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## REPUBLIC OF SOUTH AFRICA



### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 42384/14

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

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<b>SIGNATURE</b>	<b>DATE</b>

In the matter between:

**S S**

**PLAINTIFF**

**And**

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

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**Windell J:**

## INTRODUCTION

[1] This is a special plea dealing only with the plaintiff's claim for general damages (the claim). The defendant (the Fund) pleads that the claim has prescribed as the plaintiff failed to submit a serious injury assessment form (RAF 4 form) as required in terms of s17 of the Road Accident Fund Act 56 of 1996 (the Act), read with Regulation 3 thereof, within the prescribed time period.

[2] The plaintiff instituted action against the Fund on 26 November 2013 for damages suffered as a result of a motor vehicle accident which occurred on 6 October 2009. The particulars of claim however, limited plaintiff's claim to pecuniary damages, i.e loss of earnings and past and future medical expenses and did not include a claim for non-pecuniary damages. Seven and a half years later, (on 22 May 2017) the Fund's attorney secured and served a RAF 4 form, completed by Dr Mashaba, on the plaintiff's attorney. In addition the defendant also filed an expert report recording an entitlement to general damages on the narrative test.

[3] On 12 June 2017 the plaintiff served an amendment of its particulars of claim, by introducing a further head of damages, namely general damages. The Fund in its turn, did not object to the proposed amendment, but on the day of the commencement of the trial amended its plea with the introduction of the special plea.

[4] The matter proceeded to trial on 22 June 2017 and judgment was granted on 22 September 2017 in favour of the plaintiff in respect of loss of earnings in the amount

of R2 459 558. It was agreed that the special plea in relation to the claim for general damages be dealt with in a separate judgment.

## LEGAL PRINCIPLES

[5] The plaintiff lodged a claim for compensation in terms of s 17 (1)(a) of the Act, asserting that the identity of the driver was known to him. In terms of s 17 (1)(b) the Fund is obliged to compensate the plaintiff for any loss or damage which he had suffered as a result of any bodily injury to himself, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle. S 17(1)(b) specifically states the following in relation to non-pecuniary loss:

*“ ....Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.*

*(1A)(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.*

*(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974).*

[6] In order therefore to be able to claim compensation for general damages the plaintiff's injuries have to be regarded as 'serious' within the contemplation of s 17 (1)(b) of the Act. S 17 (1)(1A) (a) and (b) requires the plaintiff to submit to a process of medical assessment of his injury, the method of such assessment prescribed by Regulation 3(1) of the Act. Regulation 3(3)(a) obliges a plaintiff whose injury has been assessed in terms of these Regulations to obtain from the medical practitioner concerned a RAF 4 form. Regulation 3 (3) (b) (i) requires the RAF 4 form to be submitted at any time before the expiry of the period for the lodgement of the claim prescribed by the Act and the Regulations. Regulation 3 (3)(c) provides 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 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."*

#### The RAF 4 Form

[7] It is common cause that the plaintiff did not file a RAF4 form and that it is the Fund who procured the RAF 4 form, more than seven years after the cause of action arose. It is further common cause that the plaintiff underwent a medico-legal assessment, by an orthopaedic surgeon, Dr Mashaba, instructed by the Fund, on 9 May 2017. Dr Mashaba prepared a medical legal report and also completed a RAF 4 form. The report was co-signed by a Dr Mafeelane.

[8] In paragraph 4 of the RAF 4 form, which deals with the plaintiff's impairment in respect of the rating of the American Medical Association (AMA), Dr Mashaba refers

to his medico legal report. According to his report he assessed the plaintiff as having an whole person impairment of 7%. In terms of paragraph 5 of the RAF 4 form, which relates to 'serious injury: narrative test', Dr Mashaba concluded that the plaintiff's injuries had resulted in serious long term impairment or loss of a body function. As a result, Dr Mashaba concluded that the plaintiff had indeed suffered a 'serious injury' and is of the opinion that the plaintiff does qualify for general damages.

### The Act and prescription

[9] S 23 of the Act prescribes that the right to claim compensation under s 17 shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose. S 23(3) qualifies it further and stipulates that "*no claim which has been lodged in terms of section 17 (4) (a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.*"

[10] It is common cause that the plaintiff, in compliance with the provisions of s 17(1) and s 24(1)(a) of the Act, lodged a claim for compensation in respect of bodily injuries sustained by him in the said collision. The plaintiff lodged a claim in terms of s 24 by submitting a RAF 1 Form on 10 December 2009. According to the RAF 1 form the plaintiff's claim was for past and future loss of income, medical expenses as well as general damages in an amount of R100 000. Summons was issued on 26 November 2013, within five years after the cause of action arose.

[11] The plaintiff has only one claim which includes damages in respect of pecuniary and non- pecuniary damages. In *Nonkwali v Road Accident Fund*<sup>1</sup> Maya JA with reference to several other judgments said the following:

*‘Authorities are legion to the effect that a plaintiff who claimed compensation for damages sustained as a result of wrongful and negligent driving under the Act's predecessors had but a single, indivisible cause of action and that the various items constituting the claim were thus not separate claims or separate causes of action. This interpretation, in my view, necessarily extends to claims brought under the Act as it has the same objective and effect as these previous statutes.’*

[12] In *Nonkwali supra* the plaintiff did not include claims for past and future loss of earnings when summons was issued. The plaintiff amended its particulars of claim to include these two heads of damages after a period of three years after the cause of action arose. The defendant raised a plea of prescription. The court held that the plaintiff's right to recover past and future loss of earnings formed part of her original cause of action to claim for compensation. Therefore, the original summons interrupted prescription, *“albeit that the interruption was partial; however the partial interruption endured for the benefit of the entire right of actions or claim.”*

[13] In the present matter, the original summons interrupted prescription of the claim for general damages as it was part and parcel of the original cause of action and the

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<sup>1</sup> 2009 (4) SA 333 (SCA)

amendment merely represents a fresh quantification of the original claim or the addition of a further item of damages.<sup>2</sup>

[14] The only question that remains is whether the failure to file the RAF4 form timeously results in the prescription of the claim. This question was recently considered by the SCA in the matter of *Manukha v Road Accident Fund* <sup>3</sup>. The appellant's attorneys served the RAF4 form on the respondent's attorneys more than five years after the cause of action arose. The court held that Regulation 3 (3)(b)(i) provides that the RAF 4 form may be submitted separately from the submission of the claim itself, and implicit in this is that 'the claim' exists independently of 'the assessment report'. The court further held that the failure to submit the RAF 4 form will not result in the prescription of a claim for general damages. Petse JA remarked as follows:

*“[22] What can be inferred from the narrative set out above is, inter alia, that upon receiving the RAF4 form the Fund adopted the stance that as it was served after the expiry of a period of five years from the date of the accident, the claim for non-pecuniary loss should be left out of the reckoning. In light of what has been said above, the Fund was mistaken in adopting such attitude. In the ordinary course, the regulations provide that when the Fund receives an RAF4 form it must do one of two things. It may either accept it and then deal with the claim on that basis, or reject the RAF4 form if it is not satisfied that it complies with the Act and the regulations. In the latter event, it must, (a) in terms of regulation 3(3)(d)(i) provide reasons for doing so; or (b) it may, if it is*

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<sup>2</sup> *Evins v Shield Insurance Company Limited* 1980 (2) SA 814 (A) at 836C-E

<sup>3</sup> (285/2016) [2017] ZASCA 21 (24 March 2017)

*not satisfied with the medical assessment, direct that the appellant submits herself to a further assessment at the Fund's expense by a medical practitioner designated by the Fund as provided in regulation 3(3)(d)(ii). If, notwithstanding this process, the Fund rejects the RAF4 form, the regulations provide for an extensive procedure that would be triggered in the event that the third party wishes to contest the rejection of the RAF4 form. (See, in this regard, Road Accident Fund v Duma and Three Similar Cases para 7.) But for the present purposes nothing more need be said on that score. It remains only to emphasise that the Act and the regulations do not contemplate that a claim for non-pecuniary loss will prescribe if the RAF4 form is delivered outside of the period of prescription, should prescription have earlier been interrupted by the institution of proceedings.”*

## **CONCLUSION**

[15] The plaintiff lodged a claim against the Fund in terms of s 24 of the Act by submitting the prescribed RAF1 claim. The compensation claimed by the plaintiff incorporated a claim for non-pecuniary loss. Summons was issued within five years after the cause of action arose, which interrupted prescription. This results in the interruption of prescription in relation to all the heads of damages.

[16] In terms of Regulation 3(1)(b) (iii) an injury which does not result in 30% or more impairment of the whole person may only be assessed as serious, if that injury *inter alia* resulted in a serious long-term impairment or loss of a body function. The plaintiff was assessed by a medical practitioner, Dr Mashaba, in accordance with the



prescribed method in terms of Regulation 3. He issued a RAF 4 form and is of the opinion that the plaintiff sustained a serious injury as provided for in the Act and that he qualifies for general damages on the narrative test.

[17] The Fund did not object or reject, or respond to the RAF 4 form, except from raising the special plea of prescription. The contents and correctness of the RAF 4 form therefore remained uncontested throughout the proceedings and no argument was made that the injury was not correctly assessed or that it was not serious.

[18] The plaintiff has but one claim and the action was instituted within the five year period. The late filing of a RAF 4 form does not result in the prescription of the claim. In light thereof, I am satisfied that Regulation 3 has been complied with, and the Fund is obliged to compensate the plaintiff for general damages.

## **QUANTUM**

[19] Quantification of general damages falls squarely within the domain of the court. It is incumbent on this court to take into consideration all the relevant physical and psychological injuries, the *sequelae* of such injuries, the loss of amenities and the pain and suffering endured by the plaintiff in the enquiry into general damages. This is a holistic investigation that simply cannot be limited to one particular issue.

[20] The plaintiff testified that the accident had a devastating impact on him and his family. Before the accident he played tennis and golf, cycled, and had a wide social circle. It frustrates him that he is now unemployed and his situation have resulted in

severe financial stressors for his family. He feels inadequate because he cannot provide for his family and is even unable to play with his children. He has been in constant pain since the accident.

[21] Dr Scheltema, a neurosurgeon testified that the plaintiff presented with a significant spine injury at L5/S1 junction with acute disc herniation which leads to chronic lower back pain, nerve impingement and weakness on the left side. Chronic pain causes mood dysfunction, irritability and alteration of concentration together with problems in sleeping and resultant fatigue. Dr Chetty, a specialist psychiatrist, is of the opinion that the plaintiff has a major depressive disorder, moderate in severity.

[22] Ms Pillay, the occupational therapist, testified that on assessing the plaintiff he presented with the following: He walks with a significant limp and lacks the ability to move quickly and to perform any heavy lifting and carrying. He struggles with getting into a sitting position as well as getting up from a sitting position. He tires easily and need to take frequent rest breaks. He walks with a poor posture and is unable to walk for long distances and struggles to negotiate a flight of stairs. The plaintiff will most likely experience increased discomfort and pain from his lumbar spine with advancing age.

[23] It is trite that some guidance can be obtained by having regard to previous awards made in comparable cases. In the matter of *Ramolobeng v Lowveld Bus Services* <sup>4</sup> the plaintiff was awarded an amount of R 550 000 (current value

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<sup>4</sup> (29836/09) [2015] ZAGPPHC 31 (3 February 2015)

R621 000). Although the *sequelae* and the extent of the injuries were similar to those suffered by the plaintiff *in casu*, the court, in the determination of the amount, took into consideration that the plaintiff suffered from erectile dysfunction as a result of injuries sustained during the accident. In the matter of *Oosthizen v RAF*<sup>5</sup> the plaintiff sustained a compression fracture of the L3 vertebra with resultant pain in the lumbar spinal area. He was awarded an amount of R550 000.

[24] In the determination of a suitable award I also take cognisance of the remarks made by Holmes R in *Pitt v Economic Insurance Co Ltd*<sup>6</sup>. He said the following:

*“ The court must take care to see that its award is fair to both sides –it must give compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant’s expense”*

[25] In my assessment a fair amount to be allocated in respect of general damages is an amount of R 600 000.

[26] In the result the following order is made:

[26.1] The special plea is dismissed with costs.

[26.2] The defendant is ordered to pay the plaintiff an amount of R600 000 in respect of general damages within 14 days of this order.

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<sup>5</sup> (1663/2015) [2016] ZAGPPHC 798 (9 September 2016)

<sup>6</sup> 1957 (3) SA 284 (D) at 287 E-F

[26.3] Interest on the sum at the prescribed rate of 10, 25% per annum calculated from the date following the payment date to the date of final payment.

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**L WINDELL**

**JUDGE OF THE HIGH COURT**

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Date of Hearing:

23 July 2017

Date of Judgment:

3 November 2017