REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/04642

(1) REPORTABLE: YES / NO ✓
(2) OF INTEREST TO OTHER JUDGES: YES/NO ✓
(3) REVISED. ✓

23 September 2011
DATE

SIGNATURE

In the matter between:

LEBEKO, OUPA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MBHA, J:

INTRODUCTION

[1] On 6 June 2009 at approximately 17h30 and at Slovo Street, Vosloorus, Gauteng, an accident occurred when a motor vehicle of which the registration letters and numbers and the identity of both its owner and driver

are unknown to the plaintiff ("*the unidentified motor vehicle*"), collided with the plaintiff who was a pedestrian at the time of the collision.

[2] As a result of the aforesaid collision, the plaintiff sustained bodily injuries for which he had to receive medical treatment. The plaintiff instituted action against the defendant in terms of the Road Accident Fund Act 56 of 1996 ("the Act"), for patrimonial and non-patrimonial damages suffered as a result of the injuries so sustained. The plaintiff's action is based on the negligence of the driver of the unidentified vehicle. All forms of negligence have been denied by the defendant.

[3] The defendant has filed a special plea alleging that the plaintiff has failed or neglected to comply with Regulation 3 made under section 26 of the Act. This relates to the plaintiff's claim for general damages which the defendant insists, ought to have been referred to an appeal tribunal in terms of the Regulations.

[4] At the commencement of the trial, the parties agreed that there were only two issues which the court had to determine, namely liability and the defendant's special plea.

MERITS

[5] The plaintiff was the sole witness in his case. The defendant never called any witnesses.

[6] The plaintiff's evidence can be summarised as follows:

6.1 The collision occurred on Saturday 6 June 2009 at approximately 17h30. At the time he was coming back from what he termed "*a piece*" job and he was on his way home. Although it was almost sunset visibility was still clear.

6.2 He said he was walking in the middle of the gravel portion which is parallel or adjacent to a public tarred road, with his back facing towards traffic approaching from behind. As he was walking in the middle of the gravel portion, he was quite a distance away from the tarred road.

6.3 He said that after he had walked past a streetlight on his left, he was suddenly hit by an unknown vehicle which collided with his right side specifically his right thigh. On impact he was flung to the ground next to a road signage pole reflecting a pedestrian crossing where he had intended to traverse the tarred road.

6.4 Before the collision he never saw any people around him. However, after he had fallen to the ground passers-by appeared and advised him to lie still. An ambulance was summoned which conveyed him to hospital.

[7] The defendant closed its case on the merits without calling any witness.

ASSESSMENT OF THE EVIDENCE AND APPLICABLE LAW

[8] The plaintiff's evidence that he was walking in the middle of the gravel portion a distance away from the tarred road, was neither contradicted nor disputed. He was consistent throughout that he was never at or close to the tarred road and that he never even saw the unidentified vehicle before the collision. He said whilst he was walking looking ahead, he suddenly felt being hit by a car on his right side and that he fell to the ground as a result of the impact.

[9] I found the plaintiff, who is 71 years old and relatively unsophisticated, to be a credible and consistent witness whose testimony can be relied upon. His evidence, when coupled with the common cause factor that he sustained injuries in a motor collision on 6 June 2009, leads me to the inevitable conclusion that the driver of the unidentified vehicle was negligent and that such negligence was the entire cause of the collision. I am accordingly unable to agree with the submission by defendant's counsel that it is highly improbable that a motor vehicle could simply leave its path of travel in the tarred road and collide with the plaintiff whilst he was walking in the middle of the gravel portion.

[10] The principle is well established that although it is naturally foreseeable that a motorist could swerve off the roadway in a reckless and negligent manner and collide with someone walking on a gravel or similar portion that is adjacent to a public road, it was not expected of a reasonable man to guard against reckless or grossly negligent conduct on the part of a driver of a motor vehicle on a public road, in particular as *in casu*, where the plaintiff was walking with his back facing traffic approaching from behind. See Gray v *Protea Versekeringsmaatskappy Bpk* 1990 (3) SA 823 (O) at 827B. Corbett JA, in *Griffiths v Netherlands Insurance Co of SA Ltd* 1976 (4) SA 691 (A), at 695H, aptly described the position as follows:

> *"... Users of the road, whether they be vehicle drivers or pedestrians, normally regulate their conduct on the supposition that these codes and conventions will be generally observed by other users. Consequently, a departure from these codes and conventions will often give rise to a situation which is unexpected and dangerous and, in certain circumstances, will amount to negligence ..."*

[11] I am unable to find any negligence whatsoever that can be attributed to the plaintiff. The negligence of the driver of the unidentified vehicle was the sole cause of the collision. In the circumstances I find that plaintiff has successfully discharged the *onus* expected of him of proving negligence, on a balance of probabilities, on the part of the driver of the unidentified vehicle.

[12] The defendant is accordingly liable to pay 100% of the plaintiff's proven or agreed damages.

THE DEFENDANT'S SPECIAL PLEA – REGULATION 3

[13] In terms of section 17(1A) read with Regulation 3 of the Act, a third party who wishes to claim compensation for non-pecuniary loss from the Fund, shall submit himself or herself to an assessment by a medical practitioner who must assess whether the third party's injury is serious. Various methods are set out under Regulation 3 (1)(b)(i)-(iv) to determine the sort of injuries which will be classified as serious. The two particular methods relevant to this case are:

13.1 Where the injury resulted in 30% or more Impairment of the Whole Person ("*WPI*") as provided in the American Medical Association's Guide to the Evaluation of Permanent Impairment ("*AMA*"): and

13.2 The narrative test in terms of which an injury which does not result in 30% or more Impairment of the Whole Person may be assessed as serious if the injury:

13.2.1 resulted in a serious long-term impairment or loss of a body function;

13.2.2 constitutes permanent serious disfigurement;

13.2.3 resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or

13.2.4 resulted in loss of a foetus.

[14] Clearly, the narrative test calls for an enquiry into various components of the persona including the physical, bodily, mental, psychological and even aesthetic features of an injured third party. It is accordingly inappropriate for a single medical expert to express himself or herself with any authority to the point of a finding in terms of the narrative test on all such facets of diminished capacity. Instead it is appropriate that an RAF4 form is produced with regard to every particular medical discipline that is called for by Regulation 3(1)(b)(iii) as it will relate to a particular plaintiff with his/her specific and individual injuries and complaints.

[15] Regulation 3(3)(a) provides that a third party whose injury has been assessed in terms of these Regulations shall obtain from the medical practitioner concerned a serious injury assessment report.

[16] If the Fund or agent is not satisfied that the injury has been correctly assessed, Regulation 3(3)(c) and (d) oblige the Fund or agent to:

16.1 reject the serious injury assessment report and furnish the third party with reasons for the rejectment; or

16.2 direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment by a designated medical practitioner, to ascertain whether the injury is serous in terms of the methods set out in the Regulations.

[17] Regulation 3(3)(e) provides that the Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in the Regulations. In terms of Regulations 3(4) and (8) if a third party wishes to dispute the rejection of the serious injury assessment report, or in the event of either the third party or the Fund or the agent disputing the assessment performed by a medical practitioner, the disputant shall within ninety (90) days of being informed of the rejection or the assessment, notify the Registrar in the manner provided, that the rejection or the assessment is being disputed. The Registrar shall then refer the dispute for consideration by an appeal tribunal which must be constituted by "... *three independent medical practitioners with expertise in the appropriate areas of medicine* ..."

[18] The defendant's overriding objection, as set out in the special plea, is based on the plaintiff's alleged failure to refer the matter to the appeal tribunal for adjudication in terms of Regulation 3(4).

[19] It is common cause that RAF4 forms were provided for the plaintiff by:

19.1 Dr Morare (Orthopaedic Surgeon) on 18 September 2009;

19.2 Dr Scher (Orthopaedic Surgeon) on 11 July 2011; and

19.3 Ms Carlien Hudson (Occupational Therapist) on 19 July 2011.

[20] All the above named medical experts have confirmed that the injuries sustained by the plaintiff in the collision namely, a head injury and a fracture of the right femur, have been assessed as serious in terms of the narrative test.

[21] It is common cause that the defendant has not filed any expert reports to gainsay these assessments.

[22] On 9 March 2011 the defendant purportedly objected to the plaintiff's RAF4 form by Dr Morare on the basis that the maximum medical improvement ("*MMI*") had not been reached at the time of the conclusion of the RAF4 form ("*the first objection*"). It is noteworthy that the defendant took no steps in consequence of this purported rejection until 14 July 2011 when it purportedly supplemented its objection on the grounds that:

22.1 the plaintiff's injury "*does not result in 30% or more impairment of the whole person*" ("*the second objection*");

22.2 the information contained in the RAF4 form "*does not satisfy any*

of the requirements in terms of Regulation 3(1)(b)(iii)" ("*the third objection*"). This is in reference to the narrative test.

[23] On 21 July 2011 the defendant purportedly objected to the RAF4 form by Dr Scher on the grounds that:

23.1 the plaintiff's injury "*does not result in 30% or more impairment of the whole person*", this being a mere repeat of the second objection;

23.2 the information contained in the RAF4 form "*does not satisfy any of the requirements in terms of Regulation 3(1)(b)(iii)*", this being a mere repeat of the third objection; and

23.3 that the finding by Dr Scher of a serious injury in terms of the narrative test is medically unsustainable ("*the fourth objection*").

[24] The defendant is of the view that the objections filed are valid and assumes, incorrectly, that once "*an objection*" is raised, the plaintiff must of necessity refer the question whether the plaintiff had suffered a serious injury to the tribunal in terms of Regulation 3(4).

[25] As I have pointed out above, in terms of Regulation 3(3)(c) and (d) if the defendant or an agent is not satisfied that the injury has been correctly assessed as serious, the defendant or its agent must reject the serious injury assessment report and furnish the plaintiff with reasons for the rejection or direct that the plaintiff submit himself or herself to a further assessment.

[26] In the case of *Smit (as curator ad litem to Duduzile Ngubeni) v RAF* Case No. 09/47697, in a judgment handed down on 29 April 2011, Claassen J held that a dispute which the defendant is entitled to raise must be a genuine one and cannot merely be an objection which has no medical or legal basis. The court held that such an objection was purely obstructive and the special plea which is similar to the one *in casu*, was dismissed with costs.

[27] As the defendant is entitled in terms of Regulation 3(3)(d)(i) to reject a serious injury assessment report, it follows that the reasons furnished for the rejection of such assessment must not only be generalised, vague and non-descript but these must be relevant, rational and sustainable.

[28] The requirements under Regulation 3(3)(d)(ii) are relevant for comparative purposes when the defendant elects to exercise its rights in terms of Regulation 3(3)(d)(i) as opposed to Regulation 3(3)(d)(ii). In my view it must be assumed that a rejection in terms of Regulation 3(3)(d)(i) is favoured in circumstances where the defendant is able to furnish relevant, rational and substantial reasons why it is of the view that the injury has not

been correctly assessed absent further medical opinion which is called for by a "*further assessment*" under Regulation 3(3)(d)(ii).

[29] Accordingly, the only logical interpretation that is applicable to Regulation 3(3)(d)(i), is that the machinery under this Regulation is available to the defendant where it seeks to reject the serious injury assessment report on procedural but rational grounds, for example, that the report has been completed by a person who is not qualified to do so, or that the assessment has not been conducted according to the method prescribed.

[30] In my view the objections and/or rejections by the defendant are not sound, relevant, rational or sustainable and for these reasons the plaintiff's RAF4 forms can never be said to have been duly objected to. It would simply be pointless and inequitable to in the circumstances of this case, cause further delay by having the matter referred to the appeal tribunal as suggested by the defendant. In the absence of a genuine dispute, there simply is no disputant to refer the matter to any tribunal in terms of Regulation 3(4).

[31] Having elected to purportedly reject the assessment reports in terms of Regulation 3(3)(d)(i) and then failing to supply genuine reasons therefore as required, the purported rejections do not amount to a rejection "*in the prescribed manner*" and for this reason the defendant is deemed to be satisfied that the injury has been correctly assessed as serious and is accordingly, obliged to compensate the plaintiff for non-pecuniary loss.

[32] On the aforesaid grounds the defendant's second objection as contained in its letter dated 14 July 2011 that the plaintiff's injury "*does not result in 30% or more impairment of the Whole Person*" must fail. In any event, as the defendant has accepted that the plaintiff's case is premised on the narrative test and not based on the 30% WPI, this fact renders the second objection immaterial and inconsequential as WPI does not even come into play.

[33] The first and fourth objections do not amount to rightful challenges in terms of Regulation 3(3)(d)(i) as these objections clearly concern medical findings. If the defendant wishes to challenge medical findings arrived at during the prescribed assessment, it is obliged to make use of Regulation 3(3)(d)(ii) by obtaining dissenting medical opinion. This the defendant did not even attempt to do. At no stage did the defendant submit the plaintiff for assessment by its own experts. Instead, the defendant has left the expert reports by the plaintiff unchallenged.

[34] As appears from Regulation 3(3)(e), in the absence of its own expert reports, the defendant is not at liberty to challenge the medical findings of the plaintiff's experts.

[35] The absence of any dispute between the respective experts for the plaintiff and the defendant, means that the referral to the tribunal in terms of Regulation 3(4) can never be invoked by Regulation 3(3)(d)(ii), as read with Regulation 3(3)(e).

[36] The first objection must also fail for the following reasons:

36.1 The plaintiff's injuries have been assessed as serious in terms of the narrative test to which the concept of MMI has no bearing.

36.2 In paragraph 8.4 of the pre-trial minute the plaintiff asked the defendant "*If the court should find that MMI does not have a bearing on the narrative test, would the defendant admit that the rejection of Dr Morare is incorrect?*" to which the defendant responded "*Yes, obviously so*".

36.3 As to the medical seriousness of the plaintiff's injury overall, the plaintiff's uncontested reports by Dr Scheltema (neurosurgeon) read with the report of the neuropsychologist Mostert, as well as Ms Hudson's report, provide support for the findings of Scher and Morare.

[37] I am satisfied that all the requirements for the narrative test as prescribed in Regulation 3(1)(b)(iii) have been fulfilled.

[38] There is a further ground upon which the defendant's special plea must fail. The RAF4 form of the plaintiff's occupational therapist Ms Hudson was never rejected by the defendant and as such it stands accepted. The mere failure of the defendant to have ever objected to the RAF4 form by the

occupational therapist is paramount and on this count alone the defendant's special plea cannot succeed.

[39] There is in my view another basis upon which the defendant's special plea cannot succeed. Regulation 3(4) can only be invoked following the process contemplated by Regulation 3(3), and in particular Regulation 3(3)(d)(i) or (ii):

39.1 If therefore the defendant failed to object with valid reasons to an RAF4 form by the plaintiff's expert in terms of Regulation 3(3)(d)(i) – as I have shown above – the operation of Regulation 3(4) can never follow.

39.2 Similarly, when the defendant did not refer the plaintiff for dissenting medical assessment in terms of Regulation 3(3)(d)(ii), it will never invoke Regulation 3(e) which in turn means that Regulation 3(4) is never reached via this avenue either.

THE DEFENDANT'S ADMISSION OF LIABILITY

[40] The term "*liability*" is contextualised by section 24(6) of the Act.

[41] The Special Plea must be read with the pleadings as a whole. At paragraph 3 of the Particulars of Claim the plaintiff alleges that:

"At all relevant and material times hereto, the defendant is liable in terms of the Act and its regulations to compensate the plaintiff in respect of the damages sustained by him as a result of the accident referred to in paragraph 4 below."

[42] Such "*damages*" as referred to include a claim for General Damages as set out at paragraph 10.4 of the Particulars of Claim.

[43] The defendant pleaded to this averment at paragraph 3 of the plea as follows:

"Save to admit its liability in terms of section 17(4)(a) of the Road Accident Fund Act No. 56 of 1996 (the Act), the defendant has no knowledge of the balance of the allegations herein contained and accordingly does not admit same and puts the plaintiff to the proof thereof."

[44] Section 17(1) of the Act provides:

"The defendant or an agent shall –

(a) subject to this Act, in the case of a compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

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 to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death 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 the 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."

[45] Clearly, paragraph 3 of the defendant's plea constitutes an admission that this Court has jurisdiction and power to entertain the plaintiff's claim for general damages and that the plaintiff is entitled to enforce his claim in this Court and in particular his claim for general damages. In my view, the unqualified admission of liability in terms of section 17 must encompass an admission of liability in terms of Regulation 3.

[46] In the case of *Mbongiseni Makhombothi v RAF* Case No. 46854/09 (unreported) dated 29 April 2011, Claassen J held that the admission made at paragraph 3 of the defendant's plea constitutes an admission to the plaintiff's entitlement to seek compensation from the defendant as a result of injuries sustained in a motor collision from this Court and that this Court's jurisdiction is not ousted. Claassen J held further, that the special plea raising a lack of compliance by the plaintiff with Regulation 3, as *in casu*, is directly contradictory to the plea at paragraph 3. The court held that the plaintiff's entitlement to pursue a claim for general damages in this Court had been admitted and the special plea was dismissed with costs.

[47] In light of what I have stated above I find that this Court has jurisdiction and the power to entertain the plaintiff's claim for general damages and the defendant's special plea must accordingly, fail.

QUANTUM

[48] At the commencement of the trial the parties agreed that in the event of the court dismissing the special plea, the court must grant an order in terms of the draft order marked "XX". With regard to the merits, the court has already found that the defendant is 100% liable to compensate the plaintiff for his proven or agreed damages as a result of the injuries sustained in the motor collision on 6 June 2009.

[49] I accordingly, grant an order in favour of the plaintiff as follows:

1. The special plea is dismissed with costs.

2. The defendant is ordered to pay a capital amount of R170 000,00 to plaintiff, in full and final settlement of the plaintiff's claim. Payment shall be made into the trust account of the plaintiff's attorneys, details of which are as follows:

Raphael Kurganoff Trust Account

First National Bank, Rosebank Branch

Account Number: 50650 111 260

Branch Code: 253305

3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision of 6 June 2009, after such costs have been incurred and upon proof thereof.

4. The defendant shall pay the agreed or taxed party and party High Court costs of the action to the 2nd day of August 2011, such costs to include:

4.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 2 above;

4.2 the preparation expenses of the plaintiff's experts Dr M Scher, Dr M Shapiro, Dr J Scheltema, S Batchelor, C Hudson, C du Toit and Mr Whittaker, if any and as allowed by the Taxing Master.

B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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INSTRUCTED BY	:RAPHAEL KURGANOFF INC
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DATE OF HEARING	:02 AUGUST 2011
DATE OF JUDGMENT	:23 SEPTEMBER 2011