

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Skosana (A4/18)

[2020] ZAGPPHC 342 (29 July 2020)

[2020] ZAGPPHC 342**COURT**

North Gauteng High Court, Pretoria

BEFORE

Ranchod, Mabuse, Collis

CASE / FILE NUMBER

A4/18

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****(1)****REPORTABLE:**

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

CASE NO:

A4/18

In the matter

between:

ROAD

ACCIDENT

FUND

Appellant

And

BETTY MADY

SKOSANA

Respondent

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII.

The date and time for hand-down is deemed to be 10h00 on 29 July 2020.

JUDGMENT

RANCHOD, J

Introduction

- [1] This is an appeal against the costs order granted by the court a quo (per Lukhaimane AJ) against the appellant (the Fund) in circumstances where it had, in effect, been the successful party.
- [2] The Fund applied for condonation for the late filing of its heads of argument. The respondent opposed the application. However, the filing of the heads of argument was not inordinately late and there was no prejudice to the respondent. It was accordingly granted with no order as to costs.

Factual

background

- [3] The respondent was injured in a motor vehicle accident on 30 December 2012. She submitted a claim for compensation against the Fund in terms of the Road Accident Fund Act 56 of 1996 (the Act). It included a claim for general or non-patrimonial damages.
- [4] In terms of the regulations promulgated in 2008 (as amended) under the Act a claimant for general damages must submit an RAF4 form (also referred to as a Serious Injury Assessment Form or SIA) which is to be first completed by a medical practitioner in order to determine whether the claimant qualifies for general damages or not. The Fund must accept or reject the claim for general damages within 90 days of the submission of the RAF4 form as provided for in Regulation 3(3)(d) or elect to have the claimant assessed by a medical practitioner of its choice.
- [5] The respondent submitted the RAF4 form through her attorneys to the Fund on 4 November 2014. The Fund failed to make an election whether to accept or reject the RAF4 form within the 90 day period or elect to have the claimant assessed by a designated medical practitioner of its choice.
- [6] It would appear that nothing further transpired until the respondent's attorney wrote a letter dated 18 June 2015 to the Fund that it, within 5 days of date of the letter make an election as prescribed in Regulation 3(3)(c), (d) and (dA) failing which review proceedings in terms of section 6(2)(g) of Act 3 of 2000 (the PAJA) would be launched. At that stage the current attorneys of the Fund had not as yet been appointed as attorneys of record.

- [7] On 5 April 2016 the respondent issued summons (the Main Action) against the Fund for both special and general damages.
- [8] The Fund's current attorneys entered appearance to defend the main action on 19 April 2016.
- [9] The respondent's attorneys then served a medico-legal report by Dr Piet Engelbrecht (who had also completed the RAF4 form) on the Fund's attorneys on 22 June 2016.
- [10] On 26 August 2016 the Fund's attorneys wrote to respondent's attorneys stating:
- 'The abovementioned matter and the Plaintiff's RAF4 refers.
- Kindly note that we are currently not in a position to accept, neither reject your RAF4 form and the Defendant wishes to appoint their own expert/s in this matter.'
- [11] In spite of the letter, a month later, the respondent's attorneys launched a review application on 26 September 2016 as they had threatened to do in the letter of 18 June 2015, that is, some 15 months later.
- [12] On the same day (i.e. 26 September 2016) the Fund's attorneys wrote to respondent's attorneys requesting them to remove the review application from the roll and drew their attention to the letter dated 26 August 2016.
- [13] The respondent's attorneys responded the next day (27th September) and stated, inter alia:
- '3. We accordingly urge you to, as a matter of urgency, file Rule 36(1) &
- (2) notices to record what RAF evaluation or evaluations the defendant will require. Upon receiving these notices we will be in a position to determine whether such constitute the exercise of a proper election in terms of regulation 3. You are also at liberty to record in writing what experts will do such assessment or assessments and when same will take place.
4. Should we not receive confirmation of the foregoing and compliance in the aforesaid regard within 10 calendar days from date of this letter, we will have no option but to take further steps in the protection of our client's rights.'
- [14] The very next day, on 28 September, the Fund's attorneys wrote to respondent's attorneys and attached a copy of a rule 36(1) and (2) notice and also informed them that the respondent is to attend at Dr Birrell's rooms on 24 January 2017 at 10h30. It was also again requested that the 'notice of motion' (the review application) be withdrawn.
- [15] The Fund's attorneys thereafter also served the notices in terms of rule 36(1) and (2) and 36(9) (a) on respondent's attorneys on 30 September 2016. This was done well within the 10 calendar days stipulated by respondent's attorneys.
- [16] Instead of withdrawing the review application the respondent's attorneys placed it on the unopposed motion roll. (The notice of motion states that it was set down for the 18 October 2016.)

[17] In a letter dated 25 October 2016 the respondent's attorneys record the fact that the Fund's attorneys had requested an extension of time to file its answering affidavit. It is also stated that the application was postponed with costs reserved and that:

'Plaintiff places on record that the PAJA application was postponed cost reserved (sic) the plaintiff do to (sic) intend furthering the application at present. The plaintiff is of the view that these further steps that the defendant now intends taking constitutes an unnecessary waist (sic) of cost.'

The letter continues:

'The defendant is referred to the Plaintiff's previous letter dated 14 October 2016, the only argument was about the cost of the PAJA application on the unopposed roll and whether the defendant was liable to pay such cost escalating this cost to opposed motion cost is wasteful (sic).'

[18] The Fund filed its answering affidavit on the same day. The crux of the answering affidavit is that the respondent should not have launched the application for review as the Fund had made its election in terms of regulation 3 before the application was served.

[19] The respondent filed a replying affidavit on 10 November 2016. In many parts the replying affidavit is argumentative and repetitive rather than pertinently dealing with the Fund's contentions in its answering affidavit. The respondent's attorney, Ms Salome Le Roux, who is the deponent to the founding and replying affidavits, clearly misconstrued the purpose of a replying affidavit. The essence of the reply, apart from repeating much of what is stated in the founding affidavit is that the Fund failed to make an election.

[20] The matter eventually found its way to the opposed motion court on 10 October 2017 before Lukhaimane AJ.

[21] In his address to the court, Mr Geach SC, who appeared for the respondent (the applicant in the review application), informed the court:

'M'lady at this stage the application turns solely on the costs of the application.'

[22] After hearing argument from both parties, the learned judge granted costs in favour of the respondent (the applicant in the review application) without giving reasons for the order.

[23] Aggrieved at having to pay the costs of the application when the relief sought by the respondent had not been proceeded with, the Fund requested reasons for the judgment as it intended to appeal. The reasons were furnished by the court a quo on 17 November 2017.

[24] The present appeal is with the leave of the court a quo.

Discussion

[25] The review application is in Afrikaans. For the sake of convenience, I will loosely translate the relief sought into English:

‘1. That it be declared that:

1.1 The failure of the defendant to make an election, in terms of regulation 3(3)(c), (d) and (dA) within 90 days after the submission of the plaintiff’s RAF4 form, determining whether the plaintiff’s injuries are serious has the consequence that the defendant is deemed to have agreed with the contents of the RAF form; and

1.2 the plaintiff’s injuries as serious is accepted by the defendant.

2. Alternatively to paragraph 1:

2.1 That the defendant’s refusal and/or failure to take a decision in accordance with Regulation 3(3)(c) and 3(3)(d) of the Road Accident Fund Regulations, 2008 in terms of section 26 of the Road Accident Fund Act 56 of 1996 (hereinafter referred to as ‘the Regulations’) timeously alternatively within a reasonable period and indicate whether the plaintiff’s injuries have been determined as serious or not, is hereby reviewed.

2.2 That the defendant be ordered to deliver a decision within 10 calendar days of date of delivery of the order to the defendant’s attorneys or the defendant itself in accordance with Regulation 3(3)(c) and 3(3)(d) and inform:

2.2.1 the plaintiff whether her injuries have been determined as serious or not and if not;

2.2.2 whether the defendant rejects it, with reasons;

2.2.3 whether the defendant will want the plaintiff to be assessed by a medical practitioner of its own choice and at its own cost to determine whether plaintiff’s injuries qualify as serious or not.

2.3 That, in default of compliance with paragraph 2.2, the plaintiff’s injuries

be determined as serious without any further notice to the defendant and it be deemed that the defendant agrees with the contents of the RAF4 form.

3. Further alternatively to paragraphs 1 and 2 above:

3.1 That the defendant’s refusal and/or failure to take a decision in accordance with Regulation 3(3)(c) and 3(3)(d) of the Road Accident Fund Regulations, 2008 in terms of section 26 of the Road Accident Fund Act 56 of 1996 (hereinafter referred to as ‘the Regulations’) timeously alternatively within a reasonable period and indicate whether the plaintiff’s injuries have been determined as serious or not, is hereby reviewed.

3.2 That the defendant be ordered to deliver a decision within 10 calendar

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3.2.2 whether the defendant rejects it, with reasons;

3.2.3 whether the defendant will want the plaintiff to be assessed by

a medical practitioner of its own choice and at its own cost to determine whether plaintiff's injuries qualify as serious or not.

4. That the defendant pay the costs of the application including the fees of an advocate for drawing up the application.
5. Further or alternative relief.'

[26] It is to be noted that prayers 2 and 3 are identical except that in prayer 2 there is the additional relief sought in 2.3 that if defendant fails to comply with para 2.2. it be deemed that plaintiff's injuries are serious whereas in prayer 3 no deeming provision is sought.

[27] In the founding affidavit the deponent states that the application is for a review as contemplated in section 6(2)(g) of Act 3 of 2000 (the PAJA).

[28] It is also stated that the plaintiff has no other internal remedy at her disposal.

[29] The Fund's response in the answering affidavit was that its attorneys had informed respondent's attorneys that they were 'currently not in a position to accept, neither reject your RAF4 form and the defendant wishes to appoint their own experts in the matter.' in the letter dated 26 August 2016.

[30] As I said, in his opening address, Mr Geach SC informed the court a quo that the only issue to be argued was the question of costs.

[31] The court a quo came to the conclusion that by stating that the Fund 'wishes' to appoint its own expert did not give rise to an 'unequivocal election as required in terms of regulation 3(3)(dA) ... apart from the fact that the letter was sent after the peremptory period of 90 days. [1]'

[32] The court a quo went on to state[2] that the letter of the Fund's attorneys dated 28 September 2016 and the notices in terms of Rule 36(1) and (2) also did not

constitute a proper election as required in regulation 3. The court's view was that it still did not indicate whether the RAF4 form was accepted or rejected nor does the notice state that this is a serious injury assessment. The learned judge went on to say:[3]

'Mere reference to "examine the state of health of the Respondent for the determination of damages and compensation claims" is insufficient to rise to the level of a serious injury assessment as envisaged by the Regulations.'

And further:[4]

'The fact that the Plaintiff continued to state in the same letter [dated 25 October 2016] that they propose to wait for Defendant's

expert reports to become available and then deal with the question whether Plaintiff qualifies for general damages does not objectively

make the prior actions of the Defendant in relation to the Rule 36(1) and (2) notices and its letter of 26 August 2016 rise to elections in terms of Regulation 3(3)(dA).’

[33] Regulation 3(3)(dA) provides in the relevant part:-

‘(dA) The Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent ... accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment: (My underlining.)’

It is immediately apparent that the Fund has a choice to have a claimant (third party) submit to a further assessment.

[34] In my view, the Fund does not have to explicitly reject the RAF4 form assessment in circumstances where it elects to have the claimant submit to a further assessment by a medical practitioner of its choice. The reason is obvious. Once it obtains the further assessment it can then determine whether to accept or reject the earlier assessment by the claimant’s medical practitioner.

[35] That is what happened here. The Fund did not explicitly accept or reject the assessment by the respondent’s medical practitioner but opted instead to have a further assessment done. If it had not opted for the latter course then the argument that the Fund did not make an election would be correct. For that reason, the court a quo’s reasoning is, with respect, erroneous on that score. The Supreme Court of Appeal, per Mathopo JA (concurring in by Lewis, Ponnann, and Petse JJA and Coppin AJA) in *Mphala v Road Accident Fund*[5] stated:

‘Moreover, the clear language of regulation 3(3)(dA) enjoins the Fund to decide ... (a) to accept the SIA report; (b) to reject it; or

(c) to refer the third party for a further assessment.’[6] (My underlining.)

[36] I turn, then, to the nub of the present appeal, i.e. whether the court a quo should have granted costs in favour of the respondent.

[37] The relief sought in prayer 1, and, in the alternatives, prayers 2 and 3 are premised on an alleged failure by the Fund to make an election. As I have found, that is incorrect and therefore none of the prayers could have been granted and on that basis alone the Fund had succeeded in its opposition to the review application and would have been entitled to its costs.

[38] It is also instructive to note that in their letter dated 25 October 2016 the respondent’s attorneys stated:

‘The plaintiff proposes that we wait for the defendant’s expert reports to become available and then deal with the question whether the plaintiff qualify (sic) for general damages and the costs of the precious (sic) application after receipt thereof...’

The respondent’s attorneys accepted that the Fund had indeed made an election i.e. to refer the respondent for an assessment by a medical practitioner appointed by the Fund and should have withdrawn the review application at that stage. As I said earlier, the Fund’s attorneys had already informed the respondent’s attorneys, prior to the launching of the review application, in the letter dated 26 August 2016, that it intended to appoint its own experts.

[39] In any event, the relief sought could not have been granted for a further reason. In prayers 1 and 2 the respondent sought that the Fund be ‘deemed’ to have agreed with the contents of the RAF form. In *Mphala*[7] the learned Judge of Appeal held:

‘An interpretation that seeks to suggest that because the Fund did not make a decision within 90 days of receipt of the SIA report [the RAF4 form], 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.’

[40] Had the merits of the application been traversed at the hearing, the respondent could not have succeeded for the reasons stated and the general rule is that the party who succeeds should be awarded costs.

[41] It is a trite principle that the court has a discretion when it comes to awarding costs. However, the discretion must be judicially exercised. In awarding costs the general rule should not be departed from except on good grounds such as:

41.1 The making of excessive demands;

41.2 The manner in which the litigation was conducted;

41.3 The taking of unnecessary steps or the adoption of a wrong procedure; and

41.4 Misconduct by a party.[8]

[42] The court a quo seems to have found against the Fund on the second and/or fourth ground. It stressed, by reference to a dictionary definition of the word ‘wishes’ that the Fund had not made an election. In the light of what I have said earlier, it cannot be said that the Fund had not made an election nor did it conduct itself in a manner that warranted an adverse costs order against it.

[43] In *Fripp v Gibbon and Company*[9] it was held that:

‘In appeals upon questions of costs two general principles should be observed. The first is that the court of first instance has a judicial discretion as to costs, and the second is that the successful party should, as a general rule, have its costs. The discretion of the court therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that the successful party should be awarded his costs.’

[44] Fripp was quoted with approval in *Merber v Merber*[10] where it was further held:

‘It seems therefore that, when a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for his departure from the general rule and if there are no such grounds, then ordinarily it will interfere.’

Conclusion

[45] For all the reasons stated, this court is entitled to interfere and reverse the costs order of the court a quo.

[46] I propose the following order:

1. The appeal is upheld with costs.
2. The costs order made by the court a quo is set aside and substituted with the following order:

‘The applicant is ordered to pay the costs of the application.’

JUDGE OF THE HIGH COURT

I agree

MABUSE, J

COLLIS J

Appearances:

Appearance for appellant:

Adv L Strydom

Instructed by Mothle Jooma Sabdia Inc

Ground Floor, Duncan Manor

Cnr Jan Shoba & Brooks Streets

Brooklyn, Pretoria

Appearance for respondent: Adv BT Geach SC & Adv LJ Visser

Instructed by Salome Le Roux Attorneys

81 Thomas Edison Street

Cnr Thomas Edison & 13th Streets

Menlo Park, Pretoria

[1] Para 3.2 of the Reasons for Judgment.

[2] Para 3.5 of the Reasons for Judgment.

[3] Para 3.7 of the Reasons for Judgment.

[4] Para 3.9 of the Reasons for Judgment.

[5] (698/16) [2017] ZASCA 76 (1 June 2017)

[6] at para [13]

[7] at para 14

[8] See: The Civil Practice of the High Courts of South Africa: Herbstein & Van Winsen, 5th Ed. 2009 p961.

[9] 1913 AD 354 at 357

[10] 1948 (1) SA 446 (A) at 453

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