REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE:15/3/2018
CASE NO: 3833/16

In the matter between:

FEZILE THRONE YEBE PLAINTIFF

And

THE ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

MOSOPA, AJ

INTRODUCTION

[1] The plaintiff in this matter instituted action against the Defendant herein, the Road Accident Fund, as a result of the motor vehicle accident which occurred on the 11th July 2013 in Alrode South on the corner of Old Vereeniging Road and Kliprivier Road, between a minibus taxi bearing registration details [….] driven by Mr Themba Mahlangu in which the plaintiff was a passenger and a Freightliner Truck bearing registration details [….] driven by Ntokozo Zondi.

[2] The Plaintiff suffered personal injuries as a result of the aforesaid collision. The issue of liability was settled with the Defendant accepting liability for 100% of the Plaintiffs proven damages.

[3] In the particulars of claim at paragraphs 6 and 7 the Plaintiff alleges the following:

6.1. As a result of the collision the Plaintiff sustained the following bodily injuries:

6.1.1. A fractured left ankle;
6.1.2. A fractured left knee;
6.1.3. Head injuries;
6.1.4. Facial lacerations

[7] As a result of those injuries sustained by the Plaintiff, the Plaintiff

7.1. Experienced pam, suffering and discomfort and will do so m future;

7.2. Experienced emotional trauma and shock and will experience further emotional trauma in future;

7.3. Require hospital and medical treatment and will, in the future, require further such treatment and will have to need expenses with regard hereto;

7.4. Has suffered a loss of enjoyment of the amenities of life;
7.5. Will in the future suffer loss of earnings and or earning capacity;
7.6. Has been unable to commence his duties at work and has to this day not returned to work.

ISSUES TO BE DETERMINED

[4] I was informed by Mr Maritz on behalf of the Plaintiff that the issue of quantification of loss of earnings and/or earning capacity has been resolved and the Defendant undertook to pay the Plaintiff the amount of R986, 560,00 (Nine Hundred And Eighty Six Thousand Rands and Five Hundred And Sixty Rands).

[5] The Defendant to further furnish the Plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of the future accommodation of the Plaintiff in a hospital or any

health care facility.

[6] The only outstanding issue is the issue of general damage. The underlying issues being whether the Defendant rejected the Plaintiffs serious injuries assessment report in terms of Road Accident Fund Regulations, 2008 (“Regulations”) and whether the injuries sustained by the Plaintiff were admitted by the Defendant in a pre-trial conference held by the parties on the 26th January 2018.

THE LAW

[7] The Regulations defines the serious injury assessment report as a duly completed form RAF4 attached to the Regulations marked annexure D, or such amendment or substitution hereof as the Fund may from time to time give notice in the Gazette.

[8] Section 3(3) (c) of the Regulations provides that;

"The fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations".

[9] Further Section 3(3) (d) of the Regulations provides that "(d) if the fund or an agent is not satisfied that the injury has been correctly assessed, the fund or an agent must;

(i) reject the serious injury assessment report and furnish the third party with reasons for the rejection, or

(ii) direct that the party submit himself or herself, at the cost of the fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations, by a

medical practitioner designated by the fund or an agent.

(d A) The Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who is in terms of section 8 must handle the claim, accept or reject the serious injury report or direct that the third party submit himself or herself to a further assessment.

(e) The fund or agent must either accept the further assessment or dispute the further assessment in the manner provided in these Regulations".

[10] From the aforegoing it is clear that the legislative framework affords the Fund with three (3) options available in the event it is not satisfied with the assessment of injury of the claimant being;

10.1. to accept the serious injury report, or,

10.2. reject the report, or

10.3. direct that the party submit to a further assessment. **See Road Accident Fund v Farria (2014) 4 ALL SA 168 (SCA)**

[11] In the event a dispute is declared section 3 (8) of the Regulations makes provision for the dispute to be determined by an appeal tribunal of three independent medical practitioners with expertise in the appropriate area of medicine, appointed by the register of the Health Professional Council. In terms of section 3 (13) of the Regulations the determination by the appeal tribunal is final and binding.

[12] In **Road Accident Fund v Duma 2013 (6) SA 9 (SCA)** at paragraph 19 the court stated that "That approach, I believe, is fundamentally flawed. In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the court. That much appears from the stipulation in regulation 3 (3) (c) that the Fund shall only be obliged to pay general

damages if the Fund - and not 1e court - is satisfied that the injury has correctly been assessed in accordance with the RAF4 as serious. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages the third party must satisfy the Fund, not the court, that his or her injury was serious.

[13] Appreciation of this basic principle, I think leads one to the following conclusions,

(a) since the Fund is an organ of state as defined in section 239 of the Constitution and is performing a public function in terms of legislation; its decision in terms of the regulations 3 (3) (c) and 3 (3) (d), whether RAF4 form correctly assessed the claimant's injury as "serious", constitutes "administrative action" as contemplated by the **Promotion of Administrative Justice Act 3 of 2000 (PAJA).** (A decision is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of PAJA.

(b) If the Fund should fail to take a decision within reasonable time, the plaintiffs remedy is under PAJA.

(c) If the Fund should take a decision against the Plaintiff, that decision cannot be ignored simply became it was not taken within a reasonable time or because no legal or medical basis is provided for the decision or because the court does not agree with the reasons given.

(d) A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.

(e) Neither the decision of the Fund nor decision of the appeal tribunal is subject to an appeal to the court. The court' s control over these decisions is by means of review proceedings under PAJA.

[14] **In Mphala v Road Accident Fund (698/16) (2017) ZASCA 76 (1 June 2017)** Mathopo JA writing on behalf of the majority stated at paragraph 11 " If the Fund is not satisfied that the injury is serious, the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim. The plaintiff's remedy is to take the rejection on appeal in terms of regulation 3(4). The Fund, as an organ of state as defined in **section 239 of The Constitution,** performs a public function in terms of legislation. Its decision in terms of regulation 3(3)(c) and 3(3) (d), whether or not the report correctly assessed the claimants' injury as "serious" constitutes administrative action, as contemplated in PAJA. In terms of section 6 (2)(g), read with section 6(3)(b) of PAJA if the Fund unreasonably delays in taking a decision in circumstances where there is a period prescribed for that decision, an application can be brought for judicial review of the failure to take the decision. An interpretation that seeks to suggest that because the Fund did not make a decision within 90 days of receipt of SIA report, it is deemed to have accepted that the third party has suffered serious injuries is untenable and in conflict with the provisions of subsections 17 (1) and 17 (IA) of the Act and regulation. It is always open to the Fund to reject the SIA report when it is not satisfied that the injury has been correctly assessed in terms of regulation 3(3) (dA), where the Fund has failed to make a decision within prescribed period an otherwise not serious injury would by default become serious because of the delay. By including the prescribed period the legislature sought to ameliorate the hardship experienced by claimants prior to and after Duma case. The intention was to bring legal certainty and to compel the Fund to act promptly and timeously, not to create a presumption in favour of claimant that the injury in question is a serious one.

[15] The new legislature seeks to define the rights of the claimants in unambiguous terms and afford them an opportunity after 90 days to apply for a mandamus in terms of PAJA to compel the Fund to make a decision. It was specifically enacted to deal with the mischief identified by this court

in Duma relating to the phrase "within a reasonable time" which caused uncertainty to claimants. It is unfortunate that the Fund continues to be tardy, but one cannot formulate the regulation in order to avoid that consequence. In my view, absent any constitutional challenge, the reading into the regulation of a deeming provision is impermissible and tantamount to arrogating to the court the powers of law-making functions".

[16] Finally in the **Road Accident Fund v Lebeko (802/2011) 2012 ZASCA 158 (15 November 2012)** the court held that "in the absence of the prescribed assessment having been made in terms of the Regulations, the high court could not make an order for the payment of general damages. It was held that high court ought to have postponed the claim in regard to the claim for general damages so that the procedures for which legislative provisions has been made in this regard be completed".

CONTENTIONS BY THE PARTIES

[17] The parties agreed that there will be no oral evidence led and the parties agreed to proceed with the stated case.

[18] It was contended on behalf of the plaintiff that the Plaintiff has established jurisdictional facts for the court to deal with the issue of general damages by virtue of the following;

18.1. the plaintiff duly complied with the Regulations and his injuries were assessed to be serious as indicated in the , serious injury assessment report RAF4;

18.2. the Defendant did not reject the Plaintiff serious injuries assessment report and if it can be found that such rejectment was made, such rejection does not have the protection of the law as it does not comply with the Regulations, and,

18.3. that the Defendant admitted the Plaintiffs injuries in the pre-trial conference which was held on the 26th January 2018.

[19] On the other hand Mr Mamba on behalf of the Defendant argued that the

Fund rejected the assessment of the Plaintiff injuries and as such this court has no necessary jurisdiction to deal with the issue of general damages and as such the issue of general damages ought to be referred to the tribunal for determination.

[20] It must be noted even though not necessarily for the determination of the issues in this matter, Mr Mamba stated from the bar that the Plaintiff was referred for assessment by the Fund and the Plaintiffs injuries were found not to be falling under the threshold of serious injuries. Mr Mamba also submitted from the bar that the Fund rejected the serious injury assessment report of the Plaintiff but I was not furnished with the letter indicating such a rejection. It seems to be the Plaintiffs contention that they never received the rejection from the Fund of the Plaintiffs injuries as serious.

[21] As already indicated the Fund after rece1vmg the serious injury assessment has a choice to either accept such a report, reject the report or direct that the Plaintiff submit to a further assessment. In terms of the Regulations the Fund has a period of 90 days from receipt of the serious injury assessment report to accept or reject or direct that Plaintiff himself or herself for further assessment.

[22] In *Casu* it is clear that the Defendant when rejecting the Plaintiff serious injury assessment report as indicated by Mr Mama it was not done within the stipulated time period of 90 days. It is important to note that section 3(dA) uses the word "must" which is a clear indication that it is obligatory upon the Fund to comply with this provision. However the Regulation is silent as to what will happen if the Fund fails to comply with the period prescribed and reject the serious injury assessment report within the 90 days period.

[23] In Duma (supra) it was held that the Fund is the organ of the state and it is performing a public function in terms of the regulations 3(3)(c) and (3)(d) in satisfying itself whether RAF4 form correctly assessed the claimant's injury as "serious" and it constitutes administrative action and if the Fund fails to take a decision within a reasonable time, the Plaintiff ' s remedy is

under PAJA.

[24] I accept that for the purpose of this trial the rejection was made on the trial date even through Mr Mamba argued that the rejection was not made for the first time on the date of hearing of the matter, but the Defendant has no document to proof or support his contention.

[25] Now the question which arises is that can the rejection of the serious injury assessment report be made on the date of hearing of the matter. Reference has already been made to the matter of Duma where the court held that in such an event the Plaintiffs remedy lies under PAJA. It was further held in the Duma matter that if the Fund took a decision against the Plaintiff, such decision cannot be ignored because it was not taken within a reasonable time or no legal or medical basis is provided for the decision or because the court does not agree with the reasons given.

[26] The same dictum was adopted in the case of Mphala (supra) when the court further held that failure by the Fund to act within 90 days prescribed period does not mean that the Fund has accepted the serious injury assessment report.

[27] The issue relating to whether the injuries suffered by the Plaintiff falls under the threshold of "serious" was placed in dispute by the Fund and as such the court cannot simply ignore that and deal with general damages as the court has no jurisdiction to deal with it. The Fund and not the court must be satisfied that the claimant suffered serious injuries following a motor vehicle collision.

[28] Then it brings us to the second leg of Mr Maritz argument on behalf of the Plaintiff of the jurisdictional facts. It was contended by Mr Maritz that the Defendant accepted the injuries of the Plaintiff at the pre-trial conference which was held between the parties.

[29] At paragraph 7.1 of the pre-trial minute of the 26t h January 2018 the following was recorded;

> Question: Does the Defendant admit that the Plaintiff suffered the injuries as set out in the respective medical legal reports

filed by the Plaintiff? If not, full details are required of any injuries recorded in the aforesaid reports, which the Defendant denies that the Plaintiff has suffered in the collision.

Answer: This is admitted to the extent that same is confirmed by the hospital records or the Defendant's expert report (subject to what follows) of the joint minutes. To the extent that the Defendant does not file reports by the relevant counter-experts by the 31st of January 2018 this is deemed to be admitted.

[30] In **MEC for Economic Affairs, Environment and Tourism: Eastern Cape v Kruizenga (169/2009) (2010) ZASCA at** par 6 it was stated *" Rule 37 is thus of critical importance in the litigation process. That is why this court has held that in the absence of any special circumstance a party is not entitled to resile from an agreement deliberately reached at the rule 37 conference".*

[31] Similarly in **Filta-matrix v Freudenberg and others 1998 (1) SA 606 AD at 6148 par D the** following was stated; *"to allow a party, without special circumstance, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail scope of the litigation... If a party elects to limit the ambit of his case, the election is usually binding".*

[32] A pre-trial minute is a consensual document and, in effect, constitutes a contract between the parties. See **Shoredits Construction (Pty) Ltd v Pienaar No and Others (1995) 4 BLKR 32 (LAC) at 334 E-F.** Legal representatives during the pre-trial conference are authorised to make admission to bind their clients and their clients cannot easily resile from such agreement unless it is established that clients did not give such mandate /authority to make such admissions. It appears that in *casu* the issue of authority to make admissions on behalf of the Fund is not placed in dispute by the Fund.

[33] It is apparent that the admission made by the Defendant in the pre-trial minute was made upon certain conditions met, i.e. admitted to the extent that is confirmed by the hospital reports or Defendant's expert report". Mr Mamba is on record saying that their orthopaedic surgeon did not qualify the Plaintiffs injuries as serious. However it is not clear as to when the parties attended the pre-trial conference of the 26th January 2018 such orthopaedic report was already available or not. The expert report is referred to in the pre-trial minutes even though without specification.

[34] Consequently then the question arises as to whether the Fund admitted the Plaintiff injuries in the pre-trial conference. Mr Maritz on behalf of the Plaintiff argued strongly in favour of that fact, whereas Mr Mamba contended that such does not amount to admission. I tend to admit with Mr Mamba on that point. The admission in a pre-trial must be unequivocal and not subject to any ambiguity.

[35] I am therefore in full agreement with Mr Mamba that this court has no jurisdiction to adjudicate upon the issue of general damages. However that is not the end of the matter for the Plaintiff as he is still enjoying protection from the regulations and the matter can be simply referred to the relevant tribunal.

ORDER

[35] I therefore make the following order:

1. Draft order marked "X" is made an order of court.
2. The issue of general damages is referred to tribunal in terms of Regulation section 3(8) of the Regulations for determination.
3. The issue of general damages is postponed *sine die.*

MOSOPA M.J

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

For the Plaintiff:	Adv S.G Maritz
Instructed by:	N Van Der Walt Inc
For the Defendant:	Adv Mamba
Instructed by:	Morare Thobejane Inc
Date of Judgment:	15/3/2018

IN THE HIGH COURT OF SOUTH AFRICA.

(GAUTENG DIVISION, PRETORIA)

HELD AT PRETORIA ON THIS THE 13th DAY OF FEBRUARY 2018 BEFORE THE HONOURABLE JUDGE LEDWABA (DJP) IN COURT 8E

CASE NO: **3833/2016**

In the matter between:

FT YEBE Plaintiff

and

ROAD ACCIDENT FUND Defendant

DRAFT ORDER

HAVING HEARD COUNSEL for the plaintiff and the defendant and by agreement between the parties

THE COURT GRANTS JUDGMENT in favour of the plaintiff against the defendant in the following terms:-

1. The defendant shall pay an amount of **R986,560.00 (Nine Hundred And Sixty Thousand Rands and Five Hundred And Sixty Rands** to the plaintiff's attorneys, N VAN DER WALT INC, in settlement of the plaintiff's claim by direct transfer into their trust account with the following details:

   Name: N van der Walt Inc trust account

Bank:	Nedbank
Branch:	Edenvale
Branch code:	128842
Account number:	1288090862

2. The Defendant must furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her after the costs have been incurred and on proof thereof which costs includes but is not limited to the treatment, services or goods as set out in the medico-legal report delivered by Plaintiff, resulting from the accident that occurred on 11 July 2013.

3. Payment of the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include the following:-

3.1 The fees of senior - junior counsel on the High Court scale.

3.2 The reasonable taxable costs of obtaining all expert, medico-legal reports from the plaintiffs experts (including addendums thereto), which were furnished to the defendant.

3.3 The reasonable taxable preparation and reservation fees, if any, of the following experts of whom notice has been given, being:-

3.3.1 Dr DA Birrell / Dr Close (Orthopaedic Surgeon);

3.3.2 Dr JPM Pienaar (Plastic Surgeon);

3.3.3 M Hales (Occupational Therapist);

3.3.4 N Prinsloo (Clinical Psychologist;)

3.3.5 D Polakow (Maxillo-Facial and Oral Surgeon);

3.3.6 Dr D van Onselen (Ophthalmologist);

3.3.7 Dr T Bingle (Neurosurgeon.)

3.3.8 G Jacobson (Actuary)

3.4 The costs of a consultation between the plaintiff and his

attorney to discuss the settlement offer received from the defendant and the terms of this order;

3.5 The reasonable travelling costs incurred by the plaintiff in attending all the medico-legal appointments with the parties' experts, subject to the Taxing Master's discretion. ·

4. The following shall apply with regards to payment of the aforementioned capital and costs:-

4.1 The plaintiff shall serve the notice of taxation on the defendant's attorney of record.

4.2 The plaintiff shall allow the defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of taxation or settlement.

4.3 Should payment not be effected timeously, plaintiff will be entitled to recover interest at the rate of 10,25% on the capital. In respect of the taxed costs, interest will be recovered from date of *allocatur* to date of final payment.

4.4 The said taxed or agreed costs will also be paid into the trust account mentioned in paragraph 1 above.

BY THE COURT

On behalf of the Plaintiff: Adv SG Maritz

082 333 8521

On behalf of the Defendant: Adv Mamba

083 2452920