The Road Accident Fund Act 56 of 1996 and serious injuries

By Leslie Kobrin

The Road Accident Fund Amendment Act 19 of 2005 came into effect on 1 August 2008. The provisions discussed in this article affect persons injured in motor vehicle accidents that occurred on or after 1 August 2008 only.

The Amendment Act limits the Road Accident Fund's (RAF's) liability for compensation in respect of claims for non-pecuniary loss (general damages) specifically to instances where a 'serious injury' has been sustained. Although the Amendment Act also abolishes a motor vehicle accident victim's common law right to claim compensation from a wrongdoer for losses that are not claimable under the Road Accident Fund Act 56 of 1996 (RAF Act), and it limits the amount of compensation that the RAF is obliged to pay for claims for loss of income or a dependant's loss of support arising from the bodily injury or death of a victim of a motor vehicle accident, this article deals only with the general damages aspect and not with the other limitations in the RAF Act.

According to the RAF Act a medical practitioner has to determine whether or not the victim has suffered a serious injury by undertaking an assessment prescribed in the regulations to the RAF Act. The practitioner performing the injury assessment has to prepare a RAF 4 report. Preparation of the report requires the completion and signing of the RAF 4 form by the medical practitioner undertaking the assessment and, in many cases, will have attached to it annexures and/or substantiating reports.

The medical practitioner must assess the injury in terms of the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, 6 ed (the AMA Guides). If the injury is found to have resulted in 30% or more impairment of the whole person, according to the methods stipulated in the AMA Guides, the injury should be assessed as serious.

The final step of the report will follow only where the injury is not listed on the 'non-serious injuries' list, and where the injury is considered to have resulted in less than 30% of whole person impairment. In this case, the medical practitioner should apply what has come to be known as the 'narrative test'.

According to this test the medical practitioner should consider if the injury has resulted in any one, more or all of the following consequences:
• Serious long-term impairment or loss of a body function.
• Permanent serious disfigurement, severe long-term mental or severe long-term behavioural disturbance or disorder.
• The loss of a foetus.

Section 23(3) of the RAF Act reads as follows: 'Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(*a*) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.' The question to be posed is at what stage the RAF 4 assessment must be submitted?

This position was considered by Satchwell J in the South Gauteng High Court in the case of *Van Zyl v Road Accident Fund* (GSJ) (unreported case no 34299/2009, 11-6-2012) (Satchwell J). In this case:
• The accident occurred on 2 August 2008.
• The claim was lodged with the RAF on 8 January 2009.
• The RAF 4 form was submitted on 6 February 2012.

The serious injury assessment was therefore submitted in excess of the three-year period outlined in s 23(1), but before the expiry of the period referred to in s 23(3). The RAF's complaint was that the RAF 4 form was served outside of the time limit prescribed by s 23(1).

After considering the case law and the provisions of the RAF Act and its regulations, Satchwell J found that the furnishing of the RAF 4 form after the lapse of the three-year period referred to in s 23(1), but before the expiry of the period referred to in s 23(3), did not result in the victim's claim for general damages having become prescribed.

The RAF originally lodged an appeal against this judgement to the Supreme Court of Appeal, but this appeal has not been proceeded with and has been abandoned. Therefore, as matters presently stand, it is permissible to file the RAF 4 form after the expiry of the three-year period set out in s 23(1), but before the expiry of the five-year period referred to in s 23(3).

After the completion of a RAF 4 report, regardless of whether the whole person impairment test or the narrative test was used, it is submitted to the RAF. Peculiarly, members of the administrative staff of the RAF are then required to review the medical report and decide whether or not they accept it. If rejecting it, the RAF is obliged to furnish reasons for its rejection of the serious injury assessment.

The RAF can also request the plaintiff to make himself or herself available for further assessment by a medical practitioner appointed by and at the RAF's expense. In the event that the assessment is rejected, the issue of determining whether or not the victim has sustained a serious injury must be referred to an appeal tribunal set up by the Health Professions Council of South Africa (HPCSA). The prescribed appeal tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine appointed by the registrar, who shall designate one of them as the presiding officer. The registrar may also appoint an additional independent health practitioner with expertise to assist the tribunal in an advisory capacity.

Until very recently, as will be described later in this article, the RAF Act and its regulations were silent as to when, after receipt of the RAF 4 form, the RAF was obliged to notify the victim as to whether it accepted or rejected the assessment contained in the RAF 4 form and, if rejected, its reasons therefor. In the absence of a specific time period having been laid down, a reasonable time was expected and what was reasonable depended on the circumstances in each case. In practice this caused much difficulty for the victims' attorneys since the rejection notification is often delivered on the eve of the trial. The receipt of the letter rejecting the assessment, and the reasons therefor, on the eve of the trial obliges the plaintiff to then postpone the trial and refer the rejection to the HPCSA to set up a tribunal, which is costly and delays the ultimate conclusion of the matter to and at the prejudice of the plaintiff.

This issue came up for determination before the Supreme Court of Appeal in *Road Accident Fund v Duma and Three Related Cases (Health Professions Council of South Africa as* amicus curiae*)* [2013] 1 All SA 543 (SCA). The legal issues before the court were, *inter alia*:
• What is the remedy when the RAF does not make a decision within a reasonable time?
• What is the remedy when the RAF rejects a RAF 4 form without any and/or proper reasons?

The court found that the remedy when the RAF does not make a decision within a reasonable time is to be found in s 6(2)(*g*) read with s 6(3)(*a*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In terms of these sections, if an administrative authority unreasonably delays in taking a decision in circumstances where there is no period prescribed for that decision, an application can be brought 'for judicial review of the failure to take the decision'. Should the RAF therefore fail to make a decision regarding the acceptability of an RAF 4 form, the claimant can apply to court for an order compelling the RAF to do so within a time period specified by the court and to hold the RAF in contempt of court if it fails to do so within the specified time period.

When the RAF rejects a RAF 4 form without proper reasons, the court held that the decision by the RAF to reject a RAF 4 form clearly constitutes administrative action and therefore such a decision is subject to the provisions of PAJA. The court further held that the failure to provide appropriate or proper reasons, does not render a decision by the RAF invalid *per se*, as such a decision remains valid unless invalidated by a court or appropriate tribunal. The RAF Act, as amended, provides the remedy of an internal appeal and, in terms of s 7(2) of PAJA, that must first be exhausted before a judicial review of any of its administrative decisions can take place. The court held further that the internal remedy provided for in the RAF Act may, however, be circumvented on application for condonation of non-exhaustion of internal remedies, by the aggrieved party, in –

• exceptional circumstances; and
• if it is the interests of justice to do so.

In addition to this useful guide provided by Brand JA in the aforementioned decision the regulations to the Act were amended by a proclamation in *Government Gazette* 36452 in GN 347/15-5-2013. This amendment specified a list of injuries which, in themselves, will not amount to serious injury.

In addition reg 3(e), immediately after (d), was supplemented by the following: '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 to the 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.'

The above amended regulation came into effect on 15 May 2013, being the date of its publication in the *Government Gazette*. I submit that if the RAF does not accept or reject an assessment within 90 days from the date of service on it of the RAF 4 form, it is estopped from rejecting the assessment and is deemed to have accepted the assessment.

This submission is valid in respect of any claim where the serious injury assessment is served on or after 15 May 2013. In cases where the serious injury assessment was delivered prior to 15 May 2013, the RAF must accept or reject the assessment within a reasonable time and, where it fails to do so, then the better view would be to act in terms of the judgment of Brand JA in the *Duma* decision (see 2013 (Aug) *DR* 55).

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