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Intergenerational Family Dependence: Contradictions in family policy and law

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Abstract

Intergenerational financial support has been critical for the survival of many low-income households in South Africa, both historically and in contemporary society. Culture, in combination with necessity, leads wider kin members to assume a great deal of financial responsibility for dependents. Current social and legal structures do not always support diffuse patterns of dependency. An analysis of court cases reveals that the state, through the framework of the judicial system, attempts to accommodate new demands to recognise various forms of intergenerational support. Other state institutions, notably The Road Accident Fund, a social insurance system, has different practices and does not reflect the same understanding of dependency. The findings reveal that the court found practices of intergenerational financial support amongst diffuse kin relations and ruled that the Road Accident Fund was obliged to continue these following the death of a breadwinner in a road accident. The Road Accident Fund contested this responsibility by disputing the legal obligation of the deceased to support the kin member. Although the state, through the Courts, are actively promoting intergenerational interactions and living by supporting the complexity of family life for many in South Africa, the findings show that another state institution bases policies on certain assumptions about how families are structured and operate and tries to reinforce these assumptions even when they are not deemed legitimate by the groups affected. Whilst the lack of coherence in policy and law undermines any strong sense of agreed social norms about the family, it also causes practical problems for people having to come to court to 'win' their case and may result in a lack of take-up of certain benefits for those who do not go to court.

Keywords

Family; kinship; intergenerational; duty to support; South Africa

In 2016, a news story in the national South African newspapers centred on a ground-breaking judgementⁱ in the Gauteng High Court (Pretoria) which ordered the Road Accident Fund (hereafter referred to as RAF) to pay a family R72 439 (approx. GBP 4,285) towards their maintenance. The case involved a 26-year-old daughter who had been financially supporting her mother's household (R2500 per month, approx. GBP 144) and had been killed in a road accident in 2013. The daughter and mother had an agreement that she would contribute towards her mothers' households' expenses until the day the mother received her old-age

pension. The mother was 58 at the time of the accident and two years away from receiving the state pension (valued at R1500 per month in 2017). There were five other dependent persons in the household. The mother had testified in Court that the deceased honoured that undertaking until the day of the collision as she was obliged to do so as “she knew from where she came from” (Motha v RAF: para 7), thus indicating an obligation to support her parents in terms of customary practices.

The case highlighted the tensions that arise between the ways in which different policy and legal frameworks do not always support diffuse patterns of dependency as they do not always share the same assumptions or views on who can be considered a dependent. Drawing on the legal contestation around duty to support and understanding of a dependent between the social insurance system (RAF) and the Courts, I examine the contradictions embedded in the South African state’s definition of the duty to support. The RAF, a social insurance system, was set up in 1997 (under the Road Accident Fund Act 1997) and provides compulsory cover to all users of South African roads against injuries sustained or deaths arising from accidents.ⁱⁱ The programme compensates for the loss of support in families by allowing dependents of deceased breadwinners to make financial claims against the RAF.ⁱⁱⁱ The cases reviewed highlight the contradictions between policy and legal conceptions of obligation, and everyday obligations that shape care in families. I then take up the tensions between differing legal and policy frameworks for understanding kinship-based practices of financial support by drawing on Ferguson’s call for the state to support ‘dependence’ and the need to construct desirable forms of it.

I argue that the Courts are explicitly endorsing diffuse patterns of dependency whilst the RAF is refusing to support them. This paper examines how courts interpret who can be considered a ‘dependent’ with regard to “intergenerational” financial support and an examination of everyday boundaries of responsibility that shape care for dependents in mainly poor, black South African families. Whilst recent research (Reynolds, 2016) focused on the debate about the boundaries of responsibility to care for ‘vulnerable’ children, this paper focuses on financial support for kin other than support by adult parents for their minor children. The contestation centres around a wider debate about who has a responsibility to support a dependent relative.

Which family members have a duty to support a dependent relative and when does this responsibility fall to the state? As families have become more diverse in their structure and as rights and obligations have been tied to family relationships, the government’s definition of families has become more complicated. In this article, I interrogate key assumptions regarding family structure and care embedded in policies intended to offer support to dependent

kin members. In what follows, I will demonstrate how this is made even more complicated in a legal pluralist state, like South Africa, where there is no universal legal definition of families or dependency and the State must consider both customary law and common law obligations. Whilst the lack of coherence in policy and law undermines any strong sense of agreed social norms about the family, it also causes practical problems for people having to come to court to ‘win’ their case and may result in a lack of take-up of certain benefits for those who do not go to court.

Boundaries of obligation to care for kin

The family, at least in part, is also a legal construct and a fixed legal definition of who is part of a family, who can be considered a dependent or what family members do for each other does not always reflect their social practices. When a government forms a policy or piece of legislation, which will impact on family relationships, they are in danger of presuming a narrow definition of a family, often making assumptions that most families operate in particular ways. In fact, up until recently, South African law considered only a child, parent or spouse as a liable relative who could be legally obliged to offer financial support to their indignant parent, child or spouse respectively. This common law definition was based on the narrow understanding of a nuclear family. It was only in 2012 that the Court ordered that grandparents and siblings had a ‘duty of support’ for a child but uncles and aunts had no such duty, (Reynolds, 2016; South Gauteng High Court, 2012). Legal obligations of what family members should do was not a reflection on what families, in particular extended families, were doing in practice (Reynolds, 2016).

A large body of evidence has highlighted the level of intergenerational financial support, particularly within poorer families in South Africa (Goldblatt, 2005; Patel, 2012; Fakier and Cock, 2009; Mosoetsa, 2011; Schatz and Ogunmefun, 2007; Chazan, 2008; Reynolds, 2016). The evidence highlighted how older black African women used their pension grants and other resources to address the financial needs in their families (Schatz and Ogunmefun, 2007; Chazan, 2008; Bak, 2008, Ogunmefun and Schatz, 2009; Schatz and Madhavan, 2011; Mosoetsa, 2011; Button, 2017). The adoption of a narrow legal definition of the nuclear family for so long failed to consider the flows of financial support, diverse living arrangements and cultural understandings of kinship and it is in this context that cases against the RAF have emerged.

African kinship systems are imbued with normative obligations of kin support and reciprocity. Sagner and Mtati (1999: 400) described African kinship as a

moral order, structured around generalised reciprocity, that involved mutual obligations of support between relatives. This moral order was also said to be intertwined with the cultural ethos of Ubuntu, which embodies the value of interdependence and emphasises the importance of ensuring the wellbeing of the collective over self-interest (Sagner and Mtati, 1999: 400). Scholars have however noted that there is some scope for individual choice and kin members in South Africa can contest and ‘negotiate’ claims made on them. Therefore, kinship ties are no longer ‘given’, as they were within traditional structures, but are subject to some flexibility (Button, 2017; Ferguson, 2015; Hunter, 2008; Seekings, 2008: 4). The government is therefore faced with a problem when they seek to regulate families against a backdrop where there is this flexible character. This raises questions of how to define and understand a dependent. Do they need to see how kin groups actually work to detect the principles through which relationships and obligations are constructed?

South African families and particularly poorer South African families are subjected to a number of shocks and stresses, such as high unemployment, poverty and the AIDS epidemic. In addition to the ways in which apartheid fragmented family life (Budlender and Lund, 2011), families in the contemporary period continue to be in constant flux (Spiegel et al., 1998). If a household loses the breadwinner’s income, or if a breadwinner is unable to provide income, the effects on them and their dependents will be mitigated potentially by other kin members, either through claiming financial support from others or by moving dependents and breadwinners between households. In this way, some argue that the ‘flux’, and movements are not random, but the changes may help manage distributive claims and distribute flows (Seekings, 2008). Madhavan (2010) examined how unmarried mothers work to establish connections with the father of their children and paternal kin in order to secure material and moral forms of support. Ferguson (2015: 108) has mapped out how a great deal of work goes into establishing the kin of social standing that might enable distributive claims, and stated that “dependence is not a passive condition – but a carefully cultivated status that is the result of a long process of building social ties and reciprocal obligations.” As a result, intergenerational financial support and diffuse patterns of kin dependency in South Africa should not be conceptualised only as a safety net in times of misfortune and transition, but rather as an ongoing social process that exists on a daily basis.

These features of kinship have important implications for state action in regulating relationships, particularly when the state must consider customary and common law obligations given the legal pluralist system. The reality of kin dependency in South Africa, especially amongst poor people, is more fluid because we know that resources are likely to flow in from multiple directions generationally and across households. In responding to Ferguson’s argument

regarding suitable forms of dependency, this paper argues that social policy should not limit 'dependence' to specific positions within a narrow definition of the nuclear family; rather, it can support desirable forms of dependency by recognising the everyday practices of support. Through an examination of claims of loss of support from kin members, the analysis shows how the judiciary credit and respect the cultural practices of interdependence and social relationality that are traditionally associated with African kinship but are based on contemporary social practices. The RAF, however, appears to ignore the social practices of financial support and cling to narrow definitions of dependency, mainly based on common law systems, to argue that no duty of support existed between the breadwinner and the dependent. The paper argues that a politics (and policy) that supports diffuse patterns of kin dependency may offer new forms of belonging and care, in a context where the social and moral obligations to support kin are changing, and subject to the considerable stress and shocks of contemporary life.

Methods

The evidence in this article is based on a study of judgements of 'loss of support' applications against the RAF starting in the year 2000 in all courts in South Africa. A systematic search was conducted on the case law database (Juta Publications) for 'loss of support' and 'Road Accident Fund'. I analysed a sample (N=300) of relevant court cases in order to gain an understanding of the bigger picture of what goes on in the Courts involving such cases. The majority of these cases centred on claims made by the spouses and children of deceased breadwinners. Such cases are not included in the analysis as spouses or children of breadwinners are dependents and such relations of dependence are not contested. The analysis presented in this article is based on the data of a selected 17 cases and provides a closer analysis of claims of loss of support by intergenerational relations (uncle to nephew or grandparent to grandchild rather than spousal or parent-child) where the claim of a duty of support is contested.

Although cases were initially read as disputes over loss of support, other issues were identified which provided a more complex legal picture of how these claims are assessed. I do not examine issues concerning liability for the accident or the calculation of the quantity of a loss of support in this article. In what follows I will provide a number of short case studies to elaborate on the points I make as I demonstrate the range of issues that lie behind disputes over the application for a loss of support. It is important to recognise that the judgements do not provide access to how the litigants viewed their disputes or how the State handled their grievances. Statements in the judgement are constructed by the judge who is examining the case to address the issues that are relevant to the law. Moreover,

the judgements are publicly available, and I have therefore not anonymised the cases or the details of the parties involved.

As with all research, the study suffered from a number of limitations, which readers should bear in mind while considering the findings. Firstly, the research only examines cases where claims made on the RAF, to take over the responsibility for financial support previously provided by (deceased) kin, were successful. The research does not include cases where the courts did not order the RAF to take over responsibility, nor does the research cover cases that do not reach the courts because the RAF does not contest them. Unfortunately, these figures are not available. However, the explicit purpose of the research was to examine how law and policy draw on different understandings of dependency. Therefore, a focus on contested cases allows us to examine how dependency is contested. Secondly, the analysis is limited to judgements as there is no legislation governing legal obligations to dependents (especially wider kin) in customary law settings, because there is no codified customary law.

Intergenerational financial support: Living customary law and common law duties

The question of who has a legal duty to support dependent kin members is complicated in South Africa for two main reasons. Firstly, due to the legal pluralist system that operates in South Africa, South Africans have a customary or common law duty to support specific kin members. The ways in which such a duty is proven is guided by different legal principles in each case, but it is unclear when the courts decide to apply customary law. In what I will present below, it seems that if the common law does not provide a claim, the courts will fall back on customary law. Secondly, practices of care in South African families are diverse as many children do not live with biological parents. Therefore, the Court has been forced, over time, to recognise practices and expectations of support that arise out of everyday practices that stretch far beyond the confines of the nuclear family. In doing so, they have had to go beyond a ‘conventional’ and position-orientated interpretation of who has a duty to support. These two issues will be outlined in further detail in this part of the article.

As is practiced in most common law systems around the world, parents and grandparents have an obligation to support children and children have a reciprocal obligation to support parents, although this duty is a civil law duty in England and the UK. In a legal pluralist system like South Africa, this duty stems out of a common law duty or a customary law duty. The common law duty to provide for a parent is subject to proving a parent is indigent. Therefore, in cases applying

common law, the deciding principle is whether a parent can prove that he or she was dependant on the child's contribution for the necessities of life. The customary law duty does not require such measures, although this has only recently been recognised in the Courts. In customary law^{iv}, it is incumbent upon a child to reciprocate by supporting a parent once that child is in a position to do so. In the case *Fosi v Road Accident Fund*^v the Court held that the customary law relating to the principle that a duty rests upon a child to support his or her parents when in a position to do so, should apply in determining the liability of the RAF towards a parent who has lost a child in a motor vehicle accident. Many of the judgements at the centre of this article detail the ways in which African children, in South Africa, have a customary duty to support parents. Justice Dlodlo outlined this in *Fosi v Road Accident Fund* at paragraph [16] as follows:

...in African tradition to bring up a child is to make for oneself an investment in that when the child becomes a grown-up and is able to participate in the labour market, that child will never simply forget about where he came from. That child without being told to do so, will make a determination (taking into account the amount he/she earns, her travelling to and from work, food to sustain himself and personal clothing etc) of how much he must send home to the parents on a monthly basis. This duty is inborn and the African child does not have to be told by anybody to honour that obligation.

In the post-apartheid era, where customary law is recognised and supported through provisions in the Constitution, the Court must apply customary law when that law is applicable, according to section 211 (3) of the Constitution. In essence, where litigants have been living according to customary law, that law should be applied unless overruled by statute or the Bill of Rights.

The question of who has a legal duty to support is further complicated by the diverse living and care arrangements in South Africa. In South Africa, 30 percent of children aged 7-17 and 18 percent of children 0-6 do not live with their biological parents (Seekings and Moore, 2014) and are not necessarily financially supported by their biological parents. Other kin members are expected, not only legally, but morally, to support kin members. This could include an uncle or aunt, who do not have a common law duty to support a nephew or niece but are expected to do so through norms of obligation and perhaps even living customary law, as women and children were guaranteed economic security by the all-encompassing duty to support borne by their respective families (Bennett, 2007: 279). Over the years, the Courts have had to recognise duties of support and the reciprocal right to claim support, by persons who are in a relationship, regardless of the positions involved. Sutherland J expounded further on this matter in *JT v Road Accident Fund*^{vi} at paragraph [26] as follows:

It seems to me that these cases demonstrate that the common law has been developed to recognise that a duty of support can arise, in a given case, from the facts specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another. Moreover, a culturally imbedded notion of ‘family’, constituted as being a network of relationships or reciprocal nurture and support, informs the common law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support, by persons who are in relationships akin to that of a family.

As outlined elsewhere (see Button, et al., 2017) this issue has been further tested in the Courts when the matter arose in the contestation over who may apply for a foster care grant. In providing the necessary financial support to enable family members to provide care for dependents, the state is fulfilling its duty under section 28(1)(b) and (c) of the Constitution to ensure that children are appropriately cared for by encouraging and enabling others to do so.

Recognising legal duties or social practices

The cases that involved an underlying dispute over issues to do with whether a legal duty of support exists can be divided into two sub-categories: 1) disputes over whether a duty of support can exist in cases where the duty to support was legally extinguished through, for example, adoption and 2) disputes over whether a child can claim loss of support even if the legal duty to support lies with another employed and living relative. In the first instance the Court is left to decide what to do when a person voluntary assumes the duty to support a grandparent or a child, even when they are not legally obliged to do so. Does that give the recipient of support an enforceable right to compensation following the loss of such support? In such cases, the defence for the RAF argued that the duty to support had been extinguished through an adoption order, a process where all legal rights and responsibilities to a child are relinquished and therefore no duty of support exists. The plaintiff in these cases argued that the biological father (the deceased), by assuming an obligation to support the child, conferred on the child an enforceable right in respect of a duty of support.

In the case *JT v Road Accident Fund*, a young girl had been adopted by her grandmother since 2009 when she was about 7 years old, but the biological father had voluntarily continued to financially support her. The Fund admitted that it was liable for damages suffered by any person resulting from his death but contended that the deceased's legal obligation to support his child had been

extinguished when the adoption had taken place; consequently, there was no liability on the Fund to compensate such loss. The issue therefore was whether the daughter had an enforceable right against the deceased. Justice Sutherland ordered the RAF to compensate the girl for her loss of support, and stated at paragraph [30]:

It would be invidious to rule that a natural parent had no duty to support his daughter when he had voluntarily assumed that obligation. The undertaking had given the plaintiff a reasonable expectation that his maintenance contributions would continue. A duty of support between de facto family members was one of those areas in which the law gave expression to the moral views of society, and the common law ought to be developed to embrace this norm.

In essence, the courts argued that the practice of providing support, provides the care recipient with a reasonable expectation that such maintenance contributions would continue. The care recipient therefore has a right to claim for loss of support in the event that the provider passes away. It seems here that the court resists the question of contractual duty and the judiciary concentrates on family relationships and social practices (not simple contractual undertakings).

The second set of cases involved disputes over whether a person can claim loss of support even if the legal duty to support that person lies with another living, [employed] relative. For example, spouses have a legal duty to support each other and parents have a legal duty to support a child. What happens if another relative assumes the responsibility to support a child or spouse, even when the biological parent or spouse is in a position to support the dependent? These issues were discussed specifically in three cases. In the first case, *Keforilwe v Road Accident Fund*^{vii}, a 46-year-old mother who was unemployed had been receiving between R750 - R1000 (and groceries) per month from her son until her son died in a road accident in 2013. The son, mother, father and two dependent children were living in the same house. The son was the only regular earner. The husband was unemployed for the most part although he engaged in occasional jobs and he earned R2000 in some months when he had work. The husband's irregular income was insufficient to provide for the family. At the time of the case, the plaintiff argued that her past and future loss of support was in amount of R810 800. The defence argued that the legal duty rests with the plaintiff's husband not her deceased son. They argued that the mother was 43 and healthy and nothing prevented her from working. The defence also argued that the deceased only volunteered to assist the plaintiff and there was no legal obligation on him to support the plaintiff. The judiciary however did not agree as Justice Djaje at paragraph [14] stated "the plaintiff [mother] was dependent on the deceased for the necessities of life and is now unable to enjoy those necessities due to the

untimely death of the deceased.” Moreover, Justice Djaje supported the belief that a voluntary undertaking to support a relative created an expectation that such support would continue, and the loss of that support should therefore be recognised.

In *M v Road Accident Fund*^{viii}, the dispute centred on whether the grandchild of the deceased [grandfather] can claim a loss of support even when his mother is employed and has a legal duty to support him. The child’s biological father had died several years prior. The grandfather financially supported his grandson, despite the child’s mother being employed and bearing the legal duty to support the child. The grandchild stayed with the grandparents when the mother relocated to Nelspruit for work. The mother had another child who was 7 years old at the time of the hearing. Following the death of the grandfather in a road accident, the grandson lost the financial support he received from his grandfather. The grandson was never adopted by the grandparents and the defence argued that there was no legal duty on the grandfather to financially support the child and the RAF was not liable to compensate the child for loss of support. Justice Maluleke however rejected the claim made by the defendant that the grandfather only had a duty to support the grandson if it can be shown that the mother was indigent or unable to support the child. Instead, Justice Maluleke argued in paragraph [9] that:

the voluntary assumption of support is emphasised as relevant to the duty arising and being enforceable against third parties. The voluntary assumption of support by the deceased created an expectation of its continuation and his untimely death resulted in such support being lost by the child.

Most importantly, Justice Maluleke at paragraph [13] argued that "this is a case where the law must clearly express the morals of society and for the common law to resonate with modern day life expectations of society”. In making an order for compensation for the loss of support, Justice Maluleke respected such practices. It appears in this case as if the Court relies on a combination of factors including voluntary assumption, an expectation of support and the morals of society to make its decision.

The disputes that arise in these cases focus on the recognition of the practices of intergenerational support rather than on legal duties to support between specific related kin members. It is evident that even in cases where parents have the legal duty to support a child, and are alive and employed, the social reality of intergenerational support is what is prioritised by the Courts. The judges are declaring that a legal duty is arising out of voluntary practice of support, an

expectation that support would continue and the social morals of the society, which in some instances are aligned with principles of Ubuntu.

Delimiting boundaries of dependency

The cases reveal that everyday practices of intergenerational financial support, expectations of support and understandings of who ‘dependents’ are, have been contested by legal and policy structures. Bounded categories of kinship and duty are in stark contrast to the modes of care that occur in everyday family practices. The judgements offer an interesting lens through which to explore the tensions that can arise when fluid kinship practices of financial support are subjected to legal definitions of responsibility. The paper has uncovered the ways in which everyday practices of interconnection and relationship and responsibility is driving legal responsibilities. Instead of deriving responsibilities from rights based on specific relations, judicial reasoning is departing from an understanding of daily practices of care and responsibility. This is extremely important given the fact that flows of intergenerational financial support that sustain livelihoods differ according to the social positions of the breadwinners. Research has indicated that older black African women compared to black African men and younger black African women seem to accept the burden of financial care more readily (Chazan, 2008; Schatz and Ogunmefun, 2007). Recognising the financial support that is given in poorer households supports older black African women, who carry much of the financial burden. The Court’s approach to compensating persons for loss of support acknowledges the people who take the responsibility for supporting their kin but also recognises culturally-constructed rules and norms around relatedness. Although there is little discussion of customary rules and norms of financial support within the judgement, the focus on social practice rather than categories should be commended.

In a context where expectations around financial support follow distinctive cultural understandings of family and kinship and are also ever-changing due to considerable stresses such as high levels of unemployment, migration, poverty and the AIDs epidemic, the RAF’s adoption of a narrow definition of who can be considered dependent (as in the case of the RAF defences) seems restrictive and inappropriate. This article has demonstrated how the actions of state organisations do not always align. The lack of coherence in policy and law undermines any strong sense of agreed social norms about the family. While on the one side, the RAF adheres to strict legal definitions of obligation, the Courts favour a focus on social practices and relies on everyday practices of support.

Questions that the paper raises are thus whether the different understanding of dependency that underlie the RAF's policy are explicit or implicit – do they act simply as background assumptions against which the operation of the RAF policies are designed? It is it the declared purpose of the policy to promote particular forms of family life (resembling a nuclear family) or is it merely trying to limit the financial cost of covering wider kin members? Some South African scholars have argued that, in this neoliberal time, the South African state has called for 'good family values' foregrounding the nuclear family as the key site of care, even if these values do not align with the experiences of many families in South Africa (White, 2001; Button et al., 2017). In centering the importance of the 'nuclear family' model for ensuring the (re)production and maintenance of healthy and prosperous societies, the state attempts to shift responsibility for social and economic policy away from themselves and towards individuals. These cases offer a glimpse into the importance of recognising the social practise of care. Normative prescriptions of who counts as a dependent can delimit and constrain forms of financial support and care for dependents. Given the high level of interdependence within poorer black South African families, the RAF needs to expand its definition of dependents to recognise the everyday flows of support given by a wider range of kin. It seems that customary law is showing, in this regard, greater flexibility than social insurance systems.

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ⁱ *Motha v Road Accident Fund* (40852/2015) [2016] ZAGPPHC 559 (23 June 2016)

ⁱⁱ The primary source of income for the RAF is a levy raised on fuel, measured in cents per litre and set annually by the National Treasury. Currently (July 2017), that levy is 163 cents per litre of fuel. The RAF fuel levy therefore, can be viewed as a compulsory contribution to social security benefits.

ⁱⁱⁱ At the time of writing this article, the RAF was being reviewed and a Road Accident Benefit Scheme (RABS) Bill was at parliament. The new scheme, RABS, proposes to provide benefits to all accident victims and their dependants, irrespective of who was at fault. Benefits will be defined and paid in a structured manner and it will be capped at R160,000 per dependent.

^{iv} The author recognises that customary law is not a unified body of law and customary laws can vary according to location, ethnic group and or community. The judgements used for the

purpose of the analysis often refer to ‘customary law’ in a general sense and fail to recognise the diversity of practices.

^v Fosi v Road Accident Fund (1934/2005) [2007] ZAWCHC 8; 2008 (3) SA 560 (C)

^{vi} JT v Road Accident Fund 2015 (1) SA 609

^{vii} Keforilwe v Road Accident Fund [2016] JOL 35680 (NWM)

^{viii} M v Road Accident Fund (44393/2012) [2017] ZAGPPHC 247