THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 567/2013

Reportable

In the matter between:

ROAD ACCIDENT FUND **APPELLANT**

and

FONESCA RUI FERNANDO FARIA **RESPONDENT**

Neutral citation: *RAF v Faria* (567/13) [2014] ZASCA 65 (19 May 2014)

Coram: Maya, Shongwe and Willis JJA and Van Zyl and Mocumie AJJA

Heard: **5 May 2014**

Delivered: **19 May 2014**

Summary: General Damages – Road Accident Fund Act 56 of 1996 as amended, read with Regulations promulgated under the Act – 'serious injury' to be determined in accordance with procedure prescribed in Reg 3 of the Regulations - RAF not bound by the determination of a 'serious injury' by its own expert - the high court wrongly awarded the plaintiff general damages.

ORDER

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

1 The appeal is upheld;

2 The order of the high court that the Road Accident Fund is to pay the plaintiff the sum of R350 000 as general damages is set aside.

JUDGMENT

Willis JA (Maya and Shongwe JJA and Van Zyl and Mocumie AJJA concurring):

[1] The appellant appeals with the leave of the South Gauteng High Court (Weiner J). This case has to do with the substantive and procedural legal requirements that follow consequent upon the rejection by the Road Accident Fund (RAF) of the assessment by one of its own experts that an injury which had been sustained in a motor collision is 'serious'. In this regard, there have been discordant voices within the high court. Judicial dissonance in the high court is antithetical to legal certainty, one of the pillars of the rule of law.[1]

[2] The issues arise from changes to the legislative scheme of the Road Accident Fund Act 56 of 1996 (the Act), which took effect on 1 August 2008. These changes were introduced by the Road Accident Fund Amendment Act 19 of 2005 (the amendment Act) together with Road Accident Fund

[1] For a sterling account of the importance of legal certainty see *Cassell & Co Ltd v Broome & another* [1972] AC 1027 esp at 1054C-D; [1972] 1 All ER 801 esp at 809f-g (HL).

Regulations (the Regulations) promulgated in terms of the Act, as amended.[2] In particular, the points in question are concerned with the RAF's liability to compensate a third party for general damages (or non-pecuniary loss as it is referred to in s 17(1) of the amended Act) in circumstances where the victim of a motor collision has suffered injuries which are described as 'serious' in terms of s 17(1A) of the Act.

[3] The respondent in this appeal was the plaintiff in the high court. I shall refer to him accordingly. Riding a bicycle at the time, he was injured in a collision on 26 January, 2011. The collision involved a motor vehicle having registration number SMN 449 GP driven by Ms J M Tladi. The accident occurred on Klipriver Road, off Bellairs Drive, in Johannesburg. The RAF was liable to compensate the plaintiff in terms of the provisions of the Act.

[4] The plaintiff suffered a head injury, having been comatose for four and a half days. In addition, he sustained injuries to his right shoulder, which required surgery; four fractured ribs on his right hand side; abrasions to his back, shoulder and buttocks and abrasions to his knees, wrists and hands. The plaintiff sued the RAF in terms of the Act, claiming damages in an amount of R850 000.

[5] In its plea the RAF had disputed both the merits of the plaintiff's claim as well as the quantum of damages. At the trial, the RAF having had no witnesses to dispute the version of plaintiff, was found by the high court to be liable to pay the plaintiff 100% of his proven damages. There is no dispute that the high court was correct in this regard.

[6] In respect of the quantum of damages suffered by the plaintiff, the parties settled the claim for past medical expenses in an amount of R217 169.94. In respect of the claim for future medical expenses, the RAF gave the usual undertaking in terms of s 17(4) of the Act. The only remaining issues in dispute were: (a) the question of general damages for pain, suffering, loss of amenities of life and (b) the issue of the loss of future earnings arising from

[2] GN R770, GG 31249, 21 July 2008.

the plaintiff's diminished working capacity and productivity. The plaintiff decided to subsume the claim for damages for the loss of future earnings under the claim for general damages.

[7] The plaintiff underwent a medico-legal assessment by an orthopaedic surgeon, Dr De Graad on 30 April 2012. Dr De Graad prepared his medical-legal report on 3 May 2012. In addition, on the same day, Dr De Graad completed a so-called RAF 4 'serious injury assessment' (SIA) form (the significance of which form will appear later). In paragraph 4 of this RAF 4 form, he assessed the plaintiff's impairment in respect of the rating of the American Medical Association (AMA) as having a combined value for the impairment of the plaintiff's whole person (WPI) as 4%.

[8] In terms of paragraph 5 of the RAF 4 form, which relates to 'serious injury: narrative test', Dr De Graad concluded, pursuant more particularly to the provisions of subparagraphs 5.2 and 5.3 of the form, that the plaintiff's injuries had resulted in a permanent serious disfigurement, attributable to extensive scarring and a negatively affected physical appearance at the right shoulder, as well as a severe long-term mental or long-term behavioural disturbance or disorder. As a result, Dr De Graad concluded that the plaintiff had indeed suffered a so-called 'serious injury', the significance of which will also appear later.

[9] The plaintiff attended a further medico-legal examination undertaken by another orthopaedic surgeon, Dr G J H Swartz, who had been appointed by the RAF. Dr Swartz did not complete an SIA form but incorporated in his medico-legal assessment a reference to the AMA impairment rating, assessing the plaintiff's impairment rating for his whole person as 8%.

[10] Dr Swartz expressed the opinion in his report that the plaintiff did not qualify for the 'narrative test' in terms of paragraph 5.1 of the RAF 4 form, which relates to long-term impairment or loss of bodily function, but made no assessment of the plaintiff's permanent serious disfigurement or severe long-

term mental or behavioural disturbances in terms of subparagraphs 5.2 and 5.3 of that form.

[11] On 20 January 2013, however, Drs De Graad and Swartz prepared a joint minute in terms of which they agreed that the plaintiff had suffered disfigurement and psychological problems as a result of the scarring at his shoulder and that, accordingly, the plaintiff had suffered a 'serious injury', resulting in 'serious long-term impairment'.

[12] On 8 March 2013, the day before the trial between the parties commenced, the RAF's attorneys sent a letter to the plaintiff's attorneys in terms of which the RAF rejected the RAF 4 form completed by Dr De Graad 'in terms of Regulation 3(3)*(d)(i)*' (ie of the Regulations pertinent to this case).

[13] On 11 March 2013, a neuropsychologist, Dr A Cramer also filed an RAF 4 SIA report, pursuant to her assessment of the plaintiff on 26 October 2012. Dr Cramer, like Drs De Graad and Swartz, concluded in subparagraph 5.3 of the report that the plaintiff had suffered a 'serious injury', resulting in 'serious long-term impairment'.

[14] In both the high court and this court the RAF relied strongly on the following passage from *Road Accident Fund v Duma and three similar cases*:[3]

'The decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not the court. That much appears from the stipulation in reg 3(3)*(c)* that the Fund is only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has been correctly assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. 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.'

[3] *Road Accident Fund v Duma* 2013 (6) SA 9 (SCA) para 19.

[15] The trial judge distinguished the facts in the present case from those in *Duma*. She emphasised that it was apparent to her that it was not in dispute that the injuries sustained by the plaintiff were serious. She held that the objections raised by the RAF had fallen away by reason of the joint minute and therefore that:

'It would be artificial to hold that simply because the defendant has objected to the RAF 4 assessment that, irrespective of the basis therefor, the plaintiff must follow the procedure set out in Regulation 3.'

[16] In her judgment, the trial judge said that:

'It is common cause that both plaintiff's doctors, being Dr De Graad and Ms Cramer are medical practitioners, registered as members of the Medical and Dental Council. Both of them, in completing the RAF 4 forms, completed their assessments based upon the AMA or WPI and arrived at the decision that the plaintiff had reached MMI and that the plaintiff's injury was to be declared serious.

They both, therefore, have complied with the regulations and have submitted reports in accordance with the decision in the *Duma* matter and in contrast to the plaintiffs in such matter.

However, the defendant contends that the fund has demonstrated, by filing its objection, that it is not satisfied with the claimant's RAF 4 forms and it therefore argues that it may direct that the claimant submit himself for a further assessment to ascertain whether the injury is serious, by a medical practitioner designated by the fund. A list of medical practitioners who had completed the requisite training course and were therefore qualified to perform the assessments was handed to the Court, by consent. Drs De Graad, Swartz and Ms Cramer appear thereon.

The distinguishing feature in this case (in contrast to the facts in the *Duma* decision) arises as a result of the joint minute filed by the two orthopaedic surgeons, Dr De Graad and Dr Swartz.'

[17] The high court thereupon made an order that the plaintiff be awarded general damages in an amount of R350 000. The parties had agreed on this amount in the event that the high court found that it could award general damages. The issue in this appeal is whether it was competent, as a matter of law, for the high court to have decided, as it did, to award the plaintiff general damages in the circumstances of the case.

[18] Meanwhile, the RAF has paid the plaintiff the full amount ordered by the court, including the sum of R350 000 which is in contention. The RAF did so, on 27 March 2013. The RAF later discovered that it had mistakenly paid this amount of R350 000 awarded by the high court for general damages. The RAF, now accepts, however, that it would be unjust and inequitable to attempt to recover this amount and has given its irrevocable undertaking not to seek to recover it from the plaintiff. Moreover, the RAF has undertaken to pay the plaintiff's costs in the appeal. As between the parties themselves, the issue has become moot.

[19] Unavoidably, the question has therefore arisen as to whether the appeal should simply be dismissed for mootness in terms of s 16(2)*(a)(i)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act) as there is no longer any issue for determination between the parties. Section 16(2)*(a)(i)* of the Superior Courts Act provides that:

'When at the hearing of an appeal, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone.'

[20] Counsel for both parties accepted, however, that this case raises an important question of law that are bound to arise again, especially in view of the frequency with which the RAF is a litigant in the high court and the pending cases awaiting judgment in this appeal: it is whether the Regulations provide for the RAF to reject its own expert's finding in respect of determining a serious injury and to require that there should be compliance with the procedures provided for in the Regulations in determining whether or not an injury is 'serious'.

[21] The issue is indeed, as Mr Budlender, counsel for the RAF has submitted, a 'crisp' one. He relied on this 'crispness' to contend that the heavy workload of this court would not be unduly burdened in frustration of the mischief which s 16(2)*(a)(i)* of the Superior Courts Act was designed to

prevent.[4] Moreover, counsel for the RAF correctly pointed out that a 'live issue' raising important questions of law which is likely to arise frequently in future has, for some time, been recognized by this Court as justifying the exercise of a discretion to allow the appeal to proceed.[5]

[22] The present case deals with questions of law rather than fact. This is a relevant consideration.[6] It is not in contention that, as the RAF has claimed, there are a number of cases which have been postponed pending the outcome of this appeal. In *Meyer v Road Accident Fund*[7] Potterill J expressly disagreed with the correctness of Weiner J's decision, holding it to be inconsistent with *Duma*. Mr Zidel, who appeared for the plaintiff, accepted that the issues raised by this case were of such a nature that the appeal should indeed be decided upon its merits rather than be dismissed on account of its mootness between the parties themselves.

[23] In the full context of the matter, it cannot be said that the appeal will have no practical effect or result. On the contrary, it will have a practical effect on innumerable instances of litigation involving the RAF as a litigant. In this regard, *Executive Officer, Financial Services Board v Dynamic Wealth Limited & others*[8] has been instructive.[9] It is in the public interest to hear the appeal, which involves statutory interpretation, as there are a large number of similar cases, both existing and anticipated, in which this issue will need to be resolved in the near future.[10] If this Court fails to decide this appeal on its

[4]See, in this regard, *ABSA Bank Ltd v Van Rensburg & another; In Re: ABSA Bank Limited v Maree & another* (228/2013) [2014] ZASCA 34 (28 March 2014) para 11.
[5]See *ABSA Bank Ltd v Van Rensburg & another; In Re: ABSA Bank Limited v Maree & another* (*supra*) para 8; *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA) para 4; *Coin Security Group (Pty) Limited v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 8; *National Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 444J-445B and *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 at 114; [1944] All ER 469 at 470g-471h (HL). See, by way of contrast, *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 10.
[6] See *Port Elizabeth Municipality v Smit* (*supra*) para 10.
[7]*Meyer v Road Accident Fund* [2013] ZAGNPHC 446 (4 December 2013) paras 7 to 9.
[8]*Executive Officer, Financial Services Board v Dynamic Wealth Limited & others* 2012 (1) SA 453 (SCA) paras 43 and 44 and *SA Congo Oil Co (Pty) Limited v Identiguard International (Pty) Limited* 2012 (5) SA 125 (SCA) para 6.
[9]See also *Sebola & another v Standard Bank of South Africa Limited* 2012 (5) SA 142 (CC) para 34 and *MEC for Education, Kwazulu-Natal & others v Pillay* 2008 (1) SA 474 (CC) paras 32-35.
[10]See *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 2 All ER (HL) at 47d-f; *Executive Officer, Financial Services Board v Dynamic Wealth Limited & others*

merits, the prevailing confusion will continue unabated: the question is bound to arise again.[11] We have also had the benefit of full argument on the matter.[12]

[24] The considerations raised by both Mr Budlender and Mr Zidel justify the exercise of a discretion against dismissing the appeal merely because it is now moot between the parties.[13] The merits of the appeal will, accordingly, be considered.

[25] Subsequent to the judgment in the high court in this matter, the Regulations were revised.[14] Other than that, in terms of revised regulation 3(3)(*dA*), the RAF is given 90 days within which to (i) accept the serious injury assessment report or (ii) reject the report or (iii) direct that the third party submit to a further assessment and, in terms of revised subregulation 3(8)(*a*), a time period for the referral of a dispute to the appeal tribunal is provided for, the recent revision to the Regulations has no bearing whatsoever on the issues to hand.

[26] In terms of s 17(1) of the Act, after its amendment by the amendment Act, a third party (ie person in the position of the plaintiff) is entitled to compensation for a non-pecuniary loss only for 'a serious injury as contemplated in subsection (1A)'. Subsection 17(1A), in turn, stipulates that the assessment of a 'serious injury' must be undertaken by a medical practitioner by way of methods prescribed by the regulations.

[27] Subregulation 3(3)*(c)* provides that:

(*supra*) para 44; *SA Congo Oil Co (Pty) Limited v Identiguard International (Pty) Limited* (*supra*) para 5 and *Midi Television (Pty) Limited t/a eTV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 4.

[11] Ibid.

[12] See *Sebola & another v Standard Bank of South Africa Limited* (*supra*) para 37; *Midi Television (Pty) Limited t/a eTV v Director of Public Prosecutions (Western Cape)* (*supra*) para 4. See, by way of contrast, *ABSA Bank Ltd v Van Rensburg & another; In Re: ABSA Bank Limited v Maree & another* ((*supra*) para 12; *Port Elizabeth Municipality v Smit* (supra) para 11; *Western Cape Education Department and Another v George* 1998 (3) SA 77 (SCA) at 84E.

[13] See *Minister of Trade and Industry & another v EL Enterprises & another* 2011 (1) SA 581 (SCA) para 2 and *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) paras 6 and 7.

[14] GN R347, GG 36452, 15 May 2013.

'The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided for 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 for in these Regulations.'

[28] Subregulations 3(1) and 3*(a)* to *(c)* require a third party who wishes to claim general damages to submit an SIA report in the prescribed form to the RAF. The SIA report must be made by a medical practitioner who must assess whether the third party's injury is 'serious' in accordance with certain criteria:

(i) in terms of subreg 3(1)*(b)*(ii) the third party's injury shall be assessed as serious if it resulted in 30% or more WPI as provided for in the AMA guidelines;

(ii) a 'narrative test' as provided for in terms of subreg 3(1)*(b)*(i1).

[29] A 'narrative test' is used where the conclusion is reached, in terms of subregulation 3(1)*(b)*(iii), that the claimant has less than a 30% WPI, but the injury nevertheless:

'*(aa)* resulted in a serious long-term impairment or loss of a bodily 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.'

[30] Subregulation 3(3)*(d)* provides that:

'If the Fund [RAF] or an agent is not satisfied that the injury has been correctly assessed, the Fund or agent must:

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

(ii) direct that the third 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 or an agent.'

During the course of argument, Mr Zidel fairly and correctly conceded that the RAF has three options available to it if it is not satisfied with the assessment

of an injury. These are, as set out above: (i) accept the serious injury assessment report or (ii) reject the report or (iii) direct that the third party submit to a further assessment.

[31] In terms of subregulation 3(3)*(e)*:

'The Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided for in these Regulations.'

The fact that this provision is preceded by subregulation 3(3)*(d)*(ii) which provides that the further assessment is to be undertaken 'by a medical practitioner designated by the fund' can only mean, as Mr Zidel was bound to concede, that the RAF not only has a right, in terms of the Regulations, to dispute the assessment of its own medical practitioner (expert) but also has a right to refer the dispute to the Appeals Tribunal provided for in the Regulations.

[32] The dispute resolution procedure is provided for in subregulation 3(4), read together with subregulations 3(5), 3(7), 3(8), 3(10) 3(11), 3(12) and 3(13). There is no other. The dispute resolution procedure in the Regulations culminates in a determination by an Appeal Tribunal consisting of three medical practitioners appointed by the Registrar of the Health Professions Council. In terms of subregulation 3(13), the determination of the Appeal Tribunal 'shall be final and binding'. The dispute resolution procedure, travelling all the way to the Appeal Tribunal, is not provided purely for the benefit of a dissatisfied claimant. It avails to the advantage of the RAF as well.

[33] In *Road Accident Fund v Lebeko*[15] this 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.[16] It was held that the high court ought to have postponed the hearing in regard to the claim for general damages so that the procedures for which legislative provision had been made in this regard could be completed.[17] In similar vein, Mr Budlender has correctly contended that this is what the high court ought to

[15]*Road Accident Fund v Lebeko* (802/2011) [2012] ZASCA 159 (15 November 2012).
[16]Para 27.
[17]Para 28.

have done in the present case. In view of the mootness of the issues between the parties themselves, however, he has sought no order to this effect in substitution of the high court's order. He has asked simply that the high court's order relating to the award for general damages be set aside.

[34] The amendment Act, read together with the Regulations, has introduced two 'paradigm shifts' that are relevant to the determination of this appeal: (i) general damages may only be awarded for injuries that have been assessed as 'serious' in terms thereof and (ii) the assessment of injuries as 'serious' has been made an administrative rather than a judicial decision. In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts. Past legal practices, like old habits, sometimes die hard. Understandably, medical practitioners, lawyers and judges experienced in the field may have found it difficult to adjust. As the colloquial expression goes, 'we are all on a learning curve'.

[35] Neither *Duma* nor *Lebeko* dealt with a joint minute, prepared by experts from both sides, on the question of whether the injuries were 'serious' or not. As *Duma* makes clear, in terms of the amendment Act and the Regulations, the position is now that 'unless the Fund is so satisfied [ie that the injuries are 'serious'] the plaintiff simply has no claim for general damages'; 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' and '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'.[18] These clear statements of law entail that a joint minute of the kind in question does not, as in the past, enable the court to take a shortcut to concluding that the injury was 'serious'.

[18] *Road Accident Fund v Duma* 2013 (6) SA 9 (SCA) para 19.

[36] The trial judge may have been exasperated by the stance taken by the RAF. This does not justify a departure from recognising that, under the new legislative scheme, the RAF is not bound by the views of its own expert. The principle is not necessarily either abstract or ethereal: as Mr Budlender correctly submitted, the fact that within a period of two months its own expert changed his view that the injury was not ‘serious’ to one that it was, is indicative of some uncertainty in the matter that may justify further exploration. The high court wrongly decided to award the plaintiff a sum of money for general damages.

[37] The following order is made:

1 The appeal is upheld;

2 The order of the high court that the Road Accident Fund is to pay the plaintiff the sum of R350 000 as general damages is set aside.

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N P Willis

Judge of Appeal

APPEARANCES:

For the Appellant:	S Budlender (with him, P Ramano and E. Webber) Instructed by: Routledge Modise Inc, Sandton c/o Hutchison Attorneys, Bloemfontein
For the Respondent:	I J Zidel SC (with him, E Soares) Instructed by: Wolmarans attorneys, Randburg c/o Van der Merwe & Sorour, Bloemfontein