Much ado about *Duma*?

By Alfred Selman

Road Accident Fund v Duma and three related cases (Health Professions Council of South Africa as amicus curiae) [2013] 1 All SA 543 (SCA) (Brand JA)

The judgment in the recent case of *Road Accident Fund v Duma and three related cases (Health Professions Council of South Africa as amicus curiae)* [2013] 1 All SA 543 (SCA) presents a fascinating example of the thin gray line that exists between appropriate judicial activism and the necessary deference that our courts are required to give to legislative intention. At first glance, the judgment would seem to have wide-ranging implications on the manner in which the courts will entertain judicial reviews of the Road Accident Fund's (RAF's) administrative conduct. The following is a brief summary of the relevant issues before the court and its findings on them:

Legal issues before the Supreme Court of Appeal

The legal issues before the court were, *inter alia*: What is the remedy when the RAF does not make a decision within a reasonable time; and what is the remedy when the RAF rejects a RAF4 form without proper reasons?

Remedy when the RAF does not make a decision within a reasonable time: The court held that the remedy is to be found in s 6(2)(*g*) read with s 6(3)(*a*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In terms of these sections, if an administrative authority unreasonably delays in taking a decision in circumstances where there is no period prescribed for that decision, an application can be brought 'for judicial review of the failure to take the decision'. Should the RAF therefore fail to make a decision regarding the acceptability of an RAF4 form, the claimant can apply to court for an order forcing them to do so.

Remedy when the RAF rejects a RAF4 form without proper reasons: The court held that the decision of the RAF to reject a RAF4 form clearly constitutes administrative action and therefore such a decision is subject to the provisions of PAJA. The court held further that a failure to provide appropriate reasons, does not render a decision by the RAF invalid *per se* as such a decision remains valid unless invalidated by a court or appropriate tribunal. Since the Road Accident Fund Act 56 of 1996 provides the remedy of an internal appeal, that must first be exhausted in terms of s 7(2) of PAJA, before a judicial review of any of its administrative decisions can take place. The court held further that the internal remedy provided for in the Road Accident Fund Act may, however, be circumvented on application for condonation of non-exhaustion of internal remedies, by the aggrieved party, in 'exceptional circumstances' and if it is the 'interests of justice' to do so.

It is the court's handling of the second of these issues that is the focus of this case note. The immediate impression when one first reads this judgment, is that it seems to present a very strong interpretation of s 7(2) of PAJA and basically prescribes that, where administrative action by the RAF is contested, all internal remedies must first be exhausted before a court may be approached, no matter how obstructive the RAF may be and regardless of the sufficiency of the reasons that they give for the rejection of a RAF4 assessment, unless there are exceptional circumstances present.

An extreme hypothetical example of this could be that the RAF rejects the claim because it is not satisfied with the font the assessment is typed in. Furthermore, such a reason would remain valid until overturned by an appeals tribunal or unless the third party can prove to a court that his or her case contains sufficiently exceptional circumstances for direct judicial intervention. Thus, the RAF can stymie claims by forcing parties to approach the appeals tribunal for even the most dubious of reasons.

However, such a reading of the judgment would overlook the seemingly deft hand played by Brand JA, in balancing the practical, legal and political implications of the decision of the court in this particular case.

At this juncture, it might be necessary to look at the actual internal remedy prescribed by the Road Accident Fund Act and regulations.

In terms of reg 4, an aggrieved third party may appeal the RAF's rejection of a RAF4 assessment with the Health Professions Council of South Africa (HPCSA) and, furthermore, the RAF has the responsibility of bearing the reasonable costs of such an application. It is in this proviso that we can see that the legislative scheme and intention are patently clear in two respects. First, s 7(2) of PAJA was created with the obvious intention of attempting to resolve disputes in alternative fora, while using the courts as a final means of arbitration should the parties fail to resolve a matter. Secondly, by prescribing that the RAF bear the cost of any appeal of its decision regarding a serious injury assessment, the administration of the RAF was clearly envisaged to act in a rational manner that protects the interests of the RAF against fraudulent claims and does not merely use the appeals process to enforce an obstructionist agenda, as there are in all likelihood prohibitive financial consequences if the RAF engages in such behaviour.

The question remains: Did Brand JA and the Supreme Court of Appeal (SCA) miss an opportunity to protect third parties from being subjected to actions by the RAF that are in some cases clearly undertaken merely to frustrate their claims? The answer it would seem is a resounding no. Had the SCA gone the other way, the ruling may have had the opposite and equally undesirable effect of leaving the HPCSA appeals process redundant. This judgment is therefore neither a carte blanche for the RAF to redirect all their claims to the HPSCA nor has it changed the current jurisprudence. Indeed it would seem that all the potentially raised heartbeats may be much ado about *Duma*.
• See also 2013 (June) *DR* 51.

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