**HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 77573/2018 & 54997/2020**

**(1) REPORTABLE: YES.**
**(2) OF INTEREST TO OTHER JUDGES: YES**
**(3) REVISED.**
**DATE: 2 NOVEMBER 2022**

**SIGNATURE**

In the matters between:

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| **ADVOCATE KNOETZE obo N.B MALINGA** | First Plaintiff |
| **EVERT JOHANNES PRETRUS DE GOEDE** | Second Plaintiff |
| and | |
| **ROAD ACCIDENT FUND** | Defendant |

Amici Curiae

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| **PRETORIA ATTORNEYS ASSOCIATION** | First Amicus |
| **MARIUS COETZEE** | Second Amicus |
| **BRITS BEUKES INC** | Third Amicus |
| **FRANS SCHUTTE & MATHEWS PHOSA INC** | Fourth Amicus |
| **BLACK LAWYERS ASSOCIATION** | Fifth Amicus |

**SIZAKELE FLORENCE GUMEDE** Sixth Amicus

**Summary**:

In terms of section 14(1)(a) of the Superior Courts Act 10 of 2013, the then Acting Judge President of this Division has referred the following questions for determination by a full court:

- Is it competent for a court to order that a plaintiff's claim for future medical and hospital expenses be compensated by the Road Accident Fund (the Fund) by way of an undertaking issued in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the RAF Act) where default judgment is granted, in the absence of an election by the Fund to furnish an undertaking?

- 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 in accordance with Regulation 3?

Both questions were answered in the negative. During the course of litigation, the Fund produced a "blanket election" to furnish undertakings as contemplated in section 17(4)(a) of the RAF Act and urged courts to take judicial notice thereof.

Various *amici curiae* participated as friends of the court in the hearing of two matters which were jointly heard and costs orders were made against the Fund, based on its litigation delinquency.

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**ORDER**

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1. It is declared 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. It is noted that the Road Accident Fund has, during the course of the hearing of this matter conveyed a "blanket election" to furnish an undertaking to compensate plaintiffs claiming compensation in terms of section 17 of the said Act, in respect of costs for the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying goods to him on her, after such costs have been incurred and on proof thereof or to the provider of such service or treatment directly, and the Road Accident Fund has tendered that courts can take judicial notice of this election.

3. It is declared 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).

4. The Road Accident Fund is ordered to pay the costs of the plaintiffs in case numbers 77573/2018 and 54997/2020, on the scale as between attorney and client, including the costs of two counsel, where employed and that of the curator *ad litem* in case no 77573/2018.

5. The Road Accident Fund is ordered to pay the costs of the *amici curiae*, on the scale as between party and party, including the costs of two counsel, where employed.

6. Matters 77573/2018 and 54997/2020 are postponed *sine die* and it is directed that those actions henceforth proceed separately before the judges seized with the matters.

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**JUDGMENT**

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*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 et VAN DER SCHYFF et MUNZHELELE JJ**

**Introduction**

[1] The Road Accident Fund (the Fund) is a perpetual litigant in our courts and particularly in this division. It mostly features as the defendant by virtue of its

statutory obligation to compensate the victims of motor vehicle accidents[1]. The Fund is, however, a serial delinquent litigant and chronically either fails to defend matters or fails to participate in the proper finalization of actions. This delinquency has featured in numerous judgments[2].

[2] The result of the Fund's failure to oppose and defend actions against it, not only clogs this court's rolls, but results in numerous actions proceeding by default[3]. The plaintiffs in this joint hearing are two of literally hundreds of litigants in a similar position who seek judgment against the Fund.

[3] The two questions which feature in this matter and on which the plaintiffs seek guidance are the questions whether the court can order the furnishing of an undertaking as opposed to payment of a lump sum in respect of future medical expenses, in the absence of the exercise of an election by the Fund and whether it is permissible for the court to award general damages in the absence of a determination of whether the injuries sustained qualified as a "serious injury".

[4] The joint hearing of the two matters which came before us, was as a consequence of a directive issued in terms of section 14)(1)(a) of the Superior Courts Act 10 of 2013, by the Acting Judge president of the Division at the time. The matters were case managed by Van der Schyff J. The plaintiffs and, after some coercion, the Fund, filed heads of argument and appeared at the hearing of the matter. They were joined by six *amici curiae* who, as friends of the court, presented both written and oral argument. This assisted the Court and they are thanked for their contributions.

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[1] Section 17 of the Road Accident Fund Act 56 of 1996 (the Act).

[2] See, for example *Road Accident Fund v Delport NO* 2006 (3) SA 172 (SCA), *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E), *Modise v Road Accident Fund* 2020 (3) SA 221 (GP), *Sayed NO v Road Accident Fund* 2021 (3) SA 538 (GP) and *Taylor v Road Accident* Fund 2021 (2) SA 618 (GP).

[3] At the time of hearing this matter, this was at a rate of approximately 180 matters per week in this Division alone. A similar situation, albeit at a lesser number, prevailed in the Johannesburg Division of this court.

**The furnishing of an undertaking as contemplated in section 17(4)(a)**

[5] The question in relation to this aspect was formulated as follows in the Acting Judge President's directive: "*Is it competent for a court to order that a Plaintiff's claim for future medical and hospital expenses be compensated by the Road Accident Fund by way of an undertaking issued in terms of section 17(4)(1)(a) of the Road Accident Fund Act, Act 56 of 1996, where default judgment is granted, and in the absence of a tender to that effect?*".

[6] An ancillary question which arose, was whether it is competent for a plaintiff to claim an undertaking as appropriate relief as of right, or whether the election is the sole prerogative of the Fund. Should it be found that the election is the sole prerogative of the Fund, could courts take judicial notice of an alleged general practice in order to direct the Fund to furnish an undertaking in favour of a plaintiff? If there is no general practice, has the Fund now made a "blanket election" in all matters where plaintiffs claim future medical and ancillary expenses?

[7] In order to adjudicate these issues, the starting point is the wording of Section 17 (4) (a) of the Act. It provides: "*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 the third party in respect of the said costs after the costs have been incurred and on proof thereof*".

section 8(5)(a) of the Motor Vehicle Accidents Act 84 of 1986 and section 43(a) of the Multilateral Motor Vehicle Accident Fund Act 93 of 1989. These sections read virtually identical to each other concerning the issue of the "entitlement" of the various funds and insurers or their agents to elect the furnishing of an undertaking to pay medical and ancillary costs as and when they were incurred, rather than paying a lump sum. Apart from differing wording used pertaining to who would carry the liability from time to time as either insurer or successive funds, the wording *"... be entitled, after furnishing the third party ... with an undertaking to that effect or a competent court has directed ...*" were retained in all these enactments.

[9] The next step is to have regard to the principles governing the interpretation of statutes, which have been explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] at para 18 that:

> '*interpretation is a process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.*'

[10] At the outset, the context within which the Act and its provisions must be interpreted, is by having regard to its purpose. This was stated in *Mbele v Road Accident Fund*[5] at para 17, to be the following:

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[4][2012] ZASCA; 2012 (4) SA 593; see also *Bothma-Batho Transport (EDMS) Bpk v S Bothma & Seun Transport (EDMS) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 para 10.
[5] 2017 (2) SA 34 (SCA).

*'The Act was established, in my view, to give the greatest possible protection and to promote the socio-economic rights of victims of motor vehicle accidents'.*[6]

[11] Although our courts have interpreted this object expansively[7], the principle remained that a plaintiff must quantify its claim and seek relief for the compensation of damages in a single action according to the "once-and-for-all" principle. This means that the compensation claimed (and the award ordered by a court) must cater for past, present and future loss suffered from the same cause of action.

[12] The "once-and-for-all" principle and how the furnishing of an undertaking ties in with it, was explained in *Marine & Trade Insurance Co Ltd v Katz NO* (*Marine & Trade Insurance Co*) at 970, G-H, as follows:[8]

*"[It]...is designed for the benefit of authorised 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."*

[13] What one extracts from the above, is that the context of the Act is that it forms part of social legislation, designed to benefit victims of motor vehicle collisions. Section 17(4)(a) is designed to remove contingencies created by estimating the future costs of medical and ancillary expenses and then to

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[6] Reference was made to *Law Society of South Africa & another v Minister for Transport & another* [2010] ZACC 25; 2011 (1) SA 400 (CC) para 40; *Mvumvu & others v Minister of Transport & another* [2011] ZACC 1; 2011 (2) SA 473 (CC) at 479 para 20; *Englebrecht v Road Accident Fund & another* [2007] ZACC 1; 2007 (6) SA 96 (CC) para 23 and *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285E-F'.

[7] As set out in *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA) and *Law Society of South Africa v Minister of Transport* 2011 (A) SA 400 (CC) at para 66.

[8] 1979 (4) SA 961 (A).

recalculate those costs to a present value, further estimating that it would be sufficient to cover expenses over the lifetime of a plaintiff (itself a contingent estimate). The furnishing of a undertaking provides for an "as-and-when" payment scheme of actual expenses, removing all contingent permutations. Damages suffered are then paid as they eventuate.

[14] It is within this context that the following interpretation had been given to the section under consideration in *Van der Walt v Road Accident Fund*[9] (*Van der Walt*) para 13 where, after reference to *Marine & Trade Insurance Co Ltd v Katz*, it was stated that:

> '*The right to furnish the Undertaking is specifically given to the Fund. The furnishing of the Undertaking is not an obligation placed on the Fund but a right given to the Fund. The Act also does not create a right for the injured plaintiff to claim the Undertaking. The claimant can therefore not claim, as of right, that the Fund should furnish an Undertaking. Only the Fund may make the election either to pay the costs claimed (which is generally referred to as "future medical expenses") or to furnish an Undertaking in lieu of payment. A priori, the Court may not order it, unless it is tendered. There is no obligation to furnish an undertaking unless it has been tendered.*'

[15] So far the determination of the right of election by the Fund, but what to make of the words "or directed by a court"? One of the *amici* have argued that these words, specifically the use of "or", meant that a court may "direct" the furnishing of an undertaking. These words have however already been

[9] (2014/12763) [2015] ZAGPJHC 86.

interpreted, in *Marine & Trade Insurance Co* with reference to one of section 17(4)(a)'s predecessors as follows[10]:

> *"Its provisions ... only apply if the insurer concerned elects to involve them. That ... flows from the words 'the authorised insurer shall be entitled etc...'. The claimant cannot himself claim or insist that the insurer shall furnish the Undertaking, nor can the trial Court mero motu direct the insurer to furnish it. For the election lies entirely with the insurer. If the claimant accepts [the undertaking], ceadit quaestio .... If he does not accept it, or if no such undertaking is furnished, the litigation ensues, 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. In that event, if the claimant 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.* [11]".

The court then concluded this point as follows at 971 H:

> "*As has already been pointed out, the trial Court must direct the insurer to furnish such an Undertaking if the insurer so elects, and it cannot direct the insurer to do so if no such election is made. The trial Court has no discretion to direct or withhold it. And, in either event, the claimant has no say at all in the matter" (the then Appellant Division's emphasis).*

[16] It is clear from the above-quoted judgment that a court has no jurisdiction to direct the Fund to furnish an undertaking where the Fund did not make such an election. The corollary is that, if a court cannot grant such relief, neither can a

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[10] Above, at footnote 9.

[11] The predecessor to section 17(4)(a) referred to was section 21(1C)(a) of the Compulsory Motor Vehicle Insurance Act 56 of 1972. It read: "

plaintiff claim it. Where the Fund has not made an election to furnish an undertaking either by choice or by default, the consequence is that it will only be competent for a court to award payment of an amount calculated to cover future medical expenses, once proven, taking into account the contingencies referred to above.

[17] In an affidavit submitted by the CEO of the Fund, he submitted that plaintiffs have been claiming undertakings during default judgment hearings and the courts have been granting orders containing such undertakings. This, the CEO labelled the "standard way" and alleged that this practice has been going on for quite a long time, allegedly "for decades". It is then argued that this has become such a well-known practice or usage that courts can take judicial notice thereof and continue to order such directives to the Fund to furnish undertakings. This indeed appears to be the position adopted by many plaintiffs, virtually on a daily basis in this Division.

[18] For a practice or "usage" to qualify for legal recognition, it must however be shown to be universally and uniformly observed within the particular trade concerned, be long established, be reasonable and certain, and not be in conflict with positive law[12].

[19] We are not convinced that this argument passes muster. As a starting point, the applicability of a "trade usage" forms part of the law of contract. Where the election is a statutory right, it is highly doubtful that the law of contract would be applicable. The plaintiffs further argue that, to invoke this principle in claims against the Fund would be in conflict with the principle of separation of powers, which forms an integral part of our law. The powers of election to furnish

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[12] A J Kerr, *The Principles of the Law of Contract* 6ed (2002) at 380

undertakings reside only with the Fund, and it is impermissible for a court to usurp the function of the Fund.

[20] There is, however, a more fundamental objection to allowing the "practice" or "usage" to continue, based on its alleged entrenchedness. Once the legal position is as set out in paragraph 16 above, the fact that some courts may have been granting orders not sanctioned by the Act does not entitle either plaintiffs or the Fund to expect all courts to follow suit. To do so, would result in courts applying a practice or usage which would be in breach of the "positive law" referred to in paragraph 18 above. That cannot be countenanced.

[21] Adv Mullins SC, appearing on behalf of the Fund together with adv Pillay, argued the matter on a slightly different basis. He contended that the reason for so many plaintiff claiming (and the courts granting) directives to the Fund to furnish undertakings, is because "*a blanket election has been in operation for decades now*", to such an extent that it has become a fact which is so notoriously known that the courts may take judicial notice thereof.

[22] As proof of this notoriety, the court was invited to consider the contents of the "instructional video" hosted by the Fund on its website. In it, the Fund advises claimants that when they claim for future medical expenses, they "*... will be given an undertaking*" by the Fund. In explaining what compensation may be claimed, the website instructs as follows: "*A third party may claim his/her expected future medical treatment costs form the RAF, if it is proven that such future costs are likely. The RAF will issue to the third party a medical undertaking (a type of contract) that would enable the third party to receive future medical treatment subject to the terms of the undertaking ...*". In terms of the Fund's Claims Procedure Manual, it says with regard to future medical and hospital expenses that "*either a statutory or a contractual undertaking certificate can be issued. If*

*it is a straightforward agreement with no medical or other limitations, a statutory undertaking will be issued*".

[23] A notorious fact of which a court can take judicial notice, is one which is so commonly known that to hear evidence about it would be unnecessary and a waste of time. It is, however, generally limited to "*matters of elemental experience in human nature, commercial affairs and everyday life*[13]". Examples are: the normal period of human gestation[14]; whether a national road is a public road[15]; that no two sets of fingerprints are identical[16]; that public companies trade in order to make profit[17]; that chess is not a game of chance but one of skill[18] and that there is a high incidence of crime in the country[19].

[24] What a court may also take judicial notice of, is its own functioning and the matters that come before it[20]. In our experience, the "evidence" referred to by the Fund's CEO, mentioned in paragraph 22 above, has not featured in this Division and neither does the CEO claim that it has. Insofar as it may have been known to the "litigating public", that may not have included those courts which have "regularly" granted such claims. One of the plaintiff's counsel labelled the website as merely "informative". Furthermore, the contents of the Fund's own Claims Procedure Manual, appears to cater for various permutations and options regarding the nature and contents of undertakings. In addition, there was some doubt when the matters were argued before us as a whether the furnishing of an undertaking always applied or whether there were exceptions. If there were

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[13] *Rowe v Assistant Magistrate, Pretoria* 1925 TPD 361 at 368.
[14] *R v Sewgoolam* 1961 (3) SA 79 (N) at 81.
[15] *S v Ndlele* 1984 (4) SA 131 (N) at 132.
[16] *R v Morela* 1947 (3) SA 147 (A) at 151.
[17] *R v African Canning Co (SWA) Ltd* 1954 (1) SA 197 (SWA) at 199F.
[18] *Ex parte Minister of Justice: In re S v Cancalves* 1976 (3) SA 629 (A) at 639E.
[19] Absa Bank v Mutual & Federal Insurance Co Ltd 2003 (1) SA 635 (W).
[20] *Boyce NO v Bloem* 1960 (3) SA 855 (T) at 863 and *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 (4) SA 749 (ZA) at 753A.

exceptions, then a court would not, without having been informed thereof in a specific case, know whether the "blanket election" would apply or whether that matter might be one of the "exceptions". After some debate, it appeared that the exceptions mostly, if not exclusively, occurred *ex post facto*, that is after an undertaking had been furnished. Apparently, the Fund had been known, after the managers of its Post Settlement Department had been approached, to provide monetary payment in respect of future medical expenses in lieu of an undertaking. This apparently occurs where there has been a significant merits apportionment against a plaintiff and the foisting of an undertaking on such a plaintiff would lead to unfair results. There is a last aspect which bears mentioning and it is this: an election to furnish an undertaking (or not) should be a formal and conscious resolution by the Fund, acting through its delegated officers and even the "evidence" referred to above, does not confirm that a "blanket election" has been taken in this fashion. At best, it is an indication of what could ordinarily be expected to happen, but it cannot be said to be conclusive. For these reasons we decline to find that a "blanket election" had taken place in respect of the furnishing of guarantees in all claims against the Fund where the costs of future medical and ancillary expenses are claimed as part of a plaintiff's damages.

[25] Clearly alive to this dispute and in response to the directive of the Acting Judge President of this Division in referring this issue to this full court, the CEO of the Fund, in the affidavit filed in the joint hearing of these matters, reiterated the fact that the Fund has indeed now made a "blanket election" to furnish an undertaking to every claimant who is entitled to a claim for payment of future medical and ancillary expenses in terms of section 17(4)(a). The CEO undertook to have included in the Fund's "first letter" issued to a claimant upon receipt of a newly lodged claim and allocation of a claim number "... *a reiteration of its blanket election by expressly stating that a claimant will only be entitled to an undertaking in respect of any proven claim for the costs of the future*

*accommodation of the claimant in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her*". The fund has further undertaken to publish via a notice through the Legal Practice Council and its internal database of attorneys a statement reaffirming its blanket election.

[26] Insofar as there may have been doubt as to either the existence of a "blanket election" or whether this fact has sufficiently been so notorious that a court could have taken judicial notice thereof, such doubt has now been removed by the Fund's CEO. Counsel for the Fund has confirmed in open court that courts can now take judicial notice of this. The result is that, once a plaintiff proves its claim as contemplated in section 17(4)(a), it is entitled to claim an order catering for a direction to the Fund to furnish such an undertaking and a court is entitled to grant such an order. This will also apply in instances where orders by default are sought.

[27] The Black Lawyers Association, as the fifth *amicus*, argued that the use of the word "or" in section 17(4)(a) denoted that either the Fund might elect to issue an undertaking alternatively, that a court might direct the Fund to furnish an undertaking. Insofar as there may be ambiguity in the meaning of the section, the Constitution enjoins courts to interpret legislation in a manner which promotes the spirit, purport and objects of the Constitution. The Constitutional Court had endorsed the contextual and purposive approach espoused by *Natal Joint Municipal Pension Fund v Endumeni* in *Road Traffic Management Corporation v Waymark Infotech Ltd*[21]. In our view, this court is however bound by the decision in *Marine & Trade Insurance Co Ltd.* Even though that decision pre-dates the Constitution, its interpretation followed the development of the wording of the section, through its predecessors and had due regard to the wording of the

[21] 2019 (5) SA 29 (CC) at paragraphs 29 – 32.

successive section, including the use of the word "or". The decision of *Van der Walt*, given in our post – Constitutional dispensation, has also analysed specifically whether a court could grant a direction to the Fund and concluded that it couldn't, despite the inclusion of the word "or" in the section. We are not convinced that that decision is clearly wrong, as contended for by this *amicus*. In any event, having regard to the blanket election now having been exercised in the circumstances set out earlier, this question has now become moot and no further interpretational development is necessary.

**Is a plaintiff entitled to pursue the adjudication of general damages at trial in the default trial court in instances where the Fund had not accepted the serious injury assessment report?**

[28] For purposes of answering this question, which was the second question posed to this full court by the Acting Judge president, it was directed that regard must be had to the specific provisos contained in and obligations placed upon the Fund, as set out in regulations 3(3)(dA), 3(4) and 3(5) of the Road Accident Fund Regulations, 2008 (as amended).

**Legal framework**

[29] Section 17(1) Act *inter alia* provides that Fund shall, –

> *'be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury ... 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 or of his or her employee in the performance of the employee's duties as employee: 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*'.

[30] Section 17(1A) provides as follows:

'*(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 No. 56 of 1974)*'.

[31] Section 26(1A) of the Act provides that the Minister may make regulations regarding:

'*(a) the method of assessment to determine whether, for purposes of section 17, a serious injury has been incurred;*

*(b) the injuries which are, for the purpose of section 17, not regarded as serious injuries;*

*(c) the resolution of disputes arising from any matter provided for in this Act*'.

[32] Section 26(2) provides that any regulation may provide for penalties of a fine or imprisonment for any contravention or a failure to cotherewith.

[33] Regulation 3 of the Road Accident Fund Regulations[22] provides for the assessment of serious injuries in terms of s 17(1A). It prescribes the methods in accordance with which a medical practitioner shall assess whether a third party's injury is serious.[23] In terms of regulation 3, the third party whose injury has been assessed in accordance with the prescribed methods is obliged to obtain a serious injury assessment report from the medical practitioner concerned,[24] and submit the claim for compensation for non-pecuniary loss in accordance with the Act and regulations.[25] The Fund is only obliged to compensate a third party for non-pecuniary loss if: (i) the claim is supported by a serious injury assessment report submitted in terms of the Act and regulations, and (ii) the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in the regulations.[26]

[34] If the Fund is not satisfied that the injury has been correctly assessed, the Fund must, within 90 days from the date on which the serious assessment report was sent to it by registered post or delivered by hand, accept or reject the serious injury report or direct that the third party submit himself or herself to a further assessment.[27] Where a further assessment was obtained, the Fund must either

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[22] GNR.770 of 21 July 2008 *GG* 31249, as amended by R.347 of 15 May 2013 *GG* 36452.

[23] Regulation 3(1)(b). The regulation provides for the so-called Whole Person Impairment -, and narrative tests.

[24] Regulation 3(3)(a).

[25] Regulation 3(3)(b).

[26] Regulation 3(3)(c).

[27] Regulation 3(dA). Regulation 3(dA) was inserted by GNR.347 of 15 May 2013. Before the insertion of regulation 3(dA) regulation 3(d) only provided that the Fund must, when it is not satisfied that the injury has been correctly assessed, (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 costs of the Fund, to a further assessment to ascertain whether the injury is serious in terms of the method set out in the regulations.

accept or dispute the further assessment in the manner provided for in the regulations.[28]

[35] Regulation 3(4) provides for the manner in which either (i) the third party who wishes to dispute the rejection of the serious injury assessment report, or (ii) a third party or the Fund who wishes to dispute the 'assessment performed by a medical practitioner', needs to proceed. The regulation prescribes that the disputant shall within 90 days of being informed of the rejection or the assessment, notify the Registrar[29] that the rejection or the assessment is disputed by lodging a dispute resolution form with the Registrar. The grounds on which the rejection or the assessment is disputed, including the submissions, medical reports and opinions the disputant wants to rely on, must be submitted together with the dispute resolution form.

[36] Regulation 3(5) then provides as follows:

> *'(a) If the Registrar is not notified that the rejection or the assessment is disputed in the manner and within the time period provided for in subregulation 4, the rejection or the assessment shall become final and binding unless an application for condonation is lodged with the Registrar as well as sent or delivered to the other party to the dispute.*
>
> *(b) A written response to the application may be submitted with the Registrar 15 days after the application for condonation and a reply thereto may be lodged within 10 days.*

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[28] Regulation 3(e).

[29] The term 'Registrar' is defined in regulation 1 to mean 'the Registrar of the Health Professions Counsel of South Africa established in terms of section 2 of the Health Professions Act, 1974 (Act No. 56 of 1974).

...

*(d) The Registrar shall refer the application for condonation together with any response and reply to the appeal tribunal'.*

**The plaintiffs' submissions**

[37] Plaintiffs' counsel submitted that a dispute resolution process is provided for in regulations 3(3)(d), 3(3)(e), 3(4) and 3(5). Both parties, that is the plaintiff and the Fund, are obliged to comply with the provisions of the regulations. With reference to *Road Accident Tribunal and Others v Gouws and Another,*[30] it may be inferred that regulation 3(4) finalises the process, with the 'finalising proviso' contained in regulation 3(5). Regulation 3(4) burdens the Fund in the event it elects to dispute an assessment submitted by plaintiffs, and regulation 3(5) provides for the Fund's 'inaction'. These [sub]regulations envisage a sanction contemplated by the legislature that renders an assessment final, which in turn confers jurisdiction upon a Court to pronounce on general damages. It finalises the administrative process unless an application for condonation is lodged as contemplated in regulation 3(5). Counsel submitted that no court has properly considered the obligations placed on the Fund by regulations 3(4) and 3(5). Existing case law fails to deal with the result of the Fund's failure to meet the compulsory obligations placed on the Fund in terms of regulations 3(4) and 3(5). Counsel submitted that regulations 3(4) and 3(5) are unambiguous and capable of the interpretation assigned to it by the plaintiffs without arrogating to the court the powers of the legislature.

**The defendant's submissions**

[30] 2018 (3) SA 413 (SCA).

[38] The defendant's submissions commence with a brief historic oversight. The court is reminded that prior to the Road Accident Fund Amendment Act 19 of 2005 (the RAFAA), any person who suffered any non-pecuniary loss as a result of bodily injury caused by or arising from the driving of a motor vehicle was entitled to a claim for general damages. Claimants were consequently entitled to general damages for the most minor of injuries. This was one of the reasons for the Fund's liabilities to exceed the income derived from the fuel levy, and the situation eventuated in the appointment of the Satchwell Commission. In accordance with the recommendations of the Satchwell Commission, the Fund's liability in respect of general damages was limited to claimants that have suffered serious injury when the RAFAA commenced.

[39] The RAFAA and regulations introduced a paradigm shift in respect of a claim for non-pecuniary loss. Subsequent to the commencement of the RAFAA and the regulations: (i) general damages may only be awarded for injuries that have been assessed as serious in terms of the RAF Act and regulations, (ii) the assessment of injuries as serious has become an administrative rather than a judicial decision and is a determination that lies with experts. The legislature chose to adopt a model in terms of which the decision of whether or not an injury is serious enough to meet the threshold requirement for an award of general damages is conferred on the Fund and specialists, and not the court.

[40] Counsel for the Fund described the process provided for regarding the assessment of a serious injury as follows: A medical practitioner assesses a claimant and decides whether to certify an injury as serious or not. If the medical practitioner certifies the injury as serious, the Fund has the discretion to accept the certification or not. Where the Fund does not accept the medical practitioner's certification of an injury as serious, it may refer the claimant to a further medical practitioner for assessment, or simply reject the contention of seriousness. If the

Fund rejects the seriousness assessment, a plaintiff must either accept the rejection or insist on a referral to a specialist tribunal. Where the Fund does not straight away reject the contention of seriousness, but refers a patient for a further assessment, then, Counsel contended, whichever party is dissatisfied with the determination of that further medical practitioner's assessment must, likewise, refer the dispute to a tribunal. If the Fund does nothing, after receipt of the first serious assessment report, the claimant must take steps to force the Fund to take a decision, and if that decision is adverse, the claimant must dispute the decision by referral to a specialist tribunal. It is only the further serious injury assessment that will become binding if it is not rejected within 90 days by either the claimant or the Fund.

[41] Counsel for the Fund reiterated that the Supreme Court of Appeal has gone so far as to hold that a claimant has no claim for general damages until such time as the Fund is satisfied that the injury is a serious injury, or the appeal tribunal has determined it as such in terms of the regulations.[31] So entrenched is the Fund's entitlement to determine whether a claimant's injury has been correctly assessed as a serious injury, that the Fund has the right to dispute the findings of its own expert.[32] The decision of the Fund or the appeal tribunal is not subject to an appeal to the court.[33] The Fund is an organ of State as defined by s 239 of the Constitution and performs a public function. In the event that the Fund fails to make a decision within 90 days, the claimant is entitled and obliged to utilise the remedies provided under the Promotion of Administrative Justice Act (PAJA).[34] The SCA

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[31] *Road Accident Fund v Duma and three similar cases 2013 (6) SA 9 (SCA) (Duma)* at par [19] and *Road Accident Fund v Lebeko* 2012 JDR 2176 (SCA) [2012] ZASCA (*Lebeko*).

[32] *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA) (*Faria*) at par [31].

[33] Regulation 13(3).

[34] 3 of 2000.

held in *Mpahla v Road Accident Fund (Mphahla)*[35] that the Fund is not deemed to have accepted that the claimant suffered a serious injury in the event that it has not communicated a decision within 90 days. Therefore, counsel submitted, any suggestion by the plaintiffs or *amici curiae*, that a court may itself accept medical evidence to the effect that an injury is serious, or the serious injury assessment submitted by the plaintiff in the absence of a decision by the Fund that it is satisfied that the injury has been correctly assessed as serious, is ill-founded, and has been rejected by the Supreme Court of Appeal.

**The submissions by the *amici curiae***

[42] The *amici curiae* highlighted the problems that plaintiffs and the courts face because the Fund is, in the overwhelming majority of cases, not legally represented and most RAF matters proceed on a default basis.

[43] The Pretoria Attorneys Association and Mr. Marinus Coetzee are, respectively, the first and second *amici.* They highlight that litigants may wish to take advantage of the RAF's default in those cases where the Fund is not represented. It was submitted on their behalf that regulation 3(5) does not confer jurisdiction on the court to adjudicate general damages prior to a decision from the Fund. The court was referred to *RS v Road Accident Fund*[36] (*RS*) where the court, with reference to *Bee v Road Accident Fund*[37] (*Bee*) and *Thomas v BD Sarens (Pty) Ltd*[38] awarded compensation for general damages despite the Fund's rejection of the seriousness of the injuries. In *RS* the seriousness of the plaintiff's injuries was established by a joint expert minute that, in line with the *Bee*, bound the court. Accordingly, if a litigant wished not to be bound by such an agreement,

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[35] (698/16) [2017] ZASCA 79 (1 June 2017) at par [14].

[36] (49899/17) [2020] ZAGPPHC (21 January 2020) at para [30] – [32].

[37] 2018 (4) SA 366 (SCA) at par [6].

[38] [2012] ZAGPJHC 161 (2012) JDR 1711 (GSJ).

the litigant ought to repudiate the concession by its expert timeously. The court in *RS*, however, did not refer to *Faria,* and counsel accordingly submitted that the judgment in *RS* is open to criticism and was wrongly decided.

[44] As the third *amicus*, Brits & Beukes Inc. dealt with the Fund's submission that where the Fund fails to accept or reject a plaintiff's serious injury report or request a further assessment, a plaintiff should launch an application in terms of s 6(2)(g) and s 6(3)(b) of PAJA to compel the defendant to make such decision. The plaintiff faces a predicament, however, if the Fund still fails to comply with the court order granted in terms of s 6(2)(g) and s 6(3)(b) of PAJA. The Health Professions Counsel of South Africa HPCSA, as an appeal tribunal, can only be approached once the plaintiff is provided with a rejection letter. As a result, if the Fund is correct in its submissions, regulation 3 does not provide recourse to a plaintiff where the Fund fails to reject the serious assessment or to request a further assessment. It would never have been the intention of the legislator to leave a plaintiff 'remediless and at the mercy of the defendant'. This *amicus* submitted that all the cases referred to by the Fund, being *Duma, Mphala* and *Lebeko* are distinguishable on the basis that in all those cases the serious injury assessment reports were rejected. In those instances, this *amicus* submitted, it is in agreement that courts cannot dispose of general damages without the HPCSA Appeal Tribunal having been approached. This *amicus* nevertheless submitted that in a case where the 90-day period has lapsed and the plaintiff has brought an application in terms of PAJA to compel the Fund to make an election and the Fund remained in contempt of such an order, the court should finalise the determination of general damages to prevent an injustice to the public at large.

[45] Frans Schutte Mathews Phosa Inc., the fourth *amicus curiae*, was critical of the fact that the Fund's impasse led to the present situation. The Fund fails to accept or reject serious injury assessment reports, and then 'comfortably' takes

the position that the court cannot make a finding regarding the seriousness of an injury in any circumstances where a plaintiff's RAF4 (the serious injury assessment) has not been accepted or rejected. This cannot be equitable toward a plaintiff. Based on the judgment in *Baliso v Firstrand Bank Limited t/a Wesbank,*[39] the fourth *amicus* submitted that the court was entitled to proceed on the basis that the allegations made by the plaintiff have not been disputed. All that remains then, is for the court to hear evidence regarding the quantum of the claim, including the quantum of general damages.

[46] The fourth *amicus* compared the position where a plaintiff seeks to be granted general damages by default, to a defendant in a negligence claim who either files no plea or does not place the plaintiff's own fault in dispute. The Fund's failure to plead that it has declared a dispute regarding a plaintiff's positive serious injury assessment should allow the court to accept that the Fund does not dispute such serious injury assessment and is accordingly satisfied with it. This, the *amicus* submitted, is not the consequence of any deeming provision but the inevitable conclusion to be reached from the Fund's failure to place its case before court. An alternative argument raised is that where a plaintiff has obtained both an order striking the Fund's defence and an order in terms of PAJA to compel the Fund to make a decision as required by regulation 3(3), and the Fund still fails to take the decision, the remedy provided for in s 8(2) of PAJA allowing the court to make a substituting decision is automatically triggered. In cases where the court then rejects a serious injury assessment report, the plaintiff would be at liberty to proceed with the appeal process provided for in the regulations and approach the HPCSA.

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[39] 2017 (1) SA 292 (CC) at par [12].

[47] The Black Lawyers Association is the fifth *amicus*. It lamented the fact that regulation 3 in its current form is a cumbersome and unnecessary regime. The submission was made that regulation 3(3)(b) is *ultra vires*, but since this court is not seized with a review application and that was not the issue directed to it for consideration, this submission cannot be dealt with, irrespective of its merits. The *amicus* submitted, however, that regulation 3(c) ousted the jurisdiction of the court and that a claimant cannot proceed with its claim if the Fund is not satisfied that the injury has been assessed correctly. The Fund's decision to accept or reject a serious assessment report is an administrative decision. Due to the nature of the decision, substitution is out of the question since courts are not equipped to determine whether an injury is serious.

[48] It was submitted on behalf of Ms. Sizakele Florence Gumede, the sixth *amicus*, that exceptional circumstances may exist that exempt a plaintiff from exhausting internal remedies, where the Fund fails or refuses to accept or reject the serious injury assessment report, allowing the court to adjudicate on the issue of general damages, e.g. where the seriousness of the injury is a foregone conclusion as in cases where the plaintiff suffered severe neuro-cognitive damage or are rendered quadriplegic as a result of a motor vehicle accident. This *amicus* submitted that regulation 3(5) should be interpreted to mean that where the Fund does not notify the Registrar that it rejects the serious injury assessment, the assessment becomes final and binding, in which case a court can proceed to quantify the general damages.

**Discussion**

[49] It is clear from the case law referred to above that a court does not have the jurisdiction to find that injuries sustained by any plaintiff constitute serious injury or qualify for a claim for general damages in the absence of the injury having been classified as a serious injury in accordance with the process prescribed in

the said regulation.[40] This being said, however, this matter calls for the consideration of the 'process prescribed in the said regulation'. It is necessary to determine whether a plaintiff is entitled to pursue the adjudication of general damages at trial without the injury being found to constitute a serious injury by the Fund, where the defendant is in default and the Fund had not accepted nor rejected the serious injury assessment report, regard being had to the specific obligations placed upon the Fund.

[50] With the benefit of the context provided by the parties and the *amici*, it is necessary to consider the two judgments by the Supreme Court of Appeal that dealt with the question of whether a court can entertain the issue of general damages where the Fund has not accepted a serious injury assessment report submitted to it.

[51] In *Duma*, the matrix of the legislative scheme regulating the Fund's liability to compensate a third party for general damages, or non-pecuniary loss as it is called in the section, has received consideration. The learned judges of appeal explained that regulation 3 prescribes the method contemplated in s 17(1A) for the determination of 'serious injury'. For completeness sake it is necessary to have regard to the SCA's exposition of the framework of regulations 3:

> *'As a starting point it provides in 3(1)(a) that a third party who wishes to claim general damages 'shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations'. In terms of 3(3)(a) a third party who has been so assessed, 'shall obtain from the medical*

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[40] See *inter alia Faria*.

*practitioner concerned a serious injury assessment report' ... In terms of regulation 3(3)(c) the Fund is only liable for general damages 'if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in these Regulations.' If the Fund is not so satisfied, it must, in terms of regulations 3(3)(d), either: (i) reject the third party's RAF 4 form and give its reasons for doing so, or (ii) direct that the third party submits himself or herself to a further assessment at the Fund's expense by a medical practitioner designated by the Fund in accordance with the method prescribed in regulation 3(1)(b).*

*As to what then happens, regulation 3(4) provides that, if the third party disputes the Fund's rejection of the RAF 4 form (under regulation 3(3)(d)(i)) – or if either the third party or the Fund wishes to challenge the assessment by the medical practitioner designated by the Fund (under regulation 3(3)(d)(ii)) – 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 within 90 days of being informed of the rejection or the impugned assessment. Regulation 3(5)(a) then goes on to say that if this is not done, the rejection of the RAF 4 form or the assessment by the Fund's designated medical practitioner, as the case may be, shall become final and binding*[41].

[41] *Duma* at paragraphs [6] to [9].

[52] Brand JA, writing for the court of appeal, stated that in accordance with the model that the legislature had chosen to adopt as far as the classification of an injury as a serious injury is concerned, the decision of whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the court. The learned judge of appeal explained it as follows:

> '*This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious*'[42].

[53] Brand JA further pointed out that the decision in terms of regulations 3(3)(c) and 3(3)(d), whether or not the serious injury assessment report correctly assessed the plaintiff's injury as serious, constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA):

> '*(b) If the Fund should fail to take a decision within reasonable time, the plaintiff's remedy is under PAJA.*
>
> *(c) If the Fund should take a decision against the plaintiff, that decision cannot be ignored simply because it was not taken within a reasonable time or because no legal or medical basis*

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[42] *Duma* at para [19].

*is provided for the decision or because the court does not agree with the reasons given.*

*(d) A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.*

*(e) Neither the decision of the Fund nor the decision of the appeal tribunal is subject to an appeal to the court. The court's control over these decisions is by means of the review proceedings under PAJA'*[43].

[54] In *Mpahla* the Supreme Court of Appeal was again called upon to decide the question whether the court can entertain a claim for general damages in the absence of the Fund accepting the serious injury assessment report. The appellant in *Mpahla* contended before the High Court that on a proper construction of regulation 3(3)(dA), the Fund is deemed to have accepted that the appellant sustained a serious injury, because it did not reject the serious injury assessment report or direct the appellant to submit to a further assessment as provided for in regulation 3(3)(d)(ii) after the incorporation of s 3(3)(dA) to regulation 3. The appellant submitted that regulation 3(3)(dA) should be interpreted to mean '*that if the Fund fails to accept or reject a claimants SIA report, or fails to direct that a claimant submit himself or herself to a further assessment within the 90-day period prescribed by the regulations, then the Fund is deemed to have accepted the injury as serious*'. The argument advanced by the appellant, was that with the promulgation of the new regulation that was introduced immediately after the court's judgment in *Duma* the legislature inserted a 90-day limitation period in the regulation in order to address the concerns raised in *Duma*.

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[43] Duma at para [19].

[55] The SCA held that:

> '*An interpretation that seeks to suggest that because the Fund did not make a decision within 90 days of receipt of the SIA report, it is deemed to have accepted that the third party has suffered serious injuries is untenable and in conflict with the provisions of subsections 17(1) and 17(1A) of the Act, and regulation 3. It is always open to the Fund to reject the SIA report when it is not satisfied that the injury has been correctly assessed in terms of regulation 3(3)(dA). This regulation does no more than prescribe a period within which the Fund can reject or accept the report. It would be an anomaly if, in terms of regulation 3(3)(dA), where the Fund has failed to make a decision within the prescribed period, an otherwise not serious injury would by default become serious because of the delay. 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, not to create a presumption in favour of a claimant that the injury in question is a serious one*'[44].

[56] The crux of the SCA's finding in *Mpahla* is that whilst regulation 3(3)(dA) –

> '*seeks to define the rights of claimants in unambiguous terms and afford them an opportunity after 90 days to apply for a*

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[44] *Mpahla,* at par [14].

*mandamus in terms of PAJA to compel the Fund to make a decision. It was specifically enacted to deal with the mischief identified by this court in Duma relating to the phrase 'within a reasonable time' which caused uncertainty to claimants' it is not a deeming provision'*[45].

***Interpreting 'assessment'***

[57] In this case, the plaintiffs' submissions turn on the point that regulation 3(5) provides finality in the administrative process in that, on their interpretation of regulation 3(5) the serious injury assessment report becomes final if the Fund did not notify the Registrar that it is disputed in the manner and within the time period provided for in subregulation 4. The plaintiffs interpret the term 'assessment' as it appears in regulations 3(4) and 3(5) to incorporate both the 'serious injury assessment report' and the 'further assessment'.

[58] On reading regulation 3, it becomes apparent that the regulation provides for the assessment of a plaintiff by a medical practitioner at two distinct stages in the prescribed process, and it differentiates between the medical assessments provided for by using different terminology. At first, a 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 the regulations. The third party whose injury has been assessed shall thereafter obtain from the medical practitioner a 'serious injury assessment report'. Regulations 3(3)(a) to 3(3)(d)(i) and 3(3)(dA) refer solely to the 'serious injury assessment report'. The second stage at which a medical assessment comes into play, is where the Fund, after having received the 'serious injury assessment report' directs that the third party submit himself or herself to a further assessment to ascertain whether the injury

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[45] *Mpahla*, at par [17].

is serious. This 'further assessment' is thereafter referred to as the 'further assessment' in regulation 3(3)(e), or 'the assessment' in regulation 3(4) and 3(5), with an explicit differentiation being made between the 'serious injury assessment report' and the 'assessment' in regulation 3(4).

[59] In considering whether the term 'assessment' is to incorporate the meaning 'serious injury assessment report' sight should not be lost of the principle set out in *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd:*[46]

> '*In the construction of statutes a deliberate change of expression is prima facie taken to import a change of intention*'.

[60] As the process prescribed for the assessment of injuries in regulation 3 enfolds when the regulation is systematically analysed, it becomes apparent that the term 'assessment', as it appears in regulations 3(3)(d)(ii), 3(4) and 3(5) cannot be interpreted to refer to the 'serious injury assessment report'. The deliberate use of the term 'assessment' *viz-a-viz* 'serious injury assessment report' in the structure of the regulation 3 process, denotes that the term 'assessment' is used to refer to the process that follows when the Fund directed a plaintiff to undergo a 'further assessment'.

[61] It is evident that the SCA in *Duma* was alive to the fact that the regulation 3 processes might, depending on the circumstances, require the plaintiff to undergo medical assessments at two distinct stages. Brand JA recognised the differentiation between the 'serious injury assessment report' and the 'further assessment', and referred to the former as the 'RAF 4 form'. The plaintiff's

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[46] 1947 (2) SA 1269 (A) at 1279.

contention that that no court has properly considered the obligations placed on the Fund by regulations 3(4) and 3(5) is thus without merit.

[62] The reality of the Fund revealing itself as a defendant with little respect for the litigation process and seemingly little regard to fulfil its statutorily entrenched administrative functions by accepting or rejecting serious assessment reports or directing plaintiffs to further assessment, was not foreseen by the Supreme Court of Appeal when the *Duma* decision was handed down. One cannot but regard with irony, Brand JA's remark that:[47]

> '*First, an application [in terms of PAJA] may often not be necessary. The Fund may very well react to a letter of demand and, all things being equal, should do so. Incidentally, in none of the four cases on appeal, did the plaintiff seem to consider a resort to this rather obvious and inexpensive solution*'.

[63] Although the court in *Duma* did not at the time foresee the extent of the Fund's recalcitrance or delinquency, the SCA unequivocally stated that the satisfaction of the Fund that an injury has correctly been assessed as a serious injury, is a jurisdictional fact that needs to be established before a claim for general damages can be entertained by a court. The Supreme Court of Appeal unequivocally held that a plaintiff 'simply has no claim for general damages' in the absence of the Fund accepting the serious injury assessment report.

[64] Already in *Duma,* the SCA foresaw that, should the *mandamus* solution prove to be unaffordable, and, in the circumstances of this case it can be added, ineffective,

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[47] *Supra*, at par [21].

> *'the answer may lie in an approach to the legislative authorities or perhaps a constitutional challenge of the regulation. What is plain, however, is that it cannot justify a deviation from the procedure pertinently prescribed by regulation 3'.*

**Conclusion**

[65] The Fund's failure to accept or reject serious injury assessment reports even after being compelled to do so, does not detract from the Supreme Court of Appeal's interpretation that regulation 3 renders a court without jurisdiction to entertain a claim for general damages where the Fund has not accepted a plaintiff's serious assessment report. In view of the above, it is evident that a deviation from the procedure pertinently prescribed by regulation 3 cannot be justified, not even where the Fund is in default.[48] We thus agree with the defendant's submission that it is only the further assessment called for by the Fund that will become binding if it is not rejected within 90 days by either the claimant or the Fund, and not the serious injury assessment report that a plaintiff needs to submit for it to be considered by the Fund. We are bound by the decisions in *Duma* and *Mpahla* and the *stare decisis* principle prevents this court from dealing afresh with the legal issue at hand as a court of first instance. Until the constitutional validity of regulation 3 is successfully challenged, or the legislature steps in to ameliorate the position, plaintiffs have no other option than to seek relief in terms of PAJA.

**Costs**

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[48] See also *Maqhutyana and Another v Road Accident Fund* (CA 17/2020) [2021] ZAECMHC 30 (17 August 2021).

[66] The general principle is that costs should follow the event. In the present instance, where the answers to the questions that this court had to decide do not necessarily resulted in "success" for any of the parties, the more overriding principle is that a decision relating to costs should be "a matter of fairness to both sides"[49].

[67] In the present instance, it is clear that it is as a result of the Fund's inaction or delinquency, that the disputes which had been placed before this full court, have arisen. In fact, the virtual abdication of its duties regarding litigation and the consequential burdening of the judiciary has been conceded by the Fund's counsel in heads of argument filed on behalf of the Fund, in our view correctly so. In dealing with the Fund's attempt at using settlement processes or the State Attorney, as set out in the affidavit by the CEO of the Fund, the following summary of the position has been submitted to this court:

> "*... the fact is as things stand, we cannot deny that a hopefully temporary situation has already endured for 25 months, in which situation the [Fund] has effectively largely abdicated its control functions to the courts, through the default judgment process. It is consequently regrettable that the [Fund] has, by force of circumstances, had to place its trust in the court with regard to the scrutinizing of applications for default judgment and the granting of such judgments*".

[68] We have in the introduction to this judgment referred to the litigation delinquency of the Fund, which has now been underlined by the above concessions. The virtual abdication of its responsibilities, not only to plaintiff-litigants, but also to the Court, justifies, in our view the exercise of our discretion regarding costs, against the Fund. This foreseeable result has been accepted by

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[49] Van Loggerenberg, *Erasmus Superior Court Practice* at D5 – 6 and the cases cited in footnote1, starting with *Fripp v Gibbon & Co* 1913 AD 354.

the Fund in the written heads of argument submitted on its behalf. We find further that, in respect of the plaintiffs, they should not be out of pocket for litigation costs which the Fund could, and should have prevented[50]. As a mark of our displeasure, we are of the view that this justifies a costs order on the scale as between attorney and client.

[69] As far as the *amici* goes, we are grateful for their contributions and assistance. Even though the *amici* were motivated by wide-ranging reasons to take part in (or in some instances even attempted to intervene) in the joint hearing of the matters, they were not so compelled to participate in the same measure as, by necessity, the plaintiffs were. Different considerations should therefore apply. For this reason, although we find that the Fund should pay the costs of the *amici*, it should be on the scale as between party and party, the balance of costs remaining a consequence of the *amici's* own choice of becoming involved in litigation.

**Order**

[70] In the premises the following orders are granted:

1. It is declared 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. It is noted that the Road Accident Fund has, during the course of the hearing of this matter conveyed a "blanket election" to furnish an undertaking to compensate plaintiffs claiming compensation in terms of

[50] See in this regard *De Sausa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 655C – 655J.

section 17 of the said Act, in respect of costs for the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying goods to him on her, after such costs have been incurred and on proof thereof or to the provider of such service or treatment directly, and the Road Accident Fund has tendered that courts can take judicial notice of this election.

3. It is declared 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).

4. The Road Accident Fund is ordered to pay the costs of the plaintiffs in case numbers 77573/2018 and 54997/2020, on the scale as between attorney and client, including the costs of two counsel, where employed and that of the curator *ad litem* in case no 77573/2018.

5. The Road Accident Fund is ordered to pay the costs of the *amici curiae*, on the scale as between party and party, including the costs of two counsel, where employed.

6. Matters 77573/2018 and 54997/2020 are postponed *sine die* and it is directed that those actions henceforth proceed separately before the judges seized with the matters.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

E VAN DER SCHYFF
Judge of the High Court
Gauteng Division, Pretoria

M MUNZHELELE
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 24 & 25 May 2022

Judgment delivered: 2 November 2022

APPEARENCES

In case no: 77573/2018 and 54997/2020

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|---|---|
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| Attorney for the Plaintiffs: | Surita Marais Attorneys, Pretoria |

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| For the 5th Amicus: | Adv F R Memani together with Adv K M Choeu |
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