IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 2011/34424

MTHETWA, MZWAKHE TRUEMAN Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
19/4/12
DATE SIGNATURE

SATCHWELL J

INTRODUCTION

1. In recent months, several judgments in this South Gauteng Division considered the import and implementation of the 2008 amendments to the Road Accident Fund Act dealing with claims for non-pecuniary loss.[1] Such claims now require medical assessment of a '*serious injury*' and there have been a multiplicity of judgments where the RAF has rejected or purported to reject such serious injury assessment shortly before trial. This exception application, though distinguishable from those other judgments on both the facts and the precise legal issue at hand, is yet another stumble in the complex choreography associated with procedures for road accident compensation.

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[1] See Abraham Mathys Smith and Duduzile Ngobeni v Road Accident Fund Case No. 47697/2009 (2 June 2011); Mthunzi Gift Kubeka v Road Accident Fund Case No. 10/25663 (5 October 2011); Thabo Richard Mokoena v Road Accident Fund Case No. 2010/38170 (15 December 2011); Louw v Road Accident Fund2012 (1) SA 104 (GSJ) ; Adriana Johanna Meyer v Road Accident Fund Case No. 2010/48788 (20/2/2012); CF van Loggerenberg v Road Accident Fund Case No 71665/09 (16/03/2012)

2. Plaintiff is a road accident victim who has claimed a substantial sum of money from the Road Accident Fund ('RAF') as damages arising out of a motor vehicle accident. At issue is that portion of his claim for general damages in respect of pain and suffering, loss of amenities of life and disablement. The RAF has raised two special pleas to which plaintiff has taken exception on the grounds that they do not disclose a defence to the action. It is this exception which I am now called upon to decide.

CHRONOLOGY

3. The motor vehicle accident took place on 5th August 2008. On 29th July 2010, plaintiff lodged a claim for compensation in the prescribed form accompanied by the prescribed medical report.[2] Included in the claim documents lodged was an RAF 4 Form, duly completed, which indicated in the affirmative that "*the patient [has] reached MMI*" i.e. '*Maximum Medical Improvement*'.[3]

4. Plaintiff issued summons out of this Court on 12th September 2011 which was served on the RAF on 15th September on 2011. In the particulars of claim, plaintiff avers that he sustained serious bodily injuries which have

> "*resulted in a whole body impairment of 31% as measured in accordance with the guidelines set out by the American Medical Association and the injuries can be described as serious injuries when applying the narrative test within the meaning ascribed to it in the Act*".[4]

5. The RAF gave notice of its intention to defend the action on 18 October 2011.

6. After receiving a Notice of Bar on 28th November 2011, the RAF served its plea on 1st December 2011. Two special pleas were raised:

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[2] Pursuant to sections 24 and 17 of the RAF Act.

[3] Paragraph 4.10 of the Mr. Mthethwa's RAF 4 Form annexure "1N"; Abraham Mathys Smith and Duduzile Ngobeni v Road Accident Fund Case No. 47697/2009 (2 June 2011) at paragraph [4]; Section 17(1)(b) of the Act provides that "*the obligation of the Fund to compensate a third party for non –pecuniary loss shall be limited to compensation for a serious injury*" and section 17(1)(A)(a) provides that "*assessment of a serious injury shall be based on a prescribed method*" which method of assessment is set in some detail in Regulation 3 of the RAF Regulations of 2008.

[4] Paragraph 10 of the particulars of claim.

a. Firstly, that:

> *"the above honourable court does not have jurisdiction to make a finding as to whether or not the Plaintiff's injury is a serious injury and does not have the jurisdiction to make a finding regarding whether the Plaintiff is entitled to claim non-pecuniary loss against the Defendant."*[5]

It is averred that the prescribed method of determining whether or not an injury is "*serious*" as contemplated in the Act is set out in Regulation 3 of the 2008 Regulations. These require the road accident victim to submit himself to an assessment by a medical practitioner who shall complete a Serious Injury Assessment Report. Once such Report has been submitted the RAF shall only be obliged to compensate the plaintiff if satisfied that the injury has correctly been assessed. Final determination on a dispute as to whether or not the injury is serious is to be made by an Appeal Tribunal.

b. Secondly, notwithstanding that:

> *"plaintiff has submitted a Serious Injury Report... the Defendant has directed that the plaintiff undergo a further assessment to determine whether the injury is serious..."*[6]

The RAF has by letter dated 2nd December 2001 placed on record that *"it is not satisfied that the injury has been correctly assessed in the Serious Injury Assessment Report completed by Dr C Morare on 15 June 2010"* and accordingly the RAF directed that Mr. Mthetwa submit himself to a further assessment by a medical practitioner designated by the RAF who is Professor A Schepers.

7. To these special pleas, the plaintiff took exception, on 6 December 2001, on the grounds that the special pleas do not disclose a defence to the action. The plaintiff relies upon the provisions of section 24(5) of the RAF Act[7] stating that:

> *"[t]he defendant failed to object to the validity of the plaintiff's claim for general damages with 60 days of lodgement of the claim,*

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[5] Paragraph 6 of the first special plea.
[6] Paragraph 7 of the second special plea
[7] The subsection provides that "*if the Fund or the agent is not, within 60 days from the date on which the claim was sent by registered post or delivered by hand to the Fund or such agent is contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects.*"

> *alternatively, the defendant failed within 60 days from the date of lodgement to deny the plaintiff's claim for general damages as required by Regulation 3(3)(d)(i) within 60 days from the lodgment of the claim, alternatively a reasonable period.* "[8]

and:

> "*...the defendant's failure to reject the plaintiff's claim for general damages or to direct the plaintiff to submit himself for a further assessment, within 60 days of lodgement of the serious injury assessment report lodged on 29th July 2010, alternatively, a reasonable period from lodgement of the serious injury assessment report lodged on 29th July 2010, is an admission of the plaintiff's claim for general damages and accordingly the plaintiff's claim for general damages is valid in law in all respects.*"[9]

8. As to the second special plea, the RAF has therefore pleaded that the plaintiff has failed to submit to the further medical assessment which the RAF has directed the plaintiff should undergo. The exception is apparently that the RAF is precluded from issuing such direction because it failed to object to the claim and the RAF 4 form within 60 days or a reasonable period. As to the first special plea, the RAF has pleaded that this court does not have jurisdiction to determine whether or not plaintiff has sustained a 'serious injury' since that is a decision for the appeal tribunal. The exception is that the RAF is precluded from disputing the assessment of *'serious injury'* in the RAF 4 form because it failed to object to the claim and the RAF 4 form within 60 days or a reasonable period. Accordingly, both exceptions are to the effect that the special pleas disclose no defence because the RAF is barred from challenging the RAF 4 form and the claim of the plaintiff is therefore *"deemed valid in law in all respects"*.

"VALID IN LAW IN ALL RESPECTS"

Procedural vs Substantive issues

[8] Paragraph 12 of notice of exception.
[9] Paragraph 13 of notice of exception..

9. Plaintiff excepts that the RAF's failure to object to the validity of the claim for general damages or to deny the claim for general damages or to direct the plaintiff for a further medical assessment within 60 days or a reasonable period after submission of the claim form of 29 July 2010 has the result that, in terms of section 24(5) of the Act the claim "*deemed valid in law in all respects.*"

10. Section 24 (5) provides:

> "*If the Fund or the agent does not, within 60 days, from the date on which a claim is sent by registered post or deliver by hand to the Fund or such agent is contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects.*"

11. Plaintiff's counsel, Mr. Witz, in very brief heads of argument submitted that this Court should find that the plaintiff's claims for general damages is "*valid in law*" in terms of the provisions of the Act and the Regulations. He referred me to the recent decision of Mbha J in Mokoena supra. The remainder of his submissions appeared merely to support the submission, in his heads of argument, that "*the continual conduct of the respondent against claimants and in particular the applicant is causing severe prejudice in regard to compensation and is designed to frustrate the very objects of the legislation in respect of claimants.*"[10]

12. Mr. Witz failed to clarify what he meant by stating that the plaintiff's claim is "*valid in law in all respects*". In argument, he conceded in response to question which I put to him that it could not mean that the claim would be valid where there had been no road accident, no injuries sustained by a claimant, no fault on the part of the so-called insured driver. In other words, Mr. Witz was alive to the ineluctable conclusion that section 24(5) cannot mean that a failure by the RAF to object to a claim will render valid a claim in respect of a nonexistent accident where there are no injuries. In other words, the provisions of section 24(5) apply only to procedural issues and not substantive issues.

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[10] Paragraph 11.3 of the applicant's heads or argument.

13. I am in agreement with the learned author, Prof HB Klopper, who has prepared both "The law of third party compensation" and the "*RAF's Practitioner's Guide*" who has expressed the view that:

> "[s]*ection 24(5) only applies to formal defects*" and "*that the failure of the RAF to object is not intended to affect substantial omissions not related to the claim form and medical report... or other substantive material deficiencies in the claim*"[11] and that "*[t]he section has application only in respect of the formal requirements of section 24 and does not have the effect of legally validating non-compliance with the Act and its regulations should the RAF not object to validity.*"[12]

14. In Thugwana v Padongeoukfonds 2005 (2) SA 217 (T), the Court accepted the argument of the RAF that section 24(5) applied only procedural issues and not to the substantive case. The Court found that the insertion of the word "*thereof*" in the subsection indicated that this referred only to completion and posting of the claim form and medical report and meant no more than that the RAF would be "*barred from relying on defects*" if the RAF failed to object within 60 days to such defects.

15. In Krischke v Road Accident Fund 2004 (4) SA 358 (WLD), the RAF raised the special plea that the plaintiff had failed to comply timeously with the provisions of the Act - there had been late delivery of the claim form and medical report and accordingly the claim had prescribed. His Lordship Mr. Justice Jajbhay took the view that the provisions of section 24(5) were enacted "*to allow the parties to inform each other about sufficient details regarding the claim, and, thereafter, it affords the Fund sufficient time to consider the claim and to decide whether it will oppose, settle or acquire additional information before costs of litigation are incurred*".[13] The learned Judge then went on to state that subsection 24(5) deals with the procedural aspect of a claim covered in section 24 and that this subsection "*has nothing to do with substantive law*".

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[11] Paragraph 3.3.6 at page 314 of "*The law of third party compensation*".
[12] Para 7.20.7 at page A-123 of the "*RAF's Practitioner's Guide*".
[13] At page 365 A-B.

16. I am, with respect, in agreement with both the learned judges. To afford a different interpretation would give the subsection a meaning which would "*lead to an absurdity which the Legislature did not contemplate*". In Krischke supra, the learned Judge gave the example that a claim if the Fund failed to object to the validity of a claim lodged ten years after the cause of action commenced, then this claim would be resuscitated.

17. To my mind, the provisions of subsection 24(5) must be limited to validation only of the procedural requirements of the claim which has been lodged. It can never have been the intention of the Legislature that failure by the RAF, for whatever reason, to object to the claim within 60 days would have the effect of giving substance to a claim which is based upon a mirage or an untruth or inaccuracy. Administrative dereliction or negligence which results in no objection to a claim within two months cannot possibly build a road upon the land, construct a motor vehicle from nonexistent materials, create fault where there has been road user compliance, render whole and healthy bodies into wounded and painwracked wrecks.

18. In short, the failure of the RAF to "*object to the validity*" of the claim and both medical reports (RAF 1 and RAF 4) on 29th July 2010 within 60 days (or any other period) cannot result in the injuries referred to in such documentation being deemed to be "*serious injuries*" (either as to whole body impairment measured in accordance with the guidelines set out by the American Medical Association or by application of the narrative test within the meaning ascribed to it in the RAF Act.) It is my view that the RAF cannot be debarred from challenging either the existence of any injuries or the assessment thereof and from contending that a further assessment should be conducted by its own medical practitioner.

Timing of the Response to the RAF 4 claim

19. The chronology of this claim indicates that a period of some sixteen months elapsed between lodgment of the claim on 29 July 2010 and the letter from the RAF's attorney of 2nd December 2011. It must therefore be accepted that the RAF did not, within 60 days of delivery of the claim, object to the validity thereof.

20. There are a number of judgments which deal with the period within which an objection to the contents of an RAF 4 Serious Injury Assessment Report should be lodged. Although no judgment has prescribed that the time period prescribed in section 24(5) should also apply to any period which may be allowed for the RAF to '*object*' to the RAF 4 assessment of a serious injury, guidance has been sought in that time period of 60 days.[14] Those same judgments have also, in the main, decided that a "*reasonable*" but not open-ended period should be allowed for the RAF to reject a claim and RAF 4 form[15].

21. Mr. Witz argued that this court should follow that approach as regards the time period to reject a claim or to issue a direction for further medical assessment. I decline so to do.

22. I do not find assistance in those various judgments.

    a. Firstly, I have already indicated that I do not believe that it is possible for this court to find that the assessment of an injury as '*serious*' is deemed to be valid merely because of the lapse of a period of time.

    b. Secondly, the cases to which I have been referred all dealt with the situation where the RAF either rejected or purported to reject the assessment. In the present case, the RAF has not rejected the assessment. It has done no more than call for a further medical assessment.

    c. Thirdly, the rejection by the RAF in those other matters was at the doors of the court or within the court itself, in that the trial was imminent or had about to commence.[16] Here the RAF has filed its plea and I have not been informed that there has even been an application for a trial date. The prejudice with which those courts was concerned is not relevant in the present matter.

    d. Fourth, in those cases the courts were concerned with the basis upon which the rejection took place. The RAF failed to furnish any reasons for such rejection. In some cases the RAF raised procedural defects in the completion of the RAF 4

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[14] See Louw supra.
[15] See Kubeka supra, Louw supra, Meyer supra.
[16] See Kubeka supra "on the eve of trial", "a scant few days prior to trial"; see Mokoena supra ""a few weeks before trial".

form[17]. In other cases the RAF raised a substantive dispute as to the seriousness or otherwise of the injuries either by substitution of the assessment of its claim handlers for that of the plaintiff's medical practitioners[18] or by furnishing a contrary assessment. In this case, there is no rejection and I cannot see, and it has not been argued, that reasons need be given when no more than a further medical assessment is directed.

23. In the circumstances of this claim, I do not think it can be said that the lapse of time is unreasonable. After all, the plaintiff is not suddenly confronted for the first time, on the day of trial, with a rejection of his RAF 4 assessment. Certainly, a period of 16 months elapsed from submission of the claim form and RAF 4 form to the letter of 2nd December 2011.However, the summons was only issued on 12th September 2011. This letter directing referral for further medical assessment was telefaxed on 2nd December 2011 being one day subsequent to the filing and service of the RAF plea of December 2011. There is, as yet, no indication that the parties have even applied for the allocation of a trial date. In short, there can be no possible to prejudice to plaintiff which would assist in determining whether or not "*an unreasonable period*" has elapsed. In any event, the plaintiff's RAF 4 assessment has not been rejected and it may never be.

Applicability of Section 24(5) to RAF 4 and serious injury assessments.

24. The RAF has submitted that section 24 of the Act deals neither with the new scheme of assessment of "*serious injury*" nor the RAF 4 Form which is the "*Serious Injury Assessment Report*" provided in the 2008 Regulations.

25. I do not need to determine this point.

26. I have found that section 24(5) would not debar the RAF from raising a challenge or objection to substantive issues of fact or law - i.e. had there been an accident, an injury, was it serious or not, who was to blame, culpability etc etc etc. No procedural defects in

[17] See Kubeka supra, Mokoena supra, Meyer supra
[18] Smith supra and Kubeka supra and Mokoena supra

the RAF 4 document have been raised. The issue of debarring the RAF does not therefore arise.

27. I have found that the RAF has not rejected the RAF 4 assessment. It has done no more than pursue another alternative open to it – direct a further assessment. Reliance upon a provision such as section 24(5) cannot debar the RAF from calling for a further assessment.

DIRECTION TO FURTHER ASSESSMENT

Scheme of Medical Assessment

28. The scheme of medical assessment set out in Regulation 3 appears to have a number of stages. The first required and essential step is that the plaintiff is to go to his or her choice of medical practitioner, undergo examination and the medical practitioner shall complete the RAF 4 form.[19] Secondly, the RAF, if not satisfied that the claimant's medical practitioner has correctly assessed the injury as serious, is empowered to refer the claimant for further assessment by the RAF's own medical practitioners.[20] The third stage is the procedure invoked where either the claimant or the RAF disputes the Serious Injury Assessment Report and the Registrar of the Health Professions Council refers the dispute for consideration by an Appeal Tribunal.[21]

29. It is common cause that, on 15th June 2010 the plaintiff was assessed by Dr. C Morare who completed the RAF IV form and that this was the basis upon which the claim in respect *"a serious injury"* was submitted.

30. Where the RAF is not satisfied that the injury has been correctly assessed, then the Fund may do one of two things: either reject the Serious Injury Assessment Report with reasons or direct that the claimant submit himself to a further assessment to ascertain

[19] See Regulation 3(a) and (b).
[20] See Regulation 3(c) and (d).
[21] See Regulation 3(4)-(13).

whether or not the injury is serious.[22] There is always the third alternative – that the RAF may accept the assessment and the claim.

Second Special Plea incorrect

31. In the present case, the RAF served its plea (comprising two special pleas and a main plea) on 1st December 2011[23].

32. The second special plea relied upon a direction to further medical assessment. However at the date of the plea, the RAF had not issued such a direction.[24] The direction was only sent the following day. Accordingly, as at the 1st December 2011 and on reading paragraph 7 of the second special plea, the RAF's second special plea refers to actions which have not taken place and relies upon acts which not exist. The contents of the RAF second special plea was and is incorrect.

33. I see no prejudice to the plaintiff in the fact that the special plea preceded the direction by one day. Plaintiff's counsel does not appear to have considered this point significant enough to mention.

Assessment opposed to Rejection

34. A day after the RAF's plea was served, the letter of 2nd December 2011 was telefaxed. That letter did not reject the Serious Injury Assessment Report compiled by Dr C Morare. Instead, the second option was chosen – merely to record that the RAF was not "*satisfied that the injury has been correctly assessed*" and to direct a further assessment.

35. Plaintiff has not yet submitted himself to the further assessment directed by the RAF with Professor Scheper. No one knows the outcome of this proposed assessment. Professor Scheper may be of the view that the road accident victim has sustained serious injuries in

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[22] Regulation 3(d)(1i)(II)
[23] Within days of receipt on 25th November 2011 of the Notice of Bar calling upon the RAF to file and serve its plea.
[24] As pleaded in paragraph 7 of the second special plea.

accordance with either or both of the AMA impairment guides and narrative injury tests. He may take the view that there is or are no such serious injury(ies).

36. There is nothing to prevent the plaintiff, Mr. Mthetwa, from participating in such assessment.

37. Since so much time was spent in argument on dealing with other judgments handed down in this division, I must repeat that all those cases were concerned with actual or purported rejections. In Smith supra, the court found that an "*arbitrary, discriminating and irrational instruction unrelated to any logical assessment of the case*" could not constitute a rejection and there was accordingly no "*genuine dispute*" with the result that the issue of the jurisdiction of the appeal tribunal fell away. In Kubeka supra the court found there was no rejection because there was no medical evidence submitted by the RAF to contradict that of the medical practitioner who had assessed the plaintiff. In Mokoena supra the court also found that there was no rejection by the RAF because the conduct of the RAF and its attorney was mala fides and, in addition, the RAF had failed to provide a "true medical basis for rejection". In Van Loggerenberg supra the court found that the RAF had rejected the RAF 4 form and given reasons therefore and the plaintiff was therefore required to comply with the regulations.

38. The first special plea of the RAF is that this Court lacks jurisdiction to make a finding as to whether or not there is a "*serious injury*" because determination of a dispute on this topic is, in terms of the Regulations, to be made by an Appeal Tribunal. There is currently no such dispute. There is only one medical assessment at the instance of the plaintiff's medical practitioners and, although the RAF may not be "*satisfied*" with the assessment, the RAF is not yet in receipt of a further assessment which contradicts or disputes the earlier assessment.

39. There is currently no dispute to be referred by the Registrar of the Health Professionals Council to an Appeal Tribunal. There may never be such a dispute since it is always possible that Professor A Scheper will concur in the assessment of Dr C Morare.

40. It is only when there is a rejection by the RAF of the Serious Injury Assessment Report of Dr Morare or when the plaintiff disputes the assessment still to be performed by Dr Schepers, that any dispute would exist which could even be referred for consideration by an Appeal Tribunal.

41. It is only at that stage that the question arises as to whether or not the jurisdiction of this Court is ousted by reason of the provisions of the Regulations in terms of the RAF Act. which came into operation on 1st August 2008.

42. Accordingly, there are, as yet, no facts upon which this first special plea of the RAF can be considered. Adjudication upon this first special plea of the RAF would, at this stage, be premature. The first special plea is timeous. I cannot think of another occasion when it would have been permitted to the RAF, as defendant, to raise this plea to jurisdiction. Similarly, the exception had to be brought within after service of the plea – the plaintiff could not have waited because this may have been the only chance to except to the first special plea.

43. Accordingly, the exception that the first special plea discloses no defence must be postponed to await the outcome of the further medical assessment and the decision by one or both parties that there is or is not a dispute to be referred to an appeal tribunal. I cannot decide whether or not the provisions of the regulations establishing an internal process for determination of disputes as to seriousness or otherwise of an injury does or has ousted the jurisdiction of this court.

44. That first special plea and the exception thereto – that it discloses no defence – will have to be postponed until a dispute either eventuates or does not. That will either be the time of settlement of this action or the trial itself or when a dispute is declared and the matter is referred to an appeal tribunal.

CONCLUSION

No Striking Out

45. I see no reason to strike out the second special plea of the RAF. At time of trial it may well be a valid defence if the plaintiff has failed or refused to undergo the further medical assessment.

46. Since there is currently no dispute between the parties, the issue of the jurisdiction of the appeal tribunal and of this court is not at issue It is as yet unknown whether or not this Court will ever be called upon to make a finding on the nature of plaintiff's injuries. It may become common cause that these injuries are "*serious*" as contemplated within the provisions of the RAF Act and Regulations. It may become a matter in dispute and the nature of the dispute and how it is framed and the procedures involved may or may not involve a referral to this court. I cannot determine the question of the jurisdiction of this court in vacuo.

Costs

47. Since I do not find either the first or the second special pleas excipiable on the grounds they do not disclose a defence. the defendant is successful in its opposition to this exception application. Costs should therefore follow the result.

48. However, the exception to the first special plea – the jurisdiction plea – may well raise its head in due course. The exception is not dismissed – it is merely postponed.

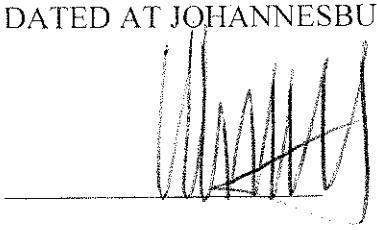
49. I am mindful that there have been these many judgments concerned with rejection of RAF 4 forms and the battle continues to furiously rage. I understand that some of these other judgments are on appeal. It may be that those appeal judgments will impact upon this judgment.

50. I have therefore decided that the question of costs should be reserved.

ORDER

1. The exception application in respect of the second special plea is dismissed.
2. The exception application in respect of the first special plea is postponed sine dies.
3. The costs of this application are reserved.

DATED AT JOHANNESBURG 20TH DAY OF APRIL 2012



Satchwell J

Date of Hearing: 1 February 2012

Date of Judgment: 20 April 2012

For Plaintiff: Adv M Witz

Instructed by Bove Attorneys

For Defendant: Adv S Budlender

Instructed by Lindsay Keller