ROAD-ACCIDENT FUND: SERIOUS INJURY CLAIMS AND JUDICIAL PRECEDENT: THE SUPREME COURT OF APPEAL HAS SPOKEN

Road Accident Fund v Duma 202/2012 and Three related cases (Health Professions Council of South Africa as Amicus Curiae) [2012] ZASCA 169 (27 November 2012)

1 Background

The appeal is based on four cases against the Road Accident Fund (the Fund) that were instituted in the South Gauteng High Court, Johannesburg, for damages suffered as a result of motor-vehicle accidents (*Duma v RAF* 202/2012, *Kubeka v RAF* 64/2012, *Meyer v RAF* 164/2012 and *Mokoena v RAF* 131/2012; see also Makue "General Damages – The New Approach" February 2013 1 *Risk Alert* 5–6). It was not disputed that the Fund was liable to compensate the four appellants as third parties for injuries sustained in the accidents. The only matter on appeal was the plaintiff's entitlement to general damages (see Slabbert and Edeling "Road Accident Fund and Serious Injuries: The Narrative Test 2012 15(2) *PER* 269 fn 6 for an explanation of general damages) as contemplated by section 17(1) and 17(1A) of the Road Accident Fund Act 56 of 1996, read with the Regulations promulgated under the Act (published in the *GG* of 21 July 2009). According to the Road Accident Amendment Act 19 of 2005 (which became effective on 1 August 2008) the Fund's liability for general damages is limited to those victims who suffered "serious injury" (see also Steynberg and Ahmed "The Interpretation of the Amended RAF Act 56 of 1996 and the Regulations Thereto by the Courts with Regard to 'Serious Injury' Claims" 2012 15(2) *PER* 245–266).

Unfortunately neither section 17(1) nor section 17(1A) provides any objectively determinable guidelines as to how to determine whether an injury is serious or not. Only the Regulations prescribe the procedure to be followed in order to determine whether the appellants indeed suffered "serious injuries" (Regulation 3). Regulation 3(1)(a) stipulates that a third party who wishes to claim general damages shall submit himself or herself to an assessment by a medical practitioner registered as a medical practitioner under the Health Professions Act 56 of 1974. Regulation 3(3)(a) determines that a third party who has been so assessed shall obtain from the medical practitioner concerned a serious-injury assessment report, defined in Regulation 1 as a duly completed RAF4 form (http://www.raf.co.za (accessed

2013-03-03)). This form read with Regulation 3(1)(b) requires the medical practitioner to assess the seriousness of an injury in accordance with three sets of criteria, namely:

(a) In terms of Regulation 3(1)(b)(i) the Minister may publish a list of injuries which does not qualify as serious. This list has been published in the Road Accident Fund Amendment Regulations, 2013 Government Notice R347 *GG* 36452 of 15 May 2013 section 3(1)(b)(i) (aa)–(pp). The assessor should therefore check primarily whether an injury falls into this category before determining whether it is serious or not.

(b) Regulation 3(1)(b)(ii) provides that the third party's injury must be assessed as "serious" if it resulted in 30 percent more Impairment of the Whole Person (WPI) as provided in the *AMA guides* (Rondelli *et al American Medical Association's Guides to the Evaluation of Permanent Impairment* 6ed (2008)).

(c) If an injury does not qualify as "serious" in terms of the above, it may nonetheless be assessed as serious under the Narrative Test (Regulation 3(1)(b)(iii)) if the injury (aa) resulted in a serious long-term impairment or loss of a body function; (bb) constitutes permanent serious disfigurement; (cc) resulted in severe long-term mental or severe long-term behavioural disturbances or disorder; (dd) resulted in loss of a foetus.

The Fund has to accept only claims for general damages if a claim is supported by a serious-injury report, duly filled in according to the method provided for in the Regulations. If the Fund is not satisfied, it must in terms of Regulation 3(3)(d) either reject the claim and give reasons for doing so, or direct that the third party submits himself or herself to a further assessment at the Fund's expense by a medical practitioner designated by the Fund in accordance with Regulation 3(1)(b).

If a claim does not comply with the prescribed procedures a claim for general damages is premature, as it is not for the court to decide whether an injury is "serious" or not.

The judgment given in this appeal by Brand JA (Mhlantla, Leach JJA, Plasket and Saldulker AJJA concurring) overturned many previous cases judged by other courts including the four referred to. The clarification given by the Supreme Court of Appeal and the Road Accident Fund Amendment Regulations, 2013 that were published after the judgment, is significant and should be taken cognisance of by any lawyer, medical practitioner involved in a RAF case or an individual approaching the Fund unaided by lawyers.

2 Facts of the case

In all of the four cases the High Court held that the plaintiffs had suffered "serious injury" and general damages were awarded to them. Leave of appeal against each of these judgments was granted by the court *a quo*. The Fund as respondent claimed that the High Court should not have awarded general damages as the plaintiffs have not proved in the different cases that they had actually suffered "serious injury". In determining whether serious

injuries were sustained, the correct method as prescribed by the Regulations to the Act was not followed. The Health Professions Council of South Africa (HPCSA) sought and was granted leave to make submissions as *amicus curiae*.

In three of the four cases in the court *a quo* action was instituted before the RAF 4 form was delivered to the Fund. In the *Meyer* case (*Meyer v Road Accident Fund* Case no 2010/48788 SGJ (20 February 2012)) the RAF 4 form preceded the service of summons. In *Mokoena* (*Mokoena v Road Accident Fund* Case No 2010/38170 SGJ (15 December 2011)), the RAF 4 form was delivered before the Fund filed its plea, but in the cases of *Duma* (*Duma v Road Accident Fund* Case No 2010/3257 SGJ (9 December 2011)) and *Kubeka* (*Kubeka v Road Accident Fund* Case No 2010/25663 SGJ (5 October 2011)) it was only submitted after the close of pleadings.

The court *a quo* found that the RAF 4 forms were in fact compliant with Regulation 3, and in any event, it was apparent from the medical evidence presented at trial that the plaintiffs did indeed suffer serious injuries (par 15). The judges relied primarily on the unreported decision of the South Gauteng High Court in *Smith and Ngobeni v Road Accident Fund* (case no 47697/2009 dated 29 April 2011), which said if the Fund did not dispute that the third party's injury was serious, the court could proceed to decide whether it was serious or not (par 17).

The Fund's rejection was thus disregarded. The reason being the Fund had failed to reject the RAF 4 forms within a reasonable time and its right to do so have therefore expired (par 15). The High Court referred to *Louw v Road Accident Fund* (2012 (1) SA 104 (GSJ) par 77–88) in this regard. According to this judgment the period of 60 days within which the Fund might object to a third party's initial claim (s 24(5) of the Act) served as a guideline and the Fund should have complied with this.

3 The Supreme Court of Appeal's judgment

The Supreme Court of appeal dealt only with the facts of the cases but the judges used the opportunity to clarify issues surrounding the payment of damages for serious injuries sustained in a motor vehicle accident. The court basically addressed three issues namely: Were the RAF 4 in accordance with the Regulations, were the claims rejected timeously and properly and were sufficient reasons given for the rejection of the claims.

3 1 Were the RAF 4 forms in accordance with Regulation 3(1)?

This question was of no real consequence to the matters to be decided, but the SCA on request of the Fund and the *amicus curiae* (HPCSA) provided some guidelines on the interpretation of Regulation 3(1) (par 27).

The Fund rejected the RAF 4 forms in all four cases mentioned mainly on three grounds:

(a) The medical practitioner who assessed the plaintiff's injuries, did so without physically examining them.

(b) The RAF 4 form was filled in by an occupational therapist who is not a medical practitioner as per Regulation 3(1)(b)(ii).

(c) An assessment in terms of the Narrative Test (Regulation 3(1)(b)(iii)) cannot be conducted without first doing the WPI Assessment in terms of the *AMA Guides*.

3 1 1 A medical practitioner assessing the claimant must examine him or her physically

It seemed as if an occupational therapist completed the forms. The medical practitioner who signed the RAF 4 forms indicated that he had not examined the patients and that he relied instead on the hospital records annexed to the reports (par 12). Despite this he described the "current symptoms and complaints" of the plaintiffs, gave a diagnosis and stated that the plaintiffs have reached maximal medical improvement (MMI) within the meaning of the *AMA Guides*. In the *Meyer* case he based his assessment on a surgeon's report that was more than 7 months old and a psychiatrist's report which was older than 20 months. In testimony he conceded that he did not know what MMI meant, because he was not acquainted with the *AMA Guides*.

Section 17(1A) of the Road Accident Fund Act and Regulation 3(1) require the assessment of a claimant to be done by a medical practitioner registered as such under the Health Professions Act 56 of 1974. This is the only requirement as the definitions to the Act do not define a medical practitioner. However, the judge remarked that the Health Professions Act distinguishes between a "medical practitioner" and a "health worker". The latter is defined as any person, including a student, registered with the Health Professions Council in a profession registrable under that Act. Although there are 12 professions registered under the Health Professions Act it is clear that "medical practitioner" as envisaged by section 17(1)(a) and Regulation 3(1) are those practitioners registered under the Medical and Dental Profession (par 33). In short therefore the SCA concluded that an occupational therapist may not complete the RAF 4 report.

Regulation 3(1)(a) provides specifically that a claimant "shall submit himself or herself to an assessment by a medical practitioner". The High Court argued that assessment was a synonym for "evaluate" or "estimate" or "determine the nature or quality of" (par 29). The SCA was of the view that these meanings were taken out of the context of Regulation 3(1)(a), Brand JA remarked: "it simply cannot be said by any stretch of the imagination that the claimant, who merely sent his hospital records to a medical practitioner has submitted himself [or herself] to an assessment by that practitioner" (par 29). In the same sense Regulation 3(3)(d)(ii) provides that, if the Fund is not satisfied with the claimant's RAF 4 form, it may direct that the claimant submit himself or herself … to a further assessment to ascertain whether the injury was serious … by a medical practitioner designated by the Fund (par

30). Moreover point 4.5 of the RAF 4 form requires medical practitioners to give their "conclusion regarding physical examination" which can only mean that the medical practitioner should give his or her own conclusion based on his or her own physical examination of the claimant (par 30).

In a "Guideline" (Edeling, Mabuya, Engelbrecht, Rosman and Birrell "HPCSA Serious Injury Narrative Test Guideline" October 2013 103(10) *SAMJ* 763–764) it is said that especially where the Narrative Test is used it is recommended that a medical practitioner's report should be supplemented by reports from other relevant experts, mainly to describe properly the relevant or altered circumstances of the third party. The guidelines indicate how these reports should be compiled, yet it is undisputed that the RAF 4 form should be completed by a medical practitioner. The medical practitioner should also provide comments on the other experts' reports.

3 1 2 Should the whole-person impairment test be done before the narrative test?

Based on the criteria of Regulation 3(1)(b) (see above) the Fund contended that the WPI test should be done before a medical practitioner who compiles the RAF 4 report can resort to the Narrative Test. The four cases above rejected the Fund's contention on the basis that the Regulations contemplated a disjunctive test where a claimant had to meet the requirements of one or the other (par 36). The SCA agreed that a reading of Regulation 3(1)(b) read in isolation seems to lend support to the idea that either of the two tests could be applied, yet Regulation 3(1)(b)(vi) favoured the Fund's argument (par 36).

Brand JA indicated the answer was really in the RAF 4 form itself. The report is divided into five sections. Section 1 requires personal detail of the claimant. Section 2 calls for particulars of the medical practitioner responsible for the assessment. Section 3 relates the list of non-serious injuries. Section 4 deals with the WPI test and the *AMA Guides*, while section 5 is the Narrative Test. Section 5 states: "If the injury is not on the list of non-serious injuries and did not result in 30 per cent WPI, as provided in the *AMA Guides* …" Of significance for the judge was section 4, which really contained the "nub" of the report. Section 4 reads: "AMA Impairment Rating: To be completed if injury is not on list of non-serious injuries":

The medical practitioner then has to complete the following sub-headings:

4.1 Describe the nature of the motor vehicle accident.

4.2 Medical treatment rendered from date of accident to present.

4.3 Current symptoms and complaints.

4.4 Diagnosis.

4.5 Conclusion regarding physical examination.

4.6 Conclusion regarding clinical studies.

4.7 Medical history.

4.8 Social and personal history.

4.9 Educational and occupational history.

4.10 Has the patient reached MMI?

4.11 Specify details regarding apportionment if any.

4.12 A clear, accurate and complete report must be provided to support a rating of impairment with reference to clinical evaluation, analysis of findings and discussion of how the impairment rating was calculated.

4.13 Exceptions

If it were to be left uncompleted, the report would be of little substance. He therefore came to the conclusion that it was never intended that an assessment could bypass the WPI test (par 37).

Unfortunately the court did not use the opportunity to consider the RAF 4 form in detail and see the shortcomings. In 4.1 the doctor was required to describe the nature of the accident, despite the fact that he or she wasn't there and therefore could only speculate. It would have been more relevant to ask whether the doctor was satisfied that the injured was indeed injured in a motor vehicle accident. There is also no specific provision for the recording of the injuries sustained. The medical treatment rendered (4.2) should be indicated before the diagnosis (4.4) and before recording the medical history (4.7), the social and personal history (4.8) or the educational and occupational history (4.9) of the injured. It was not clear whether the required diagnosis related to the injury diagnosis or the outcome diagnosis, two different concepts each which was of major importance (see Slabbert and Edeling 2012 *PER* 15(2) 281).

A medical practitioner who compiles a report and completes the RAF 4 form must thus first of all do the WPI test. If he or she who is drafting the RAF 4 Serious Injury Assessment Report after completing the WPI test feels that the injuries are serious despite it being rated less than 30 per cent, he or she should then resort to the Narrative Test. This might happen because the *AMA Guides* fail to take the "circumstances of the third party" into account as contemplated by the Act. In contrast to the requirements of the Act, the *AMA Guides* prescribe an impairment-rating system, which does not take the circumstances of the injured party into consideration (Edeling *et al* 2013 103(10) *SAMJ* 764). The *AMA Guides* do not provide for any assessment of the nature or degree of permanent disability. The *Guides* state on page 6 that it is not intended to be used for direct estimates of work-participation restrictions. It further says: "In disability evaluation, the impairment rating is one of several determinants of disablement." Impairment rating is the determinant, most amenable to physician's assessment; it must be further integrated with contextual information typically provided by non-physician sources regarding psychological, social, vocational and avocational issues.

3 2 Rejecting a claim timeously

The SCA argued that the judgments in the courts *a quo* assumed that if the Fund should fail to reject a claim timeously the rejection can be ignored and

if the medical evidence before the court then shows that in actual fact the injuries of the plaintiff were serious, the court can decide the issue of general damages (par 18). The SCA found this reasoning fundamentally flawed as the requirement for an award of general damages was conferred on the Fund and not on the court (par 19). The court has no jurisdiction to entertain a claim for general damages against the Fund, as the third party must satisfy the Fund, not the court, that his or her injury was serious. The SCA held that the solution to a third party whose claim had been rejected was to be found in section 6(2)(g), read with section 6(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). These sections provide that if an administrative authority (which the RAF is) unreasonably delays to take a decision in circumstances where there is no period prescribed for that decision, an application can be brought "for judicial review of the failure to take the decision" (par 20). The SCA also did not accept the reference to section 24(5) above as it only dealt with the procedural validity of the claimant's initial claim. The SCA concluded this point of timeous rejection by saying that Regulation 3, in not specifying any time period within which the Fund had to take its decision under Regulations 3(3)(c) and (d), specifically indicated that the Fund should apply its mind in each individual case. If it took longer than 60 days, so be it. As per Brand JA "To insist that the Fund take a decision before it is ready to do so will serve little purpose other than to compel it to reject the RAF 4 form" (par 22). He added though, that of course, was not to suggest that the Fund might drag its heels.

In May 2013 the Road Accident Fund Amendment Regulations *supra* added a Section 3(2A)(a) "The Fund or agent must determine a request by a third party in terms of subregulation (2) within 60 days from the date on which the written request was sent by registered post or delivered by hand to the Fund or agent." The amended regulations have thus filled the gap as addressed by the SCA in that the Fund must now reject the claim within a period of sixty days.

3 3 No proper reasons for the rejection of the RAF 4 forms provided

The Fund did not give reasons why the RAF 4 forms in all four cases were rejected. The SCA's view was that the Fund performed an administrative function and by not giving reasons, the rejection was invalid and the forms were therefore considered not being rejected. In any administrative action where no reasons are given the request of a person remains valid and binding until it is set aside by a court on review or overturned in an internal appeal process. The judges referred to *Oudekraal Estates (Pty) Ltd v City of Cape Town* (2004 (6) SA 222 (SCA) par 26) in this regard. "The fact that the Fund gave no reasons for the rejection, or that the reasons given are found to be unpersuasive or not based on proper medical or legal grounds cannot detract from this principle" (par 24). The SCA argued that it was not for the High Courts to disregard the Fund's rejection of the RAF 4 forms on the basis that the reasons given were insufficient, or that they were given without any medical or legal basis, or that they were proved to be wrong by expert evidence at the trial (par 24).

If the High Court's overriding of the Fund's decision was regarded as a review it could also not be accepted as section 7(2) of PAJA stipulates that no court shall entertain a review of an administrative decision unless and until any internal appeal provided for had been exhausted (par 25). The section does allow the internal appeal procedure to be circumvented "in exceptional circumstances and on application by the person concerned". No such application was brought in the cases under discussion. Regulation 3(4) explains the appeal process in RAF cases as well as how and where the Appeal Tribunal will function. The respective plaintiffs did not use this option. It was unacceptable as the Appeal Tribunals were not bound by the reasons given by the Fund. In the exercise of their wide investigative and fact-finding powers, they can establish for themselves whether an injury is serious or not. It is thus a re-hearing and a fresh determination on the merits with additional evidence or information if needs be. The SCA referred to the case of *Tikly v Johannes NO* (1963 (2) SA 588 (T) 590G–H) in this regard.

4 Conclusion

The SCA was of the view that the special pleas raised by the Fund in the court *a quo* should have been upheld (par 40). The court further remarked that what they believe the Fund sought on appeal was clarity on the application of Regulation 3. In all four cases the appeals were upheld.

The SCA and the amended regulations have now given clarity to the application of the Regulations to the Act that was long overdue as different High Courts did not apply the stipulations in the Act and the Regulations in the same manner. It is now clear that a court cannot determine whether an injury is serious or not – this is the duty of the Fund. There is now a sixty-day-time limit for the rejection of a claim for serious injuries as stipulated in the amended regulations. This is welcomed as the SCA in the case under discussion did not address this issue to satisfaction. They left it open by saying that: "[the] period of time can only be determined with reference to the facts of a particular case" (par 23).

The WPI test should be done before the Narrative Test but medical practitioners should not be afraid to apply the Narrative Test if they are convinced that the injuries are in fact of a serious nature. If the claim is rejected the Fund should give adequate reasons why it was rejected. If the Fund fails to give proper reasons either the sections in PAJA or the Appeal Tribunals at the HPSCA should be approached. It is submitted that the Appeal Process is described in detail in the Act and claimants should therefore rather opt for this process instead of using PAJA (see Edeling *et al* 2013 103(10) *SAMJ* 763–764).

Magda Slabbert
University of South Africa (UNISA)