THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 698/16

In the matter between:

NOBANTU GLORIA MPAHLA **APPELLANT**

and

THE ROAD ACCIDENT FUND **RESPONDENT**

Neutral Citation: *Mpahla v RAF* (698/16) [2017] ZASCA 76 (1 June 2017)

Coram: Lewis, Ponnan, Petse and Mathopo JJA and Coppin AJA

Heard: 15 May 2017

Delivered: 1 June 2017

Summary: Road Accident Fund 56 of 1996 – Interpretation of regulation 3(3)(dA) of the Road Accident Fund Regulations – failure of the Fund to take a decision within prescribed period does not create a deeming provision – remedy of claimant lies in s 6(2)*(g)* of PAJA.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Schippers J) (sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mathopo JA (Lewis, Ponnan and Petse JJA and Coppin AJA concurring):

[1] This is an appeal against the judgment of the Western Cape Division of the High Court, Cape Town, to which for convenience I shall refer as the high court, (Schippers J) on a question of law decided against the appellant. The matter proceeded before the high court by way of a stated case. The question of law concerned the interpretation of regulation 3(3)(dA) of the Road Accident Regulations,[1] passed pursuant to the Road Accident Fund Act 56 of 1996, which requires the Fund to accept or reject a 'Serious Injury Assessment'[2] report (SIA report) or to direct the third party to submit to a further assessment, within 90 days from the date on which the report was delivered to the Fund. The appeal is against that finding, on the stated case, is with the leave of that court.

[2] The appellant contended before the high court that on a proper construction of regulation 3(3)(dA), the Fund is deemed to have accepted that the appellant sustained a serious injury, because it did not reject the SIA

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[1] Published under Government Notice R770 in *Government Gazette* 31249 of 21 July 2008, as amended by Government Notice R347 in *Government Gazette* 36452 of 15 May 2013 (the Regulations).

[2] Discussed fully in *Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena* [2012] ZASCA 169; 2013 (6) SA 9 (SCA).

report or direct the appellant to submit to a further assessment within 90 days of delivery of the report, which expired on 26 January 2014.

[3] Regulation 3(3)(dA) provides as follows:

'The Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or an agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment.'

[4] The following facts are 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 damages in an amount of R400 000. On 28 October 2013, in compliance with regulation 3(3) and the Act, the appellant caused an SIA report) to be submitted to the Fund. Even though regulation 3(3)(dA) applied, the Fund failed to react to the appellant's SIA 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 the SIA report by rejecting it. The Fund conceded the issue of negligence and undertook to compensate the appellant for the other heads of damages but continued to resist and deny liability for general damages.

[5] 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 s 17 of the Act and regulation 3 of the Regulations relating to the submission of the SIA 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 delivered the SIA report to the Fund on 28 October 2013.

[6] 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 SIA report, or fails to direct that a claimant submit himself or herself to a further assessment within the 90-day period prescribed by the regulations, then the Fund is deemed to have accepted the injury as serious. The argument is that with the promulgation of the new regulation that was introduced immediately after this court's judgment in *Road Accident Fund v Duma,* (above) the legislature inserted a 90-day limitation period in the regulation in order to address the concerns raised in *Duma*. The regulation previously did not provide for any limitation of the period in which the Fund had to respond after submission of the SIA report.

[7] The high court rejected the appellant's submission and in brief held that regulation 3(3)(dA) was not capable of the construction contended for by the appellant, namely that if the Fund has not taken a decision within 90 days, it is deemed to have either accepted the SIA report or to have referred the plaintiff for a further assessment.

[8] The legislative provisions governing the claims for general damages or non-pecuniary loss are discussed at length in *Duma*. The general tenor of s 17(1) of the Act is that the Fund is liable to compensate claimants for loss arising from bodily injuries sustained in motor vehicle accidents. In terms of the Amendment Act,[3] the limitation on the Fund's liability for general damages was introduced as a proviso in s 17(1) that 'the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for serious injury as contemplated in subsection (1A) . . .'. In terms of this section the assessment of serious injury must be based on a prescribed method and be carried out by a medical practitioner registered under the Health Professions Act.[4] A third party in the position of the appellant who has suffered as a result of any bodily injury to herself or himself or the death of or any bodily injury to any other person caused by or arising from the driving of the vehicle due to negligence of the driver and as a result, wishes to

[3] Road Accident Fund Amendment Act 19 of 2005.
[4] Health Professions Act 56 of 1974.

claim for non-patrimonial losses, must first obtain from the medical practitioner concerned, an SIA report.

[9] One of the problems identified in *Duma* is that where the Fund does not reject or accept the SIA report within a reasonable period, the plaintiff is compelled to ask for an order of court reviewing the Fund's inaction, and in that process the court is required to determine what a reasonable period is. That is a fact-based enquiry. To avoid a plaintiff having to approach a court to determine whether the period is in fact reasonable, an amendment to the regulations was introduced requiring the Fund to assess the SIA report within 90 days.

[10] The high court rejected the appellant's argument that the introduction of the 90-day period gave rise to a deemed acceptance of the SIA report. The foundation for the argument was that the amendment sought to avoid the mischief that *Duma* identified – the Fund's inaction – and that simply requiring the Fund to respond within 90 days would not achieve that end. The plaintiff would still have to apply, after the 90-day period, for a review of the Fund's inaction in terms of s 6(2)*(g)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This was costly and time consuming and would prejudice the plaintiff, especially one who was impoverished or did not have ready access to legal services. Thus one had to read into regulation 3(3)(dA) a proviso, the effect of which is that inaction on the part of the Fund for a period of 90 days would constitute a deemed acceptance of the injury as serious.

[11] It was contended on behalf of the Fund that the interpretation suggested by the appellant was untenable and would give rise to an absurdity that could not have been intended by the legislature. The nub of the Fund's argument is that if the regulation introduced a deeming provision, as contended for by the appellant, the Fund would lose its statutory right to act in terms of regulation 3(3)*(c)*, which provides that the Fund is obliged to compensate a third party for non-pecuniary loss only if a claim is supported by a SIA report and the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method prescribed in the regulations. It

was further submitted that the argument of the appellant flies in the face of regulation 3(3)*(d)*(i) which provides that if the Fund is not so satisfied, it must reject the serious injury assessment report and give the third party reasons for the rejection; or direct the third party to submit himself or herself to a further assessment by a medical practitioner designated by the Fund, at its cost, to ascertain whether the injury is serious in terms of the method set out in regulation 3(3)*(d)*(ii). The submission made is that since the Fund had rejected the SIA report, albeit late, the appellant had to utilise the internal dispute resolution mechanisms provided for in the regulation to appeal against the rejection of the report. On the appellant's construction, so the argument went, the Fund would be liable for general damages without any legal basis and this would render the entire provisions of regulations 3(7) to 3(10), which deals with internal dispute resolution mechanisms, nugatory.

[12] If the Fund is not satisfied that the injury is serious, the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim. The plaintiff's remedy is to take the rejection on appeal in terms of regulation 3(4). The Fund, as an organ of State as defined in s 239 of the Constitution, performs a public function in terms of legislation. Its decision in terms of regulations 3(3)*(c)* and 3(3)*(d)*, whether or not the report correctly assessed the claimant's injury as 'serious', constitutes administrative action, as contemplated PAJA. In terms of s 6(2)*(g),* read with s 6(3)*(b),* of PAJA if the Fund unreasonably delays in taking a decision in circumstances where there is a period prescribed for that decision, an application can be brought for judicial review of the failure to take the decision.

[13] Moreover, the clear language of regulation 3(3)(dA) enjoins the Fund to decide within 90 days from the date on which the report was sent or delivered by hand to (a) accept the SIA report; (b) to reject it; or (c) to refer the third party for a further assessment. It was correctly argued for the Fund that regulation 3(3)(dA) was enacted to stipulate the time period within which the Fund must make a decision as to whether or not the third party has suffered serious injuries.

[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.

[15] The appellant's further argument that a failure to read in a deeming provision will leave a lacuna in the regulation that would prejudice claimants is misconceived. What that argument fails to appreciate is that reading in a deeming provision into the regulation would alter its clear meaning. In any event, reading in may occur only when it is necessary to save a provision from constitutional invalidity.

[16] In the hearing, counsel for the appellant was asked to formulate the deeming provision for which the appellant contended. He understandably had difficulty in doing so. He did, however, concede that what we were being asked to undertake is a law-making function on a scale that is unprecedented.

[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.

[19] The following order is made:

The appeal is dismissed with costs.

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R S Mathopo
Judge of Appeal

APPEARANCES:

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