Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**
Circulate to Magistrates:	YES / **NO**

THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case no: 2955/2018

In the matter between:

ROAD ACCIDENT FUND **APPLICANT/ DEFENDANT**

and

DOLORES DAPHE BOUGHAN **RESPONDENT/ PLAINTIFF**

Neutral citation: *Road Accident Fund v Boughan* (Case no 2955/2018) [2025] 14 February 2025.

Coram: Tyuthuza AJ

Heard: 20 November 2024

Delivered: 14 February 2025.

ORDER

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1. The application for leave to appeal against the judgment and order granted on 16 August 2024 to the Full Court is granted.
2. Costs to be costs in the appeal.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

***Per* Tyuthuza AJ**

INTRODUCTION

[1] The applicant, the Road Accident Fund seeks leave to appeal the order and judgment granted by myself on 16 August 2024 to the Full Court of this Division, alternatively, the Supreme Court of Appeal.

[2] The application is based on the grounds as stated in the applicant's notice dated 29 August 2024. In short, the issue is whether I was entitled to grant an order for payment of general damages to the respondent, Ms Boughan in light of the fact that the applicant rejected the respondent's claim for general damages or alternatively, in the absence of the applicant's acceptance of the seriousness of the injuries.

[3] The applicant relies on section 17(1) of the Superior Courts Act, 10 of 2013. According to the applicant, there is a reasonable prospect of success on appeal.

[4] The respondent has opposed the application and argues that there exist no reasonable prospects of success on appeal. The respondent argues that she was not placed with any formal rejection of the general damages by the applicant. The respondent further argues that the applicant was placed under bar and at no point denied liability in regard to general damages, neither did the applicant raise any issues at the pre-trial conference.

TEST FOR APPEAL

[5] Applications for leave to appeal are regulated by Section 17 (1) of the Superior Courts Act 10 of 2013 which provides as follows:

"17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[6] In the matter of *Fusion Properties 233 CC v Stellenbosch Municipality*[1] the SCA held as follows:-

"[18] Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an application for leave to appeal in terms of ss 17(1)(a)(i) and 17 (1)(a)(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted 'where the judge or judges concerned are of the opinion that-

'(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

It is manifest from the text of s 17(1)(a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that 'there is some compelling reason why an appeal should be heard'. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave . . .".

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[1] (932/2019) [2021] ZASCA 10 (29 January 2021).

[7] In *MEC for Health, Eastern Cape v Mkhitha and Another*[2] the Supreme Court of Appeal said the following:

"Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[8] It is now trite that to succeed with an application for leave to appeal the applicant must satisfy the Court that they have reasonable prospects of success on appeal or that based on the facts and the law, another court will arrive at a conclusion different to that reached by the court *a quo*.[3]

RELEVANT LEGISLATION AND AUTHORITIES

[9] The Road Accident Fund's liability to compensate a party for non-pecuniary loss is limited to compensation for a serious injury. The Act and the Regulations provide for instances where the injury is considered serious and the obligations of the Fund in those instances.

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[2] (1221/2015) [2016] ZASCA 176 (25 November 2016) paras 16-17.
[3] *S v Smith* 2012 (1) SACR 567 (SCA) para 7; *S v Mabena and Another* 2007 (1) SACR 482 (SCA) para 22; see also *Myeni v Organisation Undoing Tax Abuse and Another and a related matter* [2021] JOL 49388 (GP) para 53.

[10] Section 17(1) of the Road Accident Fund Act[4] (the Act) *inter alia* provides that the 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."

[11] In terms of section 17(1A) of the Act, the "*(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party. (b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974)".*

[12] Regulation 3(3)(c) of the Road Accident Fund Regulations, 2008 ('Regulations') stipulates that:

"The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations."

[13] The Supreme Court of Appeal has observed in this regard as follows:

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[4] 56 of 1996.

". . . In accordance with the model that the legislature chose to adopt, 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 reg 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 correctly been assessed in accordance with the RAF 4 form as serious. . .".[5]

[14] In terms of Regulation 3(3) (dA) of the Regulations, the Road Accident Fund must evaluate the serious injury assessment report sent to it by the plaintiff within 90 days and make its decision whether to accept or reject the report.[6]

[15] In *Road Accident Fund v Faria*[7], the SCA confirmed that the assessment of serious injuries is not a judicial function, but an administrative function. Furthermore, that general damages may only be awarded if injuries have been assessed as such.

[16] In *Mpahla v Road Accident Fund*[8], the SCA reaffirmed that: *"if the Fund is not satisfied that the injury is serious, 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). The Fund, as an organ of State as defined in s 239 of the Constitution, performs a public function in terms of legislation. Its decision in terms of regulations 3(3)(c) and 3(3)(d), whether or not the report correctly assessed the claimant's injury as 'serious', constitutes administrative action, as contemplated in PAJA. In terms of s 6(2)(g), read with s 6(3)(b), of PAJA if the Fund unreasonably delays in taking a decision in circumstances where there is a period prescribed for that*

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[5] *Road Accident Fund v Duma and three similar cases* 2013 (6) SA 9 (SCA) ('*Duma*') para 19.
[6] Regulation 3(3) (dA) provides: *"the Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment."*
[7] 2014 (6) SA 19 (SCA) para 36; see also *Road Accident Fund v Duma and Three Similar Cases* (*supra* fn 5) para 19.
[8] (698/16) [2017] ZASCA 76 (1 June 2017); 2019 JDR 1669 (SCA); [2017] JOL 37986 (SCA) para 12.

decision, an application can be brought for judicial review of the failure to take the decision".

DISCUSSION

[17] The respondent launched its claim against the applicant in December 2018. The applicant filed its notice to defend the action in January 2019, its erstwhile attorneys withdrew as its attorney of record on 4 March 2020. The respondent proceeded to serve the applicant with a notice of bar in July 2020, despite numerous calls to the applicant to file its plea, the applicant failed to do so. A trial-ready certificate was obtained, and the matter was set down for 17 to 18 June 2022. On 14 September 2022, the merits were settled and the defendant accepted 100% liability for the plaintiff's still to be proven damages.

[18] A trial ready certificate on the quantum was obtained on 17 October 2023, following a directive from the Court wherein the applicant was requested to indicate what steps it intended to take in expediting the matter. According to the directive, the applicant had not filed any process since 14 November 2019. The notice of set down for trial in respect of the quantum was served on the state attorney on 19 November 2023.

[19] According to the RAF4 form, which was completed in July 2018, the respondent's injuries were recorded as serious. Despite having received the RAF4 form over three years ago, the decision to reject the respondent's claim for general damages was only communicated in court on the morning of the trial. No document was provided to the court recording this decision. On 19 November 2024, a few days before the hearing of application for leave to appeal, the applicant filed a bundle of documents, which included an e-mail addressed to respondent's attorney on 20 May 2024 at 1:24pm, which recorded that the claim for general damages was rejected and an offer in respect of loss of earnings. It is common

cause that this document was not before the Court on the day of the trial in May 2024.

[20] On the day of the trial on 20 May 2024, counsel for the respondent requested that the matter proceed unopposed and that the respondent's application in terms of rule 38(2) be granted. Mr Magano appeared for the applicant and submitted that the applicant sought to oppose the application in terms of rule 38(2) in that the applicant wanted an opportunity to cross examine the respondent's experts and would not be able to do so if application in terms of rule 38(2) was allowed.

[21] Despite service of the notice of set down in November 2023 and the rule 38 (2) application the week preceding the trial, the applicant took no steps to oppose the application or file a plea. No effort was taken by the applicant to expedite the hearing of this matter as per the request in the directive issued by this Court. In the interests of justice, I ruled that the matter proceed on an unopposed basis and granted the application in terms of rule 38(2).

[22] Mr Magano, submits that he had instructions to reject the seriousness of the injury and that the instruction was sent in writing to the respondent's attorney, thus the issue of seriousness of injury was still in dispute and that by deciding on the issue, this Court effectively exercised an administrative power which is only conferred to the Fund in terms of Regulation 3.

[23] Mr. Magano referred to *Road Accident Fund v Duma and three similar cases*[9], in this matter the High Court held that the plaintiffs had suffered serious injuries and as such general damages were awarded in their favour. The RAF 4 forms declaring the plaintiffs' injury to be serious were signed by a psychiatrist and the Fund rejected the RAF 4 forms on the basis that they failed to comply with regulation 3 of the Regulations. The High Court found that the forms were indeed compliant with

[9] [2013] 1 All SA 543 (SCA); 2013 (6) SA 9 (SCA).

regulation 3 and ruled that having considered the medical evidence presented at Court, the plaintiffs suffered serious injuries as contemplated in the regulations. On appeal upon an evaluation of the High Court's decision, the SCA stated as follows:

"[18] Consideration of the High Court's judgments in the four cases on appeal and those upon which they rely, all seem to set out from the premise that it is ultimately for the court to decide whether the plaintiff's injury was 'serious' so as to satisfy the threshold requirement for an award of general damages. Proceeding from that premise, these decisions assume that if the Fund should fail to properly or timeously reject an assertion to that effect by the third party, the rejection can be ignored. If the medical evidence before the court then shows that, on balance, the plaintiff was indeed seriously injured, the court can proceed to decide the issue of general damages.

[19] That approach, I believe, is fundamentally flawed. In accordance with the model that the legislature chose to adopt, 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 correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the 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. Appreciation of this basic principle, I think, leads one to the following conclusions:

(a) Since the Fund is an organ of State as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of regulations 3(3)(c) and 3(3)(d), whether or not the RAF 4 form correctly assessed the claimant's injury as 'serious', constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A 'decision' is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of 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 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."

[24] On this basis, the applicant contends that this court followed a fundamentally flawed approach which disregards the fact that the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for the award of general damages was conferred on the Fund and not the Court.

[25] Mr Jacowitz for the respondent vehemently opposed the application on the basis that the applicant was still under bar and at no point denied liability for general damages. He contends that there were no issues in dispute, in that the applicant failed to file its plea. He submitted that the *Duma* matter was distinguishable in that none of the plaintiffs therein were examined by the medical practitioner who completed the RAF4 forms, whereas in this matter all the experts examined the respondent. He further submitted that the applicant did not provide the respondent with a formal rejection of the general damages and as such the Court was entitled to make an order for general damages. He submitted that the reports before the court confirm that the injuries sustained by the respondent were serious and that there is nothing to the contrary before the court. That in light of the facts before the court, the court has the necessary discretion to determine the amount of general damages. He referred to

Mertz v Road Accident Fund[10] *(Mertz)* wherein it was stated that: "*the court a quo had exercised a discretion in granting the award for general damages. A discretion is however not unfettered and must be exercised judicially upon consideration of the facts of each case*." However, the facts of this case, are distinguishable from those of Mertz, where the injuries were deemed to have been accepted by RAF and as such the Court adjudicated the award of general damages.

[26] In the *Duma* matter, the SCA has confirmed the position that the decision as to whether an injury is serious is vested in the Road Accident Fund and not the Court. A claim for general damages is premature until the claimant has satisfied the Fund that his injury was serious, if the RAF rejected a claimant's RAF 4 form, he would be barred from maintaining a claim for general damages in court. If the RAF took an unreasonable time to make its decision, it would amount to a failure to take an administrative action to be met with an internal appeal and review proceedings. Until the decision was overturned or reviewed, it existed as a fact, and the trial court could not disregard it.

[27] It is now settled law that a court cannot make a determination whether a plaintiff's injuries are so serious that such a plaintiff is entitled to a claim for general damages against the RAF. This remains the position, even if the Fund is in default and even if its defence has been struck out.[11]

[28] In light of the cases mentioned above, it is clear that despite the fact that the Fund did nothing in three years or failed to deal with the RAF 4 claim in accordance with regulation 3 and only communicated its decision on the seriousness of the injury on the morning of the trial, the court's hands were tied and it could not exercise its discretion in respect of general damages.

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[10] (A96/2021) [2022] ZAGPPHC 961 (2 December 2022) para 7.
[11] *Knoetze obo Malinga and Another v Road Accident Fund* (77573/2018 & 54997/2020) [2022] ZAGPPHC 819 (2 November 2022).

[29] Upon a consideration of the facts in this matter and the case law dealing with this aspect, I am of the view that the appeal has a reasonable prospect of success.

[30] I therefore make the following order:

1. The application for leave to appeal against the judgment and order granted on 16 August 2024 to the Full Court is granted.

2. Costs to be costs in the appeal.

T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Applicant:	Mr Magano
On the instruction of:	State Attorney
On behalf of the Respondent:	Adv D Jankowitz
On the instruction of:	P.Joubert Inc.