

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

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/NO
(3) REVISED.

In the matter between:

SHANE MUIR

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

- *Special plea – Substantive compliance with Section 24 (2) of the Road Accident Fund Act, 56 of 1996 as amended, and not merely formalistic compliance.*
- *Special plea – Serious injury assessment, which triggers a further referral to the HPSA, should the fund reject the plaintiff's serious injury assessment report, in terms of Regulation 3 of the RAF's Regulations.*
- *Delict - Claim for compensatory damages stemming from bodily injuries sustained in a motor vehicle collision.*
- *Legally Invalid Administrative Action - Administrative Action that is invalid on account of its non – compliance with Section 33(1), read with Section 2, Of the Constitution Of the Republic Of South Africa, No. 108 of 1996.*
- *Ethics – The Unethical Conduct of lawyer(s) during proceedings, and appropriate sanction from a Restorative and Therapeutic Justice Perspective.*

MAKHAMBENI AJ:

Introduction

[1] This is a matter involving an automotive collision between the plaintiff an unidentified insured driver, who ran a red traffic light in a minibus taxi, whilst the plaintiff's car was completing the process of driving through the intersection at the corner of Barrage and Ascot Roads in Vanderbijlpark, in the early hours of 15 December 2017.

[2] The plaintiff sustained bodily injuries, which resulted in him instituting a claim for damages against the defendant.

[3] The defendant in turn entered appearance to defend, and, sought to resist the claim by means of two special pleas, as well as, a plea over on the merits.

[4] The first special plea was premised on the alleged first treating doctor's failure to complete the mandatory form in terms of Section 24(2) of the Road Accident Fund Act, 56 of 1996 (as amended). The first treating doctor was required to provide his details in full.

[5] The attorney for the defendant, Mr Ngomana, incorrectly submitted that Section 24(2) (*supra*) required pedantic and formalistic compliance, when in actual fact, it did not, hence the first special plea failed on this very basis, and was accordingly dismissed, because the first treating doctor had substantially complied with the Act by providing all his details on the mandatory form.

[6] The second special plea was incorrectly premised on the plaintiff's failure to cause one of his medical experts, Dr Williams, to file a serious injury assessment report in terms of Regulation 3. However, when pressed on the issue, the defendant's legal representative, Mr Ngomana, conceded that Dr Williams had indeed submitted the serious injury assessment report, which his client had not

rejected, and as a result thereof, the referral to the Health Professions Council of South Africa (“HPCSA”), had not been warranted.

[7] It was on that basis that the second special plea had to suffer a fate similar to that of the first special plea. Hence, it was accordingly dismissed.

The defendant’s election not to commission expert reports and call any witnesses of its own

[8] It needs to be pointed out that in view of the defendant’s election to neither call any witness, nor file any expert reports, it was going to be difficult for the defendant to mount a credible defence, if any, to the plaintiff’s meticulously presented case, and Mr Ngomana was accordingly warned of this as he, on more than one occasion, ventured into the realms of testifying from the Bar, instead of merely cross-examining the plaintiff, which I found to be quite regrettable, to say the least.

[9] Thus, it came as no surprise that the defence lawyer could not make any impression on the case, the plaintiff’s counsel, Mr Smit presented, as well as, on the plaintiff himself.

Factual background

[10] On the 15th of December 2017, at about 05h30, the Plaintiff was driving to work in his silver VW Jetta (Sedan) bearing the registration plates RBS 412 FS, when the insured driver, a Mr Shadrack Ramotswela, driving a VW Crafter Minibus Taxi, collided with the plaintiff after the insured driver had ran through a red traffic light, and the plaintiff’s vehicle was in the process of crossing the intersection at Ascot and Barrange Road (also known as Ascot on Vaal).

[11] Prior to reaching the intersection of the Estcourt and Barrange Roads, the traffic lights turn green as the plaintiff was approaching at distance of 300 metres from the intersection.

[12] The plaintiff kept to the speed limit of 80 km/h, because had he exceeded the speed limit, the speed camera would have recorded his speed violation in this regard.

[13] As already stated in paragraph 11 above, the plaintiff reached the intersection of Ascot and Barrange Roads, and the vehicle approaching from Ascot on Vaal, heading towards the intersection he was driving across were sufficiently distant, until the above-mentioned minibus taxi skipped the red traffic light and, ran into the plaintiff's vehicle.

[14] The plaintiff testified that he had braked and swerved to the left in order to avoid the collision, however his avoidance action failed on account of the excessive speed carried by the insured driver.

[15] The plaintiff was hospitalised shortly after the accident at the Vereeniging Mediclinic, where he received treatment for a fracture of the radial styloid process of the left radius, that was stabilised by fixation, as well as, treatment of the right patella's fracture by debridement and immobilisation in a plaster.

[16] In spite of both injuries having healed, as best as they could, given the nature thereof, it comes as no surprise that the plaintiff continues to endure quite a bit of pain therefrom, when one considers the science of it all in the expert reports.

[17] The Orthopaedic Surgeon also noted an acceleration of Osteoarthritis (degenerative arthritis) on the right knee, and the plaintiff has also undergone partial knee replacement surgery on 8 August 2023.

[18] Prior to the accident, the plaintiff worked for an engineering company, but has had to resign, and take up employment as an unqualified teacher, who is now about to commence studying for an education qualification at the University of South Africa, owing to his past accident inability to sustain the physical demands of working in an engineering company.

[19] In view of the fact that the defendant had no expert witnesses to counter the plaintiff's experts, who, in my view, set out the injuries and the effects thereof on the plaintiff in a rather credible manner, I find no reason whatsoever to second guess any of the expert reports submitted on behalf of the plaintiff.

[20] In as much as one has alluded to the injuries of the plaintiff, they can be listed as follows:

- 20.1 A fracture of the radial styloid process of the left radius;
- 20.2 A compound fracture of the right patella;
- 20.3 A laceration of the left knee;
- 20.4 A contusion of the anterior chest wall (which has healed); and
- 20.5 Bruising of the face, including the left peri-orbital tissue (which in my view has reasonably healed).

[21] The injuries in question are borne out by the reports of the following experts:

- 21.1 The Orthopaedic Surgeon, Dr W E Williams;
- 21.2 The Industrial Psychologist, Dr Johan de Beer;
- 21.3 The Occupational Therapist, Robyn Hunter; and
- 21.4 The Actuary, Gerald Jacobson.

The legal position

[22] In as far as the issue of liability is concerned, it is of cardinal importance to mention the fact that it is the plaintiff, who bears the burden of proof on a balance of probabilities¹, if he is to succeed in establishing the defendant's liability.

[23] *In casu*, it is my considered view that with the uncontroverted evidence the plaintiff has given, the plaintiff has certainly established the requisite burden of proof

¹ Institutiones 2 20 4, Digesta 22 3 21, Van Zuthphen Practycke der Nederlandsche Rechten – "Bewijs" 5; "Als het bewijs van der eischer ende den ghedaeghde is, so moet tot voordeel van den ghedaeghde ghepronuncieert worden", Pillay v Krishna 1946 AD 946 at 951, Mobil Oil Southern Africa (Pty) Ltd Mechin 1965 (2) SA 706 (A) at 711; C W H Schmidt et H Rademeyer: Schmidt – Bewysreg, 4de Uitgawe, Lexis Nexis Butterworths (Edms) Bpk, Durban, 2000, bl. (p.) 31, Par. A(a) Die Kernreel: Wie beweer, moet bewys (In English: He who alleges, must prove).

on a balance of probabilities, in as far as the occurrence of the collision is concerned.

[24] In addition to the above, the defendant has unfortunately failed to discharge the evidentiary burden cast upon it by the plaintiff.

[25] The foregoing is attributable to the fact that the plaintiff's testimony was congruent with the SAPS sketch plan, the reports of all the experts referred to in subparagraphs 21.1 to 21.4, above, and more than anything else, Mr Ngomana's cross-examination made no impression on the plaintiff whatsoever.

[26] In other words, the plaintiff has satisfied the requirements for a delict, expounded upon by Professors Johan Neethling and Jan Knobel in the 8th edition of *Neethling's Law of Delict*², which can be summed up as follows:

26.1 The act (*in casu*, the collision);

26.2 Wrongfulness/Unlawfulness (*in casu*, the act of running the red light by the insured driver was not only wrongful, but it was both wrongful and unlawful).

26.3 Intention / Negligence (*in casu*, it matters not whether the intent was direct, indirect, or eventual, since by running a red light at an excessive speed that would militate against the insured driver being able to stop the minibus, should he be required to do so, the insured driver reconciled himself with the prospect of causing a collision, and unfortunately, he did, at worst, the insured driver drove with gross negligence *vis – a – vis* his obligations as a diligent driver).

26.4 Causation (*in casu*, there is a causal nexis, both factually and legally between the wrongful and unlawful act(s) of the insured driver, the resultant collision with the plaintiff's vehicle, and the injuries sustained by the plaintiff, leaving him with the damages quantified by the experts referred to above.

26.5 Damage(s) (*in casu*, the plaintiff has sustained the damages identified and quantified by the SAPS and the medico-legal experts referred to above.

² Johan Neethling et J M Potgieter, (*Neethling*) *Law of Delict*, 8th Edition, Lexis Nexis Butterworths (Pty) Ltd, Durban, on pp.27 – 301.

[27] Therefore, in as far as the issue of liability is concerned, the plaintiff did not only make it out of the starting blocks, but, has ultimately made it across the finish line.

[28] In as much as one has already touched on the issue of the injuries sustained by the plaintiff in paragraph 21, above (inclusive of subparagraphs 20.1 to 20.5), it needs to be mentioned that the accelerated onset of osteoarthritis is, in all probability, going to get worse, as the plaintiff gets older, and the authorities referred to by Mr Smith³, on behalf of the plaintiff, are reasonable, and not out of proportion with the injuries sustained by the plaintiff, as far as the amount sought for general damages is concerned.

[29] In paragraph 8 of the particulars of claim, plaintiff sought R800 000.00⁴ as general damages for the injuries sustained in the accident, being a fracture of the left distal radius and the right patella.

[30] At subparagraph 3.11.1⁵, Mr Smit referred me to the authority of *Safute v Road Accident Fund*⁶, where the Court per Dhlodlo ADJP awarded general damages to the tune of R220 000.00, which in today's terms translates into an amount of R543 000.00

[31] Mr Smit submitted that R650 000.00 would be a reasonable amount in light of the judgment of Dhlodlo ADJP in *Safute (supra)*, when there is still a 60-70% likelihood of the plaintiff undergoing knee replacement surgery.⁷

[32] Dr W E Williams' expert report lists the following orthopaedic injuries sustained by the plaintiff:⁸

32.1 A fracture of the distal radius, on the left wrist;

32.2 An open fracture of the right patella;

³ CL 015 – 14 to 015 – 19.

⁴ CL 001-7.

⁵ CL 015-12.

⁶ 2007 (5E6) QOD 1 (Ck).

⁷ CL 015-12 to 015-13 (paras 3.11.1 to 3.11.4).

⁸ CL 002-6, para 5(a)(i) to (v).

- 32.3 A laceration of the left knee;
- 32.4 A contusion of the anterior chest wall; and
- 32.5 A bruising of the face, inclusive of the left peri-orbital tissue.

[33] The injuries listed in paragraph 32(1) to (5) above, are in my view, not worthy of consideration given the fact that Dr Williams notes that they have healed. During the trial, it was also my own observation of the evidence pointed out by Dr Williams.⁹

[34] At paragraph 4(ii), Dr Williams refers to the degeneration of the bone structure noted from the radiological (x-ray) evidence, in respect of the plaintiff's left knee.

[35] In as far as the right knee is concerned, Dr Williams, at paragraphs 5(d)(ii) of his report¹⁰, concluded that the right knee had already developed "*early degenerative arthritis*", and that the plaintiff had a 60% chance of undergoing knee replacement surgery.

[36] In the case of the plaintiff, the 60% probability of requiring knee replacement surgery has already mutated into an actuality, given the fact that he has already undergone knee replacement surgery on 8 August 2023.

[37] In view of the fact that Ms Robyn Hunter (Occupational Therapist) and Dr Johan de Beer (Industrial Psychologist) have both compiled expert reports, which are based on their respective consultations with the plaintiff, both have reached their findings having considered Dr Williams' expert report, which conclusive findings I accept. I find no need to give a regurgitation of such findings on a point by point basis in this regard, hence I shall not do so *in casu*.

[38] As it is usually the norm in these types of matters, the actuarial calculation also builds on the firm foundation established by the experts dealing with the pathology of the plaintiff, and in this case the actuary, Mr Gerard Jacobson, has done the same in respect of the plaintiff's case.

⁹ CL 002-6, para 5(b)(iii) and (iv).

¹⁰ CL 002-6.

[39] In view of the fact that both the Actuary and the Occupational Therapist based their observations and conclusions on factual data from this matter, I see no reason whatsoever to fault the reports in this regard, and I certainly rely thereon to reach my conclusions in this regard.

Unlawful administrative action – abusive Regulation 3(3) of the Road Accident Fund Regulations in a manner that violates Section 33(1) of the Constitution

[40] Section 33(1) of the Constitution of the Republic of South Africa, 108 of 1996 (“the Constitution”) provides as follows:

“Everyone has a right to administrative action that is lawful, reasonable and procedurally fair.”

[41] Regulation 3(1) of the Regulations of the RAF Act (“the Regulations”) provides as follows:

“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.”

[42] Regulation 3(3)(a) of the Regulations provides as follows:

“A third party whose injury has been assessed in terms of these regulations shall obtain from the medical practitioner concerned a serious injury assessment report.”

[43] Regulation 3(3)(c) of the Regulations provides as follows:

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

[44] Regulation 3(3)(d)(i) and (ii) of the Regulations provides as follows:

“If the Fund or 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 designated by the Fund or an agent.”

[45] Regulation 3(3)(e) of the Regulations provides as follows:

“The Fund or agent must either accept the further assessment or dispute the further assessment in the manner provided in these regulations.”

[46] It needs to be borne in mind that the defendant falls within the circumscribed definition of an Organ of State, which definition is contained in Section 239 of the Constitution, given the fact that it performs a public function for the benefit of the public in terms of legislation, directed by the legislature for the benefit of the public, and if that is indeed so, then conduct regulated by Regulation 3(3) of the Road Accident Fund’s Regulatory Framework, amounts to administrative action in terms of Section 1(1) of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), which gives a clear exposition of what would constitute an administrative act.

[47] In order for an administrative act to be regarded as legally valid and binding, such an administrative act, in furtherance of the stipulations of Regulation 3(*supra*), must have in them, an element of *good faith* and, in my view, with a clear demonstration of the fact that the defendant has, indeed, applied its mind to the report of Dr Williams, the Orthopaedic Surgeon, contained in the RAF 4 report, instead of being nothing else, but a knee jerk reaction, meant to scupper the completion of the trial, as it was the case in this instance.

[48] The reason for the foregoing is attributable to the fact that if an administrative act of the Defendant, purportedly pursuant to Regulation 3(3) (*supra*), was characterised by *mala fides* and capriciousness (as it was *in casu*), then such administrative act would not be able to comply with the administrative law doctrine of

lawfulness, also known as the principle of legality, as stipulated in Section 33(1) of the Constitution, and if that was indeed so, then the administrative act in question had to be rejected, on account of its unlawfulness, which unlawfulness rendered it unconstitutional in a manner that could not be justified in terms of Section 36(1) of the Constitution(*supra*) (the limitation clause).

[49] In this matter, it needs to be pointed out that Mr Ngomana, at the time he argued the second special plea, that was based on Regulation 3(3) of RAF Regulations, ended up conceding that, in as much as the plaintiff had initially not furnished the defendant with a serious injury assessment report contained in the mandatory RAF 4 form, subsequent to the defendant filing its two special pleas and its plea over on the merits, the plaintiff caused his serious injury assessment report in the mandatory RAF 4 form to be completed by his Orthopaedic Surgeon, Dr Williams, and accordingly filed with the defendant for a period of more than 18 months prior to the date of the hearing of the trial.

[50] When this matter came before me on 18th Of October 2023, Mr Ngomana, who tried to persist with the second special plea, ultimately conceded that the special plea had indeed been overtaken by events owing to the fact that the defendant, who happen to be his client, had not rejected Dr Williams' serious injury assessment report, and with the Fund not having rejected Dr Williams' serious injury assessment report in the RAF 4 form, the special plea had to be dismissed.

[51] In the morning of 19 October 2023, Mr Ngomana directed my attention to the fact that he and his client had now uploaded a formal rejection letter, which rejection letter was meant to stop the adjudication of the plaintiff's claim on general damages.

[52] I then enquired from Mr Ngomana as to when the decision to reject the claim was taken and, he advised me that it had been taken that morning when the letter was written and subsequently uploaded on CaseLines, an act and gesture, which I found rather unfortunate and regrettable, owing to the fact that Mr Ngomana was attempting to rehash the second special plea that had been dismissed, without having filed an application for leave to appeal my decision on the special plea, and in the whole process, he was also attempting to stop the trial from getting to finality. An

act that should be frowned upon, given the fact that on the previous afternoon of 18 October 2023, after the second special plea had been dismissed, Mr Ngomana refused to answer questions that I had directed to him with a view to proceeding into the merits, to the point where he even went as far as saying to the Court that he was refusing to answer a question asked and directed towards him. In other words, in addition to refusing to answer my questions, and had we not had connectivity problems with the plaintiff on the afternoon of 18 October 2023, Mr Ngomana and his client would not have had the opportunity to capriciously seek to derail the continuation of the trial in the way that they had.

[53] In my view, it is regrettable that inasmuch as Mr Ngomana's duty to his client has to be acknowledged, the more disturbing feature about his mode of behaviour is the fact that it is indicative of a lawyer, who has forgotten that he was and still remains an officer of the Court, and as such, he owed higher duty to the Court than he could ever have to his client, hence it is not only inappropriate for him to refuse to answer questions, but rather improper to the point where it starts raising questions about whether, or not, he still remains fit and proper to practise law.

[54] I have gone through the Regulation of the Road Accident Fund's Regulatory Framework, and in my view there is nothing wrong with the Regulation if it is applied in a manner that lines up with Section 33(1) of the Constitution, instead of the manner in which Mr Ngomana sought to abuse and misapply the competencies stemming from such Regulation. Hence his conduct in this regard, as I have already stated must be rejected, on account of falling far below the bar set by Sections 2 and 33(1) Of the Constitution Of the Republic Of South Africa, No. 108 of 1996.

[55] It is also worth referring to what Prof Cora Hoexter says in her contribution to the Bill of Rights Handbook by Iain Currie and Johan de Waal (6th Edition) at paragraph 29.4(a) which reads as follows:

"At its simplest, lawfulness means that administrators must obey the law and have lawful authority for their decisions. If an administrator makes a decision that is not permitted by law, it acts unlawfully and the decision will be invalid. This is an ancient principle of common law.

The constitutionalisation of the principle in Section 33(1) of the Constitution adds little to its content, but it does have the important fact of preventing legislative ouster clauses. These are provisions that seek to exclude or restrict the review jurisdiction of the courts, thereby effectively permitting unlawful administrative action. At the minimum the right to lawful administrative action means that legislation may not oust a court's constitutional jurisdiction or otherwise deprive the courts of their review function to ensure the lawfulness of administrative action."

[56] In as much as Prof Hoexter talks about review jurisdiction of the High Court, it needs to be pointed out that the inherent jurisdiction to analyse administrative action for legality is also applicable *in casu mutatis mutandis*, and as such Mr Ngomana's conduct supported by the defendant in this regard, was designed to basically use Regulation 3(3) as a legislative ouster clause, and that was done in a rather unlawful and capricious manner, which hopelessly falls below the bar set by Section 33(1) of the Constitution, and should, as already stated, be rejected on account of its unlawfulness.

[57] In order to drive the point home with greater force, I consider it apposite to refer to pre-democratic South Africa's dispensation where ouster clauses were particularly relied upon heavily by the South African Police as they were then, through for example Section 29(6) of the Internal Security Act, 74 of 1982, which provided as follows:

"No court of law shall have jurisdiction to pronounce on any action taken in terms of this section, or to order the release of any person detained in terms of the provision of this section."

[58] The foregoing is a classic example of an ouster clause through legislation which became unconstitutional with the advent of the 1993 Constitution (i.e., The Constitution Of the Republic Of South Africa, Act No. 200 of 1993), and has remained unconstitutional up to the present day.

[59] In terms of Prof Y M Burns: *Administrative Law*, 4th Edition, Lexis Nexis, at paragraph 2.2 on page 24, the learned author opines that:

“The common law requirement for administrative legality were often referred to as the requirement that an administrator must apply his or her mind to the matter. The term ‘applying one’s mind to the matter’ simply means that all the requirements for administrative legality have to be complied with. In a narrower sense the term ‘the failure to apply one’s mind to the matter’ was often used to denote the failure to consider and apply the jurisdictional facts of the case in hand. In this context, the consideration of irrelevant factors, or the failure to consider relevant factors (jurisdictional facts) generally led to the conclusion that the administrator had failed to apply his or her mind to the matter.”

[60] At paragraph 2.3 on page 25, Prof Burnes further opines that:

“The *grundnorm* of administrative law is now found in the principles of the Constitution. The common law grounds for administrative legality have been subsumed by the constitutional right to just administrative action, but the common law principles of administrative law will continue to inform the content of the constitutional right to just administrative action.

The inclusion of a right to just administrative action in the Constitution is the product of our history. It may be traced back to a deep mistrust of executive and administrative power on the part of the public and the recognition of the need to control administrative power (including discretionary power), to avoid the recurrence of the injustices of the past.

The culture of authority which existed under the former constitutional system has now been replaced by a culture of justification: a legal culture of state accountability and transparency, in which the democratic values and principles laid down in the Constitution must be upheld by the public administration (and all branches of government). All administrative action must be capable of justification in terms of Section 33 of the Constitution.”

[61] As already said, the conduct of the defendant and Mr Ngomana in this particular matter is incapable of finding any congruence with Section 33(1) of the Constitution (*supra*), and as a consequence thereof cannot be regarded as a form of legally valid administrative action.

[62] I also need to mention the fact that, of late, one has come to notice a trend wherein the defendant tends to capriciously and unlawfully abuse Regulation 3 of its Regulatory Framework, and this capricious and unlawful abuse thereof happens to be emboldened by the incorrectly decided case of *Boy Makuapane v The Road Accident Fund*¹¹. I have already had an opportunity to express myself in an earlier judgment¹² and in that matter I could not reconcile myself with the logic adopted by my brother, Davis J, in the matter of *Makuapane v The Road Accident Fund*, and my views in this particular regard, have not changed, and with regard to the specific matter at hand, I see no basis whatsoever in fact and law, to align myself in any manner or form with what my brother, Davis J, has said in the matter of *Makuapane v The Road Accident Fund*. My reasons for taking a different view can be summed as follows:

62.1 The High Court has inherent jurisdiction, which jurisdiction stems from the Republic's common law heritage,¹³ and is also underpinned by Sections 169 and 165 of the Constitution.

62.2 Section 2 of the Constitution renders conduct that is resorted to capriciously and with a view to undermine the exercise of the rights in the Bill of Rights such as the plaintiff's Section 34 constitutionally guaranteed right to have the matter heard and brought to finality, unconstitutional and legally invalid.

62.3 The fact that the Road Accident Fund, as my brother, Davis J, has observed, is recalcitrant litigant with vexatious tendencies, can never ever serve as a justification that allows the Road Accident Fund the opportunity to unjustifiably and unduly delay the plaintiff's exercise of his Section 34 constitutionally guaranteed rights in a manner that can never ever be justified in terms of Section 36(1)(a) to (e) of the Constitution. Most troubling of all about my brother's finding to the fact that the High Court had no jurisdiction to deal with general damages in the absence of an election one way or the other by the Road Accident Fund, is the fact that nowhere in my brother's judgment can one even find an exercise that demonstrates that he has weighed up the limitation imposed by the Road Accident Fund through its capricious

¹¹ (9077/2022) 2023 ZAGPPHC 15 (19 January 2023) per Davis J.

¹² *Johannes Pieter Rautenbach v Road Accident Fund* (Case No: 2545/2019) (unreported).

¹³ Fronneman J in *Matiso v Commanding Officer Port Elizabeth Prison* 1994 (3) BCLR (SE); 1994 (3) SA 899 (SE)

abuse and misuse of Regulation 3, with Section 34, read with Section 36(1)(a) – (e) of the Constitution (*supra*), hence his logic is factually and legally unsustainable.

[63] Furthermore, the observation by my brother, Davis J, to the effect that if the Road Accident Fund fails to even comply with an Order to compel it to make an election, which order was already present in the matter before him at the time, makes his ultimate conclusion rather difficult, if not at all impossible to understand, given the fact that he is prepared to accept the recalcitrance and vexatiousness of the Road Accident Fund, but falls short of holding that the use of Regulation 3 in the way that it has been misused and abused by the Road Accident Fund, constitutes an administrative act that does not line up with Section 33(1) of the Constitution, and as a result thereof, is unworthy of any protection in any manner or form. Hence his finding and Order that in an instance as aforementioned, the only remedy available to a plaintiff would be for such a plaintiff to approach the Court for a *Mandamus* Order, in spite of the fact that the Road Accident Fund was already sitting with an Order Of Court, compelling it to make an election, and had unfortunately, elected to wilfully default in doing so, and in addition to wilfully defaulting in so doing, was already in contempt of Court, which contempt of Court finding my brother, Davis J, never even went as far as making. I cannot derive any value whatsoever from the logic deployed by my brother, Davis J, owing to the fact that it chips away bit by bit at the respect owed not only by the Road Accident Fund to existing Court Orders and existing legal process, but it is a duty of respect owed by the public at large, and if one is to follow the bad and dangerous precedent set by my brother, one would be endorsing and institutionalising the kind of conduct that undermines the public's confidence in the administration of justice and the judiciary as a whole, and this is something I am not prepared to do.

[64] If one has regard to Section 36 of the Constitution, one will find that this section which is colloquially referred to as, the limitation clause, provides as follows:
 “36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

[65] The conduct of the Road Accident Fund in the matter before my brother, Davis J, does not qualify to be regarded as a law of general application. Instead it is capricious and unlawful administrative action which was resorted to in bad faith, and if that is indeed the case, the enquiry ends there, and does not even have to get to the other factors that need to be taken into account in terms of Section 36(1)(a) to (e) of the Constitution. Hence, as already stated above, I cannot and shall not, reconcile myself with the logic expressed by my brother, Davis J.

[66] In as far as the conduct of the defendant in the matter at hand is concerned, the active uploading the rejection letter whilst the trial was continuing, will also not be able to withstand constitutional muster in terms of Section 36(1)(a) to (e) of the Constitution on account of the fact that such conduct was also capricious, *mala fide* and legally invalid in terms of Section 2 of the Constitution, and on account thereof, the defendant’s conduct falls flat on its face without one having to even make an assessment based on Subsection (1)(a) to (e) of Section 36 of the Constitution, since it is not even a law of general application.

[67] Therefore, in light of the foregoing, the rejection letter uploaded on 19 October 2023 by the Road Accident Fund with help from Mr Ngomana is accordingly struck out.

The unethical conduct of Mr T Ngomana on behalf of the defendant

[68] The conduct of Mr Ngomana, during the course of the trial, has been rather woefully shameful and unbecoming of a legal practitioner, if one is to put it mildly.

[69] Mr Ngomana struggles to answer questions honestly and with the requisite measure of sincerity to the point where it cannot be said that his inability to answer

with the requisite measure of honesty and sincerity can be attributed to him making errors with regard to the English language, since these are conscious errors that he purposely made with a view to deflecting attention from the fact that he did not have valid answers to the questions asked. It is expected that if a legal representative in proceedings before Court does not know the answer to the question asked of him/her, he/she will have the good sense and sense of duty to appraise the Court of the fact that he/she does not know, instead of giving an answer that misleads the Court as Mr Ngomana did, when he was asked whether he knew and understood the difference between substantive and formal compliance during the course of arguing the first special plea in terms of Section 24(4) of the RAF Act. Getting something fundamental as this wrong, and then attempting to cover it up with an apology that is contrived and insincere can never be good enough.

[70] After the second special plea was dismissed, Mr Ngomana was asked about his readiness, with regard to the merits of the case, and in one of our interactions, instead of answering my question, he then said to me he had no instructions whatsoever on that aspect. I then pressed him further, and asked him whether he was saying to me that he had no instructions to proceed on the merits. He then responded by saying that he was ready to proceed on the merits. I then asked him again now why did he earlier say that he had no instructions on the issue of the merits, when in fact, he had a general instruction to proceed in the first place. It was during the course of that interaction that he ultimately said to me that he was refusing to answer my questions, something which I found rather strange for a legal representative that is supposed to have a duty to appraise the Court of where he stood on a certain issue when asked about it. Hence it is my considered view that Mr Ngomana does not seem to have a proper understanding of the overriding duty that he has to Court, and as a result thereof, would benefit greatly from remedial action by the Legal Practice Council, whereby two or three senior members of the profession would have to sit down and administer the necessary rebuke towards in a safe environment and in such a way that he is helped to understand the danger he is putting his career in with his mode of behaviour, which is rather undesirable to say the least, to put it very mildly.

[71] When the hearing resumed on 19 October 2023, Mr Ngomana apologised for his regrettable and odiously repugnant behaviour on 18 October 2023, which apology was accepted, but then again, it was not long before he was at it again, because on that day he sought to conduct his cross-examination in a manner that resembled giving testimony from the bar, and when this was brought to his attention by me, he refused to listen and instead adopted the same attitude that he had adopted the day before, which left me wondering whether there was any sincerity in the apology that he had offered earlier that morning. Upon realising the error in his ways after he had again refused to answer questions, he apologised and this time around he was told in no uncertain terms that an insincere and contrived apology was one that the Court was not prepared to accept. At the end of the proceedings, I did take the time to admonish Mr Ngomana, however it remains my considered view that from a Restorative and Therapeutic Justice point of view, Mr Ngomana needs to be referred to the Legal Practice Council in Gauteng, under the supervision of the provincial chairperson of the Council, and such a referral envisages a state of affairs wherein two Senior Advocates would have to sit down with Mr Ngomana, and explain to him his duties to the Court as expounded upon in the matter of *Rondell v Worsley* [1966] 3 All ER 657, by Lord Denning, which view and judgment was confirmed on appeal to the House Of Lords (in *Rondell v Worsely* [1969] AC 19 1) by Lord Reid MR, in the House of Lords when he was writing on behalf the Lords. Once the remedial action has been administered by the two Senior Advocates, the provincial chairperson of the Legal Practice Council in Gauteng will then have to file an affidavit to the effect that she has satisfied herself that Mr Ngomana now understands his duties to the Court, and such an affidavit would have to be filed within a period of three (3) months after the order of this Court is handed down.

Findings

[72] In light of all the foregoing, I now make the following findings:

72.1 The defendant's late rejection of Dr Williams' RAF 4 form and assessment is hereby held to be an administrative act that is *mala fide*, capricious and indeed non-compliant with Sections 2 and 33(1) of the Constitution in a manner that can never ever be justified in terms of Section 36(1)(a) to (e) of the Constitution, and is accordingly struck out.

72.2 The defendant is 100% liable for the damage sustained by the plaintiff as a result of the automotive collision that occurred on 15 December 2017.

72.3 The plaintiff has proven all his past medical expenses and as a consequence thereof, the defendant is enjoined to pay all such past medical expenses.

72.4 The plaintiff has made out a proper case for an award of general damages, as well as future loss of income and residual earning capacity, together with a 100% undertaking for all future medical costs and hospitalisation fees in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 (as amended).

Order

[73] In view of the foregoing, I now make the following order:

1. The first and second special pleas are accordingly dismissed.
2. The defendant's rejection letter uploaded on CaseLines on Friday, 20 November 2023, is declared an invalid administrative act, non-compliant with Sections 2 and 33(1) of the Constitution of the Republic of South Africa, 108 of 1996, and is accordingly struck out.
3. The defendant is held liable for 100% of the damages suffered by the plaintiff as a consequence of injuries sustained in a motor vehicle accident that occurred on 15 December 2017.
4. The defendant is to pay the plaintiff the capital amount of R4 059 837.00 which amount is made up as follows:
 - 4.1. General damages: R650 000.00
 - 4.2. Loss of earnings R3 409 837.00
5. The defendant shall, within 30 calendar days of this judgment and order, capture the instruction to make payment of the capital amount on its registered not yet paid ("RNYP") list, and provide written proof thereof to the plaintiff.
6. The defendant shall make payment of the capital amount within 180 calendar days into the trust account of Leon J J van Rensburg Attorneys, namely:
 Account holder: Leon J J van Rensburg Attorneys
 Bank: Absa
 Branch: P[...]
 Account number: 2[...]

Branch code: 3[..]

7. The defendant shall be liable for interest on the capital amount at the rate of 10.25% per annum calculated from 181 days of the date of this order to the date of full and final payment, both days inclusive.

8. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 (as amended), in order to compensate him for 100% of the costs of his future accommodation in a hospital or nursing home, or treatment of, or rendering of a service, or supplying of goods to him in relation to the injuries that he sustained due to the accident, after such costs have been incurred and upon proof thereof.

9. The defendant is liable for the plaintiff's party and party costs on a scale of the High Court, in respect of this action, either as taxed in accordance with the discretion of the Taxing Master, or as agreed between the parties, which costs shall include but are not limited to:

9.1. The travelling costs of the plaintiff to and from all medico-legal appointments, including all attendance thereof, or in connection therewith;

9.2. The costs of counsel on trial for 17, 18 and 19 October 2023, including counsel's consultations with the plaintiff, the attorneys, the experts and witnesses and also the drafting of the case summary coupled with the heads of argument;

9.3. The costs of the attorneys' consultations with the experts;

9.4. The costs of the experts *infra* and consulting with the plaintiff, the plaintiff's attorneys and counsel, as well as in preparing the reports, addendum reports and statutory forms, as well as their reservation and qualifying fees, if any:

9.4.1. Dr W E Willaims (Orthopaedic Surgeon);

9.4.2. Dr M van Rensburg (Radiologist);

9.4.3. Ms R Hunter (Occupational Therapist);

9.4.4. Dr J de Beer (Industrial Psychologist); and

9.4.5. Mr R Emmermann (Actuary).

10. In the event of there being no agreement with regard to the issue of costs, the plaintiff shall:

10.1. Serve a notice of taxation on the defendant; and

10.2. Allow the defendant 180 calendar days to make payment of the taxed costs.

11. The defendant shall be liable for interests on the costs at the rate of 10.25% per annum calculated from 181 calendar days of the date of the agreement thereto or taxation, whichever is applicable to date of full and final payment with both days being included.

12. Mr Tshepo Ngomana, the attorney who appear on behalf of the defendant, is to report himself for unethical conduct to the Legal Practice Council in Gauteng by no later than Tuesday, 19 March 2024, at 12h00, and bring the specific paragraphs referring to his unethical conduct to the attention of the Legal Practice Council in Gauteng.

13. The chairperson of the Gauteng Legal Practice Council, Ms P M Keetse, is to make arrangements for Mr Ngomana to have a remedial conversation with Adv T Ellis SC of the Pretoria Bar, as well as Adv Quintus Pelser SC of the Pretoria Bar, who are to jointly sit down and counsel Mr Ngomana and impress upon him the imperative of never ever repeating his unethical conduct again.

14. The chairperson of the Legal Practice Council in Gauteng, is then required to file an affidavit subsequent to the remedial talks with Adv Ellis SC and Adv Pelser SC, having taken place, wherein she is required to confirm the fact that such remedial talks have indeed taken place, and the fact that she has also satisfied herself of the fact that Mr Ngomana understands the gravity of his misconduct, and fell in line with the advice and counsel he shall have received from Pelser SC and Ellis SC never repeat his acts of maleficence ever again. The chairperson's affidavit must be filed and uploaded on CaseLines by no later than Monday, 10 June 2024 at 12h00.

15. This Judgment must be served on the Secretariat of the Gauteng Branch of the Legal Practice Council by no later than the 20th day of March 2024, and the Secretariat must urgently bring it to the attention of the Provincial Chairperson of the LPC in Gauteng.

I hand down the order.

P W MAKHAMBENI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION; JOHANNESBURG

*Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **18 March 2024**.*

COUNSEL FOR THE PLAINTIFF: Adv. D J Smit

INSTRUCTED BY: Leon J J van Rensburg Attorneys
Johannesburg

ATTORNEY FOR DEFENDANT: Mr T Ngomana

INSTRUCTED BY: State Attorney, Johannesburg

DATE OF THE HEARING: 18 & 19 October 2023

DATE OF JUDGMENT: 18 March 2024