Recent case law

RS v Road Accident Fund (49899/17) [2020] ZAGPPHC (21 January 2020)

Third party claim- Eleventh hour rejection of seriousness of injury- Not to follow the appeal process in terms of Regulation 3

1 Introduction

In this case the plaintiff, *Salig*, claimed damages from the defendant, the *RAF*, for the harm that it had suffered arising from the negligent driving of a motor vehicle by the insured driver. The defendant accepted liability in respect of all of the harm suffered by the plaintiff, but the *quantum* pertaining to loss of income and general damages remained in dispute. This case note concerns solely the part of the judgment that dealt with general damages.

2 Applicable law

General (or '*non-patrimonial*') damages is a reduction in a legal subject's quality of highly personal interests that does not change his/her economic position [Visser & Potgieter *Skadevergoedingsreg* (2003) 97; *Edouard v Administrator Natal* 1989 (2) SA 368 (D) at 386]. According to Visser and Potgieter, personality interests includes a person's physical integrity, pain and suffering, emotional shock, disfigurement, a reduced life expectancy and loss of life amenities, and because of the personal, non-pecuniary and subjective nature of these interests, it is difficult to quantify, yet it remains recoverable [*Hendricks v President Insurance* 1993 (3) SA 158 (C); Visser & Potgieter *Skadevergoedingsreg* (2003) 101-105].

Prior to 1 August 2008, road accident victims (or third parties) could claim general damages from the Road Accident Fund (hereinafter '*the Fund*' or '*RAF*') without any limitations:[see *Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena* 2013 (6) SA 9 (SCA) para 3]. On 1 August 2008 the Road Accident Fund Amendment Act 19 of 2005 took effect, thereby amending section 17(1) of the Road Accident Fund Act 56 of 1996, by introducing limitations on the Fund's liability for general damages. 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.*' [see Section

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17(1)(b) of the Road Accident Fund Act 56 of 1996, as amended]. Section 17(1A) provides that the assessment of the seriousness of an injury shall be premised on a prescribed method. Section 26(1A) provides that the Minister may make regulations regarding the method of assessment of a serious injury.

The Road Accident Fund Regulations of 2008 were promulgated by publication in the Government Gazette of 21 July 2009. Regulation 3 deals with the method of assessing a serious injury. Regulation 3(1)(a) provides that a third party wishing to claim general damages must be assessed by a medical practitioner. Regulation 3(3)(a) provides that such a third party shall obtain a serious injury assessment report (defined by Regulation 1 as a duly completed RAF 4 form) from this medical practitioner.

In terms of Regulation 3(3)(c), the Fund is only liable to compensate the third party for general damages in the event that the Fund is satisfied that the injury has been correctly assessed as prescribed by the Regulations in general. When the Fund is not satisfied that the third party's injuries were correctly assessed, the Fund can reject the third party's RAF 4 form and give reasons for its rejection [Regulation 3(3)(d)(i)] or direct the third party to a further assessment to establish if the injury is serious [Regulation 3(3)(d)(ii)]. In the event of the latter, Regulation 3(3)(e) allows the Fund to either accept the further assessment or to dispute it.

The Supreme Court of Appeal in *Duma* at para 19 held that the model which the legislature chose in deciding whether the third party's injuries are serious or not, confer the decision on the Fund and not the court. Unless and until the Fund made such a decision, the court's jurisdiction in adjudicating the third party's claim for general damages is ousted. [*Duma* para 19]. This is premised on the absence of a jurisdictional fact for the court to adjudicate the third party's claim for non-patrimonial harm. [*Duma* para 19]. At para 20 the SCA went further to hold that, in the event that the Fund rejects the third party's RAF 4 form, whether proper reasons are submitted or not, the requirement that the Fund must be satisfied that the third party's injuries are indeed serious is not met, and the court's jurisdiction is ousted. The court further held that the Fund's rejection of an RAF 4 form cannot be ignored and the procedure deviated from merely because the RAF 4 form was not rejected within a reasonable time [*Duma* para 20].

Notwithstanding the above, the SCA in *Duma* was mindful that the Fund may avoid and frustrate claims of third parties indefinitely by not deciding on seriousness of the third party's injuries [see para 20]. At para 20, the SCA held that a third party's remedy lies in sections 6(2)(g) and 6(3)(a) of the Promotion of Administrative Justice Act 3 of 2000. These sections allow for a judicial review of administrative authorities' failure to take a decision. Claimants are often indigent and must incur further legal expenses to prosecute their claim for general damages [*Duma* para 21].

When *Duma* was handed down, there was no prescribed time period in which the Fund had to exercise its decision making right (and duty) and decide on the seriousness of a third party's injuries, as contemplated by Regulation 3(3)(d). After *Duma*, amended Regulations were promulgated by publication on 15 May 2013 in Government Gazette 36452. Regulation 3(3)(dA) now provides that the Fund must '*within 90 days from the date on which the serious injury assessment report was sent by registered mail or delivered by hand to the Fund…accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment'*.

I can do no better than the SCA in *Road Accident Fund v Faria* [2014 (6) SA 19 (SCA)], at para 36, where it was held that: *The amendment Act, read together with the Regulations, has introduced two 'paradigm shifts' that are relevant to the determination of this appeal: (i) general damages may only be awarded for injuries that have been assessed as 'serious' in terms thereof and (ii) the assessment of injuries as 'serious' has been made an administrative rather than a judicial decision. In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts. Past legal practices, like old habits, sometimes die hard. Understandably, medical practitioners, lawyers and judges experienced in the field may have found it difficult to adjust. As the colloquial expression goes, 'we are all on a learning curve'*.

3 A summary of *RS v RAF*

It is against this backdrop that the *RS v Road Accident Fund* (49899/17) [2020] ZAGPPHC 1 (21 January 2020) judgment by Potterill, J, which was marked reportable and of interest to other judges, must be critically considered. From para 33 it becomes clear that the experts employed by both parties agreed that the third party's injuries are indeed serious, but the Fund rejected the third party's injuries as being serious on the morning of trial [para 29], despite such an agreement between the experts.

At para 30-32, in referring to the SCA judgment of *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 66, [and at para 20 to *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 (2012) JDR 1711 (GSJ)] the court made an award of R800 000.00 for general damages, despite the Fund's rejection of the seriousness of the injuries. The court acknowledged that it does not have the necessary jurisdiction to decide whether injuries are serious or not in line with *Meyer v RAF* [(52229/2011) [2013] ZAGPPHC 446 (4 December 2013)] where the same Potterill, J held that the court does not have such jurisdiction [para 31].

Potterill, J then concluded in *RS v RAF* that the fact that the court does not have jurisdiction to adjudicate the plaintiff's claim for general

damages is still the case, but in light of the agreement by the experts employed by both parties in their joint minutes employed, it was not the court that assessed whether the injuries are in fact serious. The seriousness was established by a joint expert minute that, in line with the *Bee* judgment, binds the court. Accordingly, if a litigant wished not to be bound by such an agreement, the litigant ought to repudiate the concession by its expert timeously [para 32].

The court found that it is a norm and a practice for the RAF to reject the seriousness of a claimant's injuries on the morning of trial, causing RAF matters in general not be become finalised and where judges are overburdened with RAF matters [para 34]. Ordering that this practice must stop, the court at para 34 held that where experts agree that a third party's injuries are serious, and in the absence of a timeous repudiation based on good reasons, not a single matter will be referred to the Health Professions Council of South Africa (HPCSA). Put differently, a litigant will not be allowed to exercise the remedies as provided in Regulation 3(4) that allows a third party to dispute the Fund's rejection of its RAF 4 form, if it does not timeously repudiate a joint expert minute. No reference is made in the *RS v RAF* judgment to *dicta* of *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA).

4 Discussion

It is probable that the bodily injuries suffered by the plaintiff in *RS v RAF* were indeed serious as contemplated by RAF regulation 3(3)(c) and, as was described in *Faria* at para 36, the court may have been exasperated by the stance of the Fund in rejecting the general damages. However, for the reasons listed below, it is proposed in this case note that this does not justify a departure from the legislative scheme in terms of which the Fund is not bound by the opinion of even its own experts [*Faria* para 34].

In awarding general damages in *RS v RAF*, the court made a judicial decision that is reserved for the administrator, specifically the RAF: See *Faria* at para 34. The SCA in *Duma* at paras 19-20 held that the decision to decide on the seriousness is conferred on the Fund, not the court and until the Fund decided that the injuries are serious, the court's jurisdiction is ousted. The rejection cannot be ignored merely because it is not made timeously. The fact that experts agree in a joint minute that the third party's injuries are serious does not amount to a jurisdictional fact, as the SCA in *Duma* clearly held at para 20 that: *'To recapitulate; if the Fund rejects the RAF 4 form – with or without proper reasons – it means that the requirement that the Fund must be satisfied that the injury is serious has not been met. In that event the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim.'* The judge in *RS v RAF* also failed to appreciate that the law does not permit her to reject the RAF's repudiation of general damages based on an expert joint minute, which was a question of law and not one of fact to be agreed by experts [See *Faria* at para 22] and to this end, experts cannot by compiling a joint expert minute bind a court

on questions of law: See *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 72.

Potterill, J failed to consider the well-known *dicta* of *Faria* 2014 (6) SA 19 (SCA), which judgment dealt with the same question that the court was seized with in *RS v RAF*. At para 15 of *Faria*, the court referred to the finding in the court *a quo* (per WEINER J) which held that a court is bound by a joint minute where experts agree that a third party's injuries are serious. The court *a quo* in *Faria* held that the Fund's objection to the RAF 4 form falls away in light of the agreement between opposing experts that the third party's injuries are indeed serious.

In upholding the appeal, the SCA in *Faria* at para 34 held that: '*In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts'*. The *dicta* of *Faria* is not inconsistent with the judgment of *Thomas v BD Sarens supra* where it was held at para 9 that establishing the facts is the preserve of the court, but for one exception that is where parties agree on the facts. An important distinction must be drawn between facts agreed to amongst experts that will bind a court on the one hand [See *Bee* para 66 and *Thomas* para 9] and questions of law or questions reserved for the administrator on the other hand, where the court cannot interfere in the absence of a jurisdictional fact as to do so would amount to judicial overreach.

Potterill, J in her earlier decision of *Meyer v Road Accident Fund supra* at para 9 correctly held that: '*The Fund has the jurisdiction to decide whether it is a serious injury, has the jurisdiction do so with an inordinate delay and for no good reasons, but then the exercise of their discretion under those circumstances is exercised at the risk of costs on a punitive scale being awarded against them.*'. Why judge Potterill, J strayed from this sound judgment is not known nor elucidated; and it cannot competently be ascribed to the subsequent *Bee* decision as *Bee* merely endorsed *Thomas* that was handed down as far back as 2012 and did not question or overrule *Faria*.

The essentially administrative nature of the process was emphasised by the SCA in *Mahano and Others v Road Accident Fund and Another* 2015 (6) SA 237 (SCA) and *Road Accident Appeal Tribunal v Gouws* 2018 (3) SA 413 (SCA).

In *SG v RAF*, Potterill, J at para 34 held that not a single case will be allowed to be referred to the HPCSA where: (a) opposing experts in a joint minute agree that a third party's injuries are serious and (b) where the repudiation of such a joint minute is not timeously made. This is in direct contradiction of the *Bee* decision at para 69 where the court held that, whether a trial court will allow a disruption (late repudiation), will depend on the circumstances. Thus, irrespective of any other existing facts or

circumstances, where the above two conditions are met, the Fund will be barred from employing the remedies established in terms of Regulation 3(4) and will be compelled to compensate the third party for non-pecuniary damages. The SCA in *Faria* at para 36 already held that there are conceivable situations where further exploration may be justified notwithstanding an expert agreement that a third party's injuries are serious. The court in *Bee*, at para 67 held that it was not necessary to consider if a litigant need to have a good cause for repudiating a joint expert minute, giving credence to the notion that there may well be good cause for repudiating a joint minute, even at the proverbial eleventh hour.

5 Conclusion

The correct decision in *Salig* would have been to order that the general damages be referred to the HPCSA in terms of the Appeal process prescribed by regulations 3 and to punish the Fund with a punitive cost order as was the case in *Meyer v Road Accident Fund* at para 9 where the general damages claim was rejected on the morning of the trial and in *Jacobs v Road Accident Fund* 2013 JDR 2276 (GNP) where the general damages claim was rejected on the morning of the trial and the court ordered that the person at the Fund be identified who gave instructions that the RAF 4 form to be rejected only on the morning of trial and that this identified person must give reasons why costs should not be awarded on a de *bonis propriis* scale.

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