()REPORTABLE: YES/NO
()OF INTEREST TO OTHER JUDGES: YES/NO
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REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 2210/12

DATE: 12/03/2013

In the matter between

RUI FERNANDO FONSECA FARIA PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

J U D G M E N T

WEINER J:

BACKGROUND

1] In this matter, the plaintiff has sued the defendant under the Road Accident Fund Act, 56 of 1996 (the Act), for damages sustained as a result of a collision that occurred when the plaintiff was a cyclist along Kliprivier Road. The collision was between a motor vehicle with registration number SMN 449 GP, driven by one Ms Tladi and a bicycle, which the plaintiff was riding at the time.

2] The plaintiff alleged negligence and claimed damages in the total sum of R850 000.00, alleging that the plaintiff had suffered the following injuries;

2.1. a head injury (comatose for four and a half days);

2.2. right shoulder fracture requiring surgery;

2.3. four ribs fractured on the right side;

2.4. abrasions back, shoulder, buttocks.

2.5. abrasions knees, wrists, hands.

THE MERITS

3] The defendant has disputed both the merits and the quantum. At the hearing, I was informed by the defendant's counsel that he could not obtain instructions to concede the merits, but that the defendant has no witnesses to counteract the version of the plaintiff and that they were accordingly unable to dispute his evidence. I accordingly hold that the defendant shall be 100 percent liable for any damages proved by the plaintiff.

QUANTUM

4] In respect of the quantum, the parties have now agreed the past medical expenses in the sum R217 169.94. In regard to future medical expenses, the defendant will give an undertaking in terms of Section 17(4) of the Act.

5] The issues that then remain are the questions of general damages and future loss of earnings in the sense that the plaintiff's working capacity and productivity have been diminished. The plaintiff's counsel has informed me that they will seek those latter damages to be included in general damages in terms of the case of *Deysel v Road Accident Fund.*[1]

DETERMINATION OF SERIOUS INJURY

1 *Deysel v Road Accident Fund (2483/09) GSHC (24 June 2011)*

6] The question is whether or not this court can decide the issue of general damages or whether the matter needs to be referred to the tribunal set up in terms of the Act and the regulations, in order for the tribunal to determine whether or not this injury is of a serious nature. The court is empowered to decide the quantum, but not whether or not the injury is serious, if disputed by the defendant.

7] In this regard, the case of *Road Accident Fund v Duma and three related cases*[2] *(Duma)* is instructive. The SCA held that a serious injury is to be determined in accordance with the procedure prescribed in the regulations and it is not for the court to decide whether the injury is serious.

8] As appears in *Duma* at [5]:

"In terms of the Amendment Act in 2005, the all-important limitation on the Fund's liability for general damages was introduced as a proviso in Section 17(1) that 'the obligation of the Fund to compensate a third party for non pecuniary loss shall be limited to compensation for serious injury as contemplated in subsection (1)(A)".

9] The SCA went on to hold that Section 17(1)(A) provides that the assessment of whether or not a particular injury meets the threshold requirement of serious must be carried out by someone registered as a medical practitioner under the Health Professions' Act 56 of 1974 (*the HPA*) and on the basis of a prescribed method.

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2 *Road Accident Fund v Duma (202/12) and three related cases (Health Professions' Council of South Africa as Amicus Curiae) [2012] ZASCA 169 (27 November 2012).*

10] The Road Accident Fund Regulations of 2008 were promulgated on 21 July 2009. Regulation 3 prescribes the method contemplated in Section 17(1)(A) for the determination of serious injury. As a starting point, it provides in Section 3(1)(a) that if a third party wishes to claim general damages " *he/she shall submit himself or herself to an assessment by a medical practitioner in accordance with these regulations".*

11] In terms of Section 3(3)(a), a third party who has been so assessed shall obtain from the medical practitioner concerned a "*serious injury assessment report"*. This report is defined in Regulation 1 as "*a duly completed form RAF 4" and attached to the regulations as annexure "D".*

12] The RAF 4 form itself read with Regulation 3(1)(b) requires the medical practitioner to assess whether the third party's injury is serious in accordance with three sets of criteria. Firstly, the minister may publish a list of injuries which do not qualify as serious. Secondly, it would qualify as serious if it resulted in a 30 percent or more impairment of the whole person (WPI) as provided in the AMA guides, being Regulation 1 in the American Medical Associations Guide to the Evaluation of Permanent Impairment, 6th edition (*the AMA*). Thirdly, if an injury does not qualify as serious in terms of the above regulations, it may be assessed as serious under the so-called "*narrative test*" provided for in regulation 3(1)(b)(iii), if that injury

"*resulted in a serious long-term impairment or loss of body function, or it constitutes permanent serious disfigurement, and so forth".*[3]

13] The regulations provide that the Fund will only be liable for general damages if the claim is, firstly supported by a serious injury assessment report submitted in terms of the Act and the regulations, and, secondly, that the Fund accepts that the injury has been correctly assessed as serious. If not, the Fund can either reject the third party's RAF 4 form or direct that the third party submit himself or herself to a further assessment.

14] 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 appointed 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.[4] If this is not done, the assessment of the Fund's designated medical practitioner shall become final and binding.[5]

15] If a dispute is declared there is an appeal tribunal set up with three independent medical practitioners with appropriate expertise in the

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3 *Road Accident Fund v Duma and Three related matters, footnote 2 supra at paragraph 34.*

4 *Ibid at paragraph 9.*

5 *Ibid.*

area of medicine in dispute. They are appointed by the registrar of the Health Professions' Council. The appeal tribunal has the final say and its determination is binding upon the parties before them. The procedure to be adopted is set out in regulations 3(4) to 3(13).

16] In *Duma*, the court *a quo* had found that the RAF 4 forms were compliant with regulation 3 and, in any event, it was apparent from the medical evidence presented at the trial that the plaintiff did indeed suffer serious injuries as contemplated by the regulations. The court *a quo* had found as follows in regard to the Fund's rejection of the RAF 4 form,

"*Moreover, the Fund's rejection was invalid for one or both of two reasons and should thus be disregarded. The first reason was that the Fund had failed to reject the RAF 4 form within a reasonable time… The second was that since the Fund had given insufficient or invalid reasons for its rejection, it did not constitute a proper rejection in terms of Regulation 3(3)(d)(i).*"[6]

According to Brand JA at [15], *"The antecedent inquiry, so it seems to me, is whether the High Court was right in deciding, for either of the two reasons given, that the Fund's rejection of the RAF 4 forms should be disregarded. If it were, the merits of the rejection seem to be of little consequence. Conversely, if the rejections cannot be disregarded, the fact that the rejection was without merit would again be of little consequence. It is therefore to that antecedent inquiry that I now turn".*

6 *Ibid at paragraph 15.*

17] The court *a quo* had referred to *Louw v Road Accident Fund,*[7] where the period of 60 days referred to in terms of Section 24(5) of the Act, would serve as a guideline for a timeframe within which the Fund will be able reject a third party's RAF 4 form. The court a quo also relied, in regard to the Fund providing proper reasons, on the reasons in the unreported decision of Claassen J in the SGHC, in *Smith and Ngobeni v Road Accident Fund*[8].

18] Brand JA, at [17] of *Duma* summarised Claassen J's reasoning as follows;

"If the Fund does not dispute that the third party's injury is serious, the court can proceed to decide whether it is serious or not. If the court decides that question in the affirmative, it can proceed to entertain the claim for general damages. If the Fund rejects the RAF form without any legal or medical basis for doing so, that rejection is purely obstructive and does not raise a genuine dispute. In that event, the position is no different from where the Fund raised no dispute at all."

19] Brand JA held that the approach of the court *a quo*, in all four cases referred to, was fundamentally flawed. At [19] of *Duma* he stated,

"The decision 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. That much appears from the stipulation in Regulation 3(3)(C) that the Fund shall only be obliged to pay general damages if the Fund- and not the court- is satisfied that the injury has been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied, the

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7 *2012 (1) SA 104 GSJ*

8 *Smith and Ngobeni v the Road Accident Fund (47697/09) ZAGPHCJ (29 April 2009)*

plaintiff simply has no claim for general damages. 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."

20] Brand JA continued at [20], *"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 plaintiff's remedy is to take the rejection on appeal in terms of Regulation 3(4). It follows that the rejection cannot be ignored merely because it was not raised within a reasonable time."*

21] The court held that even if the Fund's decision to reject was only taken after the expiry of a reasonable period, the rejection still prevails. The court then dealt with the Fund's decision to reject the plaintiff's RAF forms without proper reasons. The court held that same constituted administrative action. It was therefore not open to the High Court to disregard the Fund's rejection of the RAF 4 form on the basis that the reasons given were insufficient or that they were given without any medical or legal basis, or that they were proved to be wrong by expert evidence at the trial.

22] The court, at [25], held that the internal appeal processes must be utilised. The court in the *Duma* matters was asked to provide some

guidance on the interpretation of Regulation 3(1) mainly because the Fund has often been penalised by the High Court for its interpretation of the regulation, which was held to be wrong.[9]

23] In all four cases on appeal, the Fund rejected the RAF 4 forms on three grounds. One, that Dr Braude, a psychiatrist, had concluded that the plaintiffs' injuries were serious but did so without physically examining them. Two, the AMA evaluation contemplated in Section 3(1)(b)(ii) was done by an occupational therapist, whom the regulation does not contemplate as a medical practitioner. Three, the whole person impairment assessment, in terms of the AMA guide, must have been conducted before an assessment in terms of the narrative test, laid down in Regulation 3(1)(b)(iii), can be done.

24] The SCA held that the court *a quo* had wrongly interpreted Regulation 3(1). Brand JA went on to examine the grounds for this decision. Firstly, in regard to the physical examination of the claimant for the purposes of the assessment, it was common cause that Dr Braude, who had signed the RAF 4 forms had not physically examined the plaintiffs but relied instead on hospital records.

25] Regulation 3(1)(a) provides that the claimant shall "*submit himself or herself to an assessment by a medical practitioner.*" In finding that assessment as used in Regulation 3(1)(a) is not to be equated with physical examination, the court *a quo* examined the meaning of the words: "*assessment of an injury*". In this regard, Brand JA, at

9 *Road Accident Fund v Duma, footnote 2 supra at paragraph 27.*

paragraph 29, held that:

"My problem with this approach is, however, that it takes the term 'assessment' out of the context of Regulation (3)(1)(a). This Regulation requires that the claimant must "submit himself or herself to an assessment." In my view it simply cannot be said by any stretch of the imagination that a claimant, who merely sent his hospital records to a medical practitioner "submitted himself" to an assessment by that practitioner."

26] This is illustrated by the fact that if the Fund is not satisfied it may direct that the claimant submit himself or herself, in terms of Regulation 3(3)(d)(i), "*to a further assessment, to ascertain whether the injury is serious, by a medical practitioner designated by the Fund."* Therefore the medical records being sent to a medical practitioner designated by the fund would also not suffice. A physical examination by the Fund's medical practitioner is necessary.

27] The court also held that a medical practitioner envisaged by Section 17(1)(a) and regulation (3)(1) are those practitioners that are registered under the medical and dental profession.[10] In consequence it excludes health practitioners such as occupational therapists, and others who are registered under other professional bodies. The Fund, in the court's view, rightly decided that the occupational therapist did not qualify as a medical practitioner.

10 *Ibid paragraph 33.*

28] At [35], Brand JA dealt with regulation 3(1)(b)(iii). He referred to the fact that Regulation 3(1) sets out the three criteria referred to above:

"it is clear from the Road Accident Fund form that Dr Braude did not rely on the criteria formulated in 3(1)(b)(ii) but on the narrative test laid down in Regulation (3)(1)(B)(iii) as the basis for his assessment that the plaintiffs' injuries were 'serious'. The Fund's contention was, however, that he was not allowed to do so. On a proper interpretation of the regulation, so the Fund contended, a Whole Person Impairment Assessment (WPI) rating of below 30 percent is a prerequisite before the narrative test can be performed. Since Dr Braude did not assess the plaintiffs for WPI under the AMA guides at all, so the Fund contended, he could not have applied the narrative test."

29] The court *a quo* had rejected the Fund's contention in this regard, on the basis that the regulations contemplated a disjunctive test where a claimant has to meet the requirements of one or the other.[11] In other words, it is open to a medical practitioner to evaluate the question of seriousness, either by way of the AMA/WPI test, or by way of the narrative test.

30] The SCA held, at [36], that Regulation 3(1)(b)(v) seems to favour the interpretation contended for by the Fund, where it provided that "*the minister may approve a training course in the application of the AMA guides by notice in the Gazette and then the assessment must be done by a medical practitioner who has successfully completed such a course.*"

31] It was common cause in the *Duma* matters that the minister had not, at such date, approved a training course. However, the court held

11 *Ibid paragraph 36.*

that the regulation clearly shows an intention that, once the course is approved, assessment should only be conducted by those doctors who had successfully completed the course.

32] The regulations indicate that all assessments require knowledge of the AMA guides, which in turn leads to the inference that the AMA guides cannot be avoided by a medical practitioner by opting for the narrative test. The court held further:

"*But a more weighty consideration in favour of the Fund's interpretation, as I see it, derives from the contents of the RAF 4 form itself, which is incorporated in the regulations as annexure D. In broad outline the report is divided in five paragraphs. Paragraph 1 requires the personal details of the claimant while paragraph 2 calls for the particulars of the medical practitioner responsible for the assessment. Paragraph 3 requires an indication of injuries observed by the medical practitioner that cannot be assessed as serious because they appear on the minister's list as contemplated in Regulation (3)(1)(b)(i). Paragraph 4 then deals with the AMA impairment Rating as contemplated in Regulation (3)(1)(b)(ii), while paragraph 5 refers to the narrative test in Regulation (3)(1)(b)(iii). Of significance, in my view, is that paragraph 4 really contains the nub of the report. If paragraph 4 were to be left uncompleted the report would be of little substance. In sum, the inevitable inference to be drawn from the contents of the report is that it was never intended that the assessment could bypass the AMA/WPI test.*"

THE PRESENT MATTER

33] The rejection by the defendant of the RAF 4 forms in the present matter is dated 8 March 2013, and therefore was only given to the

plaintiff one day before the trial. Having regard to the decision in Duma, the lateness of the rejection does not preclude the Court from dealing with the Defendant's rejection.

34] The grounds upon which the objection is founded is that the plaintiff's RAF 4 form fails to comply with the provisions in terms of Regulation 3(3)(d)(i) of the Road Accident Fund Regulations 2008 in that:

34.1"

33.1. *The plaintiff did not suffer long-term impairment and/or permanent disability and/or loss of bodily function.*

34.2. *The plaintiff has not reached his MMI at the time of completion of the RAF 4 form.*

34.3. *If the plaintiff intends to dispute the rejection and/or objection he is obliged to follow the procedures set down in regulation 3(4) to (10) of the Road Accident Fund Regulations."*

35] The RAF 4 form was completed by Dr de Graad, plaintiff's expert medical practitioner, an orthopaedic surgeon. The assessment of Plaintiff by Dr de Graad was completed on 30 April 2012. The plaintiff submitted the RAF 4 forms of Dr de Graad in April 2012. Dr de Graad recorded that the plaintiff has reached MMI status and further recorded that the plaintiff's injury specifically qualifies for permanent serious disfigurement and severe long-term mental or severe long-term behavioural disturbance or disorder.

36] The plaintiff's clinical psychologist, Ms Cramer, assessed the plaintiff on 26 October 2011 and recorded that the plaintiff's injuries specifically qualify for severe long-term mental or severe long-term behavioural disturbance or disorder and she set out her reasons for same. The RAF 4 form in this regard was served on the Defendant on 11 March 2013.

37] Joint minutes were completed by Dr de Graad and Dr Swartz, defendant's expert orthopaedic surgeon, as well as by the respective occupational therapists, the respective industrial psychologists and the respective clinical psychologists.

38] Dr de Graad and Dr Swartz, the orthopaedic surgeons, recorded in their joint minute 28 January 2013: "*his clavicle fracture was complicated by infection. He had to have plastic surgery done with a muscle flap. He has a disfigurement as a result of the injury. He has a psychological problem with the scar. This for him was a serious injury resulting in serious long-term impairment*."

39] Ms Cramer and Ms Maluleke, the respective clinical psychologists, record on page 2 of the joint report that: "*We jointly recommend psycho-therapeutic treatment of his low mood and heightened anxiety ... this would not be curative given the largely organic basis of his problems*."

40] The plaintiff argues that based upon these joint minutes, the

defendant has accepted that the injury is of a serious nature. Having regard to such concession, can the defendant still object to the RAF 4 form and insist that the plaintiff follow the procedure to have the plaintiff assessed by its medical practitioner and injury declared serious by the tribunal?

41] Dr de Graad recorded in the RAF 4 form that the plaintiff had reached MMI status and that his injury specifically qualifies as permanent serious disfigurement, severe long-term mental or severe long-term behavioural disturbance or disorder. Ms Cramer recorded in the RAF 4 form that the plaintiff's injury specifically qualifies as severe long-term mental or severe long-term behavioural disturbance or disorder.

42] Dr Swartz, the defendant's medical practitioner, filed his report on 29 November 2012. In his report, he stated that the plaintiff had reached MMI. He, however, having done the AMA test, found that the plaintiff's WPI was eight percent and that he did not qualify for the narrative test for serious long-term impairment or loss of a bodily function.

43] The notice of objection filed by the defendant on 8 March 2013 sets out the basis of the defendant's dispute and informs the plaintiff that his next step is to follow the procedure as set out in the regulations, meaning that the plaintiff should refer the matter to the appeal tribunal.

44] It is common cause that both plaintiff's doctors, being Dr de Graad

and Ms Cramer are medical practitioners, registered as members of the Medical and Dental council. Both of them, in completing the RAF 4 forms, completed their assessments based either upon the AMA or WPI and arrived at the decision that the plaintiff had reached MMI and that the plaintiff's injury was to be declared serious.

45] They both, therefore, have complied with the regulations and have submitted their reports in accordance with the decision in the *Duma* matter and in contrast to the plaintiffs in such matter.

46] However, the defendant contends that the fund has demonstrated, by filing its objection, that it is not satisfied with the claimant's RAF 4 forms and it therefore argues that it may direct that the claimant submit himself for a further assessment to ascertain whether the injury is serious, by a medical practitioner designated by the Fund. A list of medical practitioners who had completed the requisite training course and were therefore qualified to perform the assessments was handed to the Court, by consent. Drs de Graad, Swartz and Ms Cramer appear thereon.

47] The distinguishing feature in this case (in contrast to the facts in the *Duma* decision) arises as a result of the joint minute filed by the two orthopaedic surgeons, Dr de Graad and Dr Swartz. As I had set out above, the defendant's orthopaedic surgeon, Dr Swartz,, previously in his report dated 29 November 2012, found that the plaintiff had not reached 30 percent WPI and that the plaintiff did not qualify for the

narrative test. He however did find that MMI had occurred in relation to his injuries.

48] Dr de Graad, on the other hand, found that the plaintiff had reached MMI, that the plaintiff did qualify for the narrative test and that there was a serious injury. The Fund's designated practitioner, Dr Swartz has assessed the Plaintiff and, in filing the joint minute, had agreed that MMI had been reached and that the injury was serious. In the joint minute the doctors stated the following,

"Considering the following:

1. *his clavical fracture was complicated by infection. He had to have plastic surgery done with a muscle flap;*
2. *he has disfigurement as a result of the injury;*
3. *he has a psychological problem with the scar. This for him was a serious injury resulting in serious long-term impairment."* [emphasis added].

49] The two objections raised by the defendant in the notice of objection were firstly that the plaintiff did not suffer long-term impairment, or a permanent disability or a loss of body function. The second point was that the plaintiff had not reached MMI at the completion of the RAF 4 forms.

50] In regard to defendant's first objection, Dr Swartz now agrees that

the injury is one, in terms of the narrative test, to be declared a serious long term impairment. Accordingly the basis of the first ground of objection has, in effect, been "conceded" to be incorrect by the defendant's expert, Dr Swartz. The defendant's second objection is factually incorrect. When the RAF 4 form was submitted, the plaintiff's medical practitioners stated that the plaintiff had reached MMI. Dr Swartz, on behalf of defendant agreed.

51] It appears that therefore the two points of objection fall away. It would be artificial to hold that simply because the defendant has objected to the RAF 4 assessment, that, irrespective of the basis therefore the plaintiff must follow the procedure set out in Regulation 3. In this regard, the facts in the *Duma* case are distinguishable. The grounds of objection in the *Duma* case were valid. In the present case, they are not, for the reasons set out above.

52] Accordingly, the Court can accept the assessment of both the plaintiff and defendant's medical practitioners that this is a long term injury where general damages are applicable.

53] The Court therefore holds that the plaintiff can proceed to prove its general damages.

54] The parties have agreed on the damages that plaintiff is to be awarded and have prepared a draft order.

55] In the result, there will be an order in terms of the draft.

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Weiner J

Date of hearing: 11 March 2013

Date of judgment: 12 March 2013

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