbours Administration, any provincial administration, the Administration of South-West Africa, the Workmen's Compensation Commissioner, the National Transport Commission, a Black authority, any local authority mentioned in section 70 of the Workmen's Compensation Act, 1941 (Act 30 of 1941), as amended, or to any other employer by whom compensation is payable in terms of the last-mentioned Act;

(iv) the MVA Fund shall not be liable for any money paid or payable to any medical practitioner for medical services rendered by him, where such services were rendered by the medical practitioner acting in the course and within the scope of his service with any provincial hospital or with any body or authority referred to in subparagraph (iii) above, where and in so far as the above-mentioned provincial hospital, body or authority is liable to pay for such medical services;

(v) the provisions of sections 21 (1C) and 23 of the Act shall *mutatis mutandis* apply to the liability of the MVA Fund in terms of this regulation.

(*b*) The liability of the MVA Fund in respect of claims arising out of the provisions of this regulation is subject to the following further conditions:

(i) Notice of the institution or intention to institute proceedings against the owner or driver of an uninsured motor vehicle shall in terms of the provisions of section 25 (1) of the Act [except that the Form MVA 22 referred to in regulation 16 (2) shall be substituted for the Form MVA 13 referred to in regulation 16 (1)] be given to the MVA Fund not later than 90 days before the commencement of such proceedings and a copy of the summons or summonses issued in connection with

such proceedings shall be delivered to the MVA Fund on or before the day of service thereof on the owner or driver of the uninsured motor vehicle and thereafter copies of all pleadings relating to such proceedings shall be sent as soon as possible by registered post to the MVA Fund.

(ii) If the owner or driver of an uninsured motor vehicle has not entered appearance to defend the action within the prescribed period or if for some reason application is made to the court for a judgment by default, the third party or the claimant in the action shall give the MVA Fund written notification not later than fourteen days prior to the date of the hearing of such application and permit it to join the proceedings as a party at any stage of the proceedings and to exercise its rights in accordance with the provisions of this subregulation. In the event of the court refusing the MVA Fund's application to join the proceedings the liability of the MVA Fund shall lapse.

(iii) In the event of another owner or driver of an uninsured motor vehicle being joined as co-defendant otherwise than at the instance of the claimant in the proceedings referred to in subparagraph (i) above, or being granted leave to intervene in such proceedings, the claimant shall give notice to the MVA Fund of such joinder or intervention as soon as possible and in any case within 14 days of that event.

(iv) If a claimant or a defendant requires that an owner or a driver of an uninsured motor vehicle be joined as a co-defendant in proceedings instituted against an authorised insurer or against any other owner or driver of an uninsured motor vehicle by the claimant, the provisions of subparagraphs (i), (ii) and (iii) above shall *mutatis mutandis* be applicable.

(v) During the period of 90 days referred to in subparagraph (i) above and at any time before or after this period, the MVA Fund shall have the right to require the claimant to take all reasonable steps to enable the MVA Fund to investigate the circumstances which gave rise to the claimant's claim, as well as the compensation claimed by the claimant. These steps may include the claimant's subjecting himself (and/or any person on whose behalf he is claiming), at the expense of the MVA Fund, to such medical examination or examinations as may be reasonably required by the MVA Fund, as well as supplying copies of all medical and other reports and accounts relating to the claim(s) and also, if required, a written authorisation by the claimant permitting the inspection by or on behalf of the MVA Fund of all records in possession of any hospital, doctor or any other person and at the request of the MVA Fund or any of the latter's representatives or any persons thus instructed by the MVA Fund, submitting himself, at a place indicated by the MVA Fund, to interrogation by such parties and at the request of the MVA Fund or such representative or such other person making a sworn statement setting out in full the circumstances of the alleged occurrence on which his claim is based.

(vi) If the MVA Fund itself joins any proceedings contemplated in this regulation, it shall have the right to use any defence which is available

to, or which would have been available to the owner or the driver of the uninsured motor vehicle.

(vii) If required by the MVA Fund, and provided that the MVA Fund grants full indemnity for costs, the claimant shall institute proceedings against or join in any proceedings, any person, company, partnership or body designated by the MVA Fund, at its absolute discretion, as the party who is in any way wholly or partially responsible for the loss or damage allegedly suffered by the claimant, and the latter shall, if required by the MVA Fund, continue with such proceedings until judgment has been given. All judgments granted in favour of the claimant in terms of this subparagraph shall, if required by the MVA Fund, be ceded to the MVA Fund or its authorised representative against payment by the MVA Fund.

(viii) At the same time that any compensation is paid by the MVA Fund to the claimant in terms of this regulation and as a consideration for such payment, the MVA Fund shall be entitled to a cession of all claims which the claimant may have against any person, partnership, company or body in respect of damages (contemplated by the Act) sustained by the claimant and caused by the accident concerned.

(2) In the event of a dispute as to the reasonableness of a requirement by the MVA Fund that any particular steps should be taken by the third party (which steps may include his submission to such medical examination or examinations and the furnishing of such information as the MVA Fund may require), it shall be referred to the Minister whose decision shall be final.

(3) During the course of proceedings against the owner or driver of an uninsured motor vehicle, the MVA Fund shall be entitled to tender payment of an amount to the claimant at any stage of the proceedings and if the claimant thereafter continues with the action and does not obtain from the court an award of a greater amount than the amount which the MVA Fund has tendered, all costs of the action after the date of tender shall not form part of the MVA Fund's liability to the claimant.

(3A) On receipt of a notice of the institution or intention to institute proceedings mentioned in subregulation (1) (*b*) (i), and before a summons has been served on the owner or driver of the uninsured motor vehicle, the MVA Fund shall have the right to request the claimant in writing to proceed against the MVA Fund in the place of the owner or driver concerned, in which event the requirements and conditions contained in this regulation shall *mutatis mutandis* be applicable to the claimant and the MVA Fund.

(4) Claims arising out of the use of motor vehicles owned by any state or government or a provincial council or statutory body as mentioned in section 2 (2) (*a*) of the Act, or by any owner mentioned in section 2 (2) (*c*) of the Act, or additional statutory bodies or additional persons as may by subsequent amendment be added to the said section 2 (2) (*a*), shall be outside the scope of these provisions.

(5) The MVA Fund shall take such measures to ensure that persons having claims in respect of death or bodily injury caused by or arising out of the use of uninsured motor vehicles by persons staying temporarily in the Republic or by persons for whom they may be responsible and against whom such claims cannot be enforced, shall not suffer any greater disadvantage than a third party having such claims in

respect of the death of or bodily injury to any person caused by or arising out of the use of uninsured motor vehicles by persons permanently resident in the Republic.

(6) Neither the Minister nor the MVA Fund shall be obliged to give reasons for any decision taken in terms of subregulation (2) above.

MVA FUND'S LIABILITY IN RESPECT OF CERTAIN LOSS OR DAMAGE CAUSED BY UNIDENTIFIED MOTOR VEHICLES

6. (1) In terms of section 7 (2) of the Act the MVA Fund may utilise its funds to compensate any person for loss or damage suffered by him as a result of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle in a case where the owner or driver of such motor vehicle and the authorised insurer which may have insured such motor vehicle in terms of the Act cannot be identified, under the following circumstances and conditions:

(*a*) Whenever a third party as referred to in section 21 of the Act (hereinafter referred to as the "claimant") is unable to obtain judgment in terms of that section or to obtain such a judgment as referred to in regulation 5 owing to his inability to identify the owner or the driver of the motor vehicle and the authorised insurer which may in terms of the Act have insured the motor vehicle (hereinafter referred to as the unidentified motor vehicle), the driving of which caused loss or damage or out of the driving of which loss or damage arose to such claimant: Provided that—

(i) the aforesaid death or bodily injury arose out of the negligent or unlawful driving of the unidentified motor vehicle and proof thereof to the satisfaction of the MVA Fund is produced;

(ii) evidence to the satisfaction of the MVA Fund is produced that the claimant took all reasonable steps to identify the owner or the driver of the unidentified motor vehicle and the authorised insurer which may have insured such vehicle in terms of the Act;

(iii) the claimant's inability to obtain judgment in terms of section 21 of the Act or regulation 5 is not due to any act or omission on his part;

(iv) the MVA Fund shall not incur any liability in terms of this regulation where the unidentified motor vehicle (including anything on, in or attached to it) did not come into physical contact with the injured or deceased person or with another person, vehicle, conveyance or any other object or objects which directly or indirectly caused or contributed to the injury or death.

(*b*) The liability of the MVA Fund in respect of claims arising out of the provisions of this regulation is subject to the following further conditions:

(i) A claim for compensation for loss or damage to the aforesaid claimant shall be delivered to the MVA Fund within two years of the date of the occurrence which gave rise to the aforesaid death or bodily injury, *mutatis mutandis* the provisions of section 25 (1) of the Act [except that the Form MVA 22 referred to in regulation 16 (2) shall be substituted for the Form MVA 13 referred to in regulation 16 (1)]. This provision shall apply to all third parties and claimants, irrespective of whether they are subject to any legal disability.

(ii) The MVA Fund shall within 90 days of receipt of the claim referred to in subparagraph (i) above, notify the claimant in writing whether it accepts or rejects liability for the claim, or whether it consents to be sued in the matter. If the MVA Fund rejects liability for the claim or fails to notify the claimant of its decision within the 90 days, the claimant shall be entitled to submit written representations to the Minister for permission to sue the MVA Fund and a copy of such representations shall be supplied to the MVA Fund. Such representations shall also contain full details of the circumstances which gave rise to the claim in question. The Minister shall be entitled to request such further information from the claimant and/or the MVA Fund and/or to require the claimant to institute such further enquiries or to take such further steps as he (the Minister) may direct. Thereafter the Minister shall certify in writing whether or not the claimant may sue the MVA Fund. The Minister's decision shall be final and binding on all parties concerned.

(iii) The MVA Fund shall not incur any liability unless the summons arising out of the provisions of subparagraph (ii) above has been properly served on the MVA Fund within two years and 90 days of the date of the occurrence which gave rise to the aforesaid death or bodily injury: Provided that prescription shall not run against the claimant during the period reckoned from the date on which the claimant's representations reached the Minister until the date on which the Minister's decision whether the claimant may or may not sue the MVA Fund is conveyed by written notification to the claimant or his representative.

(*c*) In any action in terms of this regulation, a certificate by the Minister or the written consent of the MVA Fund in terms of paragraph (*b*) (ii) shall establish the claimant's right to sue the MVA Fund, whereupon the issues before the court shall, save for the provisions of this regulation, *mutatis mutandis* be the same as they would have been had the MVA Fund been an authorised insurer which had insured the unidentified vehicle in terms of the Act. Such a certificate by the Minister or the consent of the MVA Fund shall not constitute an admission of the liability of the MVA Fund in respect of the claim concerned.

(*d*) If so required by the MVA Fund and provided the MVA Fund grants the claimant full indemnity as regards costs, the claimant suing the MVA Fund in terms of this regulation shall sue in the same action all such other persons as the MVA Fund may require him to sue.

(*e*) The MVA Fund shall at any time after having received a claim in terms of paragraph (*b*) (i) above be entitled to require any person who has suffered bodily injury giving rise to the claimant's claim—

(i) to submit, at the expense of the MVA Fund, to a medical examination or examinations by doctors appointed by the MVA Fund: Provided that, if a person to be so examined contends that any requirement in this regard is unreasonable, he shall be entitled to appeal to the Minister, whose decision shall be final;

(ii) to submit, at the request of the MVA Fund or any of the latter's representatives or any persons thus instructed by the MVA Fund, to interrogation by such parties at a place indicated by the MVA Fund and,

at the request of the MVA Fund or such a representative or such other person, to make a sworn statement setting out in full the circumstances of the alleged occurrence on which his claim is based;

(iii) to supply the MVA Fund in writing with such further particulars as the MVA Fund may require in respect of the occurrence or accident, and of how these occurred;

(iv) to supply the MVA Fund, if required by it, with copies of all medical reports, X-ray photographs and/or other reports and accounts which have a bearing on the claim and which are in his possession or in the possession of his agents;

(v) to give the MVA Fund, if required by it, a written authorisation for an inspection by or on behalf of the MVA Fund, of all records concerning himself which are in possession of any hospital or any of his doctors.

(*f*) At any time after making payment to the claimant in settlement of a claim under this regulation, whether in terms of a judgment or otherwise, and in consideration of the said payment, the MVA Fund shall be entitled to cession of any claim which the claimant may have against the owner or driver of the unidentified motor vehicle, or any person responsible in law for the acts of such owner or driver, or the authorised insurer which insured the unidentified motor vehicle.

(*g*) subparagraphs (i), (iii), (iv) and (v) of regulation 5 (1) (*a*) and subparagraphs (ii), (iii), (iv) and (vii) of regulation 5 (1) (*b*) shall *mutatis mutandis* apply to all claims and actions instituted in terms of this regulation.

(2) If any dispute should arise regarding any matter relating to the provisions of this regulation, such dispute shall be referred to the Minister whose decision shall be final.

(3) Neither the Minister nor the MVA Fund shall be obliged to give reasons for any decision taken in terms of subregulations (1) (*b*) (ii) and (1) (*e*) (i) and subregulation (2) of this regulation.

Appointment to Premiums Committee of Members to represent Authorised Insurers

7. (1) Before appointing any person under section 8 (2) of the Act to represent authorised insurers on the premiums committee the Minister shall cause each authorised insurer to be notified in writing of the number of persons to be so appointed and that the names of the insurer's nominee or alternate nominee (to the number indicated by the Minister) for each appointment to be made and any representations the insurer may wish to make in regard to such appointment may be submitted in writing to the Secretary for Transport on or before a date to be specified in the notification.

(2) After a date specified in the notification and after considering any representations submitted under subregulation (1), the Minister may make the required appointments from amongst the persons whose names have been so submitted as nominees of the authorised insurers and such other persons as the Minister may deem suitable.

(3) Whenever a member of the premiums committee has, without its leave, been absent from three consecutive meetings thereof, he shall cease to be a member.

MANNER OF CONDUCT OF BUSINESS OF THE PREMIUMS COMMITTEE

8. (1) Meetings of the premiums committee shall be held at such times and places as may from time to time be determined by the chairman.

(2) At any meeting of the premiums committee four members shall constitute a quorum.

(3) The decision of a majority of the members of the premiums committee present at any meeting thereof shall constitute the decision of the committee: Provided that in the event of an equality of votes, the chairman shall have a casting vote in addition to his deliberative vote.

ASSIGNING OF POWERS, DUTIES AND FUNCTIONS TO OFFICERS OF THE PREMIUMS COMMITTEE

9. (1) The Minister may in writing under his hand assign to any officer referred to in section 8 (6) of the Act any or all of the powers, duties and functions referred to in section 8 (7) of the Act or in this regulation.

(2) Before demanding the production of any books, documents or accounts from any authorised insurer under powers so assigned, such officer shall give 48 hours notice to the insurer in question of the time when and place where such books, documents or accounts have to be produced.

(3) Any books, documents or accounts removed by such officer from any premises of an authorised insurer under powers so assigned, shall be returned to such insurer immediately after such officer has examined them or made extracts therefrom or copies thereof.

(4) Any officer who examines or has examined any book, document or account of an authorised insurer, under powers so assigned, may demand from any officer of the insurer in question an explanation of the contents thereof and any entry therein.

(5) Any authorised insurer and any officer of an authorised insurer who fails to comply with any demand made in terms of this regulation, shall be guilty of an offence and liable on conviction to a fine not exceeding R50 or imprisonment for a period not exceeding three months.

APPLICATION FOR INSURANCE

10. (1) (*a*) An application under section 12 (1) of the Act for the insurance of a particular motor vehicle shall be made by the owner or his authorised representative in the form MVA 1 set out in the Annex hereto.

(*b*) .....

(*c*) .....

(2) An application under section 13 (1) of the Act by a motor dealer or his authorised representative for the insurance of motor vehicles which are in his possession in connection with his business as a motor dealer and which must by law display motor dealer's registration plates when driven or operated on a public road or street

or in any other place to which the public has access, must be made in the Form MVA 2 set out in the Annex hereto.

(3) An application under section 14 (1) of the Act by the holder of a motor transport licence or his authorised representative for the insurance of motor vehicles which are in his possession in connection with his business of delivering new motor vehicles by road and which must by law display motor transport licence holder's registration number plates when driven or operated on a public road or street or in any other place to which the public has access, must be made in the Form MVA 2A set out in the Annex hereto.

INSURANCE FOR A SPECIFIC PURPOSE OF USE

10A. A motor vehicle which is required to be insured for a specific purpose of use in terms of the Act shall be insured for that purpose under the applicable classification in the Tariff of Premiums as determined from time to time in terms of section 9 of the Act.

DECLARATION OF INSURANCE

11. (1) A declaration of insurance issued by an authorised insurer in terms of section 12 (2) of the Act shall be in the Form MVA 3 set out in the Annex hereto.

(2) A declaration of insurance issued by an authorised insurer in terms of section 13 of the Act to a motor dealer shall be in the Form MVA 4 set out in the Annex hereto.

(3) A declaration of insurance issued by an authorised insurer in terms of section 14 of the Act to the holder of a motor transport licence, shall be in the Form MVA 4A set out in the Annex hereto.

TOKENS OF INSURANCE

12. (1) A token of insurance issued under section 15 (1) (*a*) of the Act to the owner of a specifically insured motor vehicle other than a motor vehicle operated under a special permit or a temporary permit shall be in the Form MVA 5 set out in the Annex hereto.

(2) A token of insurance issued in terms of section 15 (1) (*b*) of the Act to a motor dealer or the holder of a motor transport licence shall be in the Form MVA 5A set out in the Annex hereto.

(3) A token of insurance issued under section 15 (1) (*a*) relating to a motor vehicle which is operated under a special permit or a temporary permit or which requires to be insured for a temporary purpose only, shall be in the Form MVA 5B set out in the Annex hereto.

TOKEN OF EXEMPTION

13. The token of exemption issued in terms of section 29 (3) of the Act to the holder of an exemption certificate referred to in section 29 (1) of the Act, shall be in the Form MVA 6 set out in the Annex hereto.

TOKEN OF IDENTITY

14. (1) The token to identify any motor vehicle exempted from insurance in terms of section 2 (2) (*a*) of the Act, which requires to be prescribed by regulation

in terms of section 32 (1) (*h*) of the Act, shall be in the Form MVA 7 set out in the Annex hereto and shall be attached to the motor vehicle to which it relates in the manner prescribed by regulation 15: Provided that where the motor vehicle concerned bears any marking or registration number by which it can be identified as a vehicle exempted in terms of the provisions of section 2 (2) (*a*) of the Act, such marking or registration number shall be regarded as a token of identity for the purposes of the Act and this regulation.

(2) Tokens of identity shall be issued by the Secretary for Transport.

Manner of Attaching Tokens to Motor Vehicles

15. (1) Any token of insurance, token of exemption or token of identity issued in terms of the Act and regulation 14 in respect of a particular motor vehicle shall be attached to the front part of that motor vehicle in a conspicuous place so that the whole text is at all times conveniently and plainly visible from outside that motor vehicle on its left-hand side and such token shall throughout the duration of the insurance period for which it has been issued remain so attached and maintained in such condition that the whole text remains clearly legible.

(2) Any token of insurance issued in terms of section 15 (1) (*b*) of the Act in respect of motor vehicles operated under the authority of a motor dealer's licence or a motor transport licence, shall be attached to the motor dealer's or the motor transport licence holder's registration number plate to which it relates and to which the motor dealer's or the motor transport licence holder's clearance certificate issued to him by a licensing authority in accordance with the applicable law relating to the licensing of motor vehicles, must be attached when a motor vehicle must in terms of such law, display such registration number plate while driven on a public road or street or in any other place to which the public has access.

(3) All tokens which require to be attached to a motor vehicle or to the registration number plate of a motor vehicle in the manner prescribed in subregulations (1) and (2) above must be protected from direct exposure to weather conditions and if necessary be in a waterproof holder with a durable transparent substance covering the text.

Notice of Change of Ownership and Proof of Insurance

15A. A notice in terms of section 19 (2) and (4) of the Act of change of ownership of a motor vehicle shall be in the Form MVA 11 set out in the Annex hereto, which will also serve as proof of insurance.

Conditions for the Conveyance of certain Servicemen

15B. .....

Claim Form and Medical Report

16. (1) (*a*) (i) The claim form and medical report provided for in section 25 (1) of the Act shall be combined in the Form MVA 13 set out in the Annex hereto and shall be completed in all its particulars and accompanied by supporting vouchers and separate statements, where applicable. A clear reply shall be given to each question and if a question is not applicable the words "not applicable" shall be inserted.

A form on which ticks, dashes, deletions and alterations have been made and not confirmed by a signature shall not be regarded as properly completed. Precise details shall be given in respect of each item under the heading "Compensation claimed" and shall, where applicable, be accompanied by supporting vouchers.

(ii) Where a peson other than the claimant signs the claim form MVA 13, proof in writing that he is authorised to act as representative of the claimant shall be produced on request.

(*b*) (i) The medical report on the Form MVA 13 shall be completed by the medical practitioner who treated the deceased or injured person for the bodily injuries sustained by such person in the occurrence out of which the claim arises, or by the superintendent (or his representative) of the hospital where the deceased or injured person was treated for such bodily injuries: Provided that if the medical practitioner concerned fails to complete the medical report on request within a reasonable time and it becomes apparent that as a result of the passage of time the claim in question may become prescribed, the relevant medical report may be completed by another medical practitioner who has fully satisfied himself regarding the cause of the death or the nature and treatment of the bodily injuries in respect of which the claim is made.

(ii) Where a person is killed outright in a motor accident, the completion of the aforementioned medical report is not a requirement but in such an event the Form MVA 13 shall be accompanied by a copy of the inquest report in which it is clearly indicated that such person's death resulted from the accident to which the claim relates.

(2) The claim form and medical report provided for in regulations 5 and 6 shall be in the Form MVA 22 set out in the Annex hereto and the provisions of subregulation (1) above in connection with the completion of the Form MVA 13 shall *mutatis mutandis* apply in connection with the completion of this form which shall be accompanied by the appropriate supporting vouchers and statements specified thereon.

(3) A claim by a supplier for payment of incidental expenses in terms of section 26 of the Act shall be in the Form MVA 14 set out in the Annex hereto and the provisions of subregulation (1) (*a*) above in connection with the completion of the Form MVA 13 shall *mutatis mutandis* apply in connection with the completion of this form.

(4) (i) If the claim forms MVA 13 and MVA 22 prescribed in these regulations are not accompanied by the required supporting vouchers in respect of the relevant items under the heading "Compensation claimed", the claim in respect of the missing vouchers shall not be acceptable until satisfactory documentary proof is produced in support of the items concerned.

(ii) Any form provided for in this regulation and not completed as prescribed shall not be acceptable as a claim under the Act.

NOTICE BY AN AUTHORISED INSURER OF AN AGREEMENT TO PAY AN AMOUNT WITHOUT THE ADMISSION OF LIABILITY IN RESPECT OF A CLAIM

17. The notice to be given by an authorised insurer in terms of section 26 (4) of the Act of an agreement to make payment in terms of section 26 (3) of the Act, shall be by advertisement in the *Gazette* in the Form MVA 12 set out in the Annex hereto.

18. (1) If at any time the Minister is satisfied that any person who has deposited security in terms of section 29 of the Act has thereafter failed to meet in full his liabilities under section 3 (1) of the Act, such security shall vest in the Minister for the purposes of the liabilities of the depositor under the Act.

(2) In terms of section 29 (11) of the Act the deposit made under section 29 shall be made available for the payment of the compensation and costs mentioned in subsection (10) thereof by draft on the Treasury: Provided that where the deposit was in the form of security such security or portion thereof shall be realised to the extent of the amount of such draft and the sum of the security deposited shall be regarded as reduced by that amount.

(3) When the deposit is insufficient to meet in full all claims for compensation and costs from all persons the value of the deposit shall be apportioned between the different persons entitled to such compensation and costs in proportion to their relative claims.

DUTIES AND POWERS OF INSPECTORS AND AUTHORISED OFFICERS

19. (1) (*a*) An inspector or authorised officer as appointed in terms of sections 31 and 32 (1) (*a*) of the Act, has powers to—

(i) inspect any motor vehicle on any public road or street or at any place to which the public has access or, if such vehicle is in motion, cause it to stop and examine it in order to determine whether the provisions of the Act or these regulations have been complied with in respect of such motor vehicle;

(ii) require the owner or driver of any motor vehicle or any other person who may be concerned with such vehicle to furnish him with all particulars relating to the vehicle, the purpose of use thereof, persons or goods thereon and/or any occurrence in which such vehicle may have been involved or with any document relating to such vehicle;

(iii) require any person to produce all documents relating to the insurance of a motor vehicle in terms of the Act and make copies thereof or extracts therefrom;

(iv) impound any document or token relating to the insurance of a motor vehicle in terms of the Act, which is presumed to be false, or to have been unlawfully altered or defaced or to be unlawfully used or presumably contains a false statement;

(v) require any person or company undertaking the insurance of motor vehicles in terms of the Act on behalf of an authorised insurer, to produce for his inspection all documents and registers relating to such insurance and also to furnish him with all particulars of premiums collected as a result of such insurance;

(iv) enter any premises at any reasonable time in order to conduct any examination within the scope of his duty as an inspector or an authorised officer.

(*b*) An inspector appointed in terms of section 31 of the Act also has powers to require any authorised insurer or its assessors or its attorneys to produce for his inspection all documents and books relating to the insurance of motor vehicles in terms of the Act, and to any claim for payment of compensation arising therefrom.

(2) An inspector or an authorised officer shall produce his letter of appointment when requested to do so by any person with whom he deals in his official capacity.

(3) Any person failing to comply with any demand in terms of subregulation (1) or who in any way obstructs or hinders any inspector or an authorised officer in the execution of his duties shall be guilty of an offence and liable on conviction to a fine not exceeding R50.

STATISTICS

20. (1) Every authorised insurer shall in respect of each period of one month keep statistics in respect of—

(*a*) premiums and penalty payments collected in respect of insurance in terms of the Act during the month and/or premiums refused to assureds;

(*b*) claims received in respect of compensation in terms of the provisions of the Act;

(*c*) payments made in respect of claims for compensation in terms of the provisions of the Act.

(2) Every authorised insurer shall in respect of each six-monthly period keep statistics in respect of estimates of claims received which have not yet been disposed of.

(3) Returns of the aforementioned statistics shall be submitted to the Secretary for Transport by authorised insurers within six weeks of the end of the periods concerned in the appropriate Forms MVA 18, MVA 19, MVA 20 and MVA 21 set out in the Annex hereto.

(4) The Minister may from time to time in writing call upon any authorised insurer to make available such information in connection with such statistics as the Minister may deem desirable and an authorised insurer shall, within 30 days of the date of receipt of the written request of the Minister, supply the information called for.

(5) Any authorised insurer who fails to comply with any provision of this regulation, shall be guilty of an offence and liable on conviction to a fine not exceeding R50.

PRESCRIBED FORMS

Form number	*Purpose*
MVA 1	Application for specific insurance of particular motor vehicle.
MVA 2	Application for insurance by a motor dealer of all the motor vehicles in his possession in connection with his business as a motor dealer.
MVA 2A	Application by the holder of a motor transport licence for the insurance of all motor vehicles of which he is not the owner and which have to be delivered by road.
MVA 3	Declaration of insurance in respect of a particular vehicle.
MVA 4	Declaration of insurance in respect of a motor dealer's motor vehicles.
MVA 4A	Declaration of insurance in respect of motor vehicles delivered by road by the holder of a motor transport licence.
MVA 5	Token of insurance for particular motor vehicles.
MVA 5A	Token of insurance for a motor dealer's and a motor transport licence holder's motor vehicles.

MVA 5B	Token of insurance for motor vehicles operated under a special permit or a temporary permit or for use for a temporary purpose only.
MVA 6	Token of exemption.
MVA 7	Token of identity for vehicles owned by Governmental bodies.
MVA 8	Token of insurance for motor vehicles registered at a place outside the Republic.
MVA 9	Application for insurance of motor vehicles registered at a place outside the Republic.
MVA 10	Declaration of insurance in respect of motor vehicles registered at a place outside the Republic.
MVA 11	Notice of change of ownership and proof of insurance.
MVA 12	Notice by an authorised insurer of an agreement to pay certain incidental expenses.
MVA 13	Claim for compensation and medical report in terms of sections 21 and 25 (1) of the Act.
MVA 14	Claim for payment of incidental expenses in terms of section 26 of the Act.
MVA 18	Statistics: Premiums, penalty payments and levies on behalf of the National Road Safety Council received and premiums refunded.
MVA 19	Statistics: Claims sent or delivered.
MVA 20	Statistics: Payments made in respect of claims.
MVA 21	Statistics: Estimates of undischarged liabilities.
MVA 22	Claim for compensation and medical report in terms of regulations 5 and 6.

APPENDIX IX

IS THE AMOUNT OF THE LIMIT OF COMPENSATION PAYABLE INDIVIDUALLY TO EACH DEPENDANT OR COLLECTIVELY TO ALL DEPENDANTS?

This question will be dealt with firstly in relation to Section 9 (1) of the 1968 Act, and thereafter in relation to Section 9 (2).

1. SECTION 9(1)(a)

1.1 In Du Plooy vs SA Onderlinge Brand en Algemene Versekeringsmaatskappy Beperk, 1975 (1) SA 791 O it was held (in relation to the 1942 Act) that all dependants of a deceased passenger were entitled jointly to the maximum amount specified in the Section. However, the opposite view was expressed (in relation to the 1972 Act) in Constantia Insurance Company Limited vs Hearne, 1984 (4) SA 48 E, namely that each dependant is entitled to be compensated up to the specified maximum amount. This conflict was finally laid to rest, as far as the 1972 Act is concerned, by the Appeal Court in Constantia Insurance Company Limited vs Hearne, 1986 (3) SA 60 A, in which it was confirmed that the Section should be construed as applying individually and not collectively, so that each dependant (third party) is entitled to recover the specified maximum amount. The question now arises whether the rearrangement of the Section has the effect of reversing the Appeal Court's ruling. It has already been submitted (paragraph 3.9.6 of the text) that it does indeed have this effect.

1.2 In Hearne's case Hefer J A pointed out (at page 66 E) that the pith of Section 22 (1)(aa) is that:

> "The liability of an authorised insurer .... to compensate a third party .... shall be limited .... to the sum of R12 000 .... in respect of any bodily injury to or the death of any one such person."

Appellant's counsel had argued that the limitation was intended to operate not in respect of third parties, but in respect of the persons injured or killed. On this construction the number of third parties would be irrelevant; if one person had been injured or killed, the

maximum liability would be R12 000 and it would remain R12 000 irrespective of the number of third parties involved. The Court rejected this contention, pointing out (at page 66 H) that the Section speaks of an insurer's liability "to compensate a third party" and that it limits that liability in the defined respect:

> "The words 'to compensate a third party' cannot be regarded as mere verbiage. They are obviously descriptive of the liability and they cannot be ignored. The only question is: What do they mean?"

The Court then proceeded (at page 67 B) to answer the latter question as follows:

> ".... it is inconceivable that the legislature could have intended anything but a specific and precise meaning to be attached to its description of the liability which it was limiting. It must accordingly be assumed that a specific and precise meaning was intended to be attached to the words 'to compensate a third party'. Having said that, I have really also said how Sub-Section (1)(aa) is to be interpreted. The only specific meaning which the words in question can have, is the literal one. What is limited, is the insurer's liability to compensate 'a third party'. And so construed, the limitation is individual, not collective."

In reaching this conclusion the Court found it necessary to reject the further contention that the term "a third party" as used in the Section should be taken, by virtue of the provisions of Section 6 (b) of the Interpretation Act, to include the plural, so that "third parties" would be substituted in the Section for "a third party". The Court held that in the context of the Section a contrary intention was clearly evident and that Section 6 (b) of the Interpretation Act consequently did not apply.

With regard to the words "in respect of any bodily injury to or the

death of any one such person" as used in Section 22 (1)(aa), the Court said the following, at page 68 C - E:

> "To these words effect must obviously also be given. Since several passengers in the insured vehicle may be injured or killed in the same incident, thus rendering the insurer liable in respect of the injury or death of each of them, the Section provides that the limitation shall operate accordingly. This is not merely stating the obvious, for cases may occur where the same third party is affected by the injury or death of several passengers. In a single incident a woman may eg. be injured, and her husband on whom she was dependent, killed and both parents from whom a minor had received maintenance, may be killed in the same incident. Had the insurer's liability not been limited in respect of the injury or death of each passenger, the third party would not have been entitled to recover more than R12 000 from the insurer. By giving effect to the words of ss (1)(aa) as a whole the position, as I see it, is accordingly that an insurer is liable to each third party in respect of injury or the death of each passenger for a maximum amount of R12 000."

1.3 The difficulty in applying these findings to Section 9 (1) of the 1986 Act lies in the fact that there is a dramatic difference between the pith of Section 22 (1)(aa) of the 1972 Act and the pith of the re-structured Section 9 (1)(a) of the 1986 Act. To facilitate comparison, the pith of each Section is repeated here:

(a) Section 22 (1)(aa) of the 1972 Act:

> "The liability of an authorised insurer .... to compensate a third party .... shall be limited .... to the sum of R12 000 .... in respect of any bodily injury to or the death of any one such person."

(b) Section 9 (1)(a) of the 1986 Act:

> "The liability of .... the appointed agent .... to compensate a third party .... shall be limited .... to the sum of R25 000 in respect of any bodily injury to or death of any one such person who .... was being conveyed in the motor vehicle in question ...."

It is immediately apparent that the description of the liability which is being limited has undergone a complete metamorphosis: whereas in the old Section the liability to compensate "a third party" was limited to R12 000 (in respect of the bodily injury or death of any one person), the new Section, by virtue of the underlined portion thereof relates the sum of R25 000 specifically to the injury or death "of any one such person who .... was being conveyed in the motor vehicle in question". Stated differently: the old Act put a limitation on the amount payable to a third party, without more ado; by contrast the new Section specifically relates the limitation to the person who was being conveyed at the time of the occurrence, so that a total sum of R25 000 is set aside in respect of damages arising from the conveyance "of any one such person". In short, the limitation previously related to the (each) third party; it now relates to the incident which gave rise to the loss namely the conveyance of the person whose injury or death gave rise to the loss.

1.4 It is for the aforegoing reasons, and with a considerable measure of regret, that the submission is made that the legislature clearly demonstrated an intention to counteract the Appeal Court's ruling in the Hearne case. The ordinary grammatical meaning of the words as they presently stand in the new Section strongly support this contention, so much so that there does not appear to be any scope for the application of the Appeal Court's alternative basis (at page 67 I - 68 B of Hearne's case), namely that where the legislature has left room for two conflicting interpretations, the interpretation favouring the third party will be preferred.

3. SECTION 9 (1)(b)

3.1 This sub-section is considered last because it is better understood against the background of the interpretation which has been placed upon sub-sections 9 (1)(a) and 9(2)(a).

3.2 In the context of the present discussion the core of Section 9(1)(b) is worded as follows:

> "The liability of ..... the appointed agent ..... to compensate a third party ..... shall be limited ..... in the case of a person who was being conveyed in the motor vehicle concerned under circumstances other than the circumstances referred tc in paragraph (a), to the sum of R25 000 in respect of loss ..... of support .... resulting from ..... the death of one such person."

The corresponding core of Section 22 (1)(bb) of the 1972 Act is as follows:

> "The liability of an authorised insurer ..... to compensate a third party ..... shall be limited ..... in any case referred tc in paragraph (d), to the sum of R12 000 in respect of loss ..... of support ..... resulting from the death of .... any one such person ..."

3.3 It will be noted that there is precious little difference between the two sub-sections; certainly nothing of special consequence. This immediately creates a doubt as to how the new sub-section should be interpreted:

3.3.1 On the one hand the legislature has effected no significant amendment to the wording of the old sub-section which was interpreted as follows by Smalberger J (as he then was) in Constantia Insurance Company Limited vs Hearne, 19084 (4) SA 48 at 52 F - G:

> "On a proper interpretation of this provision of the Act it appears to me that what the legislature had in mind was to limit the

> liability of an insurer to R12 000,- in respect of each claim under Section 21(1) of the Act arising from the injury to or death of any person in the circumstances outlined in sub-sections (a) to (d) of Section 22(1)."
>
> (Own underlining.)

It is the specific reference to sub-section (d) which is significant in this quote, since that sub-section read together with ss. (bb), corresponds substantially with Section 9(1)(b) of the 1986 Act. (Unfortunately the Appeal Court did not consider or even mention Section 22 (1)(bb) nor the above-quoted interpretation thereof, when the matter came before it on appeal.)

3.3.2 On the other hand, as pointed out by Smalberger J in the court a quo in Hearne's case (at page 52 I):

> "One of the well-known canons of construction is to reconcile provisions in an Act as far as possible (Steyn, Die Uitleg van Wette, 5th Edition at 188)"

If this canon of construction is applied in the interpretation of Section 9(1)(b), it must follow that this Section too should be given a collective rather than in individual interpretation. The irony of this is that application of the same canon to Section 22 (1)(d), read together with paragraph (bb), of the 1972 Act, would have resulted in an opposite unterpretation because under that Act Sections 22(1)(aa) and 22(2)(a) were interpreted by the Appeal Court to have an individual rather than a collective meaning. But the legislature's explanation for this may simply be that it had never in fact intended the meanings which the Appeal Court attached to these two sections.

3.4 It is submitted (albeit with some hesitation) that the meaning of Section 9 (1)(b) must follow that of Sections 9 (1)(a) and 9 (2)(a).

Firstly, this would accord with the canon of construction mentioned above, but, more importantly, there is no apparent reason why the legislature would have intended putting the dependants of this category of passenger in a better position than the dependants of the other categories of passengers referred to in Sections 9 (1)(a) and 9 (2)(a). On the contrary, the birth and historical development of the rights of the passenger (and his dependants) envisaged in Section 9 (1)(b) would militate strongly against the wider interpretation. Compare the remarks of Botha J A in Santam Insurance Company vs Taylor, 1985 (1) SA 514 AD at 526 I et seq and particularly his conclusion at 530 I to 531 A as follows:

> "It is far more likely that the legislature intended to place a greater, rather than a lesser, limitation on the liability of an authorised insurer to pay compensation in respect of ordinary passengers ...."

Moreover, if Section 9 (1) is considered as a whole, it is submitted that Section 9 (1)(b) is closely linked to Section 9 (1)(a); it simply deals with a different category of passenger, the so-called "ordinary passenger", and it deals separately with this category of passenger for one reason only, namely that it limits the damages claimable exclusively to monetary losses; were it not for this additional limitation applying to ordinary passengers, they too would have been dealt with along with the other categories of passengers mentioned in Section 9 (1)(a).

3.5 Against this background it is submitted that the legislature intended, in Section 9 (1)(b) to achieve the same type of limitation which it envisaged in Section 9 (1)(a), namely that its liability in respect of the person who was conveyed (as opposed to each dependant of such person) shall be limited in total to R25 000. No doubt a litigant will come along who will allege that Section 9 (1)(b) is capable also of the individual interpretation preferred in the two Hearne judgments and that the wider interpretation favouring multiple dependants should therefore prevail, but before a great deal of litigation costs are wasted the legislature should consider clarifying its position at the earliest opportunity.

2. SECTION 9 (2)

2.1 Here again it is necessary to analyse the rearrangement of the wording of the new Section and to compare it with the provisions of its predecessor. The best way to do this is to again extract the pith of each Section, and in the knowledge that each Section relates only to third parties who are entitled to receive compensation under the Workmen's Compensation Act, No 30 of 1941, the two Sections may be abbreviated as follows:

(a) Section 22 (2)(a) of the 1972 Act:

> "Where the loss or damage .... is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the motor vehicle .... the liability of the authorised insurer to that third party shall be limited to ...."

(b) Section 9 (2) (a) of the 1986 Act:

> "Where the loss or damage .... is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the motor vehicle concerned .... the liability of .... the appointed agent .... in respect of the bodily injury to or the death of any one such employee shall be limited in total to ...."

The deliberate rearrangement is again immediately evident. The first-mentioned Section limited the authorised insurer's liability "to that third party" (i.e. the person who sustained the loss) to the maximum amount as specified. By contrast, the new Section seeks to relate the Appointed Agent's liability "in total", not "to that third party", but "in respect of the bodily injury to or the death of any one such employee, i.e. the employee of the driver or owner of the motor vehicle which caused the loss. In effecting the amendment, the legislature has applied more or less the same strategy as it applied in section 9(1)(a), namely to provide that the

limitation applies to a specific incident, namely the injury or death of the employee of the driver or owner of the vehicle concerned; the limitation of liability is no longer specified to relate to the third party as such. A deliberate intention on the part of the legislature is inescapable.

2.2 It must be remembered that in Hearne's case the Court was concerned with Section 22 (2) of the 1972 Act, not with Section 22 (1)(aa) thereof. Counsel for the Appellant conceded (see page 65 J - 66 B of the report) that prima facie the correct interpretation of Section 22 (2)(a) of the 1972 Act is that, in cases where there are several third parties, the limitation of the insurer's liability applies to each of them separately, but he argued that the prima facie meaning of Section 22 (2)(a) must yield to indications of a different intention in Section 22 (1)(aa), contending that the legislature was not likely to have intended to provide for different types of limitation in the two Sub-Sections. It was on this basis that the interpretation of Section 22(1)(aa) was considered despite the fact that the Court was actually concerned with the interpretation of Section 22(2)(a). Hefer J A, having interpreted Section 22 (1)(aa) against the Appellant, found it unnecessary to consider the possible effect of that provision on the interpretation of Section 22 (2)(a). (See page 69 H) In view of the fact that the same strategy has been used by the legislature in effecting its innovations in Section 9 (1)(a) and 9 (2)(a) of the 1986 Act, the conclusion is inevitable that there was a common intention on the part of the legislature, and that the two Sub-Sections will accordingly both be interpreted on the basis that liability on the part of the appointed agent (or the MVA Fund) will henceforth be collective and no longer individual.

I N D E X

	PARAGRAPH
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Act (84 of 1986)	
Commencement of	3.20
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retrospectivity of	3.21
Venda, applicability in	5.8
Advisory Committee	
creation of	3.7.1
membership of	3.7.2
rights and duties of	3.7.2
Agricultural (or any other) implement	
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Amendment of summons	7.6.5
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claims to be handled by	3.6.3
duty of to disclose evidence on merits to claimant	3.13.2
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function of in scheme	3.1.1.1; 3.6.3
identification of generally	3.6; 3.7.3.4 7.3.5
identification of in relation to tokenless vehicles	3.2.1.3
liability of excluded for failure to undergo medical examination or furnish medical reports or records	3.10.5
liability of excluded for members of household	3.10.2.2; 3.10.2.3
liability of excluded for members of SA Police, SA Defence Force, SA Railway Police	3.10.3
liability of excluded if claim not instituted and prosecuted by attorney	3.10.4.1
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conveyance for reward on motorcycle 3.10.2.1
liability of generally 3.6.3; 3.8.6
liability of in relation to accidents where date is uncertain 3.2.1.5
liability of in relation to vehicle displaying token 3.2.1.3
liability of in relation to vehicle not displaying token 3.2.1.3
liability of in respect of combination vehicles 3.11.4
liability of where token available but neither owner nor driver identified 3.6.4.3
not liable if neither owner nor driver would have been liable under common law 3.10.1
request to for documents/information relating to vehicle 7.2.10
which companies have been appointed as 3.1.1.2
Apportionment of damages
conditional counterclaims:
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S U M M A R Y

1. BACKGROUND

The Government's decision to convert the South African MVA System from an insurance scheme to a fuel levy scheme necessitated radical amendments to what was known as the Compulsory Motor Vehicle Insurance Act, No 56 of 1972. Certain recommendations of the Majority Report of the Grosskopf Commission also had to be accommodated. Apart from deleting from the Act and regulations all references to insurance, the legislature also availed itself of this opportunity to rearrange the various provisions of the Act and its regulations, to streamline the provisions of certain clumsily-worded sections, and most importantly to introduce some radical new concepts totally foreign to the traditional MVA legislation.

2. INNOVATIONS AND OTHER FEATURES

Against this background it is certainly true to say that the Motor Vehicle Accidents Act, No 84 of 1986 represents the most innovative exercise since the publication of the Compulsory Motor Vehicle Insurance Act, No 29 of 1942:

2.1 Fuel levy

The Scheme is now funded by a levy on fuel rather than by the sale of insurance. (Section 5 (1) of the Act)

2.2 No uninsured vehicles

As a necessary consequence of 2.1 above, the concept of uninsured vehicles has fallen away.

2.3 Enforced exchange of evidence on merits

The principle of enforced early exchange of evidence on the merits has been introduced into the Act. The obligations resting on the claimant are contained in Regulation 7 (2)(b) and the obligations resting on the Appointed Agent are contained in Section 13 (3) of the Act. Whilst the principle is indeed laudable, the manner of implementation has regrettable implications for the claimant (non-compliance being penalised by repudiation of the claim), the so-called reciprocal duties being heavily loaded in favour of the Appointed Agent. (See also 2.5 below.)

2.4 Legislation by regulation

Related to the principle mentioned in the preceding sub-paragraph is the fact that the traditional wide liability of the MVA Fund and the Appointed Agent as contained in Section 8 (1) of the Act, has been made subject to "the prescribed conditions" contained in the Regulations. Thus the principle of legislation by regulation has crept into this Scheme, enabling the

exclusion of liability and the implementation of the Appointed Agent's right of recourse to be governed by Regulation.

2.5 Suspension of prescription

Provisions concerning suspension of prescription have been introduced which are totally foreign to the traditional principles of suspension known to the South African MVA legislation. This involves an interplay between Sections 14 (1)(a), 14 (2) and 15 (2)(b) read together with Regulation 7 (2)(b)(iii). These provisions create a nexus between the provisions creating an obligation on the claimant to furnish evidence on the one hand and a prohibition against the issue and service of summons on the other hand, with a commensurate suspension of prescription for as long as the Appointed Agent enforces his right to call for further evidence on the merits.

2.6 INADVERTENT EXCLUSION OF CERTAIN CATEGORIES OF PERSONS

In the formulation of Regulation 7 (1), which identifies the claims which the Appointed Agent must handle, at least one category of claimants (and probably more) has been omitted, thus leaving such claimants totally without remedy.

2.7 Apart from the abovementioned radical departures from

traditional principles, there are also a number of less dramatic innovative provisions, notably the following:

(a) The re-introduction, in amended form, of the traditional concept of the self-insurer (Section 5 (2)(b) of the Act);

(b) Significant changes to the forms utilised in the implementation of the Scheme, such as a consolidated MV3 claim form and an amplified accident report form;

(c) The claimant's traditional right contained in Section 20 (2) of the 1972 Act to demand that the owner furnish certain documents whereby the Appointed Agent may be identified, has been abolished;

(d) To avoid collusion between certain parties (bearing in mind that Appointed Agents will be paid R450 for each claim handled), penalties have been imposed with regard to the furnishing of false information relating to tokens on vehicles involved in accidents (Section 13 (4) of the Act);

(e) An attempt has been made to avoid earlier loopholes in the provisions reserving MVA work largely to the attorneys' profession (Section 10 (d)).

(f) There is an amendment contained in Regulation 9 (1)(b)(ii) authorising the use, in the place of the statutory medical form, of "a copy of the relevant charge sheet", but only "in the case of a prosecution of the person who caused the deceased's death", which immediately raises the question as to whether such charge sheet is admissible where the person charged was acquitted;

(g) The disposal of settled claims has been simplified;

(h) Annual renewal of tokens of identification has been discontinued;

(i) Uncertainty has been created by Section 20 of the Act regarding a claim arising from the death of a breadwinner after the commencement of the new Act on 1st May 1986 as a result of injuries sustained in an accident which occurred prior to the said date.

(j) Section 10 (b)(ii) introduces a subtle but significant change in the category of passengers excluded from compensation who are members of the household of the driver; only if such passenger is one who is entitled under Section 9 (1)(b) to

special damages only, is he now excluded.

(k) By virtue of Section 7 the private sector has achieved a meaningful role in the affairs of the MVA Fund.

3. Whilst many of the innovations were commendable in principle, the linguistic implementation of these principles has regrettably been unsatisfactory in many respects, thus necessitating a great deal of original analytic interpretation, and many submissions have had to be made which will undoubtedly have to be tested by our courts.

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