THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

In the matter between:

Case No: 202/2012

ROAD ACCIDENT FUND **APPELLANT**
and
THOKOZANE DUMA **RESPONDENT**

Case No: 64/2012

ROAD ACCIDENT FUND **APPELLANT**
and
MTHUNZI GIFT KUBEKA **RESPONDENT**

Case No: 164/2012

ROAD ACCIDENT FUND **APPELLANT**
and
ADRIANA JOHANNA MEYER **RESPONDENT**

Case No: 131/2012

ROAD ACCIDENT FUND **APPELLANT**
and
THABO RICHARD MOKOENA **RESPONDENT**

HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA ***AMICUS CURIAE***

Neutral citation: *Road Accident Fund v Duma (202/12) and three related cases (Health Professions Council of South Africa as Amicus Curiae)* [2012] ZASCA 169 (27 November 2012).

Coram: **Brand, Mhlantla, Leach JJA, Plasket and Saldulker AJJA**

Heard: **6 November 2012**

Delivered: **27 November 2012**

Summary: Road Accident Fund Act 56 of 1996 read with Regulations promulgated under the Act – 'serious injury' to be determined in accordance with procedure prescribed in the Regulations – until third party had complied with prescribed procedure – claim for general damages premature – not for court to decide whether injury 'serious'.

ORDER

On appeal in all four matters from: South Gauteng High Court, Johannesburg. The following judges sitting as court of first instance:

Road Accident Fund v Duma – Nicholls J;

Road Accident Fund v Kubeka – Trisk AJ;

Road Accident Fund v Meyer – Coetzee AJ; and

Road Accident Fund v Mokoena – Mbha J

1. The appeals in all four matters are upheld with no order as to costs.
2. The terms of the orders are fully set out in paragraph 42.

JUDGMENT

BRAND JA (MHLANTLA, LEACH JJA, PLASKET and SALDULKER AJJA CONCURRING):

[1] The appellant in these four appeals is the Road Accident Fund (the Fund) established in terms of the Road Accident Fund Act 56 of 1996. The four appellants as plaintiffs (the plaintiffs) instituted separate actions against the Fund in the South Gauteng High Court, Johannesburg, for the damages they suffered as a result of motor vehicle accidents. It is not in dispute that their injuries were sustained in circumstances which rendered the Fund liable to compensate the plaintiffs as third parties in terms of the Act. The only remaining issues on appeal relate to the

plaintiffs' entitlement to general damages. These issues arise from the provision in s 17(1) of the Act which limits the Fund's liability to compensate a third party for general damages – or non-pecuniary loss, as it is called in the section – to instances where he or she suffered 'serious injuries' within the meaning of s 17(1A) of the Act. In each of the four cases the High Court held that the plaintiffs had suffered 'serious injury' and awarded general damages to them.

[2] The appeals against these judgments are, in each instance, with the leave of the court a quo. The contention of the Fund on appeal is, in broad outline, 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. The issues that arose from these contentions will be best understood, first in the context of the history as well as the matrix of the legislative scheme and, secondly, against the background of the underlying facts. With regard to some of these issues, the Health Professions Council of South Africa sought and was granted leave to make submissions as an *amicus curiae.* I found these submissions of material assistance, for which I express my appreciation.

History and matrix of the legislative scheme

[3] As to the history of the legislative scheme, the provisions of sections 17 and 17(1A) that I have referred to were introduced into the Act by the Road Accident Fund Amendment Act 19 of 2005 which took effect on 1 August 2008. Prior to these amendments, the Act allowed victims of motor accidents to claim their general damages from the Fund in full. The problem that arose was that the income derived by the Fund from the levy charged to motorists on the fuel they purchased did not match the liabilities incurred by the Fund. For decades this funding deficit kept growing despite the rapid increases in the fuel levy year after year. Eventually the predicament gave rise to the appointment of a commission of inquiry that became known as the Satchwell Commission. In its report of 2002 the Satchwell Commission made many far reaching recommendations. (For a more detailed account of these,

see eg *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) paras 41 *et seq* (referred to as '*Law Society*').) Most significant amongst these, for present purposes, was the recommendation that the Fund's liability for general damages be limited to those victims who suffered 'serious injury'. General damages, so the Commission found, tended to be paid out to persons who suffered light or moderate injuries and who claimed no damages for medical costs or loss of earnings. In addition, these general damages claims for relatively minor injuries put a substantial administrative burden on the Fund. By limiting awards of general damages to those who suffered serious injuries, so the Commission concluded, the total liability of the Fund could be reduced by almost 40 per cent (see *Law Society* para 42).

[4] The Road Accident Fund Amendment Act, and the Regulations subsequently promulgated under the amended Act in 2008, substantially adopted the recommendations of the Satchwell Commission. The Law Society of South Africa challenged the constitutional validity of various provisions of the Act and the regulations, including those dealing with general damages and the assessment of serious injuries, in the North Gauteng High Court, Pretoria (see *Law Society of South Africa v Minister of Transport* 2010 (11) BCLR 1140 (GNP) paras 35-36 and 54-76). The High Court dismissed these challenges. While the Law Society lodged an appeal against this judgment to the Constitutional Court on a number of other issues, it did not appeal against the dismissal of the challenges to provisions pertinent to this appeal (see *Law Society* paras 2 and 3).

[5] The general provision of s 17(1) of the Act has always been that the Fund is liable to compensate claimants for loss arising from bodily injury sustained in motor vehicle accidents. In terms of the Amendment Act in 2005, the all-important 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) . . .' Yet, neither s 17(1) nor s 17(1A) provides any objectively determinable

content or substance to the central concept of what injury would qualify as ‘serious’. All s 17(1A) adds is that the assessment of whether or not a particular injury meets the threshold requirement of ‘serious’ must be carried out by someone registered as a medical practitioner under the Health Professions Act 56 of 1974 and on the basis of a ‘prescribed method’. The latter term is defined in s 1 of the Act to mean ‘prescribed under s 26’. Section 26(1) of the Act completes the picture by saying that the Minister of Transport may make regulations regarding any matter that shall be prescribed in terms of the Act. To avoid any possible uncertainty, s 26(1A), which was introduced by the Amendment Act of 2005, goes on to say that the Minister may make regulations regarding, inter alia, the method of assessment to determine whether, for purposes of s 17, a serious injury has been incurred and the resolution of disputes arising from any matter provided for in the Act.

[6] Pursuant to s 26, the Road Accident Fund Regulations of 2008 were then promulgated by the Minister through publication in the Government Gazette of 21 July 2009. Regulation 3 prescribes the method contemplated in s 17(1A) for the determination of 'serious injury'. As a starting point it provides in 3(1)(a) that a third party who wishes to claim general damages ‘shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations’. In terms of 3(3)(a) a third party who has been so assessed, ‘shall obtain from the medical practitioner concerned a serious injury assessment report’. This report is defined in regulation 1 as ‘a duly completed form RAF 4, attached hereto as annexure D . . .’. For the sake of brevity I propose to refer to the serious injury assessment report, which takes centre stage in what follows, as the RAF 4 form.

[7] The RAF 4 form itself, read with regulation 3(1)(b), requires the medical practitioner to assess whether the third party’s injury is ‘serious’ in accordance with three sets of criteria:

(a) In terms of regulation 3(1)(b)(i) the Minister may publish a list of injuries which do not qualify as serious. If the third party’s injury falls within that description it shall not be assessed as serious. Though the Minister has not yet published such list, a

draft has been circulated for comment in the Government Gazette of 22 August 2012.

(b) Conversely, regulation 3(1)(b)(ii) provides that the third party's injury must be assessed as 'serious' if it 'resulted in 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides', which is defined in regulation 1 as the 'American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Sixth Edition.'

(c) If an injury does not qualify as 'serious' in terms of regulation 3(1)(b)(ii), it may nonetheless be assessed as serious under the so-called 'narrative test' provided for in regulation 3(1)(b)(iii) if that injury resulted in a serious long-term impairment or loss of a body function; constitutes permanent serious disfigurement; and so forth.

[8] In terms of regulation 3(3)(c) the Fund is only liable for general damages 'if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in these Regulations.' If the Fund is not so satisfied, it must, in terms of regulations 3(3)(d), either:

(i) reject the third party's RAF 4 form and give its reasons for doing so, or

(ii) direct that the third party submits himself or herself to a further assessment at the Fund's expense by a medical practitioner designated by the Fund in accordance with the method prescribed in regulation 3(1)(b).

[9] As to what then happens, regulation 3(4) provides that, if the third party disputes the Fund's rejection of the RAF 4 form (under regulation 3(3)(d)(i)) – or if either the third party or the Fund wishes to challenge the assessment by the medical practitioner designated by the Fund (under regulation 3(3)(d)(ii)) – the aggrieved party must formally declare a dispute by lodging a prescribed dispute resolution form (RAF 5) with the registrar of the Health Professions Council within 90 days of being informed of the rejection or the impugned assessment. Regulation 3(5)(a) then goes on to say that if this is not done, the rejection of the RAF 4 form or the assessment

by the Fund's designated medical practitioner, as the case may be, shall become final and binding.

[10] If a dispute is declared, regulation 3(8) provides for it to be determined by an appeal tribunal of three independent medical practitioners with expertise in the appropriate area of medicine, appointed by the registrar of the Health Professions Council. In terms of regulation 3(13) the determination by the appeal tribunal is final and binding. A procedure by which the appeal tribunal enquires into the dispute is laid down in substantial detail by regulations 3(4) to 3(13). It includes the following features:

(a) Both sides may file submissions, medical reports and opinions.

(b) The appeal tribunal may hold a hearing for the purpose of receiving legal argument by both sides and seek the recommendation of a legal practitioner in relation to the legal issues arising at the hearing.

(c) The appeal tribunal has wide powers to gather information, including the power to direct the third party to submit to a further assessment by a medical practitioner designated by the tribunal; to do its own examination of the third party's injury; and to direct that further medical reports be obtained and placed before it.

Factual background

[11] This brings me to the background facts. The four plaintiffs were represented in the High Court by the same firm of attorneys. So was the Fund. Not surprisingly in the circumstances, the procedure adopted in the four cases display many similar features. So, for instance, action was instituted in three of the four cases before the RAF 4 form was delivered to the Fund. The only exception in this regard was *Meyer*, where the RAF 4 form preceded the service of summons. In *Mokoena*, the RAF 4 form was delivered before the Fund filed its plea, but in *Duma* and *Kubeka* it was only submitted after the close of pleadings. In all four cases the RAF 4 form, declaring the plaintiff's injury to be 'serious', was signed by a psychiatrist, Dr Braude, in circumstances to which I shall presently return. In all four cases the Fund filed special pleas in which it pleaded in different ways that the plaintiff had not complied

with regulation 3 and that his or her claim for general damages was therefore not competent, alternatively, premature. In all four cases the Fund subsequently rejected the RAF 4 form in terms of regulation 3(3)(d)(i) by means of a letter from its attorneys. Not only were these letters almost identical in wording, they also showed other common features, including the fact that they 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.

[12] The RAF 4 form in each case comprised of three parts: a main report in the prescribed form signed by Dr Braude, but apparently completed by an occupational therapist, Ms Marks; an AMA evaluation in annexures A, B and C to the prescribed form, which were completed and signed by Ms Marks; and miscellaneous hospital records annexed to the report. Paragraph 4 of the main report appears under the heading 'AMA Impairment Rating: to be completed if injury is not on list of non-serious injuries'. Paragraph 4.5 requires the medical practitioner's 'conclusion regarding physical examination' to which Dr Braude responded in each case that he had not examined the patient and that he relied instead on the hospital records annexed to the report. Despite this acknowledgement Dr Braude, in each case, described the 'current symptoms and complaints' of the plaintiff in paragraph 4.3; gave a diagnosis of the plaintiff's injury in paragraph 4.4; and stated in paragraph 4.10 that the plaintiff had reached MMI, which stands for 'maximal medical improvement' within the meaning of the AMA Guides.

[13] Dr Braude's approach to RAF 4 forms was best illuminated in *Meyer*, the only case in which he actually testified. In his testimony Dr Braude confirmed that he did not examine Ms Meyer and that he did not complete the report. It was completed by Ms Marks and Dr Braude merely signed it, so he said, after he had checked it against the medical reports that were annexed. He never consulted any of the medical practitioners who prepared these reports. Though Dr Braude stated in para 4.10 that Ms Meyer had reached MMI, (as contemplated in the AMA Guide) he

conceded that none of the medical reports he relied on referred to this question and that, in fact, he did not know what MMI meant, because he was not acquainted with the AMA Guide. It also transpired that, although Dr Braude described Ms Meyer's 'current symptoms and complaints' in para 4.3 of the report as 'shortness of breath, chest pain, depression', he based this answer on the treating surgeon's report which was more than seven months old and a psychiatrist's report which was older than 20 months.

The reasoning in the High Court

[14] 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 Dr Braude had failed to do a physical examination of the plaintiffs and Ms Marks was not a medical practitioner; that, in any event, the RAF 4 forms had been rejected by the Fund, as envisaged in regulation 3(3)(d)(i); that the plaintiffs' remedy was therefore to declare a dispute in terms of regulation 3(4); and that in the circumstances, the court could not entertain the claims for general damages.

[15] 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 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). The antecedent enquiry, so it seems to me, is 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. If it were, the merits of the rejection seem to be of little consequence. Conversely, if the

rejections cannot be disregarded, the fact that the rejection was without merit would again be of little consequence. It is therefore to that antecedent enquiry I now turn.

[16] For the proposition that, because the Fund had failed to reject the RAF 4 forms within reasonable time, its right to do so had expired or lapsed, the High Court found authority in *Louw v Road Accident Fund* 2012 (1) SA 104 (GSJ) paras 77-88. According to that judgment the period of 60 days within which the Fund may object to a third party's initial claim in terms of s 24(5) of the Act, also governs or at least serves as a guideline for a period within which the Fund must reject a third party's RAF 4 form in terms of regulation 3(3)(d)(i). A proper evaluation of this reasoning requires s 24(5) to be read in the context of s 24 as a whole. That section deals with the third party's initial claim which must be set out in the prescribed form, RAF 1, and prescribes the procedures for the completion and lodging of that form. Section 24(5) then goes on to say that:

'If the Fund . . . does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund . . . object to the validity thereof, the claim shall be deemed to be valid in law in all respects.'

[17] Although it was recognised, in at least some of the judgments of the High Court under consideration, that s 24(5) has no direct application to the RAF 4 form, it was held that the section provides a guideline as to what would constitute a reasonable period within which the Fund should take its decision in terms of regulation 3(3)(d). For the further consideration which found favour with the High Court, namely that, unless the Fund provides proper reasons for its rejection, it can be disregarded, the judgments on appeal relied primarily on the unreported decision by CJ Claasen J in the South Gauteng High Court, Johannesburg in *Smith and Ngobeni v Road Accident Fund* case no 47697/2009, dated 29 April 2011. Claasen J's underlying reasoning that emerges from that judgment broadly went as follows: if the Fund does not dispute that the third party's injury is serious, the court can proceed to decide whether it is serious or not. If the court decides that question in the affirmative, it can proceed to entertain the claim for general damages. If the Fund

rejects the RAF 4 form, without giving any legal or medical basis for doing so, that rejection is purely obstructive and does not raise a genuine dispute. In that event the position is no different from where the Fund raised no dispute at all.

Evaluation of the High Court's reasoning

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

[19] That approach, I believe, is fundamentally flawed. In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the court. That much appears from the stipulation in regulation 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious. Appreciation of this basic principle, I think, leads one to the following conclusions:

(a) Since the Fund is an organ of State as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of

regulations 3(3)(c) and 3(3)(d), whether or not the RAF 4 form correctly assessed the claimant's injury as 'serious', constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A 'decision' is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of PAJA.

(b) If the Fund should fail to take a decision within reasonable time, the plaintiff's remedy is under PAJA.

(c) If the Fund should take a decision against the plaintiff, that decision cannot be ignored simply because it was not taken within a reasonable time or because no legal or medical basis is provided for the decision or because the court does not agree with the reasons given.

(d) A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.

(e) Neither the decision of the Fund nor the decision of the appeal tribunal is subject to an appeal to the court. The court's control over these decisions is by means of the review proceedings under PAJA.

The Fund's decision to be taken within a reasonable period

[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).

[21] In argument the plaintiffs' objection to this solution was that it requires claimants against the Fund, who are frequently indigent, to incur even further legal expenses. I believe there are more than one answer to this objection. 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. Incidentally, 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 lapsed. 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 (see eg *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E) para 18; *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) para 7). If this happens on a number of occasions, the Fund may mend its ways. Finally, if this *mandamus* solution proves to be unaffordable, the answer may lie in an approach to the legislative authorities or perhaps a constitutional challenge of the regulation. What is plain, however, is that it cannot justify a deviation from the procedure pertinently prescribed by regulation 3.

[22] As to what would constitute a reasonable time for the Fund's decision, it is clear to me that little, if any, guidance can be derived from s 24(5). The two situations under consideration are too dissimilar. Section 24 only deals with the procedural validity of the claimant's initial claim. All the Fund therefore has to decide under the section is whether or not the correct procedure had been followed by the claimant. It is to that situation that the deeming provision of s 24(5) pertains. Under regulations 3(3)(c) and (d), on the other hand, the Fund must not only determine the procedural validity of the RAF 4 form. It must also determine the substantive issue as to whether or not the report correctly assessed the claimant's injuries as serious.

To insist that the Fund take a decision before it is ready to do so will serve little purpose other than to compel it to reject the RAF 4 form. (That, of course, is not to suggest that the Fund may drag its heels.)

[23] In the circumstances, any determination of the period within which the Fund should reasonably take that decision must depend on the facts of each case. This, I believe, is borne out by the silence of regulation 3 in specifying any time period within which the Fund must take its decision under regulations 3(3)(c) and (d). What renders the silence significant is that the regulation prescribes the time within which most other steps of the prescribed method must be taken and the consequences of not making those decisions. I understand this as an indication of appreciation on the part of the legislative authority that it is not possible to determine the time period within which the Fund must make its decision on the basis of 'one size fits all'. That period can only be determined with reference to the facts of the particular case. Lest I be misunderstood, I do not suggest that the period of more than one year that the Fund has taken in each of the four cases on appeal could conceivably be described as reasonable. They were clearly not. But that does not mean, as I have said, that the Fund's right to reject had lapsed. Even though the Fund's decision to reject the RAF 4 forms was only taken after the expiry of a reasonable period, these rejections must therefore prevail.

Rejection of the RAF 4 forms without proper reasons

[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.

[25] To the extent that the High Court's overriding of the Fund's decision may be regarded as – or was intended to be – a review (which is doubtful in the extreme) its approach would fly in the face of the provision in s 7(2) of PAJA, that no court shall entertain a review of an administrative decision unless and until any internal appeal provided for had been exhausted. Regulation 3(4) created the mechanism of an internal appeal against the Fund's decision that an injury is not serious to a tribunal of medical specialists. 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.'
(See also *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 50.)

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

<u>Did the RAF 4 forms meet the requirements of regulation 3(1)</u>

[27] In view of my conclusion that the High Court had no authority to interfere with the Fund's decision to reject the RAF 4 forms, the correctness of the Fund's reasons for doing so are of no real consequence. Yet we have been asked by the Fund and

by the *amicus curiae* to provide some guidance on the interpretation of regulation 3(1) on the issues that arose with regard to that interpretation. I believe we should accede to this request. First, because the Fund has on several occasions been penalised by the High Court for its interpretation of the regulation, which was held to be wrong, by awards of attorney and client costs. Secondly, because the members of the *amicus curiae* are bound to give effect to the regulation.

[28] In all four cases on appeal the Fund rejected the RAF 4 forms, mainly on three grounds, to wit that:

(a) Dr Braude, who purported to assess the plaintiffs' injuries as serious, did so without physically examining them;

(b) the AMA evaluation contemplated in regulation 3(1)(b)(ii) was done by an occupational therapist, Ms Marks, who is not a medical practitioner as contemplated by the regulation; and

(c) an assessment in terms of the narrative test laid down in regulation 3(1)(b)(iii) cannot be conducted without first doing the Whole Person Impairment Assessment in terms of the AMA Guides, referred to in regulation 3(1)(b)(ii).

With reference to all three of these grounds the High Court held that they rested on a wrong interpretation by the Fund of regulation 3(1). In considering the correctness of these findings, I propose to deal with the three grounds separately.

<u>Must a medical practitioner physically examine the claimant for purposes of the assessment</u>

[29] It is common cause that Dr Braude, who signed all four RAF 4 forms involved, did not physically examine any of the plaintiffs, but relied instead for his assessments on the hospital records annexed to the reports. Regulation 3(1)(a) provides that a claimant 'shall submit himself or herself to an assessment by a medical practitioner'. In finding that 'assessment' as used in regulation 3(1)(a) is not to be equated with 'physical examination', the High Court referred to several instances where the term 'assessment' is used in the rest of regulation 3(1) as a synonym for 'evaluate' or 'estimate' or 'determine the nature or quality of'. In support

of this proposition reference was made, by way of example, to the concept of ‘assessment of an injury’ used in regulation 3(1)(b)(iii) and to the expression ‘assessing the degree of impairment’ in regulation 3(1)(b)(v). I have no doubt that ‘assessment’ can have these meanings and that it does in fact bear those meanings in the given examples. My problem with this approach is, however, that it takes the term ‘assessment’ out of the context of regulation 3(1)(a). This regulation requires that the claimant must ‘submit himself or herself to an assessment’. In my view it simply cannot be said by any stretch of the imagination that a claimant, who merely sent his hospital records to a medical practitioner has ‘submitted himself’ to an assessment by that practitioner.

[30] The same point is illustrated by regulation 3(3)(d)(ii). It provides that, if the Fund is not satisfied with the claimant’s RAF 4 form, it may direct that the claimant ‘submit himself or herself . . . to a further assessment to ascertain whether the injury is serious . . . by a medical practitioner designated by the Fund.’ It is clearly not open to a third party who has been directed to submit to such a further assessment, merely to send his or her medical records to the medical practitioner designated by the Fund. He or she must submit to a physical examination by the Fund’s medical practitioner. Moreover, paragraph 4.5 of the RAF 4 form – which is part of the regulations – requires medical practitioners to give their ‘conclusion regarding physical examination’. This can in the context only mean that medical practitioners must consult with the claimant and must give their own conclusion based on their own physical examination of the claimant.

[31] As I see it, the assessment in regulation 3(1) plays an important role in the legislative scheme. It 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. There is no reason to think that medical practitioners employed by claimants are in a better position than those employed by the Fund to evaluate medical records. Conclusions based merely on the interpretation of these records,

would therefore be of little more assistance to the Fund than the submission of the records themselves. Self-evidently the legislative authority did not regard the submission of medical records in itself as sufficient to provide the required measure of control. What is more, superficial assessments like those that were encountered in the four matters on appeal, that were made without even examining the claimants are not likely to attract the Fund's confidence. The predictable result is that in the end even deserving claimants whose injuries were prima facie serious – like those of the plaintiff in *Kubeka*, who broke his neck – are compelled to follow the long route through an internal appeal. I therefore conclude that regulation 3(1)(a) requires a medical practitioner to physically examine a claimant.

Can the assessment be done by an occupational therapist

[32] Both s 17(1A) of the Act and regulation 3(1) require an assessment by a medical practitioner registered as such under the Health Professions Act 56 of 1974. The latter Act does not per se define a medical practitioner either, save to say that it is a person registered as such under that Act. However, the Health Professions Act distinguishes a 'medical practitioner' from a 'health practitioner' and defines the latter term as any person, including a student, registered with the Health Professions Council in a profession registrable under that Act.

[33] There are twelve professions, each with its own professional board, registered under the Health Professions Act. One of these is the Medical and Dental Council. Another is the Occupational Therapy and Medical Orthotics or Prosthetics (see eg 17 *Lawsa* 2 ed part 2 para 6). In the circumstances it is clear to me that 'medical practitioner' envisages by s 17(1)(a) and regulation 3(1) are those practitioners that are registered under the Medical and Dental Profession. In consequence it excludes health practitioners, such as occupational therapists, dieticians, oral hygienists, and so forth who are registered under other professions. It follows that, in my view, the Fund rightly decided that Ms Marks, who is an occupational therapist, did not qualify as a medical practitioner within the meaning of regulation 3(1)(a).

Can an assessment in terms of regulation 3(1)(b)(iii) be conducted without first performing the assessment in terms of regulation 3(1)(b)(ii)

[34] It will be remembered that regulation 3(1)(b) sets out three criteria. The first, referred to in regulation 3(1)(b)(i) relates to those injuries which are disqualified from being assessed as serious because they appear on the Minister's list to be published. For present purposes these can be excluded. The other two are formulated as follows in regulation 3(1)(b)(ii) and (iii):

'(ii) If the injury resulted in 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious.

(iii) An injury which does not result in 30 per cent or more Impairment of the Whole Person may only be assessed as serious if that injury:

(aa) resulted in a serious long term impairment or loss of a body function;

(bb) constitutes permanent serious disfigurement;

(cc) resulted in severe long term mental or severe long term behavioural disturbance or disorder; or

(dd) resulted in loss of a foetus.'

[35] With reference to these provisions, it is clear from the Road Accident Fund forms that Dr Braude did not rely on the criteria formulated in 3(1)(b)(ii) but on the narrative test laid down in regulation 3(1)(b)(iii) as the basis for his assessment that the plaintiffs' injuries were 'serious'. The Fund's contention was, however, that he was not allowed to do so. On a proper interpretation of the regulation, so the Fund contended, a Whole Person Impairment Assessment (WPI) rating of below 30 per cent is a prerequisite before the narrative test can be performed. Since Dr Braude did not assess the plaintiffs for WPI under the AMA Guides at all, so the Fund contended, he could not have applied the narrative test.

[36] In those of the judgments on appeal that considered this issue, the Fund's contention was rejected, in short, on the basis that the regulations contemplate a disjunctive test where a claimant has to meet the requirements of one or the other. In other words, that it is open to the medical practitioner to evaluate the question of

seriousness either by way of the AMA/WPI test or by way of the narrative test. A reading of regulation 3(1)(b) in isolation seems to lend support to anyone of these rival constructions. It is therefore truly ambiguous. Yet regulation 3(1)(b)(vi) seems to favour the interpretation contended for by the Fund. In terms of this regulation:

'The Minister may approve a training course in the application of the AMA Guides by notice in the Gazette and then the assessment must be done by a medical practitioner who has successfully completed such a course.'

[37] It was common cause before us that until now the Minister has not approved the envisaged training course. Nonetheless, the intent emerging from this regulation is clearly that, once the course had been approved, assessment will be reserved for those doctors who have successfully completed the course. This seems to indicate that all assessments require knowledge of the AMA Guides, which in turn leads to the inference that a medical practitioner cannot avoid the AMA Guide by opting for the narrative test. But a more weighty consideration in favour of the Fund's interpretation, as I see it, derives from the contents of the RAF 4 form itself, which is incorporated in the regulations as annexure D. In broad outline the report is divided in five paragraphs. Paragraph 1 requires the personal details of the claimant, while paragraph 2 calls for the particulars of the medical practitioner responsible for the assessment. Paragraph 3 requires an indication of injuries observed by the medical practitioner that cannot be assessed as serious because they appear on the Minister's list contemplated in regulation 3(1)(b)(i). Paragraph 4 then deals with the AMA Impairment Rating contemplated in regulation 3(1)(b)(ii), while paragraph 5 refers to the narrative test in regulation 3(1)(b)(iii). Of significance, in my view, is that paragraph 4 really contains the nub of the report. If paragraph 4 were to be left uncompleted, the report would be of little substance. In sum the inevitable inference to be drawn from the contents of the report is that it was never intended that an assessment could bypass the AMA/WPI test.

[38] I am mindful of the argument by the plaintiffs that this interpretation may create difficulties for indigent claimants in rural areas where medical practitioner are

unable to apply the AMA Guides. However, I can find no direct evidence to support this assumption of inability on the part of rural doctors. The mere fact that Dr Braude does not know how to apply the AMA Guides does not elevate this to a generality. After all, Ms Marks, who is an occupational therapist, apparently had little difficulty in performing the AMA Impairment Evaluation. But, be that as it may, the assumed inability of doctors in rural areas to perform the AMA test, cannot change the clear meaning of the regulations. Perhaps this may be a good reason for the Minister to expedite the establishment of the training course envisaged in regulation 3(1)(b)(vi), particularly in rural areas. It may even lay the basis for a constitutional challenge of regulation 3(1). But it cannot justify a deviation from the clear meaning of the regulation.

[39] The reference to a constitutional challenge is not illusory, in that the plaintiffs did indeed launch a wide ranging constitutional challenge of regulation 3(1) which was based on sections 9, 10, 33 and 34 of the Constitution. But they only did so belatedly, on appeal to this court, and without joining the Minister of Transport as the executive authority responsible for the administration of the regulations, in compliance with the requirement of Uniform Rule 10A. This approach flies in the face of Constitutional Court decisions in two respects. Firstly, it is in conflict with those decisions which emphasised that parties who wish to challenge the constitutional validity of a statutory provision must raise that challenge at the time when they institute legal proceedings in the court of first instance (See eg *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC) para 22). Secondly, it runs counter to those decisions which underscored the importance of compliance with Rule 10A (see eg *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicae Curiae*) 2006 (4) SA 230 (CC) para 7; *Road Accident Fund v Mdeyide (Minister of Transport Intervening)* 2008 (1) SA 535 (CC) para 27). In addition, as I have said by way of introduction, virtually the same constitutional challenge of regulation 3 by the Law Society was found wanting by the High Court and not pursued as part of the appeal to the Constitutional Court. In this light

counsel for the plaintiffs, wisely in my view, did not proceed with their constitutional challenge.

Ancillary matters

[40] What remains are ancillary matters pertaining, firstly, to the further conduct of the four matters on appeal and, secondly, to issues of costs. The import of the conclusions I have reached thus far is that the special pleas raised by the Fund should have been upheld by the High Court. It will be remembered that these special pleas rested on the contention that the plaintiffs' claims for general damage were premature in that they had failed to establish that their injuries were serious in accordance with the method prescribed in regulation 3. In consequence, the Fund's prayer in these special pleas was that the claims for general damages be dismissed, alternatively, that these claims be stayed, pending the compliance by the plaintiffs with regulation 3. What the Fund sought on appeal – quite fairly, I believe, in view of the uncertainty that surrounded the application of regulation 3 – is not that the plaintiffs' claims for general damages be dismissed, but for an order pursuant to their alternative prayer.

[41] Moreover, it appears that in all four cases the quantum of the plaintiffs' general damages had since the dismissal of the special pleas been determined, either by agreement between the parties or by the court. In this light, the position taken by the Fund on appeal, again, quite fairly, was that if the plaintiffs' injuries should eventually be assessed as serious in accordance with the procedure prescribed by regulation 3, it would not be necessary for the plaintiffs to re-establish the quantum of their claims for general damages. Hence the order I propose to make provides that in that event the awards of general damages will stand. As to the issue of costs, it is clear that the plaintiffs were ultimately unsuccessful, both in their opposition to the special pleas and on appeal. Normally costs would follow that outcome. However, in the light of the uncertainty that existed about the interpretation and application of regulation 3, it would be equitable, in my view, not to make any costs order against the plaintiffs.

[42] 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.

In the matter of Road Accident Fund v Mokoena: Case No 131/2012

1. The appeal is upheld, with no order as to costs.
2. The order of the High Court is set aside and replaced as follows:

'(a) 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.

(b) The special pleas raised by the defendant are upheld.

(c) The plaintiff's claim for general damages is postponed *sine die*.

(d) 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.

(e) 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 R80 000 for general damages.

(f) There is no order as to costs in relation to the defendant's special pleas and the plaintiff's claim for general damages.

(g) Save as aforesaid, the defendant is to pay the plaintiff's costs, including the costs of the following experts: Dr Barlin, Mr White and Ms Marks.'

3. The period of 90 days referred to in paragraph 2(d) above is to be calculated from the date of this court's order.

<u>In the matter of Road Accident Fund v Duma: Case No 202/2012</u>

1. The appeal is upheld, with no order as to costs.
2. The order of the High Court is set aside and replaced as follows:

'(a) 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.

(b) The special pleas raised by the defendant are upheld.

(c) The plaintiff's claim for general damages is postponed *sine die*.

(d) 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.

(e) 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 R130 000 for general damages.

(f) There is no order as to costs in relation to the defendant's special pleas and the plaintiff's claim for general damages.

(g) Save as aforesaid, the defendant is to pay the plaintiff's costs, including the costs of the following experts: Mr White and Ms Marks.'

3. The period of 90 days referred to in paragraph 2(d) above is to be calculated from the date of this court's order.

In the matter of Road Accident Fund v Meyer: Case No 164/2012

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 R777 600 for loss of earnings.

(b) The special plea raised by the defendant is upheld.

(c) The plaintiff's claim for general damages is postponed *sine die*.

(d) 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.

(e) 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 R150 000 for general damages.

(f) There is no order as to costs in relation to the defendant's special pleas and the plaintiff's claim for general damages.

(g) Save as aforesaid, the defendant is to pay the plaintiff's costs, including the costs of the following experts: Ms Weiner, Dr Barlin and Ms Marks.'

3. The period of 90 days referred to in paragraph 2(d) above is to be calculated from the date of this court's order.

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F D J BRAND
JUDGE OF APPEAL

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