OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

Case No. CA 17/2020

In the matter between

MTHABISENI MAQHUTYANA (ECM 3254/2014) **First Plaintiff**
NOKULUNGA MNAMA (ECM 703/2013) **Second Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

FULL BENCH JUDGMENT

HARTLE J

Background:

[1] The plaintiffs mentioned above jointly referred issues for determination common to them arising during the conduct of their separate trial proceedings enforcing their claims for statutory compensation against the Road Accident Fund ("the Fund"). The claims arise in terms of the provisions of section 17 of

the Road Accident Fund Act, No. 56 of 1996 ("the RAF Act").[1]

[2] The matter ("the referral") comes before this court by way of a directive issued by the Judge President pursuant to the provisions of section 14 (1)(a) of the Superior Court Act, No. 10 of 2013 ("the SCA"), dated 8 June 2020, which provides that the common issues be heard by a court comprising of three judges on the basis of an agreed stated case between the parties.

[3] The issues were originally formulated in the Judge President's directive as follows:

> "1. The Court will be called upon to determine whether or not it is in a position to deal with the issue of special damages before the outcome of the Health Professions Council of South Africa (HPCSA) in determining the issue of [the] rejected RAF 4 form unless the (plaintiff)[2] elects to abandon the issue of general damages and what is the position if the HPCSA [decision] is negative.
> 2. The Court will be called to determine whether or not the Plaintiff may proceed with the issue of loss of earnings wherein [the] seriousness of injuries has been rejected, and plaintiff appealed to the HPCSA and the outcome of [its decision is] that the plaintiff's injuries are not serious."[3]

[4] In both matters the Fund, after merits had been separated and conceded in the separate actions, had rejected the serious injury assessment reports of the plaintiffs which had been submitted to it on the prescribed RAF 4 forms more than 3 years prior in each case.[4] Both plaintiffs had consequently invoked the dispute resolution procedure referred to in regulation 3 of the Regulations[5]

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[1] By the time the matter was heard before this court the original issues were no longer contentious as between the parties, but the plaintiffs required the court to determine a preliminary point raised on their behalf after the referral.

[2] The initial reference was to the "Defendant", but the parties were *ad idem* that this was a clear error.

[3] The directive in the record contains only two paragraphs but these were later enlarged upon. The first one, from the context, appears to relate to Mnama's situation, and the second one to Maqhutyana's.

[4] In Maqhutyana's case, the serious injury assessment report was rejected on 23 March 2018 after the matter had been enrolled for hearing in respect of the plaintiff's claims for general damages and loss of earning. In Mnama's case the Fund rejected the serious injury assessment report on 4 October 2019. (Although Mnama's collision happened on 16 April 2010, the serious injury assessment report was ostensibly only lodged in 2016, years after the issue of the summons in March 2013.)

[5] GNR.770 of 21 July 2008: Road Accident Fund Regulations, 2008 (*Government Gazette* No. 31249) as amended by Notice R.347, Government Gazette 36452 dated 15 May 2013 ("the Regulations").

promulgated under the RAF Act.[6] Mnama's process was still underway by the time of the referral, but in Maqhutyana the Health Professions Council ("HPCSA") had already rendered a decision in the appeal process unfavourable to the plaintiff.

[5] Despite this it is ostensibly evident, and not quite unsurprising, that the plaintiffs were desirous of pursing their claims in the court for loss of earnings and had sought to enroll their matters for hearing on the trial roll in the Mthatha High Court in order to have this head of damages determined in each case. The Fund however raised certain preliminary objections to the matters proceeding and questioned whether it was permissible for the court to proceed to a determination of the loss of earning claims in each scenario.

[6] The parties had ostensibly reached a clear stand-off in both matters at that time. Maqhutyana did not see any reason to forego his claim for loss of earnings because of the HPSCA's finding that his injuries were not serious. Mnama was unwilling to abandon her belatedly contested claim for general damages which she had held out for in her summons and wished to proceed to trial in pursuit of her claim for loss of earnings apart from the contested head of damages. (The parties appeared to accept that her claim for general damages had of necessity to be held in abeyance because of the Fund's rejection of her serious injury assessment report.) The Fund, by its objections, was resisting the entitlement of either plaintiff to proceed to a judicial determination of their claims for loss of earnings on a "not ripe for hearing" premise whereas it was maintained on behalf of the plaintiffs that the issue of the rejection of the RAF 4 form had nothing to do with their claims for serious damages and neither did it

[6] These processes had in Mnama not yet run their administrative course by the date of the referral. In Maqhutyana, the administrative process had already yielded an outcome, but the defendant seemed uncertain whether the court could entertain the plaintiff's remaining claim for loss of earnings as a result of the HPCSA's decision in the appeal that the plaintiff's injuries were not regarded as serious.

oust the jurisdiction of the court to determine the issue of loss of earnings. It was this stance adopted by the Fund which appears to have culminated in the parties' agreement to refer the common issues for determination.

[7] At the first set down of the matter before us,[7] the defendant was beset by certain problems relating to a lack of formal representation and the matter could accordingly not proceed. Once these difficulties had been resolved and when the matter came before us on a second occasion,[8] the plaintiffs sought a postponement in order for the parties to amplify the stated case. They were desirous of raising a preliminary point which it was contended on their behalf would dispose of the need to determine the original issues referred.

[8] With the benefit of time, it seemed to have occurred to the parties that in Mnama a separation of issues might resolve her conundrum and permit of a continuation of her claim for loss of earnings separate from her claim for general damages which was under scrutiny. In Maqhutyana the notion that the plaintiff was barred from proceeding with his claim for loss of earnings, or that the substance of that claim depended for its validity or enforceability on a finding that his injuries were serious, or that it was somehow "interwoven" with such a claim, appeared (correctly so in my view) to have been jettisoned.[9] Mr. van der Linde who appeared on behalf of the Fund together with Mr. James did not argue against the proposition of Mr. Matebese, who appeared for the plaintiffs, that despite the answers to the questions as originally framed having suggested itself to them in the interim, and in the plaintiffs' view having in any event become moot by virtue of the preliminary point they wished to interpose,

[7] The first appearance was on 8 June 2020.
[8] The second appearance was on 24 August 2020. At both the latter and the first appearance the costs were reserved.
[9] Law Society v Minister of Transport 2010 (11) BCLR (GNP) at para 35; and Botha v Road Accident Fund 2015 (2) SA 108 (GP). See also the recent judgment of Mjali J in S H Mavuso v RAF (Mthatha case no 4364/2016) delivered before the present referral, on 25 May 2020, and which in my view provides an effective answer to the question posed regarding Maqhutyana's matter.

that it was perhaps convenient for this court to still determine the original "issues" in the interests of litigants and RAF practitioners generally.

[9] We share the parties view that it may be useful to do so. The questions that initially vexed the parties seem to have been posed in similar matters in this Division which concern in each instance the same objection raised by the Fund to trials proceeding once it has rejected serious injury assessment reports.[10]

[10] The nub of the preliminary point is that the original issues referred for determination do not arise at all really because the issue of the liability of the Fund was already determined and /or conceded in the court orders disposing of the merits in each action. These orders were granted prior to the rejection of the RAF 4 forms and at a time when the plaintiffs' claims for general damages formed part of their pleaded cases and, by implication, under circumstances where there was no contestation (at least on the pleadings) that their injuries fell to be compensated under section 17 (1A) for such losses. Thus, so the argument went, on a proper interpretation of section 17 (1) and of the orders, the issue of the Fund's liability for non-pecuniary losses has become *res judicata* to the extent that the Fund is precluded from re-opening this aspect; from opting out of the court orders (obligating it to simply pay these damages without further ado); and from now raising a defence that the Fund had not pleaded nor raised at all at the time when the "orders on liability" were granted. [11]

The stated case:

[10] See, for example, Mavuso v RAF (Supra) where issues in common with the question raised in Maqhutyana was determined by way of a stated case.

[11] The plaintiffs did not raise formal pleas of *res judicata* in the traditional sense of the word on the pleadings, but then neither were the Fund's preliminary objections raised by way of special pleas in the court.

[11] In the meantime, I set out below the comprehensive agreed "supplementary stated case" between the parties which fell to this court ultimately to be determined after the postponement of 24 August 2020, which includes a reference to the purportedly defeating preliminary point:

> "1. The first plaintiff, Mthabiseni Maqhutyana, was injured in a motor vehicle accident which occurred on the 28th September 2003 at Mphumaze Location, Balasi Administrative Area, Qumbu, Eastern Cape Province. He lodged a claim against the defendant in terms of the Road Accident Fund Act 56 of 1996 ("the Act").
> 2. The claim was not settled by the defendant within the time prescribed by the Act. The first plaintiff, as a result of thereof, instituted proceedings originally in the Magistrate's Court, Qumbu under case number 146/2008. This was due to the limitation imposed then by the Act prior to its amendment of Act No. 19 of 2005.
> 3. Subsequent to the amendment of the Act the first plaintiff instituted the present proceedings in the above Honourable Court.[12]
> 4. For purposes of validating (his) claim for non-pecuniary loss in terms of section 17 of the Act, which required a serious injury assessment (the RAF 4), the first plaintiff was assessed by Dr. Songca on 23 September 2014 and the serious injury assessment, RAF 4 was accordingly lodged with the defendant.
> 5. In his Particulars of claim in the High Court the plaintiff claimed, in paragraph 10 thereof, both general damages and loss of income earning capacity.
> 6. In paragraph 11 of his Particulars of Claim first plaintiff alleged that the injuries sustained by him in the accident constituted serious injuries as contemplated in Regulation 3 (1)(b)(ii) and (iii)(aa), (bb) and (cc).
> 7. The first plaintiff annexed to his Particulars of Claim the duly completed RAF form.
> 8. In its plea to the relevant paragraphs the defendant pleaded: *"The defendant has no knowledge of the allegations contained in these paragraphs and accordingly does not admit nor deny and puts the plaintiff to proof thereof"*.
> 9. The defendant therefore placed the seriousness of the injury in issue.
> 10. On 9 February 2018 the first plaintiff's case appeared before the Honourable Mr. Justice Mbenenge JP who granted an order in the following terms:
> *"IT IS ORDERED THAT:*
> *1. The issues relating to merits shall be separated from the issues relating to quantum;*
> *2. The defendant be and is hereby held liable for all proven and/or agreed damages suffered by the plaintiff on the 28th September 2003 at or near Balasi Administrative Area, Qumbu, Eastern Cape;*
> *3. The issue of quantum shall be postponed sine die;*
> *4. No order as to costs."*
> 11. The matter was thereafter set down for the determination of quantum on 7 March 2018. It was, however, not heard on the said date.
> 12. On 23 March 2018 the defendant rejected the serious injury assessment report of Dr. Songca. As a result thereof the plaintiff referred the matter for dispute resolution to the Registrar of the Health Professions Council of South Africa (the "HPCSA").
> 13. The referral to the HPCSA came negative in that the HPCSA found that the plaintiff's injuries fall below the minimum threshold of 30% as required by the regulations and they do not qualify under the narrative test.

[12] This was no doubt in accordance with the special arrangement for certain third parties as provided for in section 2 (e)(ii) of the RAF (Transitional Provisions) Act, No. 15 of 2012.

14. The matter was set down for 29 January 2020. On the date of the hearing the defendant raised a point *in limine*. In essence the defendant's point *in limine* is that the rejection of the RAF 4 form warrants the stay of the determination of the issue of loss of earnings and further that as a result of the rejection of the RAF 4 form the above Honourable Court is not in a position to deal with the issue of the special damages in the absence of an Order for separation in terms of Rule 33 (4) unless the plaintiff elects to abandon the claim for general damages.[13]
15. The second plaintiff, Nokulunga Mnama was involved in a motor vehicle accident which occurred on the 16th of April 2010 at or near Kroza Administrative Area in the district of Mqanduli, Eastern Cape Province.
16. She also lodged her claim with the Road Accident Fund, the defendant herein. The claim was accompanied by an RAF 4 form completed by Dr. P.A Olivier dated 1 June 2016. This was in compliance with section 17 of the Act.
17. When the defendant failed to settle the claim the second plaintiff instituted action proceedings in the above Honourable Court in which she claimed special as well as general damages. In paragraph 12 of the Particulars of Claim she pleaded:
"As a result of the injuries sustained by the plaintiff aforesaid, the latter suffered damages in the sum of Six Million Nine Hundred and Fifty-One Thousand Four Hundred and Forty Four Rand (6 951 944.00) which is computed as follows:

"12.1	*SPECIAL DAMAGES:*	
12.1.1	*future medical expenses*	*R100 000.00*
12.1.2	*loss of earning capacity*	*R6 101 444.00*
12.2	*GENERAL DAMAGES*	
12.2.1	*General damages for pain and suffering, Shock and discomfort, disfigurement, Loss of amenities of life and disability*	*R750 000.00"*

18. Second Plaintiff made no specific allegation in her Particulars of Claim that the injuries suffered by her constituted serious injuries as contemplated in Section 17 (1A) of the Road Accident Fund Act 56 of 1996 (as amended).[14]
19. On 23 March 2017 the matter came before Her Ladyship Justice Dawood J who granted the following order:
"IT IS ORDERED THAT:
    1. *The issues of liability shall be decided separately from the issues of quantum and all other issues.*
    2. *The defendant is held liable for all proven or agreed damages resulting from injuries sustained by the plaintiff in the motor vehicle accident that occurred on 16 April 2010.*
    3. *The determination of quantum is postponed sine die.*
    4. *The defendant shall pay costs to date."*
20. Both parties appointed experts in preparation for the determination of the quantum. The experts appointed by both parties are to a large extent in agreement with their respective opinions and as a result the parties agreed that only the Industrial Psychologist should convene a conference in order to prepare a joint minute. The

[13] From the background sketched above, it seemed to me that the parties' confusion at the time was whether Maqhutyana could pursue the claim for loss of earnings at all anymore in the light of the HPSCA's negative decision, so the word "stay", and the notion of a separation of issues under such circumstances, appear incongruent. The document in which the *in limine* point was raised did not from part of the record before this court. In any event I deal in the judgement with the so-called election of a plaintiff to abandon a claim for general damages in either a Mnama or a Maqhutyana scenario. The phrase "in the absence of an order for separation in terms of Rule 33 (4)" was added after the fact.

[14] This is perhaps because the issue of the summons preceded her serious injury assessment by almost three years. Her particulars of claim were obviously not amended to cater for the later developments.

joint minute of the Industrial Psychologists has since been served and filed and the Actuarial calculations based on joint minute have also been served and filed.

21. The matter was then enrolled for the determination of quantum on 11 October 2019 on both heads of damages as claimed and for which the defendant had been found liable.
22. On 4 October 2019 the defendant rejected the serious injury assessment report (RAF 4 form) prepared by Dr. Olivier. The second plaintiff then referred the matter for dispute to the HPCSA. The outcome of the dispute resolution is still pending.
23. Whilst the outcome of the dispute resolution is still pending the Registrar of the above Honourable Court enrolled the matter for the determination of special damages and the matter was set down for 24 February 2020.
24. Before the hearing of the matter the defendant raised a preliminary point to the effect that the above Honourable Court is not in a position to deal with the issues of special damages if the serious injury assessment report has been rejected and a decision on the dispute lodged with the HPCSA is still pending in the absence of an Order for separation in terms of Rule 33 (4) unless the second plaintiff elects to abandon the claim for general damages. In essence the same point raised by the defendant against the first plaintiff.[15]
25. In both matters the plaintiffs contend that the issue of the rejection of the RAF 4 form has nothing to do with special damages and that the rejection cannot oust the jurisdiction of the court to determine the issue of loss of earnings and/or special damages.
26. The matters have jointly been referred to the above Honourable Court by the Honourable Judge President and by way of special allocation.

ISSUES IN DISPUTE:

27. The issues in dispute are identified in the directive from the Judge President as follows:
    - 27.1 Whether or not the court is in a position to deal with the issue of special damages before the outcome of the Health Professions Council of South Africa (HPCSA) in determining the issue of the rejected RAF 4 form unless the (plaintiff) elects to abandon the issue of general damages and what is the position if the HPCSA [decision] is negative (in the absence of a Rule 33 (4) application for separation of these issues and/or a Court Order that such issues be separated in terms of Rule 33 (4)).
    - 27.2 Whether or not the plaintiff may proceed with the issue of loss of earning wherein [the] seriousness of injuries had been rejected, and plaintiff appealed to the HPCSA and the outcome of [its decision is] that the plaintiff's injuries are not serious.
    - 27.3 Whether a Plaintiff may proceed with the issues of special damages (including loss of income) in the absence of a Rule 33 (4) application for separation of these issues and/or a Court Order that such issues be separated in terms of Rule 33 (4).
28. The matter was set down for hearing on 24 August 2020.

THE PROCEEDINGS OF 24 AUGUST 2020:

29. At the hearing of the matter on 24 August 2020 the plaintiffs, placing reliance on the facts appearing in the stated case, in particular relating to the court orders on liability referred to hereinabove, contended that the two (2) issues referred for determination by the above Honourable Court do not really arise in the matters before the court.
30. The plaintiffs contended that section 17 of the RAF Act properly interpreted is only concerned with the liability of the Fund, the defendant, and has no relevance to the quantum of damages.

[15] See my comments in footnote 13 above.

31. The plaintiffs further contended that the issue of liability of the RAF has already been determined and/or conceded in the court orders dated 23 March 2017 and 9 February 2018; that the court orders were granted prior to the rejection of the RAF 4 forms and when the general damages and/or non-pecuniary loss was still part of the plaintiff's pleaded claims and that the fund, the defendant, is therefore bound by the court orders and has a duty to obey same and cannot seek to opt out or frustrate the court orders by raising an issue that was not in existence at the time the orders were granted.
32. The proceedings were then adjourned to allow the parties to supplement the stated case by agreement to introduce the preliminary point raised.

THE PRELIMINARY POINT:

33. The Plaintiffs contend that on a proper construction of Section 17 of the RAF Act and the Court Orders of 23 March 2017 and 19 February 2018 referred to above the issue of liability of the Defendant of non-pecuniary loss (general damages) has become *res judicata* to the extent that the Defendant is precluded from reopening same or from opting out of the Court Orders by raising a defence that it had not pleaded nor raised at all at the time the said Court Orders on liability were granted.
34. The Defendant contends that the issue of liability for non-pecuniary loss (general damages) was placed in issue by the Defendant on the pleadings and/or the provisions of the RAF Act and that the Defendant did not waive any defences relating thereto on the express wording of the said Court Orders."

The pleadings in Maqhutyana and Mnama:

[12] In Maqhutyana the plaintiff claimed both general damages and "loss of income earning capacity". In support of his claim for general damages he had pleaded that the injury sustained by him in the motor vehicle accident constituted a serious one as contemplated in Regulation 3(1)(b)(ii) and (iii)(aa), (bb) and (cc) of the RAF Act. He had annexed the completed RAF 4 form which he had submitted to the Fund together with his claim documentation. He asserted that despite his compliance with the RAF Act and Regulations in this respect, the Fund had not invoked the options open to it in Regulation 3 (3)(d)(i) or (ii). In other words, it had neither accepted or rejected the serious injury assessment report, nor had it called upon him to submit himself for a further assessment to ascertain whether the injury was serious.[16] He alleged that his

[16] This status would have pertained as at the time when the particulars of claim were filed and would have remained unchanged as at the date when the Fund conceded the merits. The serious injury assessment was rejected only on 23 March 2018.

claim in respect of general damages was therefore valid and enforceable.[17]

[13] The Fund's plea filed in the action is entirely unhelpful. The standard refrain that appears throughout in response to almost every allegation of substance is that it has no knowledge of the plaintiff's allegations, does not admit nor deny them, and puts the plaintiff to the proof of them.[18]

[14] Although the Fund is adamant that it placed the serious injuries in dispute on the pleadings it hardly did so mindfully and conscious of the import of the legislative scheme pertaining to such claims to which I will shortly allude.

[15] In Mnama, the plaintiff made no specific allegation in her particulars of claim that the injuries suffered by her constituted serious injuries as contemplated by section 17 (1A) of the RAF Act. However, she sought to claim general damages on the premise that she had sustained "severe" injuries, namely a head injury, an injury to her chest and left knee and soft tissue injuries.[19] Additionally she claimed "loss of earning capacity".[20]

[16] In response to these allegations the Fund pleaded no knowledge of the nature and extent of the injuries alleged to have been suffered by her and put her to the proof thereof. It denied any obligation to compensate her for any damages at all.

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[17] This allegation would not have been correct then, or now. The claim for general damages has in fact still not become enforceable in court. Neither has the necessary requirement for the Fund's liability to compensate him for general damages been established in the administrative realm.

[18] This is however not of any real consequence as I demonstrate in the judgment.

[19] The serious injury assessment report was only lodged in 2016, more than three years after the summons and particulars of claim were served. It appears that the plaintiff has not amended her particulars of claim to bring them in line with the consequent developments of her perceived entitlement, since the serious injury assessment, to claim general damages. This too is in my view of no real consequence.

[20] In both matters it was clarified in heads of argument filed on behalf of the plaintiffs that they were not concerned with claims for future loss of earning capacity (which aspect of a claim traditionally falls under general damages since it is a prospective loss) but the actual future loss of earnings (thus a patrimonial loss), such losses having been proved in each action "by way of salary advice".

[17] The Fund did not raise any special plea that Mnama's allegations to justify her claim for general damages were somehow lacking, only complaining in the present referral proceedings (and by virtue of the "preliminary objections" it intended to raise at the eleventh hour when the trial on quantum was due to proceed)[21] that it had no case to meet on the pleadings that she had suffered a serious injury as contemplated in section 17 (1A) of the RAF Act and the Regulations.

[18] The fact of and the developments after the Fund's rejection of the plaintiffs' serious injury assessment reports is not reflected in the formal pleadings in either action.[22]

The legislative scheme:

[19] Before engaging with the issues in dispute and the "preliminary point" outlined above it is necessary to have regard to the latest legislative scheme applicable to third party claims for statutory compensation arising out of the wrongful driving of a motor vehicle and briefly to look at how these provisions (more especially pertaining to claims for non-pecuniary loss) have been applied and interpreted by our courts since their implementation.

[20] The provisions of section 17 of the RAF Act provide as follows:

> "**17. Liability of Fund and agents.** — (1) The Fund or an agent shall—
>
> (*a*) subject to this Act, in the case of a claim for 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;

[21] The Fund's rejection was made known a week before the quantum hearing.

[22] These developments were possibly recorded in minutes or case management documentation. Since in RAF proceedings the focus between the parties will move to a dispute resolution forum and then back to court again when the plaintiff's claim for general damages becomes enforceable, I would suggest that the parties' minutes should reflect the extra curial events and their relevance to or impact on the litigation.

(*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 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.

(1A) (*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 No. 56 of 1974).

(2). . . . .

(3) (*a*) No interest calculated on the amount of any compensation which a court awards to any third party by virtue of the provisions of subsection (1) shall be payable unless 14 days have elapsed from the date of the court's relevant order.

(*b*) In issuing any order as to costs on making such award, the court may take into consideration any written offer, including a written offer without prejudice in the course of settlement negotiations, in settlement of the claim concerned, made by the Fund or an agent before the relevant summons was served.

(4) Where a claim for compensation under subsection (1)—

(*a*) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate—

(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or

(ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d),

in accordance with the tariff contemplated in subsection (4B);

(*b*) includes a claim for future loss of income or support, the amount payable by the Fund or the agent shall be paid by way of a lump sum or in instalments as agreed upon;

(*c*) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding—

(i) R299 154.00 per year in the case of a claim for loss of income; and

(ii) R299 154.00 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.

(4A) (*a*) The Fund shall, by notice in the *Gazette*, adjust the amounts referred to in subsection (4) (c) quarterly, in order to counter the effect of inflation.

(*b*) In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.

(4B) (*a*) The liability of the Fund or an agent regarding any tariff contemplated in

subsections (4) (a), (5) and (6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act No. 61 of 2003), and shall be prescribed after consultation with the Minister of Health.

(*b*) The tariff for emergency medical treatment provided by a health care provider contemplated in the National Health Act, 2003—

(i) shall be negotiated between the Fund and such health care providers; and

(ii) shall be reasonable taking into account factors such as the cost of such treatment and the ability of the Fund to pay.

(*c*) In the absence of a tariff for emergency medical treatment the tariffs contemplated in paragraph (a) shall apply.

(5) Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may, notwithstanding section 19 (c) or (d), claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and such claim shall be subject, *mutatis mutandis*, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.

(6) The Fund, or an agent with the approval of the Fund, may make an interim payment to the third party out of the amount to be awarded in terms of subsection (1) to the third party in respect of medical costs, in accordance with the tariff contemplated in subsection (4B), loss of income and loss of support: Provided that the Fund or such agent shall, notwithstanding anything to the contrary in any law contained, only be liable to make an interim payment in so far as such costs have already been incurred and any such losses have already been suffered."

[21] As is immediately evident, the section commences with a general premise for the Fund's liability "subject to the Act" arising from the driving of a motor vehicle and then goes on to deal separately with each head of damages that makes up a claim for statutory compensation which the Fund would be liable to pay to a third party, assuming that it is liable in principle. Our present concern is with a third party's claim for non-pecuniary loss, colloquially referred to as "general damages".

[22] Prior to 1 August 2008, the date on which the Road Accident Fund Amendment Act, No. 19 of 2005 ("the Amendment Act") took effect, a third party could claim general damages from the Fund without any limitations. The general provision read without the current proviso. The Amendment Act

however introduced an exclusion on all claims for general damages that are not as a result of "serious injury." It also put a cap on claims for loss of income.[23]

[23] Further, since the amending provisions took effect, the assessment to determine what constitutes a serious injury as contemplated in sub-section (1A) for purposes of bringing a third's party's circumstances into the ambit of the proviso stated in section 17 (1) has been premised on the "prescribed method" spelt out in Regulation 3 and is undertaken by a medical practitioner registered under the Health Professions Act, No. 56 of 1974.

[24] Section 3 describes the object of the RAF Act as being the payment of compensation "in accordance with this Act" for loss or damage wrongfully caused by the driving of motor vehicles. Section 1 defines "This Act" as including any regulations made under section 26.

[25] Section 17 (1) of the RAF Act must accordingly be read together with the provisions of Regulation 3 which prescribes how a serious injury is to be determined along a somewhat time consuming and pedantic but specialized

[23] See Law Society of Africa & Ten Others v Minister of Transport A 2011 (1) SA 400 (CC) at paras [17] – [28]; Road Accident Fund v Lebeko *(*802/11) [2012] ZASCA 159 (15 November 2012) at paras [3] – [4]; 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) at para [3] – [10] ("Duma and three similar cases"). Each of these judgments helpfully summarise the history of the statutory road accident compensation scheme and developments bearing on the introduction of the amending provisions so that one can appreciate the pressing need for and legitimate imperative (endorsed by the Constitutional Court in Law Society of South Africa & Ten Others v Minister of Transport above) for the reduction of the Fund's unfunded and ballooning liability. The urgent steps, taken by the reforming measures, was to make the Fund sustainable so that it could fulfil its constitutional obligations to provide social security and access to healthcare services for all (at paragraph [52]). One of the ways in which this imperative was acted on is by limiting the Fund's liability for general damages to those victims who have suffered "serious injury". The all-important limitation of the Fund's liability was introduced by the proviso to section 17 (1) of the RAF Act, which is followed by the "how to" described in sub-section (1A), which in turn refers a reader to a "prescribed method" aimed at keeping the parties out of court. The method is comprehensively provided for in Regulation 3 and proposes to keep the costs of the exercise, that is of making the necessary determination that sifts a claim for general damages as a result of serious injury from ones that are not, limited to those of the Fund acting administratively for such determinations. It is evident from the Explanatory Memorandum on the Objects of the RAF Amendment Bill, 2005 that a costs savings underpinning the proposed amendments was also top of mind. The Bill sought to repeal the erstwhile provision in section 17 (2), in terms of which the Fund was liable for the legal costs of claimants.

administrative trajectory, at the Fund's cost, so as to bring a third party's claim for non-pecuniary loss within the ambit of the proviso to section 17 (1) before the Fund is obliged to compensate him or her in this respect.

[26] Regulation 3 deals with the method of assessing a serious injury.[24]

[27] Regulation 3(1)(a) provides that a third party wishing to claim general damages must firstly 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 a registered medical practitioner.

[28] Sub-regulation 3(3)*(c),* which postulates two separate jurisdictional requirements for the Fund's liability for general damages to kick in, provides that:

> "The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided for 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 for in these Regulations."[25]

[29] The Fund has three options available to it once the serious injury assessment report has been submitted to it, and it has 90 days from the date of the submission within which to make its election.[26] These are: (i) accept the serious injury assessment report or (ii) reject the report (and furnish reasons) or (iii) direct that the third party submit to a further assessment.

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[24] The method is not in issue for present purposes, and I do not propose to go into this in great detail, save to emphasize that a prescribed process for the determination exists and must be followed in all its *minutiae*.

[25] The Fund does not itself decide whether the injury is serious neither does the RAF Act provide an objective standard for deciding on the seriousness of the injury (Duma *supra* at paras 5 – 6). That assessment is to be made by the medical practitioner. The Fund can either accept or reject the medical practitioner's assessment. Its concern (acting administratively) is with the question whether the third party's injury has been correctly assessed as serious in terms of the "method" provided by the Regulations. Section 17 (1A) (a) presupposes that this method (which the Regulations are a product of) is reasonable in ensuring that the injuries are assessed in relation to the circumstances of the third party.

[26] Regulation 3 (3) (dA).

[30] In terms of sub-regulation 3(3)*(e)*: "The Fund … must either accept the further assessment or dispute the further assessment *in the manner provided for in these Regulations*". (Emphasis added.)

[31] The dispute resolution procedure which avails to the advantage of both a dissatisfied third party (who is unhappy with the Fund's rejection of the serious injury assessment report) and the Fund (which does not accept the further assessment if it goes in favour of the third party) is provided for in sub-regulation 3(4), read together with sub-regulations 3(5), 3(7), 3(8), 3(10) 3(11), 3(12) and 3(13). As is pointed out in Road Accident Fund v Faria, there is no other. [27]

[32] The latter procedure culminates in a determination by an Appeal Tribunal consisting of three independent medical practitioners appointed by the Registrar of the HPCSA with expertise in the appropriate areas of medicine.[28]

[33] If the dispute resolution procedure is not resorted to within the prescribed time period by the third party, the rejection of the RAF 4 form or of the assessment by the Fund's designated medical practitioner, as the case may be, becomes "final and binding".[29]

[34] In terms of sub-regulation 3(13), assuming a resort by either the third party or the Fund to the prescribed dispute resolution procedure, the determination of the Appeal Tribunal "shall be final and binding".

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[27] [2014] 4 All SA 168 (SCA) at para [32].

[28] An additional independent "health practitioner," with expertise in any appropriate health profession, may also be appointed by the Registrar to assist the Appeals Tribunal in an advisory capacity. (Regulation 8 (3)(c)).

[29] Regulation 3 (5)(a). Although this provision appears prejudicial to the third party, he/she may still invoke the dispute resolution process after the prescribed period by lodging an application for condonation with the Appeal Tribunal. Our courts have also leaned towards promoting the opportunity to a third party, who wishes to belatedly challenge the Fund's administrative decision by way of an appeal to the HPSCA, to do so in that forum even if he/she has only come to a realisation long after the fact that such internal remedy must of necessity first be exhausted.

The effect of the Amendment Act on the Fund's liability to compensate third parties for general damages:

[35] The Supreme Court of Appeal observed in Faria[30] that the Amendment Act, read together with the Regulations, has introduced two 'paradigm shifts': (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.[31] The latter sea-change appears to have confounded many a litigant in road accident fund claims enforced in court.

[36] It is further clear in my view from the amending provisions that the shift necessarily also entailed a costs-saving objective for the Fund, by limiting the need for a third party to resort to legal proceedings at all. Additionally, the costs of making the serious injury assessment, administratively, are borne by the Fund.[32]

[37] In the past, so it was pointed out in Faria, whereas a joint minute prepared by experts chosen from the contending sides (who would no doubt have guided the parties in making critical concessions in the litigation) would ordinarily have been conclusive in judicially deciding an issue between a third party and the RAF, including the nature of the third party's injuries, this is no longer the

[30] *Supra*.
[31] *Supra* at para [34]. I add the significance that the assessment is at the cost of the Fund in the administrative realm.
[32] Litigation should be a fallback option. Ideally the Fund will make appropriate offers in settlement of a claim before service of a summons. A third party will have to enforce his/her claim in court as a last resort to beat prescription (section 23) and in circumstances where the Fund has in writing repudiated liability for the claim (section 24 (6)). Even so, the obligation on the parties to use the administrative method at their disposal will prevail and the litigation will be sub-judicated under it.

case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts.[33]

[38] This has notably impacted what happens to the conduct of an action issued out of our courts to enforce a claim for non-pecuniary loss arising in terms of the provisions of section 17 (1A) of the RAF Act when the serious injury assessment comes under scrutiny and the parties then follow the expected and provided for administrative trajectory until a final outcome is rendered. That outcome constitutes a final and binding conclusion of the decision whether the injury is serious and only thereupon establishes the jurisdictional fact necessary for the court to decide a claim for general damages, if it is necessary for the court to adjudicate the claim at all.[34] Before this moment, the plaintiff "simply has no claim for general damages" and the court "no jurisdiction" to entertain the claim for general damages against the Fund.[35]

[39] Whilst the adjudication of the plaintiff's claim for non-pecuniary loss must of necessity wait in abeyance while the administrative processes for a serious injury assessment and a dispute resolution procedure play out in the administrative realm, the question arises what happens to the plaintiff's claims other than for their non-pecuniary loss in court (in a scenario where the third party has needed to enforce his/her claim for compensation in court), especially if the Fund raises the serious injury dispute without any warning on the pleadings and extremely late in the game and disrupts or delays the finalization of the trial. What effect does the RAF 4 rejection have on the proceedings in

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[33] *Supra* at para [34]

[34] It appears that all that will be left over for determination in court, in practical terms, will be the extent of the quantum, or matters arising therefrom. The court will no doubt have to accept whatever outcome is rendered through the process as the premise upon which to make an award of general damages. In my view an appropriate offer should be made in respect of this incident of the third party's claim immediately the decision of the Appeal Tribunal is to hand. This is the exact objective of the separate process. That is, to determine the issue in the alternative forum and to keep the parties from having to do so in court at greater cost to the Fund.

[35] Duma *supra* at para [19], and Faria, *supra* at para [35].

the court, and how is a plaintiff expected to plead his/her case or the Fund its defence in the light of the administrative interruption?

[40] Willis JA in Faria astutely observes that past legal practices, like old habits, sometimes die hard and that, understandably, medical practitioners, lawyers and judges experienced in the field of road accident claims may have found it difficult to adjust to the complex changes brought about by the Amendment Act.[36] In my view the greatest confusion appears to arise when legal practitioners conflate the administrative processes with the legal proceedings or fail to appreciate the unique nature of each.

[41] I would suggest further that the vision of the legislature by the Amendment Act was to avoid legal costs at all and that this should be kept in mind when considering how to deal with the impact of the administrative proceedings on an action instituted to enforce a third party claim for compensation when a RAF 4 form is rejected or whilst a serious injury assessment is underway.

Lebeko, Duma and related cases:

[42] In Road Accident Fund v Lebeko[37] the Supreme Court of Appeal reckoning with the issue of how a serious injury is to be assessed for the purposes of section 17 (1A) of the RAF Act made it plain that the obligation of the Fund to make payment to a third party is dependent on the extra-judicial assessment of the injury in terms of the prescribed method as outlined in regulation 3. It noted that even if the Fund delayed in making the election whether to accept or reject the assessment, that this would not justify a disregard

[36] *Supra* at para [34].
[37] *Supra*. This judgment was delivered on 15 November 2012.

for the prescribed process. In other words, the unique extra-judicial process for the assessment can firstly not be dispensed with. It is a necessary, antecedent step, before any obligation can arise on the part of the Fund to have to compensate a third party for his/her non-pecuniary loss and, secondly, the determination of the issue of whether the injury is serious or not is not for the court to make but is one that must be resolved internally and administratively by the Fund.

[43] The process is initiated (despite what the parties' pleadings say or don't say) by an examination of the third party by the medical practitioner and the submission of the prescribed RAF 4 form.[38]

[44] The process to determine whether a serious injury exists is completed if the Fund accepts the serious injury assessment report.[39] If the Fund rejects the report, the third party declares a dispute concerning the assessment of the injury to the Registrar of the HPCSA, who in turn refers the disputed assessment to the Appeal Tribunal as constituted in terms of Regulation 3 (8)(b) and (c).[40]

[45] A special plea raised by the Fund in Lebeko that this procedure set out in the regulations had not been fully complied with, and that the issue of the seriousness of the injury had not been finally determined in terms of regulations 3 (4) to 3 (12), was dismissed by the trial court. It further found that the reasons given by the defendant in correspondence for rejecting the plaintiff's serious injury assessment report(s), were unsound, irrelevant, irrational, and

[38] Regulation 3(1)*(a)* and *(b)* provides that a third party *who wishes to claim compensation for non-pecuniary loss* shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations. The RAF 4 form provides for the assessment of an injury envisaged in both regulations 3(1)*(b)*(ii) and 3(1)*(b)*(iii). The narrative test entails an assessment of prospective long-term impairment(s) which, over time, could vary or even be corrected. It ostensibly involves tests to establish whether the injury has stabilized and that the MMI has been attained.

[39] The Fund must then deal with the claim on that basis (Manukha v RAF (285/20160 [2017] ZASCA 21 (24 March 2017) at para [22]). An acceptance should require that an offer for general damages be made.

[40] *Supra* at para [5].

unsustainable and that it therefore could never be regarded as an 'objection' - (rejection). The high court accorded the same reasoning to other letters of rejection and ostensibly regarded the defendant as having accepted the assessment report(s) as correct. In particular it relied on the RAF 4 report of an occupational therapist which had not pertinently been rejected by the Fund. Leaving aside the fact that a report of an occupational therapist does not equate to compliance with the requirement of an assessment by a registered medical practitioner, the court noted however that the trial judge had been wrong to enter "the arena reserved for the defendant and ultimately the tribunal" by finding instead that the defendant had "accepted" that the injury was serious.

[46] Plaintiffs' counsel (in the appeal) argued that the Fund's failure to respond to the claimant within a reasonable time was tantamount to its acceptance of the correspondence of the serious injury assessment report submitted with the initial claim and that as such the Fund must be deemed to have agreed that the injury was serious (as defined). The appeal court however found this submission to be misplaced, noting that the nature of the inquiry into the assessment may prove to be complex and as a result take time to investigate, hence the delay on the part of the Fund in responding early.

[47] The appeal court emphasized that the power to establish whether or not an injury is serious lies ultimately with the Appeal Tribunal (comprised of functionaries with appropriate expertise) and not with the courts. In the result it concluded that if the court proceeded with the claim for general damages on that basis, it would be exceeding its powers.

[48] The regulations at the time did not stipulate a time frame within which the Fund was required to respond to a claim for general damages. The appeal

court noted that while it was conceivable that delays might be prejudicial to claimants, this did not justify a disregard for the prescribed process.

[49] To counter the inevitable prejudice, it suggested that it was open to the plaintiff to direct a written request to the Fund for an expeditious response to the claim and in particular the issue of general damages. Alternatively, so it was reasoned, because the Fund is an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996, a third party could invoke the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA") in order to compel a 'timeous' response.

[50] It further dismissed the notion that the parties could agree among themselves that the injury in question should be regarded as serious or that their opinion in this respect was a substitute for the decision by the designated functionary (Fund or Appeal Tribunal).[41] Likewise any agreement on whether the injury is serious cannot be "assumed".[42] There is no room for inferences to be drawn as to the Fund's supposed "satisfaction".[43]

[51] The court also disregarded as unconvincing the notion that once summons was issued to enforce the claim that the matter was then subject to the Uniform Rules of Court and not to the processes which fall under the RAF Act and regulations "precisely because the process of establishing whether a claimant is entitled to general damages falls exclusively within the ambit of the (Fund) and ultimately the appeal tribunal (subject, of course, to a court's power of review)."[44]

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[41] *Supra* See para [25].
[42] *Supra* at para [24].
[43] *Supra* at para [24].
[44] *Supra* at para [23]. It is a common mistake of practitioners to overlook the import of the scheme and to resort to unnecessary point-taking in the legal proceedings.

[52] In dealing with the impact of the administrative processes on the litigation, and in its conclusion generally, the appeal court found that:

> "[27] At the time that the judgment was delivered in the court below, the plaintiff had still not complied with the procedure as set out in regulation 3. The failure to do so by the plaintiff meant that the defendant could not have been, and was not as yet, satisfied that the plaintiff's injury had been correctly assessed. It was not for the high court to construe that, in the circumstances, it could make an order for general damages absent the prescribed assessment. The high court misdirected itself in doing so. Consequently, in the light of the plaintiff's failure to complete the process prescribed in regulation 3, the defendant's special plea should have been upheld.
> [28] While the special plea falls to be upheld, it was nonetheless dilatory in nature. Its success does not extinguish the plaintiff's cause of action in respect of general damages but has the effect of postponing adjudication until at least the procedural aspects complained of, have been complied with or extinguished by the operation of the regulations. It is not unknown for an offending party to be granted leave so as to enable him or her to comply with the prescribed procedure, even if a special plea (such as this) has been successful.
> [29] The special plea took the form of an objection to the plaintiff's cause of action regarding its claim for general damages, in light of his failure to comply with the prescribed regulations. The plaintiff's right to claim general damages is clearly dependent on the acceptance or rejection of the RAF 4 assessment by the defendant or ultimately a determination by the appeal tribunal.
> [30] In upholding the special plea, it simply follows that the claim for general damages is not ripe for hearing and has the effect of staying that part of the proceedings,
> pending the determination of the dispute before another forum. This is covered by rule 22(4) of the Uniform Rules of Court."[45]

[53] The appeal court confirmed that the right to claim general damages remained alive in all the circumstances and that it was still open to the plaintiff to pursue such a claim provided he fulfilled the prescribed procedural requirements.[46]

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[45] See LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd 1974 (1) SA 747 (A) at 772E; GK Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk 1984 (2) SA 66 (O) at 72A-C; Parekh v Shah Jehan Cinemas (Pty) Ltd and others 1980 (1) SA 301 (D) at G. (This is a footnote from the judgment itself.) No doubt, if the parties in the litigation plead their case and defence respectively based on the intricacies required by section 17 (1A) read together with the Regulations, with reference especially to the status of those proceedings in the parallel dispute resolution forum, the more obvious way for the court to deal with the plaintiff's claim for general damages in a scenario similar to Lebeko's is to have its adjudication postponed pending the determination of the dispute before the Appeal Tribunal. This necessary strategic approach (in recognition of the third party's right to have his/her dispute resolved in a fair and public hearing albeit in a different forum than the court) will, or at least ought to, in recognition of that same constitutional right, enable the plaintiff to proceed in court in respect of the adjudication of his/her other claims for compensation which arise from the fact of the wrongful driving of a motor vehicle.

[46] *Supra* at para [32].

[54] It is further instructive to have regard to the order issued by the appeal court concerning the consequences to the plaintiff of it having upheld the Fund's special plea. The approach sensitively supports the third party's rights afforded to him/her to still pursue the claim for general damages in accordance with the prescribed method:

> "2.1 It is declared that the defendant is liable for the plaintiff's loss without any apportionment.
> 2.2 The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996, to compensate him 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 in the motor vehicle collision of 6 June 2009 after such costs have been incurred and upon proof thereof.
> 2.3 The defendant is ordered to pay the costs of the hearing on 2 August 2011.
> 2.4 The special plea is upheld with costs.
> 2.5 It is declared that the plaintiff has not yet complied with regulation 3.
> 2.6 The plaintiff is given leave to exercise his right in terms of regulation 3(4) to appeal against the Fund's rejection of Dr Scher's serious injury assessment report within 90 days of the date of this judgment.
> 2.7 The matter is postponed sine die for the determination of:
> 2.7.1 the plaintiff's claim for general damages; and
> 2.7.2 liability for the remaining costs."

[55] The principles enunciated in Lebeko were re-stated by the Supreme Court of Appeal in Road Accident Fund v Duma & Others.[47]

[56] In this appeal against four judgments of the South Gauteng High Court, the contention of the Fund, in broad outline, was to the effect that the High Court should have held in each case that the issue whether the plaintiff had suffered "serious injury" had not been determined by the method prescribed by the regulations promulgated under the Act and that the High Court should therefore not have awarded general damages.

[57] The cases each had their own unique features and in all of them the Fund had filed special pleas in which it was pleaded in different ways that the plaintiff had not complied with regulation 3 and that his or her claim for general

[47] *Supra*. This judgment was delivered shortly after Lebeko, on 27 November 2012.

damages was therefore not competent, alternatively premature.[48] In all four cases the Fund subsequently rejected the RAF 4 form in terms of regulation 3 (3)(d)(i) by means of an identical letter from its attorneys. In each instance these commonly worded letters were written in every case at least one year – and in some cases almost two years – after the RAF 4 form had been delivered to the Fund and very shortly – in some cases a few days – before the commencement of the trial proceedings.[49]

[58] In all four cases the Fund's contentions in the High Court were, in broad outline, that the plaintiffs' RAF 4 forms did not comply with the requirements of Regulation 3, in the main, because a medical practitioner had failed to do a physical examination of the plaintiffs and another who had provided input was not a medical practitioner. Further it was submitted that in any event, the RAF 4 forms had been rejected by the Fund, as envisaged in Regulation 3(3)(d)(i) and that the plaintiffs' remedy was therefore to declare a dispute in terms of Regulation 3(4). In the circumstances, so it was submitted, the court could not entertain the claims for general damages.[50]

[59] However, in all four cases these contentions did not find favour with the High Court for reasons that essentially went along the following lines: the RAF 4 forms were in fact compliant with regulation 3 and, in any event, it was apparent from the medical evidence presented at the trial that the plaintiffs did indeed suffer serious injuries as contemplated by the regulations. 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 forms within a reasonable time and its right to do so had therefore expired. The

[48] On appeal the Supreme Court of Appeal found that these pleas should have been upheld.
[49] *Supra* at para [11]. This seems to be a common feature of road accident fund litigation which plays havoc with the court rolls.
[50] *Supra* at para [14].

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).[51]

[60] The antecedent enquiry, so the court reasoned, was 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.[52] If it was, the merits of the rejection seemed to it to be of little consequence. Conversely, if the rejections could not be disregarded by the trial courts, the fact that the rejection was without merit would again be of little consequence.[53] It was to that antecedent enquiry that the appeal court turned.

[61] The court noted that a consideration of the High Court's judgments in the four cases on appeal before it and those upon which they relied, all seemed 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, so the argument went, these decisions assume that if the Fund should fail to reject an assessment properly or to do so timeously, the rejection can be ignored. The cases also suggest, so it was submitted before the appeal court, that if the medical evidence before the court showed that, on balance, the plaintiff was indeed seriously injured, the court could then proceed to decide the issue of general damages.[54]

[62] The appeal court however set the record straight regarding the effect of the new model applicable to claims for general damages in the following all-important *dictum*:

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[51] *Supra* at para 15.
[52] It ultimately found that the Fund's rejection should not have been disregarded.
[53] Indeed, the correctness of the Fund's reasons for rejection are of no real consequence.
[54] *Supra* at para 18.

"[19] …. 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.[55]

(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.

[20] 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 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. This does not mean, as was suggested, for instance, in *Louw v Road Accident Fund* (supra) at para 82, that the Fund can avoid and frustrate every claim against it indefinitely by simply not taking a decision either way. The solution is to be found in s 6(2)(g) read with s 6(3)(a) of PAJA. These sections provide that if an administrative authority unreasonably delays to take 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'. Though PAJA sees this as a 'ground of review' it is really no different from the time honoured common law remedy of *mandamus* (see eg *Cape Furniture Workers' Union v McGregor NO* 1930 TPD 682 at 685-6)." (Emphasis added.)

[63] In answer to the objection raised on behalf of the plaintiffs that this solution did not augur well for indigent clients who must incur unnecessary

[55] The same can be said for decisions of the Appeal Tribunal. When the judgement in Duma was pronounced, we were earlier in the game after the implementation of the amending provisions. With the benefit of time since then delays on the part of the appeal tribunals constituted to hear disputes have also become commonplace.

expenses by way of an unreasonable delay PAJA review, the court proposed the following hope. First, an application may often not be necessary. The Fund may very well react to a letter of demand and, all things being equal, should do so. (The court noted incidentally that in none of the four cases on appeal did the plaintiff seem to consider a resort to this rather obvious and inexpensive solution.) Secondly, the application to compel need not be an elaborate and expensive one. It will require two allegations only: that the Fund had failed to take a decision and that a reasonable time had elapsed. Thirdly, unless the Fund was to present a plausible explanation for its unreasonable delay there is no reason why it should not be mulcted in attorney and client costs or worse to force it to mend its ways.[56] Finally, it was suggested that if this *mandamus* solution proved to be unaffordable, that the answer lay in an approach to the legislative authorities or perhaps in a constitutional challenge of the Regulation. What is plain, however, so the appeal court re-iterated, is that the Fund could not justify a deviation from the procedure pertinently prescribed by Regulation 3.

[64] The issue of what constitutes a reasonable time for the Fund to accept or reject a serious injury assessment report has in fact now been remedied by the Legislature. Regulation 3 (3) (dA) provides that the Fund has 90 days after a serious injury assessment report has been lodged with it to respond. This however seems to have done little to galvanize the Fund into earlier action and rejections of RAF4 forms are more often than not announced at the eleventh hour when a matter is about to go to trial, invariably to adjudicate quantum after the Fund has gotten the issue of merits and causation (including whatever apportionment of liability is appropriate) out of the way.

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[56] See for example Mlatsheni v Road Accident Fund 2009 (2) SA 401 (E) para 18; Bovungana v Road Accident Fund 2009 (4) SA 123 (E) para 7. (This footnote comes from the judgement itself.)

[65] A further significant finding by the appeal court concerns the legal effect of a negative decision by the Fund to reject a RAF 4 and what to do when it fails to provide proper reasons for such decision. The court noted as follows in this respect:

> "[24] Recognition that the Fund's decision to reject the plaintiffs' RAF 4 forms constituted administrative action, dictates that until that decision was set aside by a court on review or overturned in an internal appeal, it remained valid and binding (see eg *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26). The fact that the Fund gave no reasons for the rejection; or that the reasons given are found to be unpersuasive or not based on proper medical or legal grounds, cannot detract from this principle. The same holds true for the respondents' argument that it appeared from the medical evidence presented by them at the trial that the Fund was wrong in deciding that their injuries were not serious. *Whether the Fund's decisions were right or wrong is of no consequence. They exist as a fact until set aside or reviewed or overturned in an internal appeal.* It was therefore not open to the High Court to disregard the Fund's rejection of the RAF 4 forms 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." (Emphasis added)

[66] Further, in this respect, a court's overriding" as it were of the Fund's decision to reject cannot be promoted as constituting that review as this approach would fly in the face of the provisions of section 7 (2) of PAJA which require that no court shall entertain a review of an administrative decision unless and until any internal appeal provided for has first been exhausted.[57]

[67] Although recognizing that section 7 (2)(c) of PAJA allows for the internal appeal procedure to be circumvented in exceptional circumstances and on application by the person concerned, the appeal court noted that such a situation did not exist in the matters before it:[58]

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[57] *Supra* at para 25.

[58] In a brief case note by Alfred Selman in De Rebus August 2013 at 155 regarding Duma, he lauds "the seemingly deft hand played (by the Supreme Court of Appeal) in balancing the practical, legal and political implications of its decision" by presenting a "strong interpretation" of section 7 (2) of PAJA that prescribes that, where administrative action by the Fund is contested, all internal remedies must first be exhausted before a court may be approached, no matter how obstructive the Fund may be and regardless of the sufficiency of the reasons they give for the rejection of a RAF 4 assessment, *unless there are exceptional circumstances present*. In answering the question whether the court missed the opportunity to protect third parties from being subjected to actions of the RAF perceived to be undertaken merely to frustrate their claims (by not finding the existence of such exceptional circumstances), he concludes that the judgment is helpful rather than harmful. He suggests that had the court substituted its decision for that of the HPCSA and gone against the principle that the disputes arising in the four cases should have been resolved in the alternative

> [25] … It is true that s 7(2)(c) of PAJA allows the internal appeal procedure to be circumvented 'in exceptional circumstances and on application by the person concerned'. But apart from the fact that there was no application to this effect in any of the matters on appeal, I can detect no exceptional circumstances that could warrant this departure. This is of particular significance in the light of the recent Constitutional Court decisions that placed strong emphasis on the need for internal remedies to be pursued and particularly those that lie to specialised appeal tribunals. Thus it was pointed out by Mokgoro J in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) paras 35-37:
>
> > 'Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.
> >
> > First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. . ..
> >
> > Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.
> >
> > Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.'"[59]

[68] As to the Fund's obligation to provide reasons for its decision, its failure to comply with the obligation in this respect does not on its own render the decision invalid:

> "[26] As to the Fund's obligation to provide reasons for its decision, it is true that it is pertinently constrained to do so by regulation 3(3)(d)(i). But, as I have said, the Fund's failure to comply with this obligation cannot render the decision invalid per se. As a matter of principle, I suppose, the claimant can compel the Fund to give reasons in terms of s 5 of PAJA. Yet, in practice, a claimant whose medical experts maintain that his or her injury is indeed serious as contemplated in regulation 3(1)(b), would clearly be better advised to proceed directly on appeal to the appeal tribunal. I say this because the appeal tribunal is in any event not bound by the reasons given by the Fund. In the exercise of its wide investigative and fact-finding powers, the appeal tribunal can establish for itself whether or not to assess the injury as serious, whatever the reasons of the Fund might have been. The appeal created by the regulations appears to be 'an appeal in the wide sense', that is a complete rehearing of, and fresh determination on the merits with additional evidence or

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forum rather than by it as a *final* means, that this would have had the undesirable effect of leaving the appeals process redundant. He points to the necessity for the administrative processes, designed in such a manner as to protect the Fund's interest against fraudulent claims, to be shown the necessary deference, but also suggests that is unlikely that the Fund will use the appeals process to enforce an obstructionist agenda because of its responsibility to bear the reasonable cost of each appeal to the HPCSA. In other words, the prohibitive financial consequences if it engages in such behavior should act as a disincentive to the Fund in itself.

[59] See also Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC) para 50. (This footnote is from Duma).

information if needs be (see eg *Tikly & others v Johannes NO* 1963 (2) SA 588 (T) at 590G-H)."[60]

[69] The last feature of significance in Duma is how the court dealt with the further conduct of the four matters after upholding the Fund's appeal.

[70] In the special plea the Fund had prayed that the plaintiffs' claims for general damages be dismissed outright based on the Fund's contention that these were premature in that the plaintiffs had failed to establish that their injuries were serious in accordance with the method prescribed in Regulation 3. The Fund had however held out, alternatively, for an order that these claims be stayed, pending the compliance by the plaintiffs with Regulation 3.

[71] The appeal court opted for the outcome that would promote the plaintiff's right to have the dispute resolved in the proper forum. Further even though the quantum of the plaintiffs' claim for general damages had by operation of the orders of the High Court, been determined either by agreement or the court, the order made by the appeal court facilitated the recognition that the awards of general damages would "stand". As to costs, the appeal court noted further that though the plaintiffs were ultimately unsuccessful, both in their opposition to the special pleas and on appeal, that it would make no order as to costs given "the uncertainty that existed" about the interpretation and application of Regulation 3.

[72] The court's practical approach to an obviously difficult conundrum posed by the parallel administrative processes appears from the excerpt below of an

[60] This reasoning provides a compelling argument for the court to show deference to the unique assessment method, procedures and the internal remedies provided for in the regulations to determine whether an injury is serious or not and to leave well alone what is not within the court's jurisdiction to decide.

example of one (amongst the four) of its orders substituting that of the High Court:[61]

> "In this light the following orders are made in the four matters on appeal:
> In the matter of Road Accident Fund v Kubeka: Case No 64/2012:
> 1. The appeal is upheld, with no order as to costs.
> 2. The order of the High Court is set aside and replaced with the following:
> '(a) The defendant is to make payment to the plaintiff of an amount of R408 276 for loss of earnings.
> (b) The defendant is to furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for future medical expenses incurred by the plaintiff.
> (c) The first and third special pleas raised by the defendant are upheld.
> (d) The plaintiff's claim for general damages is postponed *sine die.*
> (e) The plaintiff may dispute the defendant's rejection of the plaintiff's serious injury assessment report in terms of regulation 3(4) of the Road Accident Fund Regulations, 2008 within 90 days of the date of this order.
> (f) In the event that the appeal tribunal determines that the plaintiff's injury constitutes a 'serious injury', the defendant is to make payment to the plaintiff of the amount of R300 000 for general damages.
> (g) There is no order as to costs in relation to the defendant's special pleas and the plaintiff's claim for general damages.
> (h) Save as aforesaid, the defendant is to pay the plaintiff's costs, including the costs of the following experts: Dr Barlin, Ms Marks, Ms van Zyl and Mr Rolland.'
> 3. The period of 90 days referred to in paragraph 2(e) above is to be calculated from the date of this court's order."

[73] In Mpahla v Road Accident Fund[62] the Supreme Court of Appeal had to reckon with an interpretation of the amended Regulation 3 (3) (dA) arising upon the Fund's delay in accepting or rejecting a serious injury assessment report. The appellant had contended before the high court that on a proper construction of Regulation 3(3) (dA), the Fund was deemed to have accepted that the appellant sustained a serious injury, because it did not reject the serious injury assessment report or direct the appellant to submit to a further assessment within 90 days of delivery of the report.

[74] The following facts were common cause. On 5 July 2013 the appellant instituted an action in terms of the Act for damages she allegedly suffered as a result of the injuries she sustained in a motor vehicle collision that occurred on 18 November 2011. One of her claims was for non-pecuniary loss or general

[61] In the other cases they are identical in form except for the obvious variables.
[62] (698/16) [2017] ZASCA 76 (1 June 2017).

damages in an amount of R400 000. On 28 October 2013, in compliance with Regulation 3(3) and the Act, the appellant caused a serious injury assessment report to be submitted to the Fund. Even though Regulation 3(3) (dA) applied, the Fund failed to react to her report within 90 days as contemplated in that regulation. The 90-day period expired on 26 January 2014. It was only on 17 January 2015 that the Fund reacted to it by rejecting it. It conceded the issue of negligence and undertook to compensate the appellant for the other heads of damage but continued to resist and deny liability for general damages.[63]

[75] Regarding the claim for general damages, the Fund raised two special pleas. First, it said that the appellant failed to comply with the requirements of section 17 of the Act and Regulation 3 of the Regulations relating to the submission of the serious injury assessment report. Second, it contended that the claim for general damages was premature because the appellant had failed to exhaust the processes and remedies available to her in terms of Regulation 3. The first special plea (based on the submission of the report) was correctly abandoned because the appellant ultimately delivered the report to the Fund on 28 October 2013.[64]

[76] The appellant contended that Regulation 3(3) (dA) should be interpreted to mean that if the Fund fails to accept or reject a claimant's serious injury assessment report or fails to direct that a claimant submits himself or herself to a further assessment within the 90-day period prescribed by the regulations, that the Fund should then be deemed to have accepted the injury as serious.[65]

[77] The high court had rejected the appellant's submission and in brief held that Regulation 3(3) (dA) was not capable of the construction contended for on

[63] At para [4].
[64] At para [5].
[65] At para [6].

her behalf, namely that if the Fund had not taken a decision within 90 days, that it was deemed to have either accepted the serious injury assessment report or to have referred the plaintiff for a further assessment. The appeal court agreed and dismissed the appeal, holding as follows:

> [14] An interpretation that seeks to suggest that because the Fund did not make a decision within 90 days of receipt of the SIA report, it is deemed to have accepted that the third party has suffered serious injuries is untenable and in conflict with the provisions of subsecs 17(1) and 17(1A) of the Act, and regulation 3. It is always open to the Fund to reject the SIA report when it is not satisfied that the injury has been correctly assessed in terms of regulation 3(3)(dA). This regulation does no more than prescribe a period within which the Fund can reject or accept the report. It would be an anomaly if, in terms of regulation 3(3)(dA), where the Fund has failed to make a decision within the prescribed period, an otherwise not serious injury would by default become serious because of the delay. By including the prescribed period the legislature sought to ameliorate the hardship experienced by claimants prior to and after the *Duma* case. The intention was to bring legal certainty and to compel the Fund to act promptly and timeously, not to create a presumption in favour of a claimant that the injury in question is a serious one.
>
> …
>
> [17] The new regulation seeks to define the rights of the claimants in unambiguous terms and afford them an opportunity after 90 days to apply for a mandamus in terms of PAJA to compel the Fund to make a decision. It was specifically enacted to deal with the mischief identified by this court in *Duma* relating to the phrase 'within a reasonable time' which caused uncertainty to claimants. It is unfortunate that the Fund continues to be tardy, but one cannot reformulate the regulation in order to avoid that consequence.
>
> [18] In my view, absent any constitutional challenge, the reading into the regulation of a deeming provision is impermissible and tantamount to arrogating to the court the powers of law-making functions. It follows that the appeal has no merit and falls to be dismissed."

[78] The further value of the judgment is its confirmation of the principle established in Lebeko and Duma that if the Fund is not satisfied that the injury is serious, that the plaintiff "cannot continue with its claim for general damages in court" and that the court "simply has no jurisdiction to entertain the claim." Instead, such a litigant's remedy is to take the rejection on appeal in terms of Regulation 3 (4) or, if applicable, to vindicate his/her rights under the provisions of PAJA in recognition that the Fund conducts itself as an organ of state in making the decisions pressed upon it to be made in Regulation 3.

[79] In Van Der Westhuizen v Road Accident Fund[66] the High Court exercised its powers under rule 42 (1) and (2) to rescind an order granted by consent between the parties in a road accident fund action which included a globular claim for general damages and loss of income, after it became apparent that the Fund had not yet taken a decision to accept or reject the RAF 4 form. The court had queried after the fact, on the basis of Mpahla v Road Accident,[67] whether the Fund had taken a decision either way in respect of the plaintiff's claim for general damages. In response to the court's query, plaintiff's counsel simply stated that the Fund had not rejected the claim for general damages. The Fund's counsel agreed with the plaintiff's and asserted that there was no need to rescind the order in the circumstances.

[80] The court held however that the decision in Mphala is clear authority for the proposition that, in the absence of a decision by the defendant to take a decision, a court may not entertain the claim for general damages and that the remedy of the plaintiff was to apply to court to compel the defendant to take a decision.

[81] The judgment in Road Accident Fund v Faria[68] reveals that the Fund rejected its own expert's assessment that the claimant's injury was a "serious injury" in terms of section 17 (1) of the RAF Act. The issue on appeal was whether it was competent, as a matter of law, for the High Court to have decided to award the plaintiff general damages in the circumstances of the case. The plaintiff had in the court undergone medico-legal assessments by two orthopedic surgeons, one of whom was appointed by the Fund. The experts had prepared a joint minute in terms of which they agreed that the plaintiff had

[66] (16743/2015) [2019] ZAGPHC 163 (24 May 2019).
[67] *Supra*.
[68] *Supra*.

suffered disfigurement and psychological problems as a result of shoulder scarring and that, accordingly, he had suffered a "serious injury", resulting in "serious long-term impairment". The Fund rejected the RAF assessment by its own expert. The High Court held that the objections raised by it had fallen away by reasons of the joint minute and disregarded its contention that the court should have permitted it to direct that the third party submit himself/herself for a further assessment to ascertain whether the injury was serious.

[82] The court thereupon made the order that the plaintiff be awarded general damages which the parties had agreed was an appropriate amount.

[83] The appeal was proceeded with despite the issues between them having become moot, the parties accepting that the case raised an important question of law, *viz:* "whether the Road Accident Fund Regulations ("the Regulations") promulgated in terms of the Act provide for the RAF to reject its own expert's finding in respect of determining a serious injury and to require that there should be compliance with the procedures provided for in the Regulations in determining whether or not an injury is "serious"".

[84] From the appeal judgment the obvious answer to the question was in the affirmative.

[85] The court held that since the assessment of injuries as serious is now an administrative rather than a judicial decision, that the Fund is not bound by the views of its own expert and that the High Court had wrongly awarded damages. The order of the High Court to pay the plaintiff the sum of R350 000.00 as general damages was set aside.[69]

[69] Evidently the Fund had paid the damages (albeit in error) and the issue had accordingly become moot between the parties.

[86] All of the judgments outlined above self-evidently reflect the "paradigm shift" and the hands-off approach required by our courts when it comes to the Fund assessing what claims for general damages are compensable and which not. The judgments also reveal a respect for the right of claimants to pursue their claims for general damages in the appropriate forum, rather than a court arrogating to itself a jurisdiction which it does not have. Further and of critical significance, Duma confirms that the Uniform Rules of Court must yield to what is happening in the administrative realm at any given time.

The issues concerning Mnama and Maqhutyana:

[87] In the present matters comprising the two actions issued out of the Mthatha High Court, the Fund rejected the serious injury assessment reports of the plaintiffs requiring the parties to follow the long administrative route in respect of their claims for general damages. It did so very belatedly at a stage after the Fund had accepted liability for the plaintiffs' damages to be agreed or proven and at a point after the plaintiffs in both matters had enrolled their matters for trial in respect of quantum. This is the normal progression after liability is conceded and under the old claims dispensation would not have caused any consternation, except here the RAF 4 rejection, an election expected to have been taken by the Fund within 90 days of the RAF 4 Form being lodged with them, followed long after the fact and once merits had been separated from quantum and the former issue conceded.

[88] Since the "preliminary point" only came to the plaintiffs' imagination during the course of the referral, the only confusion at the initial point of the referral was whether it was permissible, by virtue of the obvious effect of the

Fund's rejection of their RAF4 forms, for them to proceed with the determination of their claims for loss of earnings in each situation.

[89] A reading of the issues for determination as reflected in the Judge President's directive reveals that two scenarios were contemplated, one where the administrative decision of the HPCSA was still awaited (Mnama) and the other where it had been taken but was unfavourable to the plaintiff (Maqhutyana). In the case of Maqhutyana the other concern was whether the plaintiff's separate claim for loss of earning could proceed at all in the light of the HPCSA's ruling that his injuries were not serious, and in the case of Mnama, whether her claim for loss of earnings could be proceeded with whilst waiting for the HPCSA's decision unless she "abandoned her claim for general damages." A related question was what would happen if that decision then turned negative.[70]

The separation of issues option:

[90] Even before the first set down of the matter before this court the Fund appeared to have accepted (based on the heads of argument filed on its behalf at the time which foreshadowed what it would argue) that the plaintiffs were not barred from proceeding with their respective claims for loss of earnings separately from their claims for non-pecuniary losses generally, or in Mnama's situation while the administrative interlude endured, but that the plaintiffs'

[70] The parties should perhaps also have concerned themselves with the question what the position would be if the decision went in favour of the plaintiff, and she had *abandoned* her claim for general damages. What then? The manner in which the question was framed however confirms the concern on behalf of the plaintiff that if the decision went against her and it was thereafter clear that she was not entitled to have proceeded with her claim for loss of earnings in the first place, because the seriousness of the injury was at the heart of both claims as a jurisdictional fact, that this might retrospectively render futile the separate adjudication of this claim.

remedy in order to so proceed (which neither had availed themselves of), was to be found in the provisions of Rule 33 (4).[71]

[91] Uniform rule 33(4) provides as follows:

> "If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[92] Still, so it was belabored on behalf of the Fund in anticipation of arguing the initial issues before us, our courts have repeatedly warned that when a decision is called for in terms of rule 33 (4), it must be a carefully considered one, regard been given in particular to the convenience of all concerned in each action. In this respect though, it was submitted in Mnama that she had been assessed by various experts to prove special damages and the quantum thereof and that the reports produced as a result revealed that she had provided these experts with facts informing their professional opinions which are equally material to the assessment of the quantum of her claim for general damages (non-pecuniary losses) and loss of income (pecuniary losses). The Fund accordingly lamented that she would inevitably be compelled to give evidence both with regards to her claim for general damages and with regard to her loss of income which would be heard in separate sittings if those issues were separated.[72] In the result, the necessary underpinning of convenience as envisaged in Rule 33 (4), so it was submitted on the Fund's behalf, would be absent.

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[71] See Mavuso v RAF which confirms a separation of issues to be a viable solution to a problem similar to that encountered in both referred matters.

[72] No evidence would be required in court concerning the issue of her entitlement to claim compensation for general damages. This is because that determination will be made in the administrative arena or forum.

[93] In accepting that a separation of the issues was an appropriate resolve of a "not ripe for adjudication" scenario contemplated by the examples in both Maqhutyana and Mnama, Mr. Van Der Linde submitted that it was not difficult to imagine a case where the evidence on the issue of a serious injury does not overlap at all with the issues arising upon the adjudication of a loss of income claim.

[94] I am not in agreement however that the Fund's concerns of an overlapping even arise given that the experts under the new claims dispensation ought not to involve themselves in court in the assessment that undergirds the plaintiff's entitlement to enforce a claim for general damages.[73]

[95] The issue of the seriousness of the injury will be determined extra-judicially according to the prescribed method. The opinions of the experts (certainly in the court) are accordingly irrelevant to the question of whether the injury ought to be regarded as serious because it is not the court's concern to make such a determination. Not only are experts' opinions that conduce to the proof of the plaintiff's entitlement to the claim for general damages not required at all in court, but their views are also unlikely to matter (in court) if the plaintiff makes it through the threshold gateway.[74] Further, the question of the extent of those damages (assuming the jurisdictional fact is established for the

[73] Their relevance will be in examining a third party and compiling the RAF4 that asserts that the injury is serious. Their reports or arguments will also be of significance in the internal appeal hearing. (See Regulation 3 (4)(b)). Expert reports relied upon in the administrative realm are routinely put up as being relevant in the court as well, possibly duplicating costs.

[74] In Duma the court, in remarking upon the importance of the role in the legislative scheme of the assessment in Regulation 3 (1), observes that the prescribed method, the process that applies to assess the seriousness of the injury, serves as a measure of control to prevent claimants and the Fund from incurring costs in establishing whether injuries qualify as serious when a medical practitioner has assessed them to be so after a proper physical examination of the claimant. (See para [31]) The objective therefore is to keep the costs in court to a minimum if the need to enforce any aspects of the third party's claim arises in the judicial forum at all. Further, if the assessment goes under scrutiny through the internal remedy mechanism, these costs also, insofar as they are reasonable are also borne by the Fund pursuant to the provisions of Regulation 3 (14)(a) so should not be duplicated in court by the plaintiff unnecessarily resorting to the filing of expert reports unless their views pertain to issues in respect of which the court does have jurisdiction.

court to ultimately determine this aspect) would, in my experience, rarely require that evidence be adduced especially since the narrative test envisaged in regulation 3 (1)(b)(iii) would already have taken into account the impact of the injury on the plaintiff's personality rights. These factors will be evident to the Fund acting in its capacity as administrator if it accepts the serious injury assessment report, in which event it should be prompted to make an appropriate offer for the third party's non-pecuniary loss commensurate therewith. If not, the relevant factors would certainly have become apparent in the specialized dispute resolution forum, and ought to form the basis for an appropriate offer in respect of general damages, should the decision of the Appeal Tribunal conduce to the plaintiff's favour. If anything will remain for consideration after such an offer is rejected, I expect that this would relate to the extent of the quantum only, an aspect routinely argued before the court on the basis of a stated case if the parties cannot agree on the extent thereof.

[96] The Fund's stance in objecting to Mnama proceeding to determine her claim for loss of income in the meantime pending the administrative processes that were underway appears to have been founded on a judgment of this division in Samana v RAF[75] on which it relied. The court held in that matter that:

> "….(A) plaintiff is not entitled to unilaterally proceed in respect of one aspect of his or her claim without specifically abandoning relief sought in respect of the others, or pursuant to an order for separation of the issues in terms of Rule 33 (4). It was accordingly incumbent on the applicant to apply for separation. Second, it was manifest that the evidence relevant to the seriousness of the plaintiff's injuries would also be relevant in respect of the impact of the injuries on his earning capacity. It was accordingly unavoidable that there would have been substantial overlapping of evidence, and it was accordingly in any event not convenient to hear these issues separately."

[75] EL Case No. 432/12, ECD 1132/12, unreported judgment dated 15 August 2018.

[97] The issue argued before the court in Samana concerned who should bear the wasted costs of a postponement of a trial. In that matter the defendant had rejected the plaintiff's RAF 4 form and adopted the view in court that the matter (enrolled for hearing in respect of quantum and comprising of claims for both general damages and loss of earnings) was not ripe for hearing.

[98] The Fund had asked the plaintiff to agree to a postponement (ostensibly not on the basis that a court could not *in principle* adjudicate on the issue of loss of income in the case of a non-serious injury), but for the reason that it was unlikely, *inter alia* because of a *prima facie* view expressed by the trial judge in this regard, that it would allow the matter to proceed in respect of this head of damages on its own, and because it foresaw it as inevitable that the issue of general damages would overlap with it. The plaintiff was not in agreement. Instead, it was asserted on his behalf that he was entitled to proceed with his claim in respect of loss of income only and that it was unnecessary to apply for a separation of issues.

[99] Despite making such an election (not to make the interlocutory application for a separation of issues), the plaintiff yet sought to persuade the defendant that the issues of general damages and loss of earnings did not overlap, this because the latter concerned a claim for *special damages*. It was contended on behalf of the plaintiff that the concept of special damages within the meaning of the RAF Act and its regulations is not symbiotic with the issue of the seriousness of the injuries and that the evidence the plaintiff sought to lead in respect of the claim for loss of income instead concerned the question of the plaintiff's functional capacity subsequent to the injury sustained by him. For this reason, so it was maintained, there would not be any overlapping of evidence and there would therefore be no inconvenience to the Fund to have to hold over on the issue of the general damages.

[100] The Fund had however indicated that it would vociferously oppose an application for separation of issues and maintained its position that there would an overlap of evidence and therefore an inconvenience to it.[76] Even though there was no such application before it, the court, held that the plaintiff ought to have been aware 12 days before the trial when the Fund requested a postponement that there was "no reasonable prospect" that the matter would proceed in respect of loss of income only, that the plaintiff's counsel had "obstinately" refused to agree to a postponement under these circumstances, and that it was only fair that the Fund should be indemnified in respect of the wasted costs.

[101] A general order was issued that the matter be postponed *sine die*, with the plaintiff to pay the wasted costs occasioned by the postponement.

[102] The value of the judgment lies in the *ratio* that a plaintiff cannot unilaterally decide to isolate out one aspect of his claim whilst going to trial on the other except with the leave of the court. I would venture to suggest however that this aspect of a practical separation of issues is imminently capable of being agreed between the parties during the case management processes (to be endorsed by an appropriate directive of the case management judge at conference) or ordered by the court at Trial Roll Call. The unique nature of road accident fund litigation, and the more recent expectation on the part of

[76] This appears to have been an obstructive approach and unfortunately suggests a lack of understanding by the Fund of the import of the new legislative scheme and order of things. I am not discounting however that there may be real circumstances in which the Fund can resist an application for separation of issues on the basis of the criteria of "convenience". It remains to be seen however what difficulties the Fund foresees as presenting a challenge, or what in its experience since the implementation of the amending provisions, it can bring to the court's attention as posing a real concern that militates against a separate adjudication of a plaintiff's separate claim for special damages apart from a claim for general damages. The Fund would in my view have a hard time explaining, in instances where it has been the cause of any delays, why the plaintiff should be expected to put off the hearing of his/her incidents of the claim for compensation that are ripe for hearing in the meantime, until the administrative procedures have run their course, which may take several months still.

litigants to employ effective case management measures, compels one in the direction of finding practical solutions to the problem.

[103] Inasmuch as the Fund (in the present actions) may have been under the impression by the *dictum* in Samana aforesaid that the plaintiffs had of necessity to abandon their claims for general damages in order to effectuate their matters proceeding in respect of their loss of income claims, they are mistaken. The court in Samana did not rule out the possibility of a separation of these heads of damages at all. It merely suggested that the plaintiff would have to put aside his claim for general damages at that juncture to enable the matter to proceed in respect of his loss of income claim (tantamount to a stay of the claim for general damages), otherwise the question of a separation of issues would have been entirely irrelevant. Separate the claim for loss of income from what? An abandoned claim? This is not what could have been meant by the judgment in my view.

[104] The fate of the other part of Mnama's claim is not that it ought to be irrevocably abandoned, but that it must of necessity stand over for determination or final disposal once the administrative processes concerning the issue of her serious injury dispute following the rejection of her RAF4 form have run their course. The provisions of section 17 (1A) dictate as much. This must be so even if her pleadings have not yet been brought in line to reflect the tangential developments along the administrative trajectory, most especially that she lodged a RAF4 form and that the Fund rejected the serious injury assessment.[77]

[77] Mnama was criticised by the Fund's counsel for not pertinently pleading that there was an issue about the seriousness of the injuries but at the least she did indicate in her particulars of claim that she would hold out for a claim for general damages, the enforcement of which was, and remains, premature. The filing of her RAF4 form ultimately would have been sufficient indication of her desire to pursue her entitlement to claim compensation for her non-pecuniary loss and would have set the administrative procedures on track. (The RAF1 form might also have heralded an indication that a claim for general damages was among the heads of

[105] In practice the parties record the relevant developments concerning the status of the extra-judicial dispute resolution at the case management conference by bringing the judge up to speed as to what aspect of the plaintiff's claim is ready for hearing and what not. This cost-effective measure should be promoted over technical objections to pleadings or the unnecessary hearing of special pleas where the inevitable outcome remains that the court (as a result of the recognized impact of the legislative scheme) will not be able to adjudicate the plaintiff's claim for general damages in the court for so long as the administrative processes interpose. I would suggest that such an approach would give recognition both to the effect of the legislative scheme in all of its nuances, meet the objective of the amending provisions by unnecessarily limiting litigation costs for the Fund, and also respect the right of the third party to pursue his claim for general damages through the unique administrative processes, or by the opportunity given to him/her to resolve any dispute arising concerning the seriousness of the injury in the alternative dispute resolution forum made provision for in the scheme.

[106] Indeed, a plaintiff should in my view be chary of being forced into a situation where he/she formally abandons his/her claim in an action for non-pecuniary loss to gain the value of being able to proceed to adjudication in respect of his/her claim for special damages, thus burning his/her bridges in respect of the court adjudicating the quantum of the claim for non-pecuniary loss assuming an ultimate determination through the administrative processes that the injury is serious and deserving of being compensated for under this head of damages. It may also give the impression, unless expressly qualified,

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damage she was intent upon claiming from the Fund.) Although the parties wear different hats in the administrative arena and the court, it would be inimical to responsible litigation to unnecessarily take issue with the pleadings when the fact of or status of the administrative processes underway are well known to each party in the litigation.

that he/she is throwing in the towel in respect of the dispute resolution process that has its own life force apart from the formal action.

[107] Whilst the action and the administrative processes respectively are separate and independent the reality is that the end (and thus interwoven) goal is to ensure that he/she is compensated for his/her non-pecuniary loss where, administratively, the Fund accepts or is obliged to accept on the basis of a final and binding decision of the HPCSA that the injury sought to be compensated for is a serious one within the meaning ascribed to it in section 17 (1A) of the RAF Act read together with the Regulations.

[108] A separation of issues (if not a stay of Mnama's claim for general damages as in the example of Lebeko),[78] would be desirable, and indeed both logical and practical, because of the recognized principle that this court has no jurisdiction to entertain a claim for general damages against the Fund pending the administrative decision being taken in terms of the RAF Act and regulations as to whether or not the injury of the plaintiff is serious enough to meet the threshold requirement for an award of general damages.

[109] What is an appropriate case for a separation order is obviously a consideration best left for the court to determine in an interlocutory application in terms of rule 33 (4) if an order in this respect is not issued by the trial court *mero motu.* Alternatively, I would suggest that the parties should propose in the course of their case management processes what is a reasonable step forward in court (at that time) in the light of the status of the tangential dispute resolution

[78] In Lebeko the pleadings obviously lent themselves to a stay of the claim for general damages since the special plea, which took the form of an objection to the plaintiff's cause of action regarding his claim for general damages (in light of his failure to have complied with the prescribed Regulation) fell to be upheld. The plaintiff's right to assert his claim for general damages is clearly, as the court observed, dependent on the acceptance or rejection of the RAF 4 assessment, the rejection of the further assessment by the Fund, or ultimately the determination by the Appeal Tribunal (see paras [27] – [29]).

procedure and keep in mind that the litigation will defer to what is happening in such realm at any given time. This is the fate that both plaintiffs must content themselves with in the further prosecution of their actions going forward.

The Fund's objection against the piecemeal adjudication of issues:

[110] The initial stance adopted by the Fund (in the present matter before us) that in principle claims for loss of earnings ought not to be dealt with separately from the issue of general damages (where the Fund or the appeal tribunal's decision on the issue of seriousness of the injury is still awaited) on the basis that the piecemeal adjudication of actions ought to be discouraged, was correctly so in my view not pursued before us.[79] Indeed, in my view the legislative scheme lends itself to the separate adjudication of the uniquely distinct components of the compensation that a third party is entitled to claim under section 17 of the RAF Act.

[111] A claim for future medical expenses is one that particularly comes to mind. Such claims are routinely settled, and the required undertaking given in terms of section 17 (4)(a) of the RAF Act without upsetting the proverbial apple cart and indeed without requiring a separation of that issue from what remains still to be determined by way of appropriate statutory compensation.

[112] There are, in addition, myriad examples of RAF actions litigated in this division where claims for general damages stand over for determination apart from the immediate adjudication of their claims for loss of income until a later

[79] Ironically the court dealt with very aspect in Mavuso v RAF (Supra), which judgment was delivered on 25 May 2020, prior to the issue of the Judge President's directive. One would have thought that this would have rendered the referral moot and have clarified for the Fund that there was absolutely no merit in the preliminary objections raised by them.

indefinite date whilst the decision of the HPCSA is awaited following the invocation by one of the parties of the dispute resolution process.

[113] The earlier implementation in this court's division (before the recent amendment of Uniform Rule 37A and the issue of the Judge President's Directive in this respect) of effective case management has in fact promoted the piecemeal dealing of RAF actions as has suited the parties' convenience. In my view this has dramatically reduced costs for the Fund which has a public duty to litigate responsibly.

Is the claim for loss of income barred if the HPSCA's decision on the issue of the seriousness of the injury is negative to the third party?

[114] The answer to this question is a resounding "No. [80] The parties conceded as much.

[115] Neither is the jurisdiction of the court to adjudicate on a plaintiff's claim for loss of earnings momentarily ousted where the dispute resolution process has been invoked after the Fund has rejected the plaintiff's serious injury assessment report, and the administrative challenge is underway.

[116] This is because a claim for loss of income as an incident of the statutory compensation that a third party is entitled to claim stands on its own.

[80] In Law Society of South Africa v Minister of Transport 2010 (11) BCLR (GNP) at para 35 the court confirmed the principle that whereas a third party with a non-serious injury cannot claim general damages for past and future loss of amenities of life, he/she can still claim medical expenses and loss of earnings. See also Botha v RAF *supra* at para [23] and Mavuso v RAF (*Supra*) at par [11].

[117] It has its own unique requirements and limitations referred to in section 17 (4). It is self-evidently not hit by the proviso to section 17 (1) and is distinct and separate from any serious injury assessment.[81] In other words, the Fund's liability to pay damages for loss of income (assuming the loss and probable extent thereof is proven) arises immediately once the Fund accepts or the trial court finds that the injuries sustained by the plaintiff (or the death of the breadwinner as the case may be) arose from the negligent driving of a motor vehicle under the circumstances described in general in section 17.

[118] The related question whether a plaintiff in obliged to wait out the administrative decision in respect of the seriousness of the injury before being entitled to proceed in court with his/ her claim for loss of income appeared to be premised on the initial misgivings of the parties in the present referral that such a claim was interwoven with a claim for general damages (understood in the traditional sense of the concept) and/or only competent in the case of a serious injury.[82] That is however not the situation, and nothing stands in the way of such a claim being adjudicated separately, and first, if the circumstances lend themselves to such a scenario.[83]

The takeaway from the Lebeko and Duma related cases:

[81] The RAF 4 form in fact delineates the claim for non-pecuniary loss referred to in the proviso (and which is subject to the serious injury assessment) as being in respect of "general damages" or "pain and suffering". Botha confirms that a claim for loss of earning capacity is pecuniary in nature and does not constitute general damages. *Supra* at [23]. See also Mavuso v RAF (*Supra*).

[82] Botha *supra* at para [30] where the court observed that the historical categorisation of future loss of earnings and loss of future earning capacity as being included in a traditional claim for general damages "took place in an era prior to the current legislation". In terms of the new dispensation, although the parties and courts still colloquially refer to a claim for general damages, it is, in terms of the RAF Act, a claim for non-pecuniary loss (for pain and suffering) subsumed under a unitary claim for statutory compensation. See also Mavuso v RAF (Supra).

[83] In my view it was probably never envisaged that the serious injury disputes would take so long to resolve as has been the case.

[119] From the foregoing leading judgments and others of the High Courts on the issues under consideration, the following observations appear:

119.1 In terms of section 17 (1) of the RAF Act, after its amendment by the Road Accident Fund Amendment Act, No. 90 of 2005, a third party is entitled to compensation for a non-pecuniary loss only for a serious injury as contemplated in sub-section (1A).

119.2 The determination of whether the injury meets this threshold must be undertaken by a medical practitioner by way of the method prescribed by the regulations.

119.3 A request for such assessment must be initiated by the third party on the prescribed form. An acceptance or "satisfaction" by the Fund that this assessment of the seriousness of the injury has been correctly undertaken in terms of the method provided in the regulations will establish the third party's entitlement, assuming he/she has filed a RAF4 form in accordance with the prescribed procedure, to be compensated for his/her non-pecuniary loss. It will also signal the relevant moment when a claim for general damages affords a plaintiff the necessary jurisdictional fact for a court to adjudicate such a claim.

119.4 If the assessment by the medical practitioner is not endorsed by the Fund in its capacity as administrator, or any further assessment of the third party required by the Fund is disputed by it, the dispute resolution procedure must of necessity be invoked and the third party and the Fund must proceed administratively to a final determination of the dispute.[84]

[84] The procedure and format for the launch of a dispute is outlined in Regulation 3. The notice of the dispute is to be given on prescribed form RAF 5.

119.5 Whilst such a process endures, the plaintiff's claim for general damages will not be justiciable.

119.6 The "model" or legislative scheme introduced by the Amendment Act in respect of third party's claims for non-pecuniary loss presupposes that unless and until the necessary jurisdictional fact is established by means of the strictly administrative processes that run in tandem with or parallel to the action proceedings, the court cannot enforce an obligation on the part of the Fund to pay general damages even if the Fund has in principle conceded liability for any damages that may be proven or agreed or has impliedly gone along with the suggestion that the serious injury assessment is not in contention up until that point.

119.7 Whilst the Fund may further notionally agree in the action (wearing the hat of a defendant) to pay an agreed sum of general damages conditionally upon the administrative decision going in the plaintiff's favour, the expectation that it will pay out such an award is doomed to remain a velleity unless the administrative process is concluded in the plaintiff's favour as a matter of fact. Further any order for general damages issued short of the administrative process having run its course and conducing to the benefit of a plaintiff falls to be set aside on the basis that the court would have had no power to make it.

119.8 The scheme also postulates that the administrative processes cannot be sidelined, avoided, disregarded, or deemed to have taken place. A court should be especially wary of going along with the parties' assumption that the Fund (because it has neither accepted nor rejected the serious injury assessment report) has thereby accepted the injury to be serious and within the threshold that warrants the

payment of compensation in terms of the provisions of the proviso to section 17(1).

119.9 If the Fund fails (or by necessary implication the Appeal Tribunal) delays in taking the decision which it must, the plaintiff's remedy is to vindicate the administrative inaction pursuant to the provisions of section 6 (2)(g) read together with section 6 (3)(a) or (b), as the case may be, and section 8 (2) of PAJA.

119.10 Likewise, if the Fund fails to furnish reasons for the rejection, the third party's recourse lies in the provisions of section 5 of PAJA.[85]

119.11 There is no deeming provision that assists the plaintiff, or any default outcome that pertains when, as in these instances, the Fund has been particularly tardy in rejecting the plaintiffs' serious injury assessments or has done so after conceding liability in the action, or at the eleventh hour when the matters have been enrolled for trial already.

119.12 Neither can the parties in the litigation subvert the administrative process by agreeing that the injury meets the threshold even if the experts involved in the litigation express such a common view. Their opinions are irrelevant in court because it is not the court's decision to make whether the injury is serious or not, neither whether objectively considered it is a decision which the Fund ought to have made.

119.13 Further, it is not open to the trial court to adjudge whether the decision taken by the HPCSA ultimately was the correct one. That too is a matter for judicial review.

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[85] The reasons will only be of consequence really in a separate application for the judicial review of the decision. Such an application seems unnecessary, however, in the light of the third party's right in any event to seek a rehearing, in the wide sense, of the determination whether the injury is serious or not. (Duma *supra*, at [26])

119.14 Since the effect of Regulation 3 (13) is that the decision of the Appeal Tribunal is final and binding, this means that once the Tribunal's decision has been made, it can be safely assumed that the jurisdictional fact necessary for the trial court to order the Fund to pay general damages (if the court has to determine the claim at all) has established itself, or not depending on the import of that decision, and will continue to have the corresponding effect until, consonant with the general principle of our law that an administrative decision remains valid and binding unless set aside upon judicial review, it is overturned on review.[86]

119.15 A parties' objection to the court's jurisdiction to adjudicate a claim for general damages can be raised by way of a special plea.

119.16 A court will generally incline in favour of upholding a special plea raised by the Fund where the plaintiff has not complied with the provisions of the regulations or pursued his/her dispute to finality before the Appeal Tribunal but will afford the plaintiff an opportunity to exhaust the internal remedy at his/her disposal rather than dismissing the claim for general damages.

119.17 The provisions of Uniform Rule 22(4) can be employed to order a stay of the plaintiff's claim for general damages to afford him/her the opportunity to pursue the internal remedies at his/her disposal.

119.18 Our courts should show deference to the Fund and specialized Appeal Tribunal in respect of the decisions required to be made by these functionaries in terms of section 17 (1A) read with Regulation 3.

119.19 A court should also recognize (in respect of that part of the plaintiff's claim for statutory compensation that represents his/her

[86] Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA). See also Duma *supra* at para [24].

non-pecuniary loss) that the matter is not subject to the Uniform Rules of Court but to the proceedings that fall under section 17 (1A) and the regulations.[87]

Further comments and observations:

[120] I would suggest that if a plaintiff elects after the fact to challenge a negative decision of the HPCSA by way of judicial review, it would require him/her to request the Fund to agree to a further stay of the claim for general damages for later adjudication in the court, in order to await the outcome of the separate application for judicial review. This is because the regulations recognize that the decision of the Appeal Tribunal is final and binding and signals the end of the administrative internal processes. The likely manner in which this will affect the proceedings in court is that the Fund is entitled to demand that this sub-claim be withdrawn or that the plaintiff acknowledges that it cannot be enforced or has no interest in it being enforced.

[121] Although the pleadings in court should ideally foreshadow a claim for general damages, I would suggest that it is not fatal to a plaintiff's case if they are only amended later once the claim for general damages becomes justiciable. In laying the basis for the claim, when it does mature, a plaintiff should properly bring the claim within the ambit of section 17 (1A). The Fund ought also to plead appropriately regarding whether the plaintiff's claim for general damages is enforceable (in circumstances where the plaintiff has sought to bring it within the ambit of the inclusion for serious damages), and if not, why it lacks. I would suggest that a bald denial concerning a claim for general damages in an

[87] An approach that does not conflate the two processes is infinitely desirable. The parties should also bear this in mind and not litigate irresponsibly. Although it might have been essential for the plaintiff to have had to issue a summons to enforce his/her claim in court, it should not be overlooked that the action proceedings are just a means to an end.

action which is sub-judicated to the administrative process would have no place and may irresponsibly run up costs of litigation. A plaintiff's claim for general damages should perhaps be qualified in his/her particulars of claim as being conditional upon the acceptance by the Fund of the seriousness of the injury, or the HPCSA's finding in his/her favour ultimately. This would avoid unnecessary objections to the plaintiff's particulars of claim or even the raising of a special plea by the Fund that the claim for general damages does not yet arise if at the time it is not yet justiciable. I would suggest that it is best compartmentalized in the particulars of claim so that it can ideally receive separate treatment in recognition of the unique import of the legislative scheme.

[122] A question which begs itself is how the acceptance by the Fund or its "satisfaction" that an injury has been correctly assessed as serious (as defined) is to be denoted. This may be particularly relevant in applications for default judgment where this jurisdictional fact will have to be established by the plaintiff as a fact before a court will be satisfied in turn that it has the necessary jurisdiction to adjudicate a claim for general damages.[88] (In my experience it is only the rejections that are documented and even these are informally placed before the court during case management proceedings in which the Fund has entered a notice of intention to defend and is actively participating in court.)

[123] If the Fund has made an offer to a third party in respect of general damages, can this offer stand as proof that the Fund has accepted that the third party's injury has been correctly assessed as serious? In my view it would not be an unreasonable inference to draw in all the circumstances that in such a scenario the relevant jurisdictional fact for the court to adjudicate a claim for general damages in a default judgment application has been established,

[88] Applications for default judgment against the Fund have become the norm since the Fund has cancelled service level agreements with attorneys.

otherwise a court should leave the resolve of this aspect of the plaintiff's claim where it belongs, namely in the administratively realm, reserving the right of the plaintiff to pursue it in court again at the appropriate time.[89]

The answers to the original issues:

[124] On the first issue for determination as outlined in paragraph 27.1 of the Supplementary Stated case as set out above, there is no dispute that it remains open to a plaintiff wishing to proceed to trial to adjudicate a claim for loss of earnings, despite the absence of an outcome following a determination by the HPSCA concerning whether his/her injuries are to be accepted as serious following a rejection of his/her RAF 4 form by the Fund, to make application on the basis of the provisions of rule 33 (4) to separate his/her claim for special damages (including any claim for future medical expenses which is routinely dealt with separately) from that of general damages so as to enable him/her to proceed to trial on this aspect in the meantime.[90]

[125] Lebeko also proposes a stay of the claim for general damages on the basis provided for in Uniform rule 22 (4), assuming the parties' pleadings in court lend themselves to such a solution. (The inevitable practical effect which a court should recognize is that the claim for general damages must of necessity stand over for determination until the administrative process has run its course.)

[126] I would suggest further that a judge should adopt a robust approach through the case management machinery and prompt the parties in the right direction to facilitate the objectives of the effective disposal of the litigation

[89] It needs to be emphasized that the fact that the Fund has not filed a notice to defend should not entitle a plaintiff to claim default judgment in respect of his/her claim for general damages unless the plaintiff can make the essential allegation that the Fund has in fact accepted the injury to be a serious one.
[90] Mavuso v RAF (Supra).

with the least fuss and/or cost and in the manner that yields itself best to the obvious effect of the legislative scheme.

[127] The answer to the issue as framed in the first part of sub-paragraph 1 is therefore in the affirmative.

[128] Self-evidently, however, a formal separation of issues in an action is not automatic, and a party must apply for it in terms of the provisions of rule 33 (4) unless the court orders it *mero motu*. Such a separation will not and should not require a plaintiff to "abandon" the issue of his/her entitlement to claim "general damages" as a pre-requisite for such a direction.[91] A stay of the claim for general damages whilst the plaintiff's claims for special damages proceed may also be more appropriate and achieve the same effect.

[129] As to the second part of the question, assuming a separation of the issue of loss of earnings was ordered, even if the HPSCA's decision is negative, the action remains extant (but unenforceable) in respect of the plaintiff's remaining claim for general damages and the plaintiff as *dominus litis* must surely decide what to do in the court to bring this incident of his unitary claim for compensation to a disposal. Invariably RAF matters are settled by agreement and the HPCSA's decision will prompt the most suitable outcome but there may, for example, be a costs issue arising which justifies the parties enrolling the matter on trial for an appropriate judgment in his/her favour in this respect. As suggested above, a plaintiff may also seek to keep the action alive whilst he/she reckons with the possibility of reviewing that decision with a view to still proceeding to a determination of the claim for general damages ultimately,

[91] It may however be appropriate for the Fund to request the plaintiff to confirm that he no longer wishes to pursue his claim for general damages where the Appeal Tribunal has not found in his favour and in circumstances where he does not want to challenge this decision by way of judicial review in separate proceedings. Such a declaration of intent would in my view conduce to finality in respect of the litigation.

assuming the plaintiff's claim for his/her non-pecuniary loss becomes enforceable by such a fiat.

[130] As for the question posed in paragraph 27.2 of the supplementary stated case, I am inclined to agree with the reasoning of Victor J in Botha v RAF that the court's jurisdiction is not ousted to deal with the plaintiff's claim for issue of loss of earning even where the seriousness of the injury is in contention and its determination underway in terms of the parallel administrative process provided for in the regulations.[92]

[131] The answer to the question posed in paragraph 27.3 in in the negative, but subject to what I have said above about the parties being sensible and agreeing to stay claims for general damages wherever possible, eschewing obstructive approaches or technical objections that will run up the legal costs and thwart the objectives of the scheme.

The preliminary point:

[132] That brings me finally to the preliminary point. I have deliberately left this issue for last as the exposition set out above is necessary to demonstrate the fallacy of the argument submitted on the plaintiffs' behalf in this respect.

[133] Mr. Matebese, who appeared on behalf of the plaintiffs, argued that everything hinges for the determination of this point on the interpretation of the provisions of section 17 (1) of the RAF Act and on the orders themselves, which general provisions, he sought to persuade us, concern themselves with the question of liability as opposed to that of quantum.

[92] See also the reasoning of this court in Mavuso v RAF (Supra).

[134] It is correct, as he submitted, that the provisions of section 17 (1) make it clear that the Fund or its agent is liable for all damages or loss suffered by a third party 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 wrong 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.

[135] But since the implementation of the Amendment Act, there can also be no question that one cannot read the general provisions establishing the Fund's liability apart from the proviso introduced by the amending provisions, or disjunctively from the Regulations, which, as explained in the numerous judgments of the Supreme Court of Appeal above, as well as that of the Constitutional Court in Law Society of South Africa v Minister of Transport[93] must be understood against the background of the historical matrix and rationale for its introduction and limitation of the Fund's liability to compensate a third party in respect of general damages for only serious injury as contemplated in sub-section (1A).

[136] It is also important to appreciate the "paradigm shift" referred to in Faria that requires the process of sifting enforceable claims for general damages from non-enforceable ones to be determined administratively, eschewing the court's intervention in any action instituted to enforce the claim to determine this issue.

[137] The general preamble to section 17 (1) cannot be read without the proviso (the inclusionary provision), sub-section 1A or Regulation 3. They are integral to the question what circumstances justify the exclusion of the Fund's liability

[93] *Supra*.

for general damages or, conversely, meet the gateway threshold. Mr. Matebese appeared to concede as much in earlier heads of argument filed regarding the effect and proper interpretation of section 17 (1A) in its amended form, when viewing the scheme as a whole.

[138] There is nothing new he could offer in the interpretative exercise in enjoining this court to adopt the interpretation of section 17 (1) that he contended for. Our courts have said their say concerning the effect of the amending provisions.

[139] Further, on a plain reading of the merits orders of the Judge President and Dawood J, there can be no suggestion that anything was intended other than that the Fund has conceded negligence and causation, in other words general liability, but for the question whether the plaintiffs' claims for their non-pecuniary loss fall to be accepted or rejected by the Fund or are found to be justified by the Appeal Tribunal on the basis that the injury is to be regarded as serious and therefore compensable by the Fund. Against the clear construct of the new model there is simply no room for any assumptions to be made based on what the pleadings say or don't say, neither can anything be inferred from the conduct of the Fund because the question whether the inclusion (or exclusion as the case may be) applies or not is dependent on an extrajudicial determination. In other words, the plaintiffs have to satisfy the Fund (not the court) that their injuries are serious. This fact or knowledge would certainly have formed part of "the material known to those responsible for (the orders') production", or at least should have at the time the merits orders were granted.[94]

[140] Further, it can hardly be suggested, in the circumstances that pertain here that the issue of the Fund's liability for non-pecuniary loss (general damages)

[94] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18.

has become *res judicata* especially since that issue has not yet arisen in either Maqhutyana or Mnama. It will not arise in Maqhutyana unless the HPCSA is upset pursuant to a judicial review. In Mnama it may still arise depending on the outcome of the appeal process.

[141] It is a trite principle that *res iudicata* cannot be founded by implication. The decision set up as *res iudicata* must necessarily involve a determination of the same question of law or fact.[95]

[142] I agree with the submission made on behalf of the Fund that it was not obviously necessary for the court in each action and at the juncture that the merits orders were made to decide whether the defendant had accepted the injuries as serious for them to make the order in terms of the operative words thereof. These issues were not connected and indeed in accordance with the prevailing stance adopted by our courts, such an issue (as to whether the injuries were serious enough to justify compensation for non-pecuniary loss) would not have arisen in either case.

[143] In Maqhutyana, although the Fund limply asserted on the pleadings that it was not liable to compensate him, this is irrelevant to the separate administrative determination of whether the injury sustained by him is a serious one within the contemplation of section 17 (1A) and in accordance with the prescribed method.[96] The process pursuant to the provisions of Regulation 3 was still underway and the culminating decision providing the jurisdictional basis for this incident of the claim (and the Fund's liability therefore to pay such damages) still anticipated.

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[95] Boshoff v Union Government 1932 TPD 345 at 350, 351.

[96] Although the Fund ought to have raised a special plea that the plaintiff had not complied with Regulation 3 and therefore had no jurisdiction to adjudicate on this incident of his claim for compensation, this is neither here nor there for present purposes.

[144] In Mnama it is not clear how the *res judicata* argument advanced by Mr. Matebese on her behalf could have assisted her at all, because she did not plead the basis in terms of the provisions of section 17 (1A) on which she became entitled to claim general damages.[97] Fortunately, however, her entitlement to be so assessed lays not in how she has pleaded, but in the provisions of the regulations which she had, by the time the merits order was granted, already availed herself of. By filing the RAF 4 form she obviously intended to make her claim for general damages dependent on an outcome in respect of the issue of the seriousness of the injury conducing to her favour ultimately.

[145] Even if the parties in Maqhutyana and Mnama had proposed to finally resolve the issue of general damages (in the sense contended for by the plaintiff) by the merits orders, that is without any recourse to the prescribed procedure outlined in section 17 (1A) read with regulation 3, these orders would not be able to stand and would fall to be set aside.

[146] In the result I am not inclined to find in the plaintiffs' favour that the orders fall to be interpreted in the manner contended for by Mr. Matebese or that the issues raised by the Fund by way of the preliminary objection in the actions do not arise on the mere basis that "liability" for general damages was conceded.

The practical way forward for the plaintiffs:

[147] In the case of Maqhutyana it appears that the HPCSA came to its decision prior to the set down of the referral before this court on 29 January 2020. According to the defendant the plaintiff has taken no active steps to challenge

[97] As I indicated above, however, the pleadings are not determinative of the serious injury issue.

this outcome, which means that the decision remains effective until set aside by a court.[98] The plaintiff is free to pursue the remaining aspect of quantum which is for loss of income (if this aspect has not yet already been settled) and in fact should have been regarded as having been free to do so even since before the referral. The Fund should not have stood in his way of doing so.

[148] The plaintiff will in seeking to re-enroll the matter for trial have to comply with the practice of this court concerning case management and the provisions of rule 37 A. The parties will no doubt responsibly outline the remaining issues still in dispute which they require the court to determine.

[149] In the case of Mnama her injuries were assessed as serious by Dr. Olivier on 1 June 2016, but the RAF 4 form lodged with the Fund was rejected. Mnama filed a dispute with the HPCSA. The stated case does not reflect whether the Appeal Tribunal has resolved the matter one way or the other. It is suggested that the delay in reaching a conclusion (if the decision is still outstanding) be queried and the administrative inaction be vindicated in terms of PAJA should either party feel so inclined.

[150] In the meantime, Mnama is free to seek a separation of issues (so as to continue with her claim for loss of income), alternatively the parties are encouraged to agree that her claim for general damages be stayed pending the resolve of her dispute before the HPCSA.[99] Such agreement will clear the way for her to proceed to trial forthwith in order to determine her claim for loss of earnings separately from her claim for general damages.

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[98] MEC for Health v Kirkland 2014 (3) SA 481 (CC); 2014 BCLR 547 (CC).

[99] Although in the form of an *in limine* objection, the Fund in effect relies on a special plea, not of abatement, but a dilatory one that accords with our courts' treatment of claims under the provisions of section 17 of the RAF Act, that the competence of a court to pronounce upon the issue of general damages is stayed or suspended until the aspect of the seriousness of the injury has been disposed of in the administrative forum.

Costs of referral:

[151] On the issue of costs, both the plaintiffs and the Fund sought the indulgence of this court for each of the respective postponements and should respectively bear these wasted costs. These costs orders will however, as suggested by Mr. Van Der Linde, cancel each other out. Although the belated "preliminary point" raised on behalf of the plaintiffs cannot be upheld, I cannot blame the parties for the confusion by the parallel process contemplated by the provisions of section 17 (1A) and Regulation 3 in respect of claims for general damages and the general inclination to assume that absent any fuss made in the court (on the pleadings) about the issue of the seriousness of the injury (whether by the plaintiff or the Fund) that the claim falls within the court's domain to adjudicate. This is a mistake commonly made by practitioners.

[152] In the circumstances it would be fair to rather order that each party bear their own costs of the referral.

[153] I add however that the parties should have been more circumspect about agreeing to a referral in the first place that required a determination of issues that were parochial to the litigation yet were elevated to a full bench to decide. The fact that they supplemented their stated case suggests that they were not bound by the terms of the initial referral. They should at that point have sought the Judge President's consent to opt out especially since the answers had by then occurred to them. A full bench referral ought to be reserved for matters of importance or in this instance, of continuing importance at least.[100] By its very nature a referral involves extra costs to the litigants. It further carries with it the downside that an appeal from the decision of a full bench lies to the Supreme Court of Appeal in terms of the provisions of section 16 (1) (a) of the Superior

[100] Thembani Wholesalers (Pty) Ltd v September 2014 (5) SA 51 (ECG) at 511-52A.

Courts Act. It finally distracts the parties from getting on with or back to the litigation especially where the referral only disposes of a preliminary objection rather than the action in its entirety. Delays and the logistics of establishing a panel of three judges will inevitably frustrate the parties who in this instance would have promptly received a ruling on the Fund's preliminary objections a while back already.

[154] As for these objections, it is not evident that the argument advanced on behalf of the Fund, viz that the plaintiffs' claims for loss of earnings were not in each case ripe for hearing, would necessarily have prevailed. The trial court will no doubt have to determine the impact of the now moot objections raised by the Fund in the actions and where the costs should lie in each instance.

[155] In the premises I issue the following order:

1. The "preliminary point" advanced on behalf of the plaintiffs in the supplementary stated case is rejected.
2. Each party is to pay his/her own costs of the referral.

_____

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE,

_____

G N Z MJALI
JUDGE OF THE HIGH COURT

I AGREE,

_____

T MALUSI
JUDGE OF THE HIGH COURT

DATE OF HEARING: 18 June 2021
DATE OF JUDGMENT: 17 August 2021

APPEARANCES:

For the plaintiffs: Mr. Z Z Matebese SC instructed by Caps Pangwa & Associates, Mthatha (ref. Mr Pangwa).
For the defendant: Messrs H J Van Der Linde SC & N James instructed by Mohulatsi Attorneys, care of Mgxaji Inc, Mtatha (ref. Mr. Mgxali).