REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/04245

DATE:13/10/2011

REPORTABLE

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

....
DATE SIGNATURE

In the matter between:

AKAAI, LESTER CRAIN Plaintiff

And

ROAD ACCIDENT FUND Defendant

J U D G M E N T

KATHREE-SETILOANE, J:

[1] This is an action for damages against the Road Accident Fund in terms of the Road Accident Fund Act 56 of 1996 ("the Act"). The issue of negligence and liability have been agreed and settled on the basis that the defendant admits 70% liability for the proven damages that the plaintiff has suffered as a result of the accident. Future medical expenses have been settled by the parties on the basis of an undertaking in terms of s17(4)(a) of the Act. Future loss of earnings/income has also been settled on the basis that the defendant will pay the plaintiff an amount of R315 916.00. The only issue for determination therefore relates to general damages.

[2] The defendant, however, raises a special plea which relates to the question of whether this Court has the jurisdiction to deal with the question of general damages for failure of the plaintiff to comply with regulation 3 of the Regulations to the Act, (as amended). Regulation 3(1) provides as follows:

"3. Assessment of serious injury in terms of section 17(1A)
(1)(a) 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.

(b) The medical practitioner shall assess whether the third party's injury is serious in accordance with the following method-

i. The Minister may publish in the Gazette, after consultation with the Minister of Health, a list of injuries which are for the purposes of section 17 of the Act not to be regarded as serious injuries and no injury shall be assessed as serious if that injury meets the description of an injury which appears on the list.

ii. If the injury resulted in a 30 percent or more impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious.

iii. *An injury which does not result in 30 percent or more Impairment of the Whole Person may only be assessed as serious if that injury:*

(aa) *resulted in a long-term impairment or loss of a body function;*

(bb) constitutes permanent serious disfigurement;

(cc) resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or

(dd) resulted in loss of a foetus.

iv. The AMA Guides which must be applied by the medical practitioner in accordance with operational guidelines or amendments, if any, published by the Minister from time to time by notice in the Gazette.

v. *Despite anything to the contrary in the AMA Guides, in assessing the degree of impairment, no number stipulated in the AMA Guides is to be rounded up or down, regardless of whether the number represents an initial, an intermediate, a combined or a final value, unless the rounding is expressly required or permitted by the guidelines issued by the Minister.*

vi. *The Minister may approve a training course in the application of the AMA Guides by notice in the Gazette and then the assessment must be done by a medical practitioner who has successfully completed such a course."*

[3] Underpinning the claim for general damages is the mandatory "serious injury assessment report" ("the report"), which a claimant is required to submit in terms of s17(1A) of the Act read with regulation 3(3) which provides as follows:

"*(3)(a) 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.*

(b) A claim for compensation for non-pecuniary loss in terms of section 17 of the Act shall be submitted in accordance with the Act and these Regulations, provided that —

(i) the serious injury assessment report maybe submitted separately after the submission of the claim at any time before

the expiry of the periods of the lodgement of the claim prescribed in the Act, and these Regulations; and

(ii) where maximum medical improvement, as provided in the AMA Guides, in respect of the third party's injury has not yet been reached and where the periods for lodgement of the claim prescribed in terms of the Act and these Regulations will expire before such improvement is reached, the third party shall notwithstanding anything to the contrary contained in the AMA Guides, submit himself and herself to an assessment and lodge the claim and the serious injury assessment report prior to the expiry of the relevant period."

The serious injury assessment report is defined in regulation 1(x) of the Regulations as a "duly completed form RAF4", which is attached to the Regulations.

[4] In compliance with regulation 3(1)(a) of the Regulations, the plaintiff submitted himself to an assessment by medical practitioners. Duly completed RAF4 forms were provided by the plaintiff's medical practitioners in relation to the nature of the injuries sustained by him. They assessed the plaintiff's injuries as constituting serious injuries in terms of the narrative test contemplated in regulation 3(1)(b)(iii) of the Regulations.

[5] In terms of regulation 3(3)(c) the Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided for in the Act if a 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. However, in terms of sub-regulation (3)(d)(i) to (iii), if the Fund or agent is not satisfied that the injury has been correctly assessed, the Fund or an agent must:

(a) reject the serious injury assessment report, and furnish the third party with reasons for the rejection, or

(b) 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.

[6] In terms of regulation 3(3)(e), the Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in regulation 3(4)(a) to (c) of the Regulations which provide as follows:

"(4) If a third party wishes to dispute the rejection of the serious injury assessment report, or in event of either the third party or the Fund or the agent disputing the assessment performed by a medical practitioner in terms of these Regulations, the disputant shall —

(a) Within 90 days of being informed of the rejection or the assessment, notify the Registrar that the rejection or the assessment is disputed by lodging a dispute resolution form with the Registrar;

(b) *in such notification set out the grounds upon which the rejection or the assessment is disputed and include such submissions, medical reports and opinions as the disputant wishes to rely upon; and*

(c) if the disputant is the Fund or agent, provide all available contact details pertaining to the third party.

[7] In terms of regulation 3(5) once the Registrar is notified that the rejection or assessment is disputed in the manner and within the time period provided for in sub-regulation (4), the rejection or the assessment shall become final and binding. The Registrar shall within 15 days of having been notified of the dispute in terms of sub-regulation (4) inform in writing the other party to the dispute and provide copies of all submissions, medical reports and opinions submitted by the disputant to the other party (sub-regulation (6)). After being informed in terms of sub-regulation (6), the other party may ─

(a) in writing and within 60 days notify the Registrar which submissions, medical reports and opinions are placed in dispute; and

(b) attach to such notification the submissions, medical reports and opinions relied upon. (sub-regulations (7)(a) and (b))

The Registrar shall, in terms of sub-regulations 8(a) and (b), after receiving the notification from the other party or the expiry of the 60 day period, referred to in sub-regulation (6), refer the dispute for consideration by an appeal

tribunal paid for by the Fund. The appeal tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine, appointed by the Registrar, who shall designate one of them as the presiding officer of the appeal tribunal.

[8] The plaintiff's experts submitted their serious injury assessment reports (RAF4 forms) to the defendant in mid-2009. However, between March 2011 and June 2011, some two years after these serious injury assessment reports were submitted, the defendant rejected the serious injury assessment of Dr Scher (the plaintiff's Neurosurgeon) and Dr Morare (the plaintiff's Plastic and Reconstructive Surgeon). The plaintiff contends that the defendant's rejection of the serious injury assessment reports of Drs Scher and Morare did not comply with regulation 3(3)(d)(i) as they had not provided proper reasons for rejecting their assessments. In *Smit (as curator ad litem to Duduzile Ngobeni) v Road Accident Fund*, case no: 09/47697, 29 April 2011, a matter which has identical facts and pleadings to this matter, Claassens J, held that a dispute which the RAF is entitled to raise must be a genuine one, and not merely an objection which has no medical and legal basis. In that case, Claassens J, found that the RAF's objection was not supported by a medical or legal basis, and was therefore purely obstructive. He accordingly dismissed the special plea.

[9] The defendant's objection to the serious injury assessment reports of Drs Scher and Morare, in this matter, is that the plaintiff has not yet reached maximum medical improvement ("MMI"), and that the RAF4 forms were not

properly completed. I am of the view that these reasons do not constitute sound and proper basis for rejecting the serious injury assessment reports of Drs Scher and Morare, for the following reasons:-

(a) The concept of MMI is irrelevant to the assessment of the plaintiff's injuries as they have been assessed as serious in terms of the narrative test to which the concept of MMI has no bearing. MMI is, in this regard, a concept particular to the assessment of impairment in terms of the AMA Guides, which have no application to the assessment of injuries in terms of the narrative test contemplated in regulation 3(b)(iii) of the Regulations.

(b) In addition, in terms of regulation 3(3)(b)(ii) where MMI, as provided for in the AMA Guides, in respect to a third party's injury has not been reached, and where the period for lodgement of the claim, prescribed in terms of the Act, and the regulations, will expire before such improvement is reached, the third party is required to submit himself or herself to an assessment and lodge the claim and serious injury assessment report prior to the expiry period for the lodgement of the claim.

[10] Accordingly, the failure to reach MMI is not, on a proper reading of Regulation 3(3)(b)(ii), a good reason for rejecting a serious injury assessment reports of Drs Scher and Morare. Furthermore, the defendant's contention that it rejected the serious injury assessment reports of Drs Scher and Morare because the RAF4 forms were incomplete is also rejected. Having perused

the forms, it is clear that when a question did not apply to the plaintiff, then “N/A”, being the abbreviation for “not applicable” was inserted in the blank space. This does not constitute a failure to properly complete the RAF4 form. Accordingly, I am of the view that the reasons which were provided by the defendant for rejecting the medical assessments reports of Drs Scher and Morare do not constitute sound and proper reasons, that are supported by any medical or legal basis. That this is indeed the case was eventually conceded to by the defendant’s counsel, Mr Saint, during argument. The serious injury assessment reports of Drs Scher and Morare must accordingly stand.

[11] The defendant had also, in terms of Regulation 3(3)(c) and (d) directed the plaintiff to submit himself to a further assessment, which he did. Not surprisingly, the alternate serious injury assessments obtained by the defendant confirm the assessment of the plaintiff’s injuries as serious. The defendant’s experts agree, in this regard, with plaintiff’s experts on the severity of the plaintiff’s injuries. This appears clearly from the joint minutes between the plaintiff’s and defendant’s respective orthopaedic surgeons, and occupational therapists. Critically, the joint minutes conclude inter alia that:

(a) the plaintiff sustained a right hip fracture dislocation, and “[t]his would be considered a severe injury.” (Drs Scher and Stein (Orthopaedic Surgeons))

(b) “Thus impairment of body function would be considered severe in Mr Akaai’s case.” (Niewoudt and Keyser (Occupational Therapists))

(c) “Ongoing sequelae from injury suffered to the right hip, results in Mr Akaai suffering a severe impairment, which does affect all spheres of his life. (Niewoudt and Keyser (Occupational Therapists)).

[12] It is significant that although the defendant rejected the serious injury assessment reports of Drs Scher and Morare, it did not reject the serious injury assessment of Ms Niewoudt, the plaintiff’s Occupational Therapist. This then raises the following question ─ is the defendant required to raise an objection in respect of each individual expert of the plaintiff or is one objection adequate. The narrative test contemplated in regulation 3 calls for an enquiry into various aspects of the injuries or impairment sustained by the claimant in the motor vehicle collision, including the loss of bodily function (which falls within the domain of an orthopaedic surgeon), serious disfigurement (which falls within the domain of a plastic or reconstructive surgeon), long term mental or behavioural disturbance and disorder (which falls within the domain of a neurosurgeon, psychiatrist, psychologist etc,), and finally loss of a foetus (which falls within the domain of an obstetrician gynaecologist).

[13] It would, in my view, be inappropriate for one single medical practitioner to express himself or herself, in terms of the narrative test, on all

aspects of the injuries or impairment envisaged in regulation 3(1)(b)(iii). It would, in my view, be more appropriate that a serious injury assessment of the claimant be carried out by medical practitioners that are skilled in each of the respective medical disciplines contemplated in regulation 3(1)(b)(iii) of the Regulations. Depending on the specific complaints and injuries sustained by a claimant, more than one serious injury assessment report may be required to be submitted by different medical practitioners. The defendant would, where more than one serious injury assessment report is submitted, be required to accept or reject each one of them individually. Its failure to do so in relation to any one of them, will result in such report being accepted. Therefore, having regard to the fact that the serious injury assessment report of Ms Niewoudt, the plaintiff's occupational therapist, was never rejected by the defendant in terms of regulation 3(3)(c) and (d) of the Regulations, her report stands as accepted.

[14] As indicated earlier, in terms of regulation 3(4), if a third party wishes to dispute the rejection of the serious injury assessment report or if the third party disputes the rejection or the assessment performed by the medical practitioner then the third party must lodge a notice of the dispute with the Registrar, setting out the grounds upon which the rejection or the assessment is disputed and include such submissions, medical reports and opinions as the disputant wishes to rely upon. The plaintiff does not, in this regard, dispute the assessment performed by the defendant's experts and it, therefore, did not refer a dispute to the Registrar to be considered by an appeal tribunal.

[15] Mr Du Plessis, appearing on behalf of the plaintiff, contends that in so far as the defendant's objection, as contained in the special plea, is based on its failure to refer the matter to an appeal tribunal, such tribunal has not yet been established and the defendant's objections are thus nothing more than a tactic to delay the finalisation of the plaintiff's claim.

[16] Mr Saint, appearing on behalf of the defendant, countered this contention, by arguing that the Act does not contemplate the establishment of one single appeal tribunal, but rather that an appeal tribunal, as contemplated in regulation 3(8)(a), is to be convened by the Registrar following procedural compliance by the claimant after rejection, by the Fund, of his or her serious injury assessment report. In other words, it is Mr Saint's submission that an appeals tribunal will be constituted/convened by the Registrar, from time to time, and as and when a dispute requires consideration. Nothing, however, turns on this point other than that it is the plaintiff's complaint that the Fund has, in numerous claims for non-pecuniary loss under the Act, taken special pleas relating to the claimant's failure to refer the dispute to the appeal's tribunal in terms of regulation 3(8) of the Regulations, when such tribunal has not been established. Significantly, in this regard, we have yet to hear from the Fund whether "the appeals tribunal" or "an appeals tribunal" ─ whichever is contemplated in the Act ─ has to date been constituted and established by the Fund, to consider the disputes which have already been referred to it.

[17] The defendant's primary contention is that once the defendant rejected the serious injury assessment reports submitted by the plaintiff, then the

plaintiff was required to refer the dispute, relating to the question of the seriousness or otherwise of the plaintiff's injuries, to the appeals tribunal for determination. The defendant stands by this contention, notwithstanding that all the plaintiff's expert medical practitioners, and those of the defendant's as well, are in agreement that the injuries sustained by the plaintiff in the motor vehicle collision constitute serious injuries. Having regard to the agreement between plaintiff's experts and those of the defendant's in relation the serious nature of plaintiff's injuries there is, in my view, simply no basis for the matter to be referred to an appeals tribunal for it to make a determination, on the same documentation which is currently before this Court, on the question of whether the injuries sustained by the plaintiff, as a result of the motor vehicle collision, constitute serious injuries or not. To do so will delay the finalisation of the plaintiff's damages claim for non-pecuniary loss.

[18] Simply put, in view of the agreement between the plaintiff's experts and those of the defendant's as to the seriousness of the injuries sustained by the plaintiff as a result of the motor vehicle collision, there is no dispute which requires referral to the appeals tribunal. Hence, the mere say so by the Fund that it rejects the serious injury assessment report/s of a claimant's medical practitioners does not, in itself, create a dispute. Its rejection must be founded on a sound legal or medical basis, supported by such submissions, medical reports and opinions as the Fund wishes to rely upon. In the circumstances, I am of the view that in the absence of a dispute on the question of the seriousness of the plaintiff's injuries, the plaintiff was not required, in terms of regulation 3 of the Regulations, to refer his claim for general damages to the

appeal tribunal. Accordingly, absent a dispute as to the seriousness of the injuries, there can be no basis upon which a referral to the appeals tribunal would be justified. The defendant's special plea must accordingly fail.

[19] The parties have agreed that in the event that I decide the special plea in the plaintiff's favour, then the defendant will pay the plaintiff an amount of R200 000 in respect of the general damages suffered by him. Having considered the evidence before me in respect of the serious nature of injuries sustained by the plaintiff as a result of the motor vehicle collision, his ongoing pain and suffering, his loss of general functioning in daily life, and his loss enjoyment of amenities of life, I am of the view that the payment of an amount of R200 000 in respect of general damages is fair and just.

[20] In the result I make the following order:

1. The special plea is dismissed with costs.
2. The defendant is ordered to pay a capital amount of R525 916,00 to the plaintiff, in full and final settlement of the plaintiff's claim. Payment shall be made into the trust account of the plaintiff's attorneys, details as follows:

    Raphael Kurganoff Trust Account

    First National Bank, Rosebank Branch

    Account Number: ...

    Branch Code: ...

3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision of 24 January 2009, after such costs have been incurred, and upon proof thereof, which undertaking shall be limited to 70% thereof.

4. That the defendant will pay the agreed or taxed party and party High Court costs of the action to the 1st day of August 2011, such costs to include:-

    4.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;

    4.2 the preparation expenses of the plaintiff's experts Dr M.Scher, Dr M Shapiro, Dr S Braun, K. Niewoudt, P Leibowitz and Mr Whittaker, if any and as agreed or allowed by the Taxing Master.

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F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for the Plaintiff:	**Mr APJ Du Plessis**
Attorneys for the Plaintiff:	**Raphael Kurganoff Inc**
Counsel for the Defendant:	**Mr F.Saint**
Attorneys for the Defendant:	**Kekana Hlatshwayo Radebe Inc**
Date of Hearing:	1 August 2011
Date of Judgment:	13 October 2011