SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 802/2011

Reportable

In the matter between:

ROAD ACCIDENT FUND **APPELLANT**

and

OUPA WILLIAM LEBEKO **RESPONDENT**

Neutral citation: *Road Accident Fund v Oupa William Lebeko* (802/11) [2012] ZASCA 159 (15 November 2012).

Coram: Mpati P, Brand, Heher, Bosielo et Pillay JJA

Heard: **21 August 2012**

Delivered: **15 November 2012**

Summary: General damages – Road Accident Fund Act 56 of 1996 – Claim for non-pecuniary damages flowing from injuries sustained in a motor vehicle collision – Limited to 'serious injury' – Reg 3 sets out prescribed procedure for determination of 'serious injury' – Plaintiff failed to comply with regulation 3 – Claim for general damages postponed pending compliance with regulation 3.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mbha J, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

‘2.1 It is declared that the defendant is liable for the plaintiff’s loss without any apportionment.

2.2 The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996, to compensate him for 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 him arising out of the injuries sustained in the motor vehicle collision of 6 June 2009 after such costs have been incurred and upon proof thereof.

2.3 The defendant is ordered to pay the costs of the hearing on 2 August 2011.

2.4 The special plea is upheld with costs.

2.5 It is declared that the plaintiff has not yet complied with regulation 3.

2.6 The plaintiff is given leave to exercise his right in terms of regulation 3(4) to appeal against the Fund’s rejection of Dr Scher’s serious injury assessment report within 90 days of the date of this judgment.

2.7 The matter is postponed sine die for the determination of:

2.7.1 the plaintiff's claim for general damages; and

2.7.2 liability for the remaining costs.'

JUDGMENT

PILLAY JA (MPATI P, BRAND, HEHER ET BOSIELO JJA CONCURRING)

[1] With the leave of the South Gauteng High Court, Johannesburg, the appellant (defendant in the court a quo) appeals against the order dismissing its special plea (with costs) and awarding general damages to the respondent (plaintiff in the court a quo). For the sake of convenience, the parties will be referred to as they were in the court below. The real issue in this appeal is how a 'serious injury' is to be assessed for the purposes of s 17(1A) of the Road Accident Fund Act 56 of 1996 (the Act).

[2] It is perhaps prudent to first set out, as briefly as possible, the latest developments in South African law regarding claims for general damages resulting from injuries sustained in motor vehicle collisions.

[3] In 2002, The Satchwell Commission report was published. The commission was established to investigate the financial and policy difficulties encountered in implementing the provisions of the Act. The report highlighted a number of issues. These included the disproportionate awards for general damages in respect of pain and suffering, loss of amenities of life – non-pecuniary damages – as between road accident victims who suffer long-term disability, on the one hand, and those who do not, on the other. It is clear from the investigation that the total of general damages paid out to victims who sustained minor injuries and did not suffer any long-term disability far exceeded the total amount paid out to those who sustained serious injuries, which resulted in long-term disability.

[4] The commission's recommendations were adopted in the Road Accident Fund Amendment Act 19 of 2005. S 17(1) of the Act reads:

’17. Liability of Fund and agents

(1) The Fund or an agent shall –

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) ….

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.’

S 17(1A) of the Act reads:

‘(1A)*(a)* Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974).’

[5] It is clear that the obligation of the defendant to make payment to a third party for non-pecuniary damages is dependent on an assessment of an injury in terms of a prescribed method. The regulations pertaining to s 17 of the Act, including the prescribed method of assessment were promulgated in GN R770, *GG* 31249, 21 July 2008 (with effect from 1 August 2008). Regulation 3 is germane to this appeal and sets out the procedure for the required assessment. It provides for a three stage assessment. Firstly the third party’s serious injury assessment report must be completed by a general practitioner and submitted with the formal claim to the defendant. Thereafter the defendant is required to respond thereto either by accepting or rejecting the assessment report.[1] The final stage arises when, within 90 days of being informed of the rejection by

[1]Regulation 3(3)*(c)* stipulates that the defendant (or an agent) shall be obliged to compensate a third party for general damages if (i) the assessment report was properly submitted and (ii) it is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in the regulations.

the defendant, the third party declares and refers a dispute concerning the assessment of the injury to the Registrar of the Health Professions Council who in turn refers the disputed assessment to the appeal tribunal as constituted in terms of regulation 3(8)*(b)* and *(c)*.[2]

[6] The relevant parts of regulation 3(1)*(a)* and *(b)* read:

'**3. Assessment of serious injury in terms of section 17(1A)**

(1)*(a)* A third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations.

(b) The medical practitioner shall assess whether the third party's injury is serious in accordance with the following method:

(i) . . .

(ii) If the injury resulted in 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious.[3]

(iii) An injury which does not result in 30 per cent or more Impairment of the Whole Person may only be assessed as serious if that 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 disturbance or disorder; or

(dd) resulted in loss of a foetus.'

As was alluded to by Mr Du Plessis, who appeared for the plaintiff, the narrative test envisaged in regulation 3(1)*(b)*(iii) takes into account the impact of an injury on body function (as opposed to the impairment of a person), the impact of injury on a claimant's work as well as the likelihood of further surgery, rehabilitative treatment, future

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[2]Regulation 3(8)*(b)* and *(c)* reads:

'*(a)* . . .

(b) The appeal tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine, appointed by the Registrar, who shall designate one of them as the presiding officer of the appeal tribunal.

(c) The Registrar may appoint an additional independent health practitioner with expertise in any appropriate health profession to assist the appeal tribunal in an advisory capacity.'

[3]Regulation 3(1)*(b)*(ii) is predicated on the American Medical Association's Guides to the Evaluation of Permanent Impairment 6th Edition (AMA 6 assessment). It seeks to assess permanent impairment only after Maximum Medical Improvement (MMI) is determined.

deterioration and complication, past experience and risks of relapse.

[7] On or about 6 June 2009, along Slovo Street, Vosloorus, a collision occurred between the plaintiff and a motor vehicle. The plaintiff was a pedestrian at the material time.

[8] As a result of the collision, the plaintiff sustained the following injuries:
(a) a compound fracture of the right femur; and
(b) a concussive brain injury.
As a result of these injuries, the plaintiff received treatment in hospital. This treatment included surgery and the necessary physiotherapy. He was discharged from hospital on 7 July 2009.

[9] The plaintiff submitted a claim in terms of s 24 of the Act to the defendant. He simultaneously submitted reports on a RAF 4 form as contemplated by s 17(1A)*(a)* and *(b)* of the Act read with regulations 3(1) and 3(3)*(a)* and *(b)*. The reports were those completed by Dr C Morare (9 September 2009), Dr J Scheltema (1 June 2011), Dr M A Scher (11 July 2011) and Carlien Hudson (19 July 2011).

[10] The RAF 4 form provides for the assessment of an injury envisaged in both regulations 3(1)*(b)*(ii) and 3(1)*(b)*(iii). The latter entails an assessment of prospective long term impairment(s) and which, over time, could vary or even be corrected. It clearly involves tests to establish whether the injury has stabilised and that the MMI has been attained.

[11] On 8 February 2010, the plaintiff commenced action against the defendant, even though the latter had not by then responded to the plaintiff's claim. According to the particulars of claim, the damages claimed were set out under the following headings:

'(a)	estimated past hospital and medical expenses	1 000.00;
(b)	estiated future medical expenses	800 000.00;
(c)	estimated past and future loss of earnings/ earning capacity/employability	2 000 000.00;
(d)	general damages for pain and suffering; disability	

and loss of amenities of life 1 000 000.00;'

As a result, the plaintiff claimed against the defendant, as follows:

'(a) payment in the sum of 3 801 000.00;

(b) interest a tempore morae at the prevailing rate of interest calculated from a date fourteen days after judgment to date of payment;

(c) cost of suit.'

The defendant conceded the merits but took issue with the quantum.

[12] In defending the action, the defendant entered a special plea and pleaded over. The defendant specially pleaded that the plaintiff had not fully complied with regulation 3 and that the issue of the alleged injury had not been finally determined in terms of regulations 3(4) to 3(12). Regulations 3(4) to 3(12) provide for the procedures to be followed by a third party who wishes to dispute the rejection of a serious injury assessment report(s). All the other court procedures in preparation for the trial were eventually complied with and the matter was finally set down for trial. A full minute of a conference held by the parties in terms of rule 37 of the Uniform Rules of Court was filed.

[13] In a letter addressed to his attorney dated 9 March 2011, the plaintiff was formally informed that the defendant had rejected the assessment of the injury as set out in the RAF 4 form. It did so on the basis that the plaintiff had not reached MMI by the time of the submission of the RAF 4 form.

[14] On 15 March 2011, the plaintiff's attorneys replied to the letter of rejection and disputed the validity of the defendant's rejection on the basis that its 'right to object' had lapsed and that in any event the rejection 'did not comply with regulation 3(3)*(d)*(i)'.

[15] On 16 March 2011, the attorneys for the defendant wrote back to the plaintiff's attorneys reiterating that the plaintiff is not entitled to seek an order for general damages in that the plaintiff's injuries had not been finally assessed as serious in terms of regulation 3. This letter suggested that the defendant would argue either for the dismissal of the claim for general damages or for a postponement of this part of the claim until such time that the process envisaged by s 17(1A) of the Act, read with regulation 3, was completed viz – (a) a dispute had been filed with the Registrar of the Health Professions

Council and (b) the dispute had been determined by the appeal tribunal.

[16] On 14 July 2011, the defendant supplemented its reasons for rejecting the plaintiff's serious injury assessment report which had been completed by Dr Morare on 9 September 2009. The defendant furthermore expanded on its reasons for the rejection by indicating (a) that the assessment was less than the required 30 per cent threshold, referred to in the regulations; (b) that the assessment was completed only three months after the date of the collision and this was insufficient time to properly assess whether MMI had been reached and (c) that the report did not satisfy the requirements of regulation 3(1)*(b)*(iii). The defendant also drew the plaintiff's attention to the procedure set out in regulations 3(4) to 3(14).[4]

[17] At the commencement of the trial on 2 August 2011, the learned judge was informed by the parties that, in the event of him dismissing the special plea, he should then grant an order by agreement between the parties. He dismissed the special plea and granted the agreed order.

[18] In dismissing the special plea, the learned judge found that the reasons given by the defendant in the letter of 21 July 2011, for rejecting the plaintiff's serious injury assessment report(s), were unsound, irrelevant, irrational and unsustainable and therefore it could never be regarded as an 'objection' - (rejection). He accorded the same reasoning to all the other letters of rejection. It is clear from his approach that he then regarded the defendant as having accepted the assessment report(s) as correct. In particular he relied on the RAF 4 report of Ms Carlien Hudson, a qualified occupational therapist because it had not been rejected by the fund. (This aspect is dealt with below). Having done so, he entered, as it will become apparent, the arena reserved for the defendant and ultimately the tribunal and found that the defendant had accepted that the injury was serious.

[19] The high court subsequently granted leave to appeal against paragraphs 1 and 2

[4]Regulations 3(4) to 3(14) sets out primarily the procedures and time lines to be observed in the event of a third party wishing to dispute the rejection of a serious injury assessment report or the fund (or agent) disputing an assessment by a medical practitioner.

of the order. It is these two aspects which form the subject of this appeal.

[20] Mr Du Plessis argued that the defendant's failure to respond to the claim within a reasonable time was tantamount to its acceptance of the correctness of the serious injury assessment report(s) submitted with the initial claim and as such the defendant must be deemed to have agreed that the injury is serious (as defined). This submission is misplaced in that the nature of the inquiry into the assessment may prove to be complex and as a result may take time to investigate. Hence a delay in responding early. In addition, the power to establish whether or not an injury is serious lies ultimately with the tribunal (of experts) and not with the courts – agreement on whether or not the injury is serious, cannot be assumed. If the court proceeds with the claim for general damages on that basis, it would be exceeding its powers.

[21] The regulations do not stipulate a time frame within which the defendant should respond to a claim for general damages. While it is conceivable that delays might be prejudicial to claimants, this does not justify a disregard for the prescribed process. It was open to the plaintiff to direct a written request to the defendant for an expeditious response to the claim and in particular the issue of general damages.

[22] Alternatively, in light of the defendant being an organ of state as defined in s 239 of the Constitution of the Republic of South Africa, 1996, it was also open to the plaintiff to invoke the provisions of the Promotion of Administrative Justice Act 3 of 2000 in order to compel a 'timeous' response.

[23] Similarly, Mr Du Plessis' contention that once the summons was issued, the matter was then subject to the Uniform Rules of Court and not to the processes which fall under the Act (and the regulations), is unconvincing. This is so, precisely because the process of establishing whether a claimant is entitled to general damages falls exclusively within the ambit of the defendant and ultimately the appeal tribunal (subject, of course, to a court's power of review).

[24] Based on the approach adopted by the trial court, Mr Du Plessis further argued that the defendant did not respond to the assessment report of Carlien Hudson, (an occupational therapist) who had also completed the RAF 4 form, and consequently her

report remained uncontested throughout the proceedings in the high court. He contended that in such circumstances it was fair to assume that the defendant accepted the findings in her report as correct. The fundamental problem with this argument is that Ms Carlien Hudson is a professional assistant in a concern known as Anneke Greef Occupational Therapist. The regulations require the RAF 4 assessment report to be completed by a medical practitioner, registered as such by the Health Professions Council of South Africa, which does not include occupational therapists. Carlien Hudson is therefore not a medical practitioner and consequently the defendant need not have responded or reacted to that report. In the light thereof, it cannot be relied upon to find that regulation 3 has been complied with or to infer that the defendant was satisfied that the injury assessment report was properly submitted and that the injury was correctly assessed as serious.

[25] Mr Du Plessis further sought to persuade this court that some agreement had been reached between the parties that the injury was a serious one. He relied on item 8.4 of the rule 37 minute in support of this contention. The question and answer read as follows:

'If the court should find that MMI does not have a bearing on the narrative test, would the Defendant admit that the rejection of Dr Morare is incorrect?
Yes, obviously so.'

[26] It cannot, on any construction, be construed that the defendant did or intended to agree that the injury in question should be regarded as serious in answering the question as it did. All it did was to respond logically to the proposition involving a possible finding of the court.

[27] At the time that the judgment was delivered in the court below, the plaintiff had still not complied with the procedure as set out in regulation 3. The failure to do so by the plaintiff meant that the defendant could not have been, and was not as yet, satisfied that the plaintiff's injury had been correctly assessed. It was not for the high court to construe that, in the circumstances, it could make an order for general damages absent the prescribed assessment. The high court misdirected itself in doing so. Consequently, in the light of the plaintiff's failure to complete the process prescribed in regulation 3, the defendant's special plea should have been upheld.

[28] While the special plea falls to be upheld, it was nonetheless dilatory in nature. Its success does not extinguish the plaintiff's cause of action in respect of general damages but has the effect of postponing adjudication until at least the procedural aspects complained of, have been complied with or extinguished by the operation of the regulations. It is not unknown for an offending party to be granted leave so as to enable him or her to comply with the prescribed procedure, even if a special plea (such as this) has been successful.

[29] The special plea took the form of an objection to the plaintiff's cause of action regarding its claim for general damages, in light of his failure to comply with the prescribed regulations. The plaintiff's right to claim general damages is clearly dependent on the acceptance or rejection of the RAF 4 assessment by the defendant or ultimately a determination by the appeal tribunal.

[30] In upholding the special plea, it simply follows that the claim for general damages is not ripe for hearing and has the effect of staying that part of the proceedings, pending the determination of the dispute before another forum. This is covered by rule 22(4) of the Uniform Rules of Court.[5]

[31] At the commencement of this appeal counsel for the defendant made an open offer in terms of which the appeal would be postponed in order to allow the plaintiff to still pursue his claim for general damages by complying with the regulations – the effect being that the appeal would not be proceeded with and that the plaintiff would presumably forego the advantage of a favourable high court order. This offer was rejected.

[32] The right to claim general damages, however, remains alive. In the circumstances, it is still open to the plaintiff to pursue such a claim provided that he fulfills the prescribed procedural requirements. The order I propose to make is the one agreed upon by the parties.

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[5]See *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 772E; *GK Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 72A-C; *Parekh v Shah Jehan Cinemas (Pty) Ltd and others* 1980 (1) SA 301 (D) at G.

[33] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

‘2.1 It is declared that the defendant is liable for the plaintiff’s loss without any apportionment.

2.2 The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996, to compensate him for 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 him arising out of the injuries sustained in the motor vehicle collision of 6 June 2009 after such costs have been incurred and upon proof thereof.

2.3 The defendant is ordered to pay the costs of the hearing on 2 August 2011.

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2.7.1 the plaintiff’s claim for general damages; and

2.7.2 liability for the remaining costs.’

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R PILLAY

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	Adv. W Trengove SC with Mr Latib Instructed by: KHR Inc., Johannesburg Moroka Attorneys, Bloemfontein
FOR RESPONDENT:	Adv Du Plessis Instructed by: Raphael Kurganoff Inc., Johannesburg Lovius Block, Bloemfontein