



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20008/2014

Reportable

In the matter between:

Malefane Kemuel Mahano

First Appellant

Mmaphuti Grace Kubjana

Second Appellant

Roland Sydney Thomsen

Third Appellant

and

Road Accident Fund

First Respondent

Minister of Transport

Second Respondent

Neutral Citation: *Mahano v Road Accident Fund* 20008/2014 [2015] ZASCA 23 (20 March 2015)

Coram: Lewis, Shongwe and Willis JJA and Gorven and Meyer AJJA

Heard: 09 March 2015

Delivered: 20 March 2015

Summary: General Damages – Road Accident Fund Act 56 of 1996 – interpretation of reg 3(1)(b)(iv) of the Road Accident Fund Regulations, 2008 – whether Minister of Transport must publish operational guidelines in order to apply the American Medical Association's Guides to the Evaluation of Permanent Impairment in assessing whether third party's injury is 'serious' such as to qualify for general damages.

ORDER

On appeal from: North Gauteng Division, Pretoria (Kgomo J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Meyer AJA (Lewis, Shongwe and Willis JJA and Gorven AJA concurring)

[1] This appeal concerns the meaning of reg 3(1)(b)(iv) of the Road Accident Fund Act: Regulations, GN R770 GG 31249, 21 July 2008 (the Regulations). The particular sub regulation governs the Fund's liability to pay general damages to a claimant. The Regulations were promulgated by the second respondent, the Minister of Transport (the minister), under the amended Road Accident Fund Act 56 of 1996 (the Act). The amending provisions were introduced by the Road Accident Fund Amendment Act 19 of 2005. This Act and the Regulations came into force on 1 August 2008. The threshold requirement for the obligation of the Road Accident Fund (the Fund) to pay general damages is that the Fund must be satisfied that the injury has been correctly assessed as 'serious' in accordance with the method prescribed in the Regulations. The 'American Medical Association's Guides to the Evaluation of Permanent Impairment Sixth Edition' (the AMA Guides) must be applied in the assessment. The question that arises in this appeal is whether reg 3(1)(b)(i) makes the application of the AMA Guides in the assessment of whether a third party's injury is 'serious' dependent on the existence of 'operational guidelines'.

[2] The history of 'the statutory road accident compensation scheme' is set out in the judgment of Moseneke DCJ in *Law Society of South Africa & others v Minister of*

Transport & another 2011 (1) SA 400 (CC) paras 17-28. The matrix of the legislative scheme that is also relevant to this appeal is to be found in the judgment of Brand JA in *Road Accident Fund v Duma & three similar cases* 2013 (6) SA 9 (SCA) paras 3-10. I first refer briefly to the legislative scheme in order to contextualize reg 3(1)(b)(iv).

[3] Section 17(1) of the Act limits the obligation of the Fund to compensate third parties for general damages (non-pecuniary loss) to those instances in which the third party has suffered a 'serious injury'. In terms of s 17(1)(A) the assessment of a serious injury 'shall be based on a prescribed method' and 'shall be carried out by a medical practitioner'. The Act, as was held in *Duma* paras 5-6, does not provide an objective standard for deciding on the seriousness of the injuries but stipulates that the assessment should be made by a medical practitioner on the basis of a prescribed method and empowers the minister to promulgate Regulations.

[4] Regulation 3 prescribes the method contemplated in s 17(1) for the determination of 'serious injury'. A third party who wishes to claim general damages must submit him- or herself to an assessment by a medical practitioner (reg 3(1)(a)). Once assessed the third party 'shall obtain from the medical practitioner concerned a serious injury assessment report (reg 3(3)(a)), which is defined as 'a duly completed form RAF 4' and attached to the Regulations as annexure D (reg 1). The RAF 4 form itself, read with reg 3(1)(b), requires the medical practitioner to assess whether the third party's injury is 'serious' in accordance with three sets of criteria (See *Duma* paras 6-7):

(a) First, if the injury meets the description of any one or any combination of the injuries listed in reg 3(1)(b)(i) (as amended by the Road Accident Fund Amendment Regulations, 2013) it shall not be assessed as serious. If the injury falls within the list the third party is only 'entitled to be assessed in terms of regulations 3(1)(b)(ii) and 3(1)(b)(iii)' if 'any complication arises from any one, or any combination of the injuries' listed in reg 3(1)(b)(i). A 'complication', in terms of the amended reg 1, 'means any medical complication and, or (sic) functional impairment relating to the third party, which in the opinion of the medical practitioner, could result in the injury being assessed as serious in terms of sub regulation 3(1)(b)(ii) and/or 3(1)(b)(iii)'.

(b) Second, the third party's injury must be assessed as 'serious' if it 'resulted in 30 per cent or more Impairment of the Whole Person' (WPI) as provided in the AMA Guides (reg 3(1)(b)(ii) read with reg 1). This is where reg 3(1)(b)(iv) fits into the legislative scheme. Regulations 3(1)(b)(iv) – (vi) provide as follows:

- '(iv) The AMA Guides must be applied by the medical practitioner in accordance with operational guidelines or amendments, if any, published by the Minister from time to time by notice in the Gazette.
- (v) Despite anything to the contrary in the AMA Guides, in assessing the degree of impairment, no number stipulated in the AMA Guides is to be rounded up or down, regardless of whether the number represents an initial, an intermediate, a combined or a final value, unless the rounding is expressly required or permitted by the guidelines issued by the Minister.
- (vi) The Minister may approve a training course in the application of the AMA Guides by notice in the Gazette and then the assessment must be done by a medical practitioner who has successfully completed such a course.'

It is common cause that no operational guidelines have been published by the minister under reg 3(1)(b)(iv).

(c) Third, an injury which does not result in 30 per cent or more WPI may nonetheless be assessed as serious under what has become known as the 'narrative test' if that injury resulted in a serious long-term impairment or loss of a body function; constitutes permanent serious disfigurement; resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or resulted in loss of a foetus (reg 3(1)(b)(iii)).

[5] The Fund is only liable for general damages if a claim is supported by a serious injury assessment report (the RAF 4 form) 'and the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in these Regulations' (reg 3(3)(c)). If the Fund is not so satisfied, it must either reject the third party's RAF 4 form or direct that the third party submits him- or herself to a further assessment by a medical practitioner designated by the Fund in accordance with the method prescribed in the regulations (reg 3(3)(b)). The regulations go on to provide for a dispute resolution procedure. It culminates in a determination by an appeal tribunal consisting of three medical practitioners appointed by the registrar of the Health Professions Council. If the dispute resolution procedure is not resorted to, the rejection of the RAF 4 form or the assessment by the Fund's designated

medical practitioner, as the case may be, becomes ‘final and binding’ (reg 3(5)(a)). The determination of a dispute, if one is declared, by the appeal tribunal is also ‘final and binding’ (reg 3(13)).

[6] It was held in *Duma* para 19 that-

‘[i]n accordance with the model that the legislature chose to adopt, 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 on the court. That much appears from the stipulation in reg 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund — and not the court — is satisfied that the injury has correctly been 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.’

[7] Recently this court in *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA) para 34 said that:

‘[t]he 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.’

[8] The three appellants as plaintiffs instituted separate actions against the Fund in the North Gauteng Division of the High Court, Pretoria, for the damages they suffered as a result of injuries they sustained in motor vehicle accidents that occurred after 1 August 2008. General damages form part of the relief claimed in each action. The stance adopted by the appellants in each action is that compliance with reg 3 is ‘legally impossible’ in the absence of operational guidelines in relation to the application of the AMA Guides. The first and second appellants each launched an application after the close of pleadings in their respective actions in which they sought declaratory relief in accordance with their interpretation of reg 3(1)(b)(iv). They joined the minister in each application, who gave notice that he would abide the decision of the court. Although it opposed the second appellant’s application (the

second appellant's application for declaratory relief) the Fund failed to oppose the first appellant's application. Default judgment in accordance with the relief prayed for in the notice of motion was granted in the first appellant's application. The Fund then launched an application for rescission of the default judgment, which application was opposed by the first appellant (the Fund's rescission application). The third appellant raised the issue by way of an objection to an application for the amendment of the Fund's special plea in which the third appellant's non-compliance with reg 3 was raised (the Fund's application for amendment).

[9] The appellants and the Fund agreed that a determination of the following questions is dispositive of the Fund's rescission application, the second appellant's application for declaratory relief and the Fund's application for amendment: whether (a) reg 3(1)(b)(iv) requires operational guidelines to be published by the minister before the AMA Guides can be applied in the determination of a claimant's WPI; (b) the AMA Guides can be applied for purposes of the Regulations in the absence of operational guidelines published by the minister; and (c) a claimant is excused from compliance with the regulations by virtue of the maxim *lex non cogit ad impossibilia* (the law does not compel a person to perform that which is impossible) if the AMA Guides cannot be applied for purposes of the regulations in the absence of operational guidelines.

[10] The three applications were heard together by Kgomo J on 26 July 2013. The high court was called upon to determine the three questions. Judgment was delivered on 30 August 2013. The interpretation of reg 3(1)(b)(iv) contended for by the appellants did not find favour with the high court. In answering questions (a) and (b) in favour of the Fund the high court held that the phrase 'if any' in reg 3(1)(b)(iv) applies to and qualifies both the publication of 'amendments' and of 'operational guidelines'. The minister was therefore, so the high court held, not obliged to publish guidelines before the AMA Guides could be applied. Instead of granting orders appropriate to each application the high court made the following order:

- '1. The application is dismissed with costs.
2. The costs shall include the costs attendant on the employment of two counsel.'

[11] The appeal lies against this order with the leave of this court. The Fund did not cross-appeal. Counsel, however, informed us that the determination of the

central legal issue raised in this appeal is accepted as decisive of each application and that the parties had agreed to act upon the decision in a manner appropriate to what each application's outcome should have been.

[12] With reference to the language used in reg 3(1)(b)(iv), the appellants contend that it envisages and requires the publication of operational guidelines, which 'must' be applied in order to apply the AMA Guides. The injunction, they contend, is peremptory. They contrast the language of reg 3(1)(b)(iv) with that used in reg 3(1)(b)(i) prior to its amendment ('[t]he Minister may publish' a list of non-serious injuries, which was indeed done) and in reg 3(1)(b)(v) ('[t]he Minister may approve a training course . . . by notice in the *Gazette* and then the assessment must be done . . .'). The appellants contend that those provisions are plainly discretionary whereas reg 3(1)(b)(iv) by contrast is peremptory. The words 'if any' used in reg 3(1)(b)(iv), so they contend, only qualify and apply to the publication of amendments and not to both the publication of amendments and operational guidelines

[13] Regulation 3(1)(b)(iv) must be interpreted in accordance with the established principles of interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.) The meaning to be attributed to reg 3(1)(b)(iv) as contended for by the appellants is not sensible and has no basis in its language or in context. The language used clearly confers a discretion on the minister to publish operational guidelines and the application of the AMA Guides is not dependent on the existence of operational guidelines. Reference to the context supports this legislative intent.

[14] As to language, the words 'if any' in reg 3(1)(b)(iv) denote that the publication of 'operational guidelines' or of 'amendments' thereto is discretionary. An alteration of the punctuation used in reg 3(1)(b)(iv) is required in order to sustain the interpretation contended for by the appellants: the insertion of a comma after the words 'operational guidelines' and the deletion of the comma after the word 'amendments'. ('The AMA Guides must be applied by the medical practitioner in accordance with operational guidelines, or amendments if any, published by the Minister from time to time by notice in the *Gazette*.') The distinction which the appellants seek to draw between operational guidelines and amendments is artificial:

once operational guidelines, if published, are amended they remain operational guidelines in accordance with which the AMA Guides must then be applied. The obligation created in reg 3(1)(b)(iv) by the use of the word 'must' is one placed conditionally upon the medical practitioner: the AMA Guides 'must' be applied by the medical practitioner in accordance with 'any' operational guidelines or amendments 'if' published. No obligation is placed on the minister. The publication of operational guidelines is clearly not a condition precedent to the application of the AMA Guides in the assessment whether an injury is 'serious'.

[15] The same legislative intent is reinforced when reg 3(1)(b)(iv) is considered contextually. The use of the permissive or facultative word 'may' in the other regulations referred to by the appellants and not in reg 3(1)(b)(iv) is no indication that the publication of operational guidelines is peremptory. The statutory provision in reg 3(1)(b)(iv) concerning the publication of operational guidelines is not couched in words which have an affirmative or imperative character, such as 'shall' or 'must'. There is also no other provision in the Regulations, or in the Act, which imposes an obligation on the minister to publish operational guidelines in order for the AMA Guides to find application.

[16] There is nothing in the other provisions of the regulations and of the Act which lends any weight to the interpretation contended for by the appellants. On the contrary, that interpretation will result in the absurdity that the AMA Guides, which take centre stage in the administrative determination of whether an injury is 'serious' to qualify for an award of general damages in terms of s 17(1) of the Act, cannot be applied until such time as the minister publishes operational guidelines even though the minister may consider the publication of operational guidelines not necessary or expedient. Furthermore, there is no impediment, it is common cause, to the practical application of the AMA Guides in the absence of operational guidelines.

[17] I conclude, therefore, that the publication by the minister of operational guidelines or amendments under reg 3(1)(b)(iv) is discretionary. The application of the AMA Guides in the assessment whether the third party's injury is 'serious' to qualify for general damages is not dependent on the existence of operational guidelines. The conclusion at which the high court arrived therefore cannot be faulted and the appeal cannot succeed.

[18] Finally, the matter of costs. The interpretation contended for by the appellants, without intending to be unkind, is rather opportunistic and seems to be an attempt to avoid compliance with the Regulations despite the clear and unambiguous wording of reg 3(1)(b)(iv). I agree with the Fund's contention that the construction contended for by the appellants is linguistically and contextually untenable. I am, therefore, not persuaded that the circumstances of this case warrant a deviation from the general principle that costs should follow the event.

[19] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

PA Meyer
Acting Judge of Appeal

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