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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 24261/2014

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| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |

10 October 2016

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SIGNATURE

In the matter between:

M., L. L.

obo M. J. M.

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

SPILG, J:

INTRODUCTION

1. The plaintiff sues as mother and natural guardian of her minor son who was injured in a motor vehicle accident on 9 May 2011 when the child was 5 years old. He is now 12 years old.
2. As appears below the Road Accident Fund (*'the RAF'*) conceded liability prior to the institution of proceedings. An action was instituted to recover damages in respect of the *sequelae* of the injuries allegedly sustained as a consequence of the accident.
3. The matter was placed on the roll of 23 September for trial certification. This was during the recess. The trial is set down to commence on 21 October 2016.
4. The defendant contended that the matter was not trial ready since it had raised a special plea which required prior adjudication. The special plea is that the plaintiff failed to comply with s 24(2) (a) of the Road Accident Fund Act 56 of 1996 (*"the Act"*).
5. The papers before me indicate that the child is alleged to have sustained a severe head injury as well as orthopedic injuries. The claim is for R4.5million.
6. In view of the nature of the alleged injuries, the fact that there has been no interim payment, the plaintiff being a single parent who is unemployed and therefore unlikely to provide financially for the reasonable care of her child it was necessary that the manner of proceeding with trial certification has regard to the child's best interests. They are to be considered of paramount importance in all matters affecting him or her. This is expressed in s 28(2) of the Constitution and repeated in s 9 of the Children's Act 38 of 2005.¹

¹ S 28(2) of the Constitution provides that:

A child's best interests are of paramount importance in every matter concerning the child.

S 9 of the Children's Act reads:

'Best interests of child paramount'

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied'

7. For a host of rather obvious reasons the child's interests are best served if it is feasible to resolve the special plea in good time before the allocated trial date, not the least of which will be the avoidance of a possible postponement of the trial even if the special plea were to be heard on the trial date and dismissed.
8. Moreover the issue is not simply one concerning the merits of the special plea but the plaintiff in turn has challenged the competency of the defendant to have raised it. If the plaintiff is correct then a matter that in fact should be certified trial ready cannot proceed.
9. If the issues concerning the special plea could be determined immediately then it was still possible to certify the matter trial ready for 21 October. Since last week was also during the recess and I was not on duty for any other matters, I enquired whether the parties were amenable to my hearing the special plea. Both parties were agreeable and filed heads of argument.

THE ISSUES

10. The defendant has sought to introduce a special plea of non-compliance with s 24(2) (a) of the Act. The ground is that the medical report contained in the RAF 1 claim form was not completed by the medical practitioner who had treated the child at the time of the accident or by the superintendent of the hospital where the child received treatment and no explanation has been provided as to why they did not do so. Instead Dr Morare completed the medical report section of the form.
11. In turn the plaintiff takes issue on two grounds with the competency of the Fund to raise the special plea. Firstly, that the defendant had failed to amend its existing plea as required under Rule 28(1) of the Uniform Rules but simply introduced a new plea which included for the first time the special plea under consideration. The other ground is that the Fund failed to object to the validity of the claim lodged by the plaintiff within 60 days of its delivery as required by

s 24(5) of the Act and had in any event acquiesced when admitting liability on the merits.

12. In order to appreciate the challenge raised to the special plea it is necessary to set out the chronology.

CHRONOLOGY

13. The child was treated at Leratong Hospital for the injuries sustained in the accident of 9 May 2011 and a claim was lodged with the Fund on 13 September 2013.

On 14 May 2014, the Fund made an offer of 100% settlement in respect of liability. This was accepted on 20 May 2014.

14. Subsequently on 7 July 2014 the summons was served on the Defendant

On 14 September 2014 the Fund, then represented by Mohlala Attorneys, served its Plea.

A year later, on 9 September 2015 a notice of set down for trial was served on Mohlala Attorneys.

15. However on 31 May 2016 Mohlala Attorneys were substituted by Dev Maharaj & Associates as the Fund's attorneys of record.

16. On 5 August 2016, Dev Maharaj & Associates served another Plea (which the plaintiff refers to as the '*Second Plea*'), wherein the Defendant raised, for the first time, an issue of non-compliance with section 24(2) (a) of the Act. The Defendant failed to withdraw the First Plea, initially delivered by Mohlala Attorneys and on that basis the Plaintiff did not replicate to the second Plea.

17. On 22 September 2016, the Defendant served the Plaintiff with a Notice in terms of Rule 28(1) of the Uniform Rules of Court, alleging that the Plaintiff had not complied with the provisions of S24 of the Act.
18. On 26 September 2016 the Plaintiff's Attorneys in turn objected to the Defendant's Rule 28(1) notice on the basis that it did not afford the Plaintiff enough time to make use of the provisions of rule 28(8).
19. The chronology suggests that the new attorneys for the Fund simply tried to steamroller their special plea through without proper consideration for the rules and in a belated attempt to stave off the trial date because the Fund had changed attorneys at a very late stage and did not seem to be properly prepared for trial. This appeared to be borne out by the failure of the Fund to produce any medico-legal report while the plaintiff had submitted all barring that of the actuary. Counsel for the plaintiff argued that the special plea was a ruse to buy time.
20. Appearances can be deceiving. The previous attorneys engaged by the Fund were removed from its panel by the court. The attorneys however would not release their files. The only pleading the Fund had was the originating summons served on them. They were unaware whether a plea had been filed.
21. On receipt of instructions from the Fund Att. Putsoane contacted the plaintiff's attorneys on 24 May to advise that his firm had taken over the matter and requested information regarding the state of the pleadings. The person he spoke to, Ms Bongi, indicated that she would revert. The Fund's attorneys also sent an email to the plaintiff's attorneys on the following day confirming their appointment and formally requested information about whether both the merits and quantum were still in dispute and whether a trial date had been applied for.
22. The notice of substitution mentioned earlier was served on 31 May 2016 together with rule 35(14) and 36(4) notices which included a request for all medical reports and hospital records as well as the RAF 1 and 4 claim forms and statutory affidavit.

23. The plaintiff responded to the rule 35(14) and 36(4) notices in early July. The documents supplied suggested that the merits had not been conceded and since there was no response to the email sent on 25 May (which was dated 24 May) the Fund's attorneys considered it prudent to raise the standard special pleas and plead over on the merits, including a denial of liability. The plea itself also denied the averment contained in the summons that the provisions of s 24 had been complied with.
24. The defendant's attorneys then prepared an assessment report which was submitted to the responsible handler at the Fund. One of the issues picked up from the replies to the various notices was that Dr Morare who signed the RAF 1 form was not one of the treating doctors identified in the hospital records.
25. The Fund responded to the assessment report and contended that it had objected to the claim. Its attorneys were requested to amend the plea. This resulted in the notice in terms of rule 28(1) being served on the plaintiff which raised as a further special plea that she had not complied with the provisions of S24(2)(a) of the Act.
26. It is unfortunate that both sets of attorneys did not communicate more regularly with one another. The plaintiff's attorneys neither responded to their counterpart's request about the state of the pleadings or to take issue with the second plea as an irregular step. Similarly the defendant's attorneys did not follow up on their initial enquiry. Plaintiff's counsel submitted that the defendant's attorneys ought to have inspected the court files. In my view that does not answer the failure on the part of the plaintiff's attorney to respond to the initial enquiries. An inspection of the court file would shed no light on whether the merits had been conceded. Although one might ordinarily go to the court file collegiality should direct a more open exchange between attorneys; it would certainly save time and unnecessary costs.

27. In my view the defendant's present attorneys acted responsibly both in protecting their client's interests and in engaging the plaintiff's attorneys.

Unfortunately both sets of attorneys treated their pre-trial conference as a formality. It was no more than a necessary inconvenience entailing the ticking of a box to access the certification for trial readiness procedure.

This is to put the cart before the horse. The certification process is intended to oversee trial readiness. It is not a substitute for the pre-trial conference provided for under the rules.

THE ISSUES

28. The issues are:

- a. whether the defendant's Second Special Plea is competent.

The plaintiff contends that the rules required a formal amendment to the first plea and that the rule 28 notice should not be accepted as it was served with insufficient time allowed for objection under the rules prior to the trial date. It is also contended that under s 28(5) the Fund is precluded from raising an objection at this stage and that in any event it had consented or otherwise acquiesced to receiving a defective claim form.

The defendant contended that it had timeously objected to the claim on the grounds that the plaintiff failed to comply with the provisions of the Act. This was however submitted from the bar on instructions received without the production of the objection itself.

- b. whether s24(2)(a) makes provision for a non-treating doctor to complete the RAF1 form without the tender of an explanation having regard to the provisions of the section.

THE STATUS OF THE SECOND PLEA

29. In my view an attack on the regularity of the second special plea does not preclude the defendant from relying on the notice of amendment to be construed by reference to the first plea filed. Its substance is clear; it seeks to add another special defence to the case it has pleaded. The fact that in form it may be construed as referring to a proposed amendment to the second plea and not the first should not be allowed to preclude the raising of the defence provided it is raised *bona fide* and there is not prejudice which may be cured by a suitable costs order.
30. This is not the type of case where a defendant is deliberately ignoring the provisions of the Uniform rules of court by filing a second plea without notice of amendment. The circumstances under which the second plea came to be filed have been set out and the plaintiff's attorneys are not entirely exculpated since they should have assisted by responding to the email enquiry. I am satisfied that the failure by the plaintiff's attorney was an oversight.
31. The reason for raising the want of compliance with s 28(1) is that the hospital records reveal that the child was treated for a leg fracture but not treated for a head injury. At most there was a doctor's note that the child should be observed in case there were any neurological sequelae, but none were mentioned.
32. It is evident that Dr Morare in completing the RAF 1 form also confirmed that the hospital records did not indicate any sequelae associated with the head injury other than superficial cuts and abrasions.
33. In my view it is essential for the proper scrutinising of claims that an opportunity is afforded to the Fund to investigate whether the head injuries described in the hospital report could have resulted in the brain damage now contended for. A red

flag has been raised and the reason for it not being dealt with sooner appears to be due to the quality of the legal representation the Fund previously had.

34. That however does not end the enquiry. The plaintiff contends that the defendant is precluded from belatedly raising want of compliance with formalities when lodging the claim form by reason of the provisions of s 24(5) of the Act.

S24(5) provides that:

‘If the Fund does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund...as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects’.

35. The Defendant did not discover any document indicating that it had objected to the claim. Att. Putsoane, who has right of appearance, however informed the court that his instructions were that an objection had been served. He also advised that the Fund’s documentation was filed off-site and that he had a day or two previously requested the Fund to obtain a copy. However there was a bomb scare which prevented the Fund’s officials from accessing the storage facility. I indicated that the matter would be postponed for two days so that the search could be resumed on the following day.

36. When the case resumed two days later the court was informed that the file had still not been located. The plaintiff’s attorney’s position was that the claim form was lodged by them with a covering letter from them and that no objection had been received by them.

37. Having regard to the view I took of the matter I decided that irrespective of whether there had been an objection properly served the defendant’s obstacle still remained the letter it sent on 14 May 2014 advising that it had considered the available evidence giving rise to the claim and was prepared to settle the issue of negligence on the basis that the insured driver was solely negligent. No offer was made in respect of quantum. The letter continued that acceptance would only be

effective when the acceptance offer is fully completed. It is common cause that the offer was accepted.

38. The letter goes on to say that *“If this offer is made after prescription of the claim, it will not be deemed to be a waiver of prescription and any purported “.* The sentence is incomplete. It does not apply, but even if it did it is difficult to appreciate how there could be a residual issue if an offer made in respect of both merits and quantum was accepted.
39. There is also an earlier paragraph which advises that the offer is limited to the aspect of negligence only and may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim and that to *“avoid doubt, the RAF reserves all its rights in law with regard to all other procedural and substantive aspects of the claim”.*
40. While the *caveat* may cover the adequacy of the information provided in the RAF4 part of the claim form in respect of a serious injury assessment report it would be tantamount to approbating and reprobating if a claim is admitted as to negligence since the acceptance of at least the RAF1 portion of the claim is essential for the Fund to consider the claim at all for purposes of admitting negligence.
41. If I am wrong then it is necessary to deal with whether the RAF 1 form was properly completed.

ADEQUACY OF THE RAF 1 FORM BEING COMPLETED BY A NON-TREATING DOCTOR

42. S 24(2)(a) of the Act provides that:

“The medical report shall be completed on the prescribed form by the medical practitioner who treated the deceased or injured person for the bodily injuries sustained in the accident from which the claim arises, or by the

superintendent (or his or her representative) of the hospital where the deceased or injured person was treated for such bodily injuries: Provided that, if the medical practitioner or superintendent (or his or her representative) concerned fails to complete the medical report on request within a reasonable time and it appears that as a result of the passage of time the claim concerned may become prescribed, the medical report may be completed by another medical practitioner who has fully satisfied himself or herself regarding the cause of the death or the nature and treatment of the bodily injuries in respect of which the claim is made.”

43. It is common cause that Dr Morare who completed the RAF 1 form was not the treating doctor.
44. It is also conceded by the plaintiff that no attempt was made to ask the treating doctor to complete the form or to have it completed by the superintendent at the hospital. While the issue of prescription did loom, it was not by reason of a refusal on the part of the treating doctor or superintendent that Dr Morare was approached.
45. The plaintiff's attorney was given an opportunity to set out in an affidavit the reasons advanced by Adv Moshidi from the Bar as to why the treating doctor and superintendent were not contacted. An affidavit by Att. Nkeli confirmed the systemic difficulty experienced by the practice in which he is a director in securing the completion of RAF 1 forms by the treating doctor or the hospital superintendent in hospitals in the Gauteng province.
46. The attorney explained that hospitals in and around Gauteng do not respond to requests to complete the RAF 1 form. Moreover in some cases it is impossible to have the form completed by the hospital as the hospital did not retain the records or simply does not respond. The attorney gave the example of requests made to the South Rand, Charlotte Maxeke and the Helen Joseph hospitals. In some cases a request for payment of a fee was made and complied with, but in all cases, emanating from October 2014 to January 2015 Att Nkeli has yet to receive the hospital records.

47. The intention of s 24(2)(a) is clear. The Fund should be satisfied as to the medical treatment that was received from the hospital at which the claimant was admitted pursuant to an accident. I have referred to this in a previous RAF case as a primary source of evidence². This aspect lay at the foundation of my criticism of the expert evidence tendered and the failure of the Fund to properly investigate the nature of injuries actually sustained in that earlier case.³

48. My attention was directed to the unreported judgment of Alkema J in *Zuko Busuku v the Road Accident Fund* [2016] 3 All SA 498 (ECM). With respect to the learned judge I do not see the purpose of s 24(2)(a) and the mischief it seeks to address in quite the same way. At paras 24 the court said that

'It follows that the hospital records may not substitute a duly completed medical report as the source of the information. The Act read with the Regulations only recognize the duly completed medical report on form RAF1 as the only source of the information. If the hospital records may constitute substantial compliance with Regulation 7 read with section 24 of the Act, as Mr Bodlani submitted, then the words used in the Act and Regulations become meaningless and are not given effect to. And this is not permissible under the law of interpretation of Statutes and it offends the case law on the subject, including judgments from the Supreme Court of Appeal which are binding on this Court.' (emphasis added)

49. There is some distinction between that case and the present. The court in *Busuku* was concerned with a claim form that was not signed by any medical practitioner but only had attached the hospital records. In the present case a non-treating medical practitioner completed the medical report after it is clear that he had considered the hospital records. There is however a fundamental point of departure. In *Busuku* the court found that the fundamental consideration of the

² *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ) at paras 114 and 120(a)

³ *Ndlovu* at paras 101, 113- 114 and 120(a)

section was directed at obtaining the signature of the treating doctor. This appears also from para 25 of the judgment:

‘The requirement by section 24 (2) (a), namely that the medical report must be completed by the medical practitioner who treated the plaintiff, strengthens the inference that the hospital notes may not substitute the duly completed medical report under form RAF1. ‘

50. I have no difficulty in accepting that direct evidence is sought in the form of a declaration. The question is “*direct evidence of what?*” In answering this question I have a reservation regarding the learned judge’s view as to the actual focus of the section.

It seems to me that at the heart of s 24(2)(a) is the primary evidence of the hospital records for otherwise it would not make sense for the superintendent to suffice, without more, as a satisfactory alternative declarant to the treating doctor. It appears that the court’s attention was not directed to the significance of allowing for the superintendent, or for that matter his or her representative, to sign. A superintendent would not have personal knowledge of the treatment received by the patient.

Accordingly the purpose of his or her signature or that of a representative at the treating hospital, in satisfactory substitution for that of the treating doctor, must reside in the fact that the completion by such person of the medical report section of the RAF 1 form will sufficiently vouch for the details supplied accurately reflecting the contents of the treating hospital records.

Which brings one back to the treating doctor. In a busy hospital treating doctors are unlikely to recall the specifics of every patient, they may not be exclusively treating the same patient and may be rotated. They are unlikely to have firsthand recall, but they would be able to confirm what they did, provided they have sight of the hospital records. It is unnecessary for the purposes of this case to consider the further aspects dealt with in *Busuku* .

51. But what must be done if the evidence demonstrates a systemic frustration of the intention of the section by those who are required to complete the medical report portion of the RAF 1 form? It seems to me that by parity of reasoning substantial compliance will suffice if the section is to remain in the statute book while its implementation is frustrated in this way. Practitioners cannot be expected to bring compelling orders, much less should lay persons who pursue their own claims.
52. Accordingly substantial compliance in circumstances where the Fund is entitled to condone strict non-compliance (as evident from s24(5)) is not necessarily confined to where there is some deviation from the strictures of the legislation but includes cases where it is demonstrated that there is a systemic impediment to the reasonable attainment of the objective of s 24(2)(a) by the hospital authorities and provided of course there is no prejudice.
53. There is a further difficulty created by the draftsman of the RAF 1 form. The form requires the treating doctor to not only set out the treatment received at the hospital but also to deal with future medical treatment that the patient might be currently receiving. It is difficult to see how an intern who might have been on duty in the emergency ward when the patient was brought in by ambulance would be able to complete this section. There can be no assumption that the patient will continue to receive treatment at the same hospital, particularly in the case of motor vehicle injuries which, precisely because transport is being used, would suggest that the hospital would not necessarily be close to where the patient resides.
54. In the present case Dr Morare correctly set out the medical treatment received at Leratong hospital which was confined to the leg fracture. He also confirmed the identity of the hospital and that he was summarising the hospital records.
55. The Fund was able to confirm all these facts as far back as 2014 and no issue was taken, despite three earlier special pleas, with the adequacy of Dr Morare completing the RAF 1 medical report section. As stated by the Supreme Court of

Appeal, the requirement relating to the submission of the form is peremptory while the prescribed requirements regarding the completeness of the form are directory as evident from the continued practice adopted in this division by practitioners.⁴

56. In the present case there has been substantial compliance with the Act and as a fact the Fund has accessed the hospital records from which the identity of the treating doctor can be established should he or she be required to give evidence or file a report.

TRIAL CERTIFICATION AND ORDER

57. That however does not end the enquiry. The question is whether the matter is trial ready. This depends on whether the defendant is prejudiced in its preparation for trial. The court is conscious of the need for the Fund to properly examine whether the head injury claim with its sequelae as now contended for was casually connected to the accident.

Adv Mahomed and Att. Putsoane confirmed that this was indeed so. All the defendant's experts have examined the child and are preparing their reports which will be submitted within sufficient time for the respective experts to hold their pre-trial meeting before the trial date.

58. I wish to commend both sets of legal representatives and the Fund for appreciating that this case involved the rights of a child and that as long as there was no prejudice every one strove to attain the same objective, of ensuring that the matter could be trial ready.

59. On 7 October I accordingly:

⁴ *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA) at para 19

1. *Dismissed the special plea with costs*
2. *Certified the case as trial ready, and by agreement between the parties and the court's sanction the plaintiff is to provide her actuary's report by later the same day while the defendant is entitled to file its further expert reports, being that of the occupational therapist, the neurologist, the educational psychologist, industrial psychologist, clinical psychologist and actuary by 13 October. The joint minutes of all the experts are to be filed by 18 October 2016.*

SPILG J

DATES OF HEARING:	28 September, 5 and 7 October 2016
DATE OF ORDER AND CERTIFICATION:	7 October 2016
DATE OF JUDGMENT:	11 October 2016
FOR PLAINTIFF:	Adv T Moshidi Jerry Nkeli Attorneys Inc
FOR DEFENDANT:	Adv S Mahomed and Att. T Putsoane (arguing respectively s24(2)(a) and the background to the pleadings) Dev Maharaj & Associates