

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA.**

CASE NO: 21619/18

(1) Reportable: No.

(2) Of interest to other judges: No

(3) Revised

Date: 19 AUGUST 2024

MAXHINGA NENE

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

This judgment has been handed down remotely and shall be circulated to the parties by way of email. Its date and time of hand down shall be deemed to be 19 August 2024

JUDGEMENT

INTRODUCTION

1. This is a claim for personal injuries against the Road Accident Fund arising out of the motor vehicle accident that occurred on the 20th of July 2017, whereby the Plaintiff was a Pedestrian. The Plaintiff was at the time of the accident, 57 years of age. At present, he is 64 years old.

2. The Plaintiff claimed for Future medical expenses and General Damages. The matter was thus set down for the determination of merits and quantum, and it proceeded as such.

3. In support of his case, the Plaintiff's attorney filed and served the documents from the South African Police Services("SAPS") and Vryheid District Hospital.

4. An application in terms of rule 38(2) of the Uniform rules was dealt with in court.

RULE 38(2)

5. An application to allow the medico-legal report of Dr Ngcoya (Orthopaedic surgeon), as contained in the founding affidavit, to be admitted, as evidence was made in court.

6. The expert had, prior to the trial, deposed to an affidavit in terms of which he confirmed his credentials, and the opinion or content of his medico-legal reports filed on behalf of the Plaintiff.

7. Having listened to the counsel and having gone through the papers therein, I hereby provisionally admit the evidence by way of the affidavits as contemplated by Section 34(2)¹. This provisional admission is subject to the outcome of the assessment of merits and quantum.

THE MAIN CASE

FACTUAL BACKGROUND

PLAINTIFF

1. ¹ the Civil Proceedings Evidence Act 25 of 1965 read with Uniform Rule 38(2).

8. The merits documents before me are the plaintiff's Affidavit in terms of section 19 (f) of the Road Accident Fund Act confirming the accident, the ID copy of the plaintiff, the inexpressible document from SAPS recorded by Officer M.E Erasmus, and the pretrial minutes dated 5 September 2019.

9. According to the affidavit and the police document plaintiff was walking on the left side of the road and the truck came behind him veered off the road and hit him. He stated that there was nothing he could do to avoid the accident. The said car was a Truck with registration number N[...] and was driven by one Dumisani M. Mabika on the 20th of July 2017 in Utrecht Street next to Cecil Emmet

10. The plaintiff's averment in the particulars of claim, was that the insured driver was solely negligent in one or more of the following conduct; (a). he failed to keep a proper lookout, (b). he drove at a high speed....." As a result of the accident, the plaintiff sustained serious bodily injuries and was taken to the hospital by the said driver.

11. In support of his claim and for compliance, the plaintiff's attorneys filed the RAF1 form which was completed by Dr Seima who extracted information from the hospital records; the Medico-legal report by Dr Ngcoya who completed the RAF4 form as well and the hospital records from Vryheid district hospital. According to the evidence presented, he sustained a right compound olecranon fracture.

12. Following the hospital records, he was admitted on 20 July 2017, was operated on 27 July 2017 and was discharged on 28 July 2017. Thus, he stayed for about 8 days in the hospital before he was discharged. It is also recorded on the nursing history record that he presented a history of being involved in a PVA. . He was then taken to theatre a few days later for debridement, K-wire insertion, and tension band wiring of his right olecranon. He received antibiotic therapy and analgesia during his stay in the hospital

13. In his particulars of claim, the plaintiff avers that as a result of the injuries he suffered damages which he is hereby claiming in the sum of R 1600 000,00 for

General damages and Future medical expenses, of which he is claiming section 17(4)(a) undertaking certificate.

14. As a means to compliance, the plaintiff served the defendant with the RAF 4 Form duly completed by Dr. N. Ngcoya - Orthopaedic Surgeon on the 2 of May 2019. On 28 March 2023 and 11 April 2023 correspondences were transmitted both physically and electronically to the defendant by the plaintiff soliciting the determination of their position regarding the seriousness of the injuries contained in the RAF4 form, to which there were no responses.

15. It is noteworthy that all the attempts by the plaintiff to get the defendant to either accept, reject, or refer to the issue of the seriousness of the injuries as contemplated in the Road Accident Fund Act and regulation 3, did not yield any results.

ORTHOPEDIC SURGEON: DR NGCOYA

16. Dr Ngcoya compiled a report indicating that the plaintiff had passed the narrative test. His final orthopaedic impairment score: = 10% WPI. He confirmed that the plaintiff sustained a Right compound olecranon fracture,

17. He indicated that the plaintiff sustained an open intraarticular fracture of his right elbow for which he was surgically managed. He also seems to have suffered a crush injury to his right shoulder which was not evident in the acute setting. He stated that 8 months after the accident occurred, he continues to have residual pain complaints and functional impairment complaints which collectively affect his amenities and his productivity and performance at work. He has a reduced range of motion in both his right shoulder and right elbow and generalized weakness in his right upper limb.

18. He i that the plaintiff would benefit from conservative treatment in the form of physiotherapy to help manage his pain, improve his range of motion of both affected joints, and strengthen his right upper limb muscles in preparation for definitive interventions. An undertaking is suggested for future right shoulder replacement as

well as right elbow replacement (or arthrodesis, whichever one will be deemed suitable for each joint).

DEFENDANT

19. The defendant raised two special pleas. Both special pleas are to the effect that the plaintiff did not comply with the prescribed method of determining whether an injury is “serious” as contemplated in the Act set out in Regulation 3 of the 2008 Regulations to the Act. The defendant pleaded that the plaintiff’s claim for general damages be dismissed, alternatively, be referred to the appropriate forum, or be postponed *sine dies* all these with the plaintiff to pay the defendant’s costs.

20. The defendant’s plea bears a bare denial of the accident. However, in the pretrial minutes of 5 September 2019 agreed to the occurrence of the accident, and the plaintiff’s involvement in it.

THE ISSUE

21. Whether the Defendant is the cause of the accident and therefore liable for the injuries proven or to be proven sustained by the plaintiff arising out of this motor vehicle accident?

22. Having regard to the specific obligations placed upon the Fund as set out in Regulations 3(3)(dA),3(4) of the Road Accident Fund Regulations, 2008 (as amended), is a plaintiff entitled to pursue the adjudication of general damages at trial or in the default trial court, in the absence either of the Fund having accepted the injuries in question as constituting serious injury as contemplated in Section 17(1A) of the RAF Act or of assessment of such injuries as constituting serious injury by an appeal tribunal by Regulation 3?

THE LEGAL PRINCIPLES AND APPLICATION

MERITS

23. In terms of Section 17(1) of the Road Accident Fund Act, the fund shall be liable where there has been injury or death due to the unlawful and negligent driving of a motor vehicle.

24. The Constitutional Court explained the position as follows²

“... It has retained the underlying common-law fault-based liability. This means that any accident victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner that was wrongful and coupled with negligence or intent.”

25. On the test of negligence the plaintiff relied on the case of **K v Road Accident Fund**³, it was held that the insured driver should not have veered to the left side of the road onto the shoulder of the road particularly as she was aware of the pedestrian walking along the side of the”“the fact that the impact was not on the road but outside establishes *prima facie* inference of negligence.

26. The plaintiff’s counsel submitted that the insured driver was solely negligent in that among others, *he failed to keep a proper look-out, and he encroached on the Plaintiff’s Lane of travel when it was dangerous and unsafe to do so*. There was nothing the Plaintiff could have done to avoid the collision as opposed to the insured driver. The plaintiff has placed more weight on the credibility of his version.

27. Therefore, from the wholeness of the evidence, it appears as weighed on a scale of a preponderance of probabilities as well as of logic, that the insured driver’s conduct is held to not be of a diligence paterfamilias (reasonable man). The evidential onus of rebuttal is the cost on the Defendant. Furthermore, on the evidence adduced and on a balance of probabilities, the insured driver was solely negligent in all respects set out by Plaintiff. The defendant has consequently not discharged the onus of rebuttal as per the established case of negligence. The

² *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para [25]:

³ (3688/2015)[2016] ZAGPPHC 1064 (15 DECEMBER 2016)

Defendant has presented no evidence in rebuttal. plaintiff has, thus, indeed discharged his burden of proof (counsel submission).

28. Concisely, the uncontested evidence before the court is that the plaintiff, a pedestrian, got knocked down by an insured driver's car. The occurrence of the motor vehicle accident is confirmed by the hospital records and the defendant acknowledged that in the pretrial minutes. The whole cause of the accident was due to the wrongful or negligent act of the driver of the insured car, which resulted in the defendant being 100% liable for the damage sustained and proved by the plaintiff.

Quantum

General Damages

29. To arrive at a fair amount of the award the court must first establish the right to compensate for general damages and then analyse the evidence of expert witness which forms part of the trial bundle. The general provision of s 17(1) of the Act is that the Fund is liable to compensate claimants for loss arising from bodily injury sustained in motor vehicle accidents⁴. In terms of the Act, the claimant shall qualify for compensation if the seriousness of the injuries meets the specified threshold. The legal instrument governing the procedure for determination of the findings and observations in the serious injury assessment reports are the regulations which are explained below.

30. `Regulation of the Road Accident Fund Act No. 36 of 1996

30.1 Regulation 3(3)(c) makes a provision to the effect that:

“The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and in terms of these Regulations

⁴ Road Accident Fund v Duma (202/12) and three related cases (Health Professions Council of South Africa as Amicus Curiae) [2012] ZASCA 169 (27 November 2012).

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”.

This regulation gives the RAF the right to compensate for general damages only if it is “satisfied that the injury has been correctly assessed as serious in terms of the method provided in these regulations. In the current case, the plaintiff initiated its compliance by serving the defendant with the RAF4 Form which is a serious injury assessment report, as mentioned in the factual background above.

30.2. Regulations 3(3)(d) ,

“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 further assess 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 agent

The Defendant in this present case transmitted three courtesy letters to the defendant for compliance with these regulations and despite all these repeated reminders, the defendant continued to remain silent.

30.3. Regulations 3(3) (dA) :

“The Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment.

31. The Supreme Court of Appeal has established in various cases, regarding regulation 3(3)(dA) that a failure by the Road accident fund to decide whether a

plaintiff's injuries are serious within the prescribed period does not create a **deeming provision**⁵. Mathopo AJA stated that of late, the Road Accident Fund's inaction and failure to explicitly reject or accept serious injury assessment reports filed by victims of road accidents, often even after being compelled to do so, leads to an impasse.

32. He further said that by including the prescribed period, the legislature sought to ameliorate the hardship experienced by claimants prior to and after the Duma case. The intention was to bring legal certainty and to compel the Fund to act promptly and timeously,

33. The plaintiff in the current case has on more than one occasion already afforded the Respondent an opportunity to conform and comply with the requirements contained in the act and regulations, but the defendant failed decisively to adhere to the requirements. Regrettably, as stated in the general damages authorities *supra* this Court does not have the jurisdiction to make a finding as to whether the Plaintiff's injury is serious, absence of the defendant's decision or comment on the RAF4 form in terms of regulation 3. Therefore, in the interest of justice, this court shall utilize its inherent powers⁶ to compel the Defendant to make a decision in terms of regulation 3 *supra*.

Undertaking in terms of s 17(4)(a) of the Road Accident Fund Act

38. Section 17(4)(1)(a) of the Road Accident Fund Act provides as follows:

(4) Where a claim for compensation under subsection (1)(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate—

⁵ *Mphahla v RAF* 698/16 [2017] ZASCA 76 (1 June 2017)

⁶ S173 of the Constitution of the Republic of South Africa

(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or

(it) the provider of such service or treatment directly, notwithstanding section 19

(c) or (d), in accordance with the tariff contemplated in subsection (4B)'.

39. Mojapelo DJP held ⁷ that a court may not order that an undertaking be issued unless it is tendered by the Road Accident Fund. Mojapelo DJP relied extensively on a decision of the Appellate Division, as it then was, in *Marine & Trade Insurance Co Ltd v Katz* NO⁸ In this decision, the court pronounced on the nature of an undertaking in terms of section 21(1C)(a) of the Compulsory Motor Vehicle Insurance Act, Act 56 of 1972. This section provided as follows:

'(1C) Where a claim for compensation under section 21 - (a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, the authorized insurer concerned shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed him to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof.

40. In *Katz*, Trollip JA explained that the purpose of the provision was to innovate a departure of the common law. He stated:

'Now para (a) of the amendment is designed for the benefit of authorized insurers and has the effect, if invoked, of eliminating the uncertainties and imponderables inherent in having to adjudicate once and for all the quantum for the future loss or damage mentioned therein. Its provisions, however, only apply if the insurer concerned elects to invoke them. That was common cause and flows from the words "the authorized insurer shall be entitled etc..." The claimant (the third party) cannot himself claim or insist that the insurer shall furnish the undertaking, nor can

⁷ *Van der Walt v RAF* 2014/12763 [2015] ZAGPJHC 86 para 13,

⁸ 1979 (4) SA 961 (A).

the trial Court mero motu direct the insurer to furnish it. For the election lies entirely with the insurer. The insurer's election must, of course, be conveyed to the claimant.

He can do that by furnishing the claimant with the undertaking after the claim for compensation has been submitted under s 25 (1) of the Act. ... if no such undertaking is then furnished, the litigation ensues and the insurer can at the trial furnish it, or tender to furnish it, or otherwise convey his election to the claimant and the trial Court.

41. In that event, if the claim is successful in the litigation, the trial Court must by its order direct, and the claimant must submit to that direction, that the insurer shall furnish the undertaking to the claimant. The reason and need for the judicial direction is to render the undertaking binding on both parties for the future.’...

42. Evidently, in the current case Plaintiff seeks to be granted a section 17(4) undertaking certificate by default. However, considering the Katz and Van der Walt’s decisions the Plaintiff cannot himself claim or insist that the defendant (RAF) should furnish the section 17(4) undertaking, nor can the trial Court *mero motu* direct the Defendant to furnish the Plaintiff with the certificate. Thus, this Court does not have the power to order that a section 17(4) undertaking certificate be issued by the Defendant in the absence of it tendering such.

CONCLUSION

43. The failure of the defendant to respond to the plaintiff’s request for it to comply, unreasonably delays the adjudication of this matter. In addition to that, this delay is set in circumstances whereby there exists a prescription period, and despite the clear direction of the Regulations which enjoins it to decide within 90 (ninety) days to either accept, reject or refer, the defendant continues to neglect it. Surely, the inaction of the defendant to act has led this matter to an impasse. It is worth noting that the Defendant’s situation regarding their legal representation is understandable, however, one cannot expect the wheels of justice to stop turning because of this situation.

The Order

44. Consequently, I make the following order:

1. Merit is granted 100% in favour of the plaintiff with costs thereof

2. Quantum is postponed sine dies for the following reasons:

2.1. that it is generally not competent for a court to direct the Road Accident Fund to furnish an undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in circumstances where the Road Accident Fund has not elected to furnish such an undertaking, by default or otherwise.

2.2. that plaintiffs in actions against the Road Accident Fund are not entitled to pursue the adjudication of non-pecuniary damages in absence of either the Road Accident Fund having accepted the injuries in question as constituting serious injury as contemplated in Section 17 (1A) of the Road Accident Fund Act 56 of 1996 or of assessment of such injuries as constituting serious injury by the appeal tribunal contemplated in Regulation 3 of the Road Accident Fund Regulations, 2008 (as amended).

2.3. The defendant is hereby compelled to decide within 30 (thirty) working days of this order, in terms of Regulation 3 of the Road Accident Fund Act No. 56 of 1994 as amended, either to accept, reject, or refer the outcome of the assessment of the seriousness of injuries, as contained in the plaintiff's RAF4 form signed by Dr Ngcoya

Malatsi-Teffo AJ

Judgement Delivered: 19/08/2024

Plaintiff's counsel: Ms R.S Molamu

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Defendant's counsel: No Representation