

**NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]**

CASE NUMBER: 67880/14

15/1/2020

In the matter between:

**ALBERT JABHI MAHLANGU N.O.
ON BEHALF OF MICHAEL MAHLANGU**

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAVUNDLA J.,

- [1] The plaintiff is Mr Michael Mahlangu, an adult male residing at 370 Kotze Street Garsfontein, Pretoria, Gauteng, sued the defendant for damages he allegedly suffered on 20 July 2013 at Atterbury Road, Menlyn, Pretoria, Gauteng when a motor vehicle with registration letters and numbers [...] then and there driven by Mr GA Mabitsela (hereinafter referred to as the insured driver) collided with the plaintiff who was standing next to the pavement behind the yellow lane at the time of the accident.
- [2] The defendant in its plea raised three special pleas, but during a pre-trial minute held on 18 September 2019, indicated that it would only rely on its first special plea; which is:

2.1 Defendant's first special plea

2.1.1 In paragraph 4 of the plaintiff's particulars of claim it is alleged that the collision occurred on 20 July 2013. The Road Accident Fund Act, Act 56 of 1996, and regulations thereto were amended, which amendments commenced on 10 August 2008;

2.1.2 In accordance with Regulations 3(1)(a) and (b) of the Road Accident Fund Amendment Act, Act No 19 of 2005, in that a third party who wishes to claim compensation for non-pecuniary loss shall submit himself to an assessment by a medical practitioner in accordance with the regulations;

2.1.3 The plaintiff failed and or refused to submit himself to the statutory prescribed assessment procedure and methods stipulated in Regulations 3(1)(a) of the Road Accident Fund Amendment Act, Act No 19 of 2005;

2.1.4 The defendant pleads exclusion of liability in terms of Section 17 of the Road Accident Fund Amendment Act, Act 19 of 2005, read together with Regulation 3, the plaintiff has failed or neglected to prove per statutorily prescribed method of assessment of serious injuries, that he has sustained a serious injury as defined by the Amendment Act read together with Regulation 3;

2.1.5 In the premises the plaintiff has failed and or neglected to comply with the provisions enacted under the said regulation and therefore the claim is accordingly not enforceable in the present proceedings.

[3] On the 4 December 2019, the parties agreed that the matter should be proceeded with only on the aforesaid special plea and that the rest of the issues be and indeed were separated in terms of rule 33.4 of the Uniform Court Rules and postponed *sine die*.

[4] It is common cause that summons was issued on 15 September 2014 and the defendant's plea and special plea were filed on 17 October 2014. *Litis contestation* occurred on 7 November 2014; vide Uniform Rule 25(1) read in

conjunction with Uniform Rule 29(b); In *Milne, NO v Shield Insurance Co. Ltd* 1969 (3) SA 352 (AD) at 358C Holmes JA stated that: " It has rightly been held that, in our modern procedure, *litis contestatio* or joinder of issues takes place when the pleadings are closed; *vide* also *Government of RSA v Ngubane* 1972 (2) SA 601 (AD) at Holmes JA held at at 608D-E that 'In modern practice *litis* is taken as being synonymous with close of pleadings, when the issue is crystallised and joined."; *Potgieter v Sustein (Edms) Bpk* 1990 2 15 (T) at 18H-19H.

- [5] It is trite that a claim for general damages does not pass to the estate of a deceased person unless *litis contestatio* has taken place; *vide* in this regard *Jankowiak v Parity Insurance Co Ltd* 1963 (2) SA286 (w); *Potgieter v Rondalia Assurance Corporation of SA Ltd* 1970 (1) SA 705 (N) at 710-D; *Vide also* the authorities cited in the preceding paragraph.
- [6] The Regulations in terms of Road Accident Fund Act 56 of 1996 however, added some more requirements before any estate of a claimant would be able to claim general damages for pain and suffering and those requirements one finds under regulation 3.
- [7] *In casu* Mr Michael Mahlangu passed away on 8 April 2015 which was 5 months after *litis contestation* and almost two years after the alleged accident according to the letter of authority of the Master of the High Court issued on 29 March 2017. It is common cause that the deceased never submitted himself to a medical practitioner in accordance with regulations to the Road Accident Fund Act 19 of 2005 (as amended).
- [8] In an attempt to comply with the Act and the Regulations, the hospital records which defined the injuries sustained by the plaintiff were provided to Dr N Mogoru (an independent medical assessor) who accordingly prepared the statutorily required RAF 4 Form. Dr. Mogoru having considered the injuries of the plaintiff, concluded that, had the plaintiff been alive his injuries would have qualified as 'serious' by virtue of the fact that he would either have had a 30% whole person impairment or would have qualified under the narrative test.
- [9] It is not in dispute that according to the hospital records, the plaintiff sustained

the following accident- related injuries:

- 9.1 Polytrauma;
- 9.2 head injury with cerebral cedema (brain swelling) identified by a CT Scan; (GCS of 2/15 on admission to the hospital;
- 9.3 open left femur fracture; and
- 9.4 Closed left femur fracture; and
- 9.5 C2 injury (and neck vertebra fracture)

[10] Per the hospital records the plaintiff received the following treatment for the aforesaid accident related injuries:

- 10.1 a debridement of the left femur (24 July 2013);
- 10.2 external fixation of the right tibia (24 July 2013);
- 10.3 a debridement and open reduction with an internal fixation of the right tibia (24 July 2013)
- 10.4 open reduction and internal fixation of the right tibia (28 September 2013) and
- 10.5 a protracted stay in hospital for operations and recovery.

[12] It was submitted on behalf of the plaintiff that:

- 12.1 the purpose of RAF 4 assessment is to determine the seriousness of the injury as the defendant is only liable to compensate a plaintiff if the injury is serious;
- 12.2 the defendant's special plea targets plaintiff's purported non-compliance with Regulation 3: the defendant's protestation can be distilled to read that there is no valid assessment of the 'seriousness' of the plaintiff's accident- related injuries;
- 12.3 the applicable authority to the special plea is the case of *Road Accident Fund v Duma (2002/12)* and three related cases (*Health Professions Council of South Africa as Amicus Curiae [2012] ZASCA 169 (27 November 2012)*) dealt with the Road Accident Fund Act 56 of 1996

read with the Regulations promulgated under the Act with regards to 'serious injury' to be determined in accordance with the procedure prescribed in the Regulations;

- 12.4 the proverbial bone of contention raised in the respective cases adjudicated simultaneously before the SCA is that the plaintiff's 'serious' injury, had not been determined by the method prescribed by the Regulations promulgated under the Act and that the High Court should not have awarded general damages;
- 12.5 the SCA held that neither s17(1) nor s17(1A) provides any objective determinable content or substance to the central concept of what injury would qualify as 'serious'. All s17 (1A) adds is that the assessments of whether or not a particular injury meets the threshold requirements 'serious' must be carried out by someone registered as a medical practitioner under the Health Professions Act 56 of 1974 and on the basis of a prescribed method;
- 12.6 Regulation 3 prescribes the method contemplated in s17(1A) for the determination of 'serious injury'. As a starting point it provides in 3 (1) (a) that a third party who wishes to claim general damages 'shall submit himself or herself to an assessment by a medical practitioner in accordance with these regulations'. In terms of 3(3)(a) a third party who has been so assessed, 'shall obtain from the medical practitioner concerned a serious injury assessment report.' This report is defined in regulation 1 as a duly completed RAF4.
- 12.7 The RAF4 form itself, read with Regulation 3(1)(b), requires the medical practitioner to assess whether the third party's injury is 'serious' in accordance with 3 sets of criteria.
- 12.8 At paragraph [8] of the SCA judgment the SCA held that in terms of Regulation 3(3)© the defendant is only liable for general damages 'if a claim is supported by serious injury assessment report submitted in terms of the Act and Regulations' and the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method

provided for in the Regulations. If the defendant is not satisfied, it must in terms of regulations 3(3)(d), either:

- ‘(i) reject the third party’s RAF4 form and give reasons for doing so; or
- (ii) direct that the third party submit himself or herself to a further assessment at the defendant’s expense by a medical practitioner designated by the Fund in accordance with the method prescribed in Regulation 3(1)(b).’;

12.9 In all four matters which served before the SCA simultaneously the defendant rejected the RAF4 form in terms of Regulation 3(3)(d)(i) by means of a letter from its attorneys. Post the aforesaid envisaged rejection the plaintiff is entitled to lodge a dispute in terms of regulation 3(4).

12.10 the SCA held at paragraph [19] of the judgment that in 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 defendant and not the court. That much appears from the stipulation in Regulations 3(3)© that the defendant shall only be obliged to pay general damages if the defendant, and not the court, is satisfied that the injury has correctly been assessed in accordance with the RAF4 as serious. Unless the defendant 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 defendant is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the defendant.

12.11 Unlike the respective plaintiffs in the SCA judgment who did not submit themselves for a physical assessment, the plaintiff could not submit himself for the envisaged assessment due to his unfortunate early passing.

12.12 the defendant to date has failed to, in terms of regulation 3(3)(d)(i), reject the plaintiff’s RAF4 form. Regulation 3(3)(d)(iii) is not available to the defendant due to the fact that the plaintiff is deceased;

- 12.13 the reality of the defendant's special plea, in the absence of the aforesaid rejection envisaged by regulation 3(3)(d)(i), is that the defendant is calling upon the court to make a determination as to the seriousness of the injury which, as stipulated *supra*, this court does not have the jurisdiction to do so by virtue of the legislative framework;
- 12.14 Regulation 3 provides the protocol which must be followed and the defendant is of the opinion that the plaintiff has not been correctly assessed, then the only option available to the defendant is to reject the generals on the basis that the plaintiff has not been correctly assessed, notwithstanding the fact that the plaintiff has been assessed, post-mortem, by virtue of the hospital records and a signed and dated RAF4 form which is before the court;
- 12.15 Until such time the defendant has formally rejected the RAF4 the plaintiff's legal representatives are proverbially felled on the knees from pursuing the internal appeals process delineated by regulation 3(4);
- 12.16 due to the fact that the defendant is not satisfied as to the seriousness of the plaintiff's injury, the only way for the plaintiff's legal representatives is to obtain finality on the seriousness of the plaintiff's injury and to have the Health Professions Council of South Africa peruse RAF 4 in conjunction with the hospital records and to make a finding accordingly;
- 12.17 for the defendant to persist with its first special plea when it has not acted positively as is required by the regulations renders the special plea moot. The special plea is not even academic as it is redundant and serves no purpose;
- 12.18 the defendant must accept or reject the RAF4 and if they reject it then they must detail why they reject it and they can defer to their own experts or they can defer to the tribunal;
- 12.19 the defendant maintains that the plaintiff was not correctly assessed or not assessed at all. It is submitted on behalf of the plaintiff that that position is disputed by virtue of the fact that the plaintiff was assessed post-morbid by virtue of the hospital records;
- 12.20 nowhere in the regulations does it say that the dispute should be

referred to the court for argument on the factual question of whether or not someone was assessed or correctly assessed at all.

12.21 It is accordingly submitted that the only question this court is faced with is whether: has the defendant made an election and was the election made in terms of the Regulations? Thus, it is not the question of arguing a special plea, it is the fact that the defendant has failed to make a decision;

12.22 it is accordingly submitted that the defendant cannot rely on the special plea until such time as it has acted in accordance with its obligations. Again, if the defendant is not satisfied it must exercise its rights and obligations which will entitle the plaintiff to exercise their rights and obligations;

12.23 it was accordingly submitted that the special plea is moot and general damages should be referred to the HSPCSA in light of the defendant's failure to make an election. The plaintiff in this regard relied on the *J.E. Meyer v Road Accident Fund* case, CN; 522229/2011 for costs on an attorney and client scale due to the defendant's failure to reject the RAF4 within a reasonable time;

12.24 notwithstanding the aforesaid, the defendant has (at the last pre-trial conference) made an offer in respect of the merits which the plaintiff accepted. Such an offer and acceptance at the pre-trial was the basis of a 60/40 apportionment (i.e. the defendant is liable for 60% of the plaintiff's proven and or agreed damages.) Accordingly, the plaintiff seeks an order on the merits portion of the trial as same has become settled between the parties together with the appropriate costs order.

[13] It was further submitted that, in the event the defendant accepted the RAF 4 on the date of trial, it will be submitted that the defendant has satisfied itself that the plaintiff's injuries were serious as described in the clinical and hospital records and that this court can accordingly make an order for non-pecuniary loss. I must hasten to state that unfortunately on the date of trial the defendant persisted with special plea. Besides, the parties agreed that the rest of the issues should be separated and postponed *sine die* in terms of rule 33.4 and

that only the special plea be adjudicated. That being the position, I am constrained to only deal with the special plea, period.

[14] It was submitted on behalf of the defendant that:

- 14.1 Michael Mahlangu never submitted himself to a medical practitioner in accordance with the regulations to the *Road Accident Fund Act* 19 of 2005 (as amended);
- 14.2 the RAF 4 was however completed by one Dr Mogoru at a venue known as Road Accident Assessment Clinic – which has no affiliation with the defendant whatsoever. Of note, a search of the Health Profession Council’s website iregister (sic) of a Dr N Moguru was not found, only a Dr N J Moguru practising under registration number MP0475076 was found. The last mentioned person is a general practitioner. It is not clear whether the report was completed by the last mentioned person as no HPCSA registration number nor qualifications are reflected on the report;
- 14.3 the assessment was done on 13 April 2017 (two years after the demise of Mr Michael Mahlangu, who has since been substituted by a AJ Mahlangu N.O (albeit not pleased as such). It is common cause between the parties that the assessment was based on a letter of instruction and available hospital records. The conclusion in RAF4 form was that: he believes that he was going to qualify either with 30% WPI or narrative test;
- 14.4 In the unanimous decision in *Road Accident Fund v Duma and Three similar cases*¹ Brand JA stated:

“Unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this court, for example, in the case of *South African Forestry*²; *Brisley*³; and *Bredenkamp*⁴; *Maphango*⁵, which do not support the first proposition relied upon by the court *a quo*. As to the second proposition, it follows, in my view, that the supposed principle of contract law perceived by

¹ 2013 (6) SA 9 (SCA) at 21G – 22H

² *South African Forestry Co Ltd v York Timbers* 2005 (3) SA 323 (SCA)

³ *Brisley v Trsotsky* 2002 (4) SA 1 (SCA)

⁴ *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA)

⁵ *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA)

the court *a quo* cannot be expanded to other parts of the law. In addition, the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much is illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome of a particular case will thus depend on personal idiosyncrasies of the individual judge. Or, as Van der Heever JA put it in *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge. (See also *Brisley* para 24; *Bredenkamp* para 38; *PM Nienaber 'Regters en Juriste'* 200 TSAR 190 at 193; JJF Hefer '*Billikheid in die Kontraktereg volgens die Suis-Afrikaanse Regskommisie*' 2000 TSAR 143.)"

14.5 in conclusion, it was submitted on behalf of the defendant that the special plea should be upheld with an appropriate order of costs.

- [15] In the matter of *Road Accident fund v Faria* 2014 (6) SA 19 (SCA) the Supreme Court of Appeal, restated the principle from the Duma matter *supra* and held that under the new legislative regime the assessment of whether a claimant's injury was serious was an administrative and not judicial, decision. Unless the Fund was satisfied that the injuries were serious, the claimant has no claim for general damages.
- [16] in the *Duma v Three Similar cases* the Supreme Court of Appeal held that the decision as to whether an injury is serious is vested in the Road Accident Fund and not the Court. A claim for general damages was premature until the claimant has satisfied the RAF that his injury was serious: if the RAF rejected a claimant's RAF 4 form, he would be barred from maintaining a claim for general damages in court. If the RAF took an unreasonable time to make its decision, it would amount to a failure to take administrative action- to be met with an internal appeal and review proceedings. Until the decision was overturned or reviewed, it existed as a fact, and the trial court could not disregard.
- [17] It was further held in the Duma matter that both s 17(1A) of the Act and reg 3(1) require an assessment to be done physically by a medical practitioner

registered as such under the Health Professions Act 56 of 1956.; *vide* pages 22 para [31] G – page 23 A-B para [32] A. *In casu*, doubt has been cast as to whether the RAF 4 form was completed by a person registered as a medical practitioner as such under the Health Professions Act; *vide* sub paragraph 14.2 *supra*. In my view, this uncertainty could be cured through further evidence, were the matter to be allowed to proceed further.

[18] In terms of regulation 3(3)(d) where the defendant is not satisfied that the claimant was properly assessed, it must either:

- (i) reject the third party's RAF4 form and give reasons for doing so; or
- (ii) direct that the third party submit himself or herself to a further assessment at the defendant's expense by a medical practitioner designated by the Fund in accordance with the method prescribed in Regulation 3(1)(b).

[19] It is common cause that the deceased never submitted himself to a medical practitioner in accordance with the regulations to the Road Accident Fund Act 19 of 2005(as amended). The RAF4 form was compiled on the strength of the hospital medical records post-morbid. Needless to state that there was no physical examination of the deceased and therefore there was no assessment as required by the Act and regulations. Even if option (ii) were to be resorted to, calling for further assessment, physical examination, is completely out of the question

[20] However, the defendant has failed to exercise the option of rejecting the RAF4 form. If it had done so, it would have been obliged to give its reasons for doing so. Bearing in mind the fact that the defendant as an organ of state, is constitutionally enjoined in exercising its administrative function, to do so within a reasonable time. *In casu* the defendant has failed to take a decision at all, thus frustrating the plaintiff in exercising its rights to proceed further to appeal to the tribunal in terms of the regulations.

[21] In the *Faria* matter *supra* the Supreme Court of Appeal at pag27 E-H, pointed out that in terms of the regulations, if the Fund is not satisfied with the assessment of an injury, it has three options, namely, (i) accept the serious injury assessment report; or (ii) reject the report; or (iii) direct that the third

party submit to a further assessment.

- [24] It is trite that costs follow the event. *In casu*, the defendant has been dilatory in making an election as required by the regulations, to the prejudice of the plaintiff. There is absolutely no explanation why this matter had to reach court without the defendant having made an election. This requires the court to show its disdain and mulct the defendant in punitive costs on attorney and client scale; vide **Road Accident Fund v Duma, Road Accident Fund v Kubeka**; **Mlatsheni v Road Accident Fund**⁶; **Bovungana v Road Accident Fund**.⁷

www.saflii.org/za/cases/ZACSA/2012/169.html

- [25] In the result the following order is issued:

1. That the special plea is dismissed;
2. That the defendant is ordered to make a decision in terms of regulations;
3. That the defendant is ordered to refer general damages to HSPCA;
4. That the defendant is ordered to pay the costs of action to date on attorney and client scale

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING	: 05/01/2020
DATE OF JUDGMENT	: 15/01/2020
PLAINTIFF'S ADV	: ADV J.T. JOOSTE
INSTRUCTED BY	: SPRUYT INC.
DEFENDANT'S ADV	: ADV R.G. MASIPA
INSTRUCTED BY	: T.M. CHAUKE ATTORNEYS

⁶ 2009 (2) SA 401 (E) para 18.

⁷ 2009 (4) SA 123 (E) para 7.