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## NEWSLETTER

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## WE WISH YOU A VERY HAPPY XMAS AND A PROSPEROUS NEW YEAR

**Vital statistics**:

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| CAP determination 31 October 2020: | R297877 |
| CPI year-on-year to September 2020: | 3,0% |
| RSA long bond yield November 2020: | 6,9% |
| Real rate of return (6,9 less 3,0): | 3,9% |
| FNB Property Index August 2020 (real): | -0,2% |

**Financial indicators**: The real rate of return continues at a very high level of 3,9% per year. The short-term repo rate is 3,5% per year and the cost of borrowing to buy a house or start or restart a business is low. Beware – the long-term bond rate is 6,9% per year. Inflation and interest rates will surely rise as the realities of our broken economy come home to roost. This cost will bring down many who grabbed at the "cheap money" that presently prevails.

**Lost savings**: Many years ago in *Mariamah v Marine & Trade Ins* 1978 3 SA 480 (A) at 488/9 it was ruled that when calculating loss of support regard should be had not only to family expenditure but also to money that would have been saved. That is also the normal approach adopted as regards claims for loss of earnings. The calculations of actuaries routinely include the subsidy by the employer to pension benefits, an important form of savings generated by a claimant's earning capacity. "Retirement annuities" are a form of pension savings that receive special treatment in terms of the Income Tax Act. This financial instrument is used by the self-employed to accumulate pension savings and by salaried persons to supplement the savings provided by their employer. Such considerations notwithstanding in *Boutell v RAF* 2018 (5) SA 99 (SCA) it was ruled that contributions to a "retirement annuity fund" must be deducted from the earnings to be assumed when assessing loss of earnings. This is absurd, not the least because a retirement annuity is a form of privately negotiated insurance which would normally be ignored as "*res inter alios acta*". The ruling is to be regretted, and will hopefully be ignored, not the least because the claimant could at any time of his own volition have ceased making the contributions.

**COID capitalisation**: The Commissioner is empowered to recover from the RAF the capitalised value of such pensions as the COID fund has been obliged to pay to the victim (or the dependants). S36(4) of the COID Act specifies "the

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capitalized value as determined by the Commissioner". This means capitalisation using the Commissioner's tables set out at page 115 of the *Quantum Yearbook* 2021. These tables are based on a discount rate of 4,5% per year, much higher than the 2,5% usually used by actuaries. This means lower capital values. Thus for a widow age 40 a COID pension of R1000 per month will be valued by the Commissioner at R209040 whereas an actuary would value it at R283777. This is a deductible collateral benefit so RAF claimants can be grateful that the lower value is deducted. The RAF is then obliged to pay R209040 to the COID fund.

Amendments to the COID Act are coming soon: It is proposed that for work related injuries on a public road the victim will be obliged to claim from the Road Accident Fund and will lose the right to claim from the COID fund. Compensation by the COID fund is done on a no-fault basis whereas for a claim against the RAF fault must proved on the part of driver. For injury claimants the contributory negligence of the victim will also be brought into account and the damages payment reduced proportionately. This proposed amendment to the COID Act should be abandoned.

**Undertaking by the RAF to pay necessary expenses**: It was ruled that the cost of employment of a domestic assistant is an expense that the RAF is entitled to pay in terms of an undertaking under s 17(4)*(a)* (*RAF v Mphirime* (1036/2016)[2017] ZASCA 140 (2 October 2017)). The claimant had argued for the capitalised value of the future payments.

**Reforms at the Road Accident Fund**: The RABS legislation has been abandoned. The cash flow of the RAF is inadequate to pay finalised claims. There is talk of available funds being used to make partial payments, to spread the money to ensure that everyone gets something. In an attempt to reduce legal costs the RAF has dismissed its panel of attorneys and placed the emphasis on out-of-court settlement meetings. For such litigation as cannot be avoided use is to be made of the State Attorney's office. Meanwhile we have had lockdown and a substantial reduction in road usage and the collection of the fuel levy used to provide funds for payment of claims. Even in better times the collected fuel levy was not enough. To add to our woes unscrupulous persons are making matters worse by dishonestly manipulating the claims process (*Taylor v RAF and a related matter* [2020] JOL 48990 (GJ)).

**General damages**: These days general damages can only be claimed from the RAF for a "serious injury". The decision as to what is a "serious injury" is an administrative decision and thus not subject to judicial oversight. There is an administrative appeal procedure. In *RS v RAF* (49899/17) [2020] ZAGPPHC (21 January 2020) the Court voiced its annoyance with last minute decision changes by RAF claims handlers.

**Finis**