



OFFICE OF THE ACTING JUDGE PRESIDENT

GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA
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17 March 2022

To:

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- e. **The Judges Of The Gauteng Division Of The High Court Of S.A**
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- p. Parties indicating their interest during the virtual judicial management meeting held on 18 February 2022

E-mail: ferdinandhh@gmail.com

In the matters of:

Advocate Knoetze obo Malinga

Plaintiff

EJP Goede

Plaintiff

and

The Road Accident Fund

Defendant

Under Case Numbers:

1. 77573/2018
2. 54997/2020

**ACTING JUDGE PRESIDENT'S PRACTICE DIRECTIVE IN TERMS OF SECTION
14(1)(a) OF THE SUPERIOR COURTS ACT, ACT 10 OF 2013**

1. This is a Directive issued in terms of section 14(1)(a) of the Superior Courts Act, Act 10 of 2013, read with section 173 of The Constitution of the Republic of South Africa. The purpose of this Directive is to make provision for the constitution of a Full Court, to sit at first instance, to hear, determine and resolve the legal issue that recently arose in a number of matters where Plaintiffs approach the Court to obtain default judgment against the Road Accident Fund. It is necessary and in the interest of justice that a uniform approach is followed in this Division when Courts deal with the Legal Issue set out below.

2. Background

- (i) Re: Undertaking in terms of s 17(4)(a) of the Road Accident Fund Act

Section 17(4)(1)(a) of the Road Accident Fund Act provides as follow:

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

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

- (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or
- (ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d),

in accordance with the tariff contemplated in subsection (4B)’.

Mojapelo DJP held in *Van der Walt v RAF* (2014/12763) [2015] ZAGPJHC 86 para 13, that a court may not order than an undertaking be issued unless it is tendered by the Road Accident Fund. Mojapelo DJP relied extensively on a decision of the Appellate Division, as it then was, in *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A). In this decision the court pronounced on the nature of an undertaking in terms of in section 21(1C)(a) of the Compulsory Motor Vehicle Insurance Act, Act 56 of 1972. This section provided as follow:

‘(1C) Where a claim for compensation under section 21 -

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a

service or supplying of goods to him, the authorized insurer concerned shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed him to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof;

In *Katz*, Trollip JA explained that the purpose of the provision was to innovate a departure of the common law. He stated:

'Now para (a) of the amendment is designed for the benefit of authorized insurers and has the effect, if invoked, of eliminating the uncertainties and imponderables inherent in having to adjudicate once and for all the quantum for the future loss or damage mentioned therein. Its provisions, however, only apply if the insurer concerned elects to invoke them. That was common cause and flows from the words "the authorized insurer shall be entitled etc..." The claimant (the third party) cannot himself claim or insist that the insurer shall furnish the undertaking, nor can the trial Court *mero motu* direct the insurer to furnish it. For the election lies entirely with the insurer. The insurer's election must, of course, be conveyed to the claimant. He can do that by furnishing the claimant with the undertaking after the claim for compensation has been submitted under s 25 (1) of the Act. ... if no such undertaking is then furnished, the litigation ensues and the insurer can at the trial furnish it, or tender to furnish it, or otherwise convey his election to the claimant and the trial Court. In that event, if the claimant is successful in the litigation, the trial Court must by its order direct, and the claimant must submit to that direction, that the insurer shall furnish the undertaking to the claimant. The reason and need for the judicial direction is to render the undertaking binding on both parties for the future.'

It is common cause that the majority of orders granted against the Road Accident Fund are currently granted by default. Recently, some Plaintiffs insist on being

awarded a lump sum as compensation for their claim for future medical and hospital expenses. It is submitted by these Plaintiffs that in light of the *Katz* decision, a Court is not competent to order that a section 17(4)(1)(a) undertaking be furnished by the Road Accident Fund in the absence of a tender by the Road Accident Fund.

(ii) *Re: General Damages*

It has already been determined by the Supreme Court of Appeal in, amongst others, *Mpahla v RAF* (698/16) [2017] ZASCA 76 (1 June 2017) with reference to regulation 3(3)(dA) that a failure by the Road accident fund to take a decision as to whether a plaintiff's injuries are serious within the prescribed period does not create a deeming provision. Of late, the Road Accident Fund's inaction and failure to explicitly reject or accept serious injury assessment reports filed by victims of road accidents, often even after being compelled to do so, leads to an impasse. In *Mpahla*, the Road Accident fund rejected the serious injury assessment report, albeit after the expiry of the time provided for in the regulations. In this context Mathopo JA held that:

'If the Fund is not satisfied that the injuries is serious, the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim.'

and

'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.'

No reference was, however made in *Mphahla* to the interaction between regulations 3(3), 3(4) and 3(5). Regulation 3(5)(a) provides:

'If the Registrar is not notified that the rejection **or the assessment** is **disputed** in the manner and within the time period provided for in subregulation (4), **the** rejection or **the assessment shall become final and binding** unless an application for condonation is lodged with the Registrar as well as sent or delivered to the other party to the dispute.'

The Legal Issue raised:

- 2.1. Is it competent for a court to order that a Plaintiff's claim for future medical and hospital expenses be compensated by the Road Accident Fund by way of an undertaking issued in terms of section 17(4)(1)(a) of the Road Accident Fund Act, Act 56 of 1996, where default judgment is granted, and in the absence of a tender to that effect?
- 2.2. Is a plaintiff entitled to pursue the adjudication of general damages at trial in the default trial court, regard being had to the specific obligations placed upon the Road Accident Fund as set out in Regulations 3(3)(dA), 3(4) and 3(5) of the Road Accident Fund Regulations, 2008 (as amended)?

3. Directive

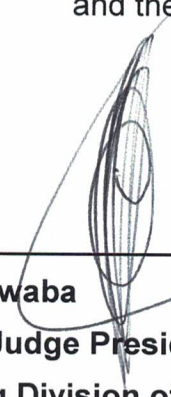
- 3.1. Therefore, in terms of section 14(1)(a) of the Superior Courts Act, Act 10 of 2013, I hereby constitute a Full Court for purposes of hearing and disposing of the issue referred to above, as well as any other issue that may be raised for determination by the Full Court.
- 3.2. The Plaintiff shall create a CaseLines file with the prefix "FULL COURT – Various matters against the Road Accident Fund: Section 17(4)

Undertakings” and categorize the sections of the electronic file according to the case numbers listed under the case citation in the heading of this Directive, and invite the Chief Registrar and Ms. A. Mbelani of this Office, and Mr. S. Tshetlho registrar in Van der Schyff J’s office, to the CaseLine file with the necessary authorisation to invite other parties.

- 3.3. The Plaintiff is to ensure that the indexed case bundle of each listed case is uploaded to the corresponding case number of the matter by no later than close of business on **25 March 2022**.
- 3.4. For purposes of service and filing of any process envisaged in this Directive such service and filing shall be by electronic email communication provided that the appropriate proof of delivery shall be provided and through uploading to the electronic file on CaseLines.
- 3.5. Access to the documents already filed in the matters referred to the Full Court will be provided to any party requiring it, but such request should be communicated to the Mr. S Tshetlho via the email address - sello.tshetlho@webmail.co.za by no later than 14:00 on **1 April 2022**.
- 3.6. Interested parties who wish to be admitted as *amicus curiae* in this matter, are directed to serve and upload their applications, setting out the basis why they wish to be so admitted as well as the legal arguments/ heads of argument, they intend to advance in support of their applications by 14:00 on **8 April 2022**.
- 3.7. Any interested and affected party who wishes to join the proceedings as a party, is directed to serve and upload their applications, setting out the basis why it wishes to be so joined as well as the legal arguments/ heads of argument, it intends to advance in support of the application by 14:00 on **8 April 2022**.
- 3.8. The Plaintiff shall indicate its consent/objection to any application for admission as *amicus curiae*, or joinder on or before . In the event of an

opposition/objection, the basis thereof must be provided as well as such legal argument as the Plaintiff wishes to advance in this regard. Consent or objection in this regard should be uploaded to the electronic file on CaseLines and the potential *amicus curiae* should be invited to the electronic file. Decisions on the admission of *amici* will be communicated by **22 April 2022**.

- 3.9. The Plaintiff is to serve and upload its heads of argument, on or before **22 April 2022**. The Defendant shall serve and upload its heads of argument by no later than **6 May 2022**. Other Parties, who shall have received consent as well as granted consent to be admitted as *amici*, must serve and upload their legal argument/heads of argument by 14h00 on or before **6 May 2022**.
- 3.10. The further conduct of the matter shall be case managed by Judge E Van der Schyff. The case management shall include the hearing of any objections to any application for admission as *amicus curiae*, or regarding joinder.
- 3.11. The date on which the Full Court will hear the matter referred to it is **24 & 25 May 2022**.
- 3.12. The issuing of this Directive does not affect any new or pending matter(s) between the Parties which may be processed and dealt with by the Parties and the Judges hearing them as they deem fit.



A P Ledwaba

Acting Judge President

Gauteng Division of the High Court of South Africa