

This Week's Spotlight

Motor Vehicle Insurance law set for court interpretation

The Law Society of Kenya (LSK) has moved to court to challenge the Insurance (Motor Vehicle Third Party Risks) Act which was assented to law by the President, Uhuru Kenyatta, on December 24th,



Injury	Compensation (Sh)
The maximum payout is Sh3 million	
Death	3,000,000
Loss of right arm	1,950,000
Stiff hip	750,000
Loss of eye	900,000
Loss of all toes	450,000
Total blindness	3,000,000
Loss of thumb	150,000
Scalp injury	30,000 to 150,000
Loss of nose	900,000

SOURCE: NATIONAL TREASURY

2013. The new law introduced pre-determined amounts of compensation payable to those injured, permanently disabled or killed through road traffic accidents. The Act, which has been in operation since its commencement date on January 28th, 2014 was seen as a means of creating greater certainty over compensation of

insurance claims in the face of varying awards by the courts and a prevalence of fraudulent claims.

The new law introduced pre-determined compensation based on the severity of injury or fatality. The petition by the LSK – which the Insurance industry is expected to respond to – seeks to declare section 5 (b) of the Act unconstitutional because it sets out a pre-determined compensation for accident victims without considering an individual's circumstances. Under section 5 (b), the maximum compensation payable in the event of death is pegged at Kshs 3 million.

The LSK is seeking a finding that the amount payable to victims of road accidents can only be determined through a judicial process and can, therefore, not be set through a statute such as the Insurance (Motor Vehicle Third Party Risks) Act. The LSK argues that by determining the



compensation payable, the Act effectively takes away the power of the courts to determine compensation. Among the factors that the LSK considers germane in determining the level of compensation include issues like the injuries sustained, the victims age, earning capacity and prospects in life. In essence, the petition seeks a finding that all victims of road accidents cannot be treated in like manner in determining compensation.

“The schedule seeks to treat all persons as being in identical situations. Some individuals are more dependent on some parts of their bodies more than others. Therefore the rate of compensation cannot be identical for everyone”, argues the petition.

The LSK is also challenging the power vested in the Cabinet Secretary, in consultation with the Director of Medical Services, to determine and prescribe the compensation payable for categories of injury not currently provided for in the schedule of compensation. The LSK Petition holds that this is tantamount to donating judicial power which is vested in the judiciary under article 159 of the Constitution.

“To the extent that the Cabinet Secretary is permitted to determine compensation for other categories of disablement violates article 47 of the Constitution in that it does not compel the Cabinet Secretary to furnish written reasons for the determination”, notes the Petition.

Also challenged is the requirement for litigants to be subjected to a medical examination before payment of compensation by an insurer. According to the Petition challenging the Insurance (Motor Vehicle Third Party Risks) Act, “this impedes the enforceability of judgments. It denies successful litigants the fruits of judgments entered in their favour”.

The insurance industry is now expected to respond to the Petition pending a full determination by the court. Should the High Court agree with the LSK Petition in full or in part, the National Assembly will be required to amend the Insurance (Motor Vehicle Third Party Risks) Act on areas that the court finds the Act to be inconsistent with the constitution or going beyond the exercise of legal authority. This Petition highlights the distinct roles of the Judiciary and the Legislature under the constitution – the latter enacts and makes law while the former interprets enacted legislation.

This section reviews Bills in the pipeline and due for debate before the National Assembly and/or the Senate highlighting the key elements and provisions of the proposed legislation. In this week's Issue, we focus on the Mining Bill, 2014

The National Assembly is expected to commence debate on a new law which seeks to regulate the natural resources sub-sector in Kenya. This follows the presentation of the Mining Bill 2014 by the leader of Majority in the House, Hon. Aden Duale. The Bill comes at a time of growing attention over the need for a clear and progressive legislative framework to regulate prospecting and mining as significant deposits of natural resources are discovered in Kenya. However, the Mining Bill will not apply to petroleum and hydrocarbon gases which are expected to be regulated under a Petroleum Bill currently being prepared by the Ministry of Energy.

The Mining Bill vests all natural resources in Kenya in the national government on the legal basis that these natural resources are held in trust for the benefit of



the Kenyan people. The Bill contains provisions on the acquisition of mineral rights through the issuance or permits and licences for prospecting and mining of minerals. Significantly, the Bill makes a clear distinction between small scale and large scale mining operations which should create different incentives and policy interventions to encourage the growth and development of each of these streams.

To advance socio-economic development and for national security reasons, the Cabinet Secretary responsible for mining, is allowed to seek cabinet approval to declare certain minerals strategic mineral deposits. To enhance efficient regulation, the Bill establishes two distinct directorates – Mining and Geological Survey. In seeking to maximize on economic returns from mining, the Bill has proposed the establishment of a National Mining Corporation as an



investment arm of the national government. The Bill also seeks to establish a Mineral and Metals Exchange to “facilitate efficiency and security in mineral trade transactions”.

Disputes arising from the prospecting and mining of minerals will be handled through a tribunal to be created by the Chief Justice. And in recognition of the role of the National Land Commission in managing public land, the Bill makes it mandatory that the consent of the NLC is sought before any mining on public land is undertaken.

The Mining Bill comes in the wake of the development of a proposed Mining Policy which is expected to offer broad guidelines on policy implementation of various aspects of the Bill once it is enacted into law. It has long been evident that the Mining Act – which is to be replaced by the proposed Mining Bill – and which predates Kenya’s independence, is not well aligned to the needs, demands and expectations of investors and has provided insufficient safeguards and incentives to attract and motivate investor interest in the mining sector. The Mining Bill 2014 is, therefore, expected to provide a more predictable legal framework.