



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 9077/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 19 JANUARY 2023
SIGNATURE

In the matter between:

BOY MAKUAPANE

Applicant

and

ROAD ACCIDENT FUND

Respondent

Summary: *Road Accident Fund (RAF) – claim for general damages – jurisdictional requirement – satisfaction of RAF that injuries “serious” – failure of RAF to take a decision to accept or reject assessment contained in plaintiff’s RAF 4 form – plaintiff entitled to a mandamus to compel the making of such a decision - failure to comply with a court order not having deemed effect amounting to satisfaction of injuries being serious – plaintiff’s remedy a formal review in terms of PAJA – such review can only be pursued after exhaustion of internal appeal processes, being a referral to the*

appeal tribunal of the Health Professions Council in terms of Reg 3 of RAF regulations (utilising RAF 5 form).

ORDER

1. The respondent is directed to, within 3 (three) days from date of service of this order, make a decision and transmit same to the applicant's attorney of record in writing, in respect of whether or not the applicant's injuries are assessed as serious or not in terms of Regulations 3(3)(c) and 3(3)(d) of the Road Accident Fund Act No 56 of 1996. In so doing the respondent must:
 - 1.1 Determine whether it is satisfied that the applicant's injuries which he sustained in the motor vehicle collision that occurred on 13 October 2019 have been assessed as serious in terms of the method provided for in the Road Accident Fund Regulations and accordingly accepts that the applicant qualifies to claim non-pecuniary loss;
 - 1.2 Alternatively to 1.1 above, reject the applicant's Serious Injury Assessment Report (the RAF 4 form) and in so doing, shall simultaneously furnish the applicant's attorney of record with written reasons for the rejection;
 - 1.3 Alternatively to 1.1 and 1.2 above, direct the applicant to submit himself for a further assessment at the respondent's costs with a

medical practitioner appointed by the respondent to determine whether the applicant's injuries are serious or not.

2. The respondent is ordered to pay the costs of the application.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] This matter came before the unopposed motion court of 12 January 2023 but has some measure of urgency attached to it as the trial has been set down for hearing on 27 January 2023. No cogent reason has however been furnished why this application has not been made long ago already and why it has been left to so late in the litigation day.

[2] The plaintiff seeks to pursue a claim for non-pecuniary loss (general damages) but the Road Accident Fund (RAF) has not yet made a formal decision to accept or reject the serious injury assessment contained in a RAF 4 form submitted by the plaintiff. There is little doubt that the plaintiff is entitled to a mandamus compelling the RAF to make such a decision.

[3] The question which arose, is what the consequences would be, should the RAF, despite having been compelled by an order of court to make a decision

within a stipulated time, still fail (or refuse) to do so. Apart from the issue of contempt of court, the plaintiff contends that the consequence should be that the RAF then be deemed to have accepted the plaintiff's injuries as being serious, satisfying the requirements of section 17(1) of the Road Accident Fund Act¹ and the Regulations².

Claims for general damages against the RAF

[4] It is now settled law that a court cannot make a determination whether a plaintiff's injuries are so serious that such a plaintiff is entitled to a claim for general damages against the RAF. The stipulation in Reg 3(3)(c) is to the effect that “... *the Fund shall only be obliged to pay general damages if the Fund – and not the court - is satisfied that the injury has correctly being assessed in accordance with the RAF 4 Form as Serious*”³.

[5] The above remains the position, even if the RAF is in default and even if its defence has been struck out⁴.

[6] Despite numerous exhortations contained in various judgments and practice directives of this court, the RAF remains a delinquent litigant. A consequence hereof is the numerous instances of failure by the RAF to make a decision as contemplated in Reg 3.

[7] For the sake of completeness and ease of reference, the procedures contemplated in Reg 3 preceding an entitlement to claim general damages can be summed up as follows: a plaintiff wishing to claim general damages must in terms of Reg 3(1)(a) submit himself or herself to an assessment by a medical

¹ 56 of 1996.

² In particular Regulation 3 of the Regulations promulgated under the Road Accident Fund Act in GN R 769 and R 777 in Government Gazette 31249 of 21 July 2008.

³ *Road Accident Fund v Duma and three similar cases* 2013 (6) SA 9 (SCA) (*Duma*) at para 19.

⁴ *Knoetze NO v Road Accident Fund* (77573/2018 & 54997/2020 (plus six amici) [2022] ZAGPPHC 819 (2 November 2022) (*Knoetze*))

practitioner in order to assess the seriousness of the injuries sustained. The medical practitioner then records the findings in a “serious injury assessment report”, known as the RAF 4 report (with reference to the form prescribed in the Regulations). The RAF 4 report is then presented to the RAF who is obliged to make a decision as to whether, in terms of Reg 3(3)(c) it is satisfied that the injuries have correctly been assessed as being serious or, in terms of Reg 3(3)(d) to reject the findings contained in the report (and furnish reasons for such rejection). As a third alternative, the RAF may direct that the plaintiff undergo a further assessment by a medical practitioner designated by the RAF. In terms of Reg 3(4), should the plaintiff dispute the RAF’s rejection or if either the plaintiff or the RAF wishes to challenge the further assessment by the medical practitioner designated by the RAF, the aggrieved party must formally declare a dispute by lodging a prescribed dispute resolution form (RAF 5) with the registrar of the Health Professions Council of South Africa (the HPCSA). Once such a dispute has been declared it is determined by an appeal tribunal consisting of three independent medical practitioners with expertise in the appropriate area of medicine, appointed by the HPCSA registrar. The procedure before such an appeal tribunal has been prescribed in some detail in Regs 3(5) – (12). In terms of Reg 3(13) the appeal tribunal’s decision itself is final.

The *mandamus*

[8] It follows from the above that, after a plaintiff has submitted the RAF 4 report to the RAF, the ball is in the latter’s court and it is obliged to make a decision. In terms of Reg 3(3)(dA), this must be done within 90 days after receipt of the RAF 4 report.

[9] The RAF is an organ of state as defined in section 239 of the Constitution and it is performing a public function in considering RAF 4 reports submitted to

it. Where the RAF is vested with the discretion and powers to consider and determine the acceptance of an assessment of a plaintiff's injuries as serious or not, it has concomitant duty to exercise that power⁵. The exercise of that power, i.e, the making of a decision to accept or reject the assessment contained in the RAF 4 report, amounts to administrative action, which is reviewable in terms of the Promotion of Administrative Justice Act⁶ (PAJA). This has expressly been found by our courts to be the position⁷.

[10] Once an administrator has duty to exercise a power, it cannot "... *simply decline to act or to decide*"⁸ and, should it fail to exercise the power in question, a court may compel it to do so⁹.

[11] This is exactly what the plaintiff in the present matter sought to do. The principal relief sought, was a mandamus compelling the RAF to exercise its powers and to make a decision whether it is "*satisfied that the injury has been correctly assessed as serious in terms of the method provided for in these Regulations*". The plaintiff is clearly entitled to such relief.

The issue

[12] The question which arose, was what the plaintiff's remedy would be, should the RAF fail (or refuse) to comply with the compelling order. Clearly, if this had been done with the requisite animus, it might amount to contempt of court, but that won't assist the plaintiff in prosecuting its claim for general damages at the trial.

⁵ Hoexter, *Administrative Law in South Africa*, 2nd Ed at 313 para 5.9 (a).

⁶ 3 of 2000.

⁷ See inter alia *Duma* at paras 19(a) and 24.

⁸ Hoexter *ibid*.

⁹ See eg *Laerskool Gaffie Maree v MEC for Education, Training, Arts and Culture, Norther Cape* 2003 (5) SA 367 (NC) and *Cape Furniture Workers Union v McGregor* NO 1930 TPD 682 at 685-686.

[13] The solution proposed by the plaintiff was that, upon the RAF's failure to comply with the compelling order, it be deemed that the assessment contained in the plaintiff's RAF 4 report is accepted i.e. that the RAF is deemed to be satisfied that the plaintiff suffered serious injury.

[14] This proposition, attractive as it may be on a practical level as an answer to literally thousands of plaintiffs in this court faced with the RAF's virtual perpetual inaction in the majority of cases, may not be sound in law.

[15] The common law position, which included the failure to act in the definition of "administrative action"¹⁰, has been codified in section 1 of PAJA. There it is provided that "*administrative action means any decision taken or any failure to take a decision ...*" (my emphasis).

[16] Section 6 of PAJA then goes further and provides that a court or tribunal has the power to judicially review an administrative action if, in terms of section 6(2)(g) "*... the action concerned consists of a failure to take a decision*". This would amount to a "proper" review and was also the remedy contemplated in *Duma*.

[17] Such a review application would however, be subject to the customary pre-conditions relating to timing and the duty to exhaust internal remedies¹¹.

[18] It does not follow automatically that, in the event of the RAF failing (or refusing) to make a decision, the outcome preferred by the plaintiff, namely a deemed satisfaction by the RAF that the injuries are serious should follow. Although a court may have sympathy for plaintiffs regularly put to expense and effort due to a failure by an organ of state to at least make a decision (which in this case is not an unduly onerous one being either a) satisfaction; b) rejection

¹⁰ *Hoexter* at 198 and 313.

¹¹ Sections 7(1) and 7(2) of PAJA.

or, even if the RAF is in doubt; c) referral to a further medical practitioner for assessment), “*sympathy is not a proper basis for a court to grant orders*”¹².

[19] The failure by the RAF to elect either of the three options referred to above, not only constitutes a ground of review as contemplated in Section 6(2) (g) of PAJA, but also a dispute between the plaintiff and the RAF as to whether the plaintiff is entitled to claim general damages. The existence of such a dispute is confirmed by the RAF’s pleas in the action. As a second special plea, the RAF not only pleaded that it had not yet taken a decision but, as an alternative, pleaded (in para 9 of the pleading) that the RAF has rejected the plaintiff’s Serious Injury Report in terms of Regulation 3(3)(d)(i). Based hereon, the liability to compensate the plaintiff for general damages is denied. This denial is repeated in the main plea. Clearly, in this case the plaintiff disputes this rejection, thereby bringing itself within the ambit of Reg 3(4).

[20] The plaintiff is therefore not only entitled to refer such a dispute to the HPCSA as contemplated in para 7 above, but more so, is obliged to exhaust this available internal remedy in terms of section 7(2) of PAJA before proceeding with its review application. In view of the RAF’s plea, it can also hardly object to such a referral, for which it will be liable to pay the costs in terms of Reg 3(14).

[21] It might also well be that the decision by the appeal tribunal referred to in paragraph 7 above, puts an end to the question as to whether the plaintiff’s injuries are serious or not. The further beneficial consequence of such a referral is that an assessment is then performed by a panel of medical experts in terms of the Regulations. This is further in accordance with *Duma* which confirmed that

¹² *Thusi v Minister of Home Affairs* 2011 (2) SA 561 (KZP) (*Thusi*) per Wallis J (as he then was) at para 52, being comment made in equally exasperating circumstances.

the scheme of the legislation is that the assessment and determination of the seriousness of the injuries is not a question for determination by the court.

Costs

[22] Much has been said in recent times about the appropriateness of awarding costs on a punitive scale against a delinquent, but absent organ of state. In *Duma* it was stated: “...unless the Fund was to present a plausible explanation for its unreasonable delay there is no reason why it should not be mulcted in attorney and client costs or worse”¹³. In my view, the indemnity principle¹⁴, namely that a successful litigant should be indemnified for litigation expenses incurred as a result of another party’s conduct, would justify such an order in circumstances such as the present. Although a court has a wide discretion in respect of costs, in the present matter where the plaintiff has alerted the RAF in the Notice of Motion that costs would only be sought on a party and party scale, I find that it would unduly offend against the *audi alterem partem*-rule if punitive costs are awarded.

Timing

[23] The circumstances of this case compels me to add a concluding remark. Although I have found that the referral to the HPCSA constitutes an internal remedy which has to be exhausted in terms of section 7(2) of PAJA and although the starting point for the running of time within which to satisfy the requirement in section 7(1)(a) of PAJA to launch review proceedings within a reasonable time, commences once the internal remedy proceedings have been concluded, plaintiffs are reminded of this fact. It is further important to note that the right to claim a mandamus against the RAF arises once the 90 day period prescribed in Reg 3(3) (dA) has expired and there is no reason for

¹³ At para 21 see also *Mlatsheni v RAF* 2009 (2) SA 401 (E) para 18 and *Bovungana v RAF* 2009 (4) SA 123 (E) para 7.

¹⁴ *Thusi* at para 99 and the cases cited there.

plaintiffs to wait until close to a trial date in order to exhaust their remedies. The failure to do so expeditiously often results in claims for general damages being postponed. In allowing literally years to slip by, practitioners acting for plaintiffs often fail their clients in this regard and it is a practice which should stop.

The order

[24] In the premises the following order is made:

1. The respondent is directed to, within 3 (three) days from date of service of this order, make a decision and transmit same to the applicant's attorney of record in writing, in respect of whether or not the applicant's injuries are assessed as serious or not in terms of Regulations 3(3)(c) and 3(3)(d) of the Road Accident Fund Act No 56 of 1996. In so doing the respondent must:
 - 1.1 Determine whether it is satisfied that the applicant's injuries which he sustained in the motor vehicle collision that occurred on 13 October 2019 have been assessed as serious in terms of the method provided for in the Road Accident Fund Regulations and accordingly accepts that the applicant qualifies to claim non-pecuniary loss;
 - 1.2 Alternatively to 1.1 above, reject the applicant's Serious Injury Assessment Report (the RAF 4 form) and in so doing, shall simultaneously furnish the applicant's attorney of record with written reasons for the rejection;
 - 1.3 Alternatively to 1.1 and 1.2 above, direct the applicant to submit himself for a further assessment at the respondent's

costs with a medical practitioner appointed by the respondent to determine whether the applicant's injuries are serious or not.

2. The respondent is ordered to pay the costs of the application.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 12 January 2023

Judgment delivered: 19 January 2023

APPEARANCES:

For the Applicant: Adv C D'Alton

Attorney for the Applicant: Savage, Jooste and Adams Inc., Pretoria