Haulage). Where other factors strongly indicate the existence of a delictual duty in a contractual setting (as in *Holtzhausen* and *Sanlam Capital Markets*) and a delictual action has not been expressly excluded in the contract, the law should be loath not to allow the Aquilian action for an independent delict (see Neethling and Potgieter 2014 *THRHR* 295–296).

J NEETHLING
University of the Free State
JM POTGIETER
University of South Africa

A STEEP LEARNING CURVE IN THE ASSESSMENT OF "SERIOUS INJURY" AND CLAIMS FOR GENERAL DAMAGES AGAINST THE ROAD ACCIDENT FUND

'n Stywe leerkurwe in die assessering van 'n "ernstige besering" en eise vir algemene skadevergoeding teen die Padongelukfonds

***Road Accident Fund v Faria* 2014 6 SA 19 (HHA)**

Die wysiging van die Padongelukfondswet 56 van 1996 deur die Road Accident Fund Amendment Act 19 van 2005 was begryplik. Die Padongelukfonds (POF) was 'n ruk insolvent en die wetgewing moes dringend gewysig word om die POF van ondergang te red. Toe die regulasies van die Wysigingswet op die Padongeluksfonds op 1 Augustus 2008 in werking getree het, was daar vir mediese en regspraktisyns weinig leiding oor die ingrypende veranderinge en, om dit sag te stel, bisarre wyse waarop 'n "ernstige besering" geassesseer word in eise vir algemene skadevergoeding. Regulasie 3 skryf 'n uiters omslagtige prosedure voor vir die assessering van 'n "ernstige besering" en 'n nog langdradiger appèlprosedure wat alle partye betrokke by POF-eise aanvanklik heel amusant gevind het. In hierdie bydrae word na die feite en die belangwekkende beslissing van die Hoogste Hof van Appèl in *RAF v Faria* verwys. Vervolgens word kommentaar gelewer op belangrike aspekte waarna in die beslissing van Willis WR verwys word, en wat praktiese implikasies het vir eise vir algemene skadevergoeding teen die POF. Voor die slotopmerkings word die tekortkomings in die voorgeskrewe prosedure vir die assessering van 'n "ernstige besering" en eise vir algemene skadevergoeding bespreek, asook gevalle waar eisers hulle kan beroep op die Wet op die Bevordering van Administratiewe Geregtigheid 3 van 2000.

1 Introduction

The purpose of amending the Road Accident Fund Act 56 of 1996 (hereinafter referred to as the "Act") with the Road Accident Fund Amendment Act 19 of 2005 (hereinafter referred to as the "RAFAA") was understandable. The RAF has been insolvent for some time and needed, as a matter of urgency, to amend the legislation (in the interim while in the process of developing a new scheme – the "Road Accident Benefit Scheme Bill 2013", hereinafter referred to as the "RABS Bill 2013") in order to remain operative (see Steynberg and Ahmed "The

interpretation of the amended RAF Act 56 of 1996 and the regulations thereto by the courts with regard to 'serious injury' claims" 2012 *PER* 246–247). Their motive for curbing compensation paid out for, *inter alia*, general damages was also understandable in light of the fact that a fair amount of compensation which was eventually paid out to the claimant was usually for general damages (*Road Accident Fund v Duma* 2013 6 SA 9 (SCA) para 3; *Road Accident Fund v Lebeko* case no 802/2011 dated 15 November 2012 para 3). It is a well-known fact that income earned from RAF claims were not too long back a lucrative source of income for legal practitioners and the courts in turn (even up until now) are brimming with litigation involving RAF claims.

Unfortunately, when the RAFAA and the regulations thereto became applicable on 1 August 2008, there was little guidance for legal and medical practitioners with regard to the drastically different and not to mention "foreign" way of assessing "serious injury" in respect of claims for general damages. The Act as amended, itself, only stated that if a claimant wanted to claim general damages, such claimant's injuries must be regarded as "serious" (see s 17(1) and 17(1A) of the Act; Slabbert "Road Accident Fund: Serious injury claims and judicial precedent: The Supreme Court of Appeal has spoken *Road Accident Fund v Duma* 202/2012 *and Three related cases* [2012] ZASCA 169 (27 November 2012))" 2013 *Obiter* 623). Regulation 3 (of the regulations to the Act) then provided an elaborate procedure on the assessment of "serious injury" and an even more cumbersome appeals procedure (in instances of a dispute between the RAF and the claimant as to whether the injuries are "serious" – see Steynberg and Ahmed 2012 *PER* 247–254) that in the beginning just bemused all parties involved in RAF claims. This included legal practitioners, medical practitioners, the judiciary, employees of the RAF, the claimants, and the public in general. Willis JA in *Road Accident Fund v Faria* 2014 6 SA 19 (SCA) para 34 with regard to the assessment of "serious injury" in Road Accident Fund claims aptly pointed out that "[u]understandably medical practitioners, lawyers and judges experienced in the field may have found it difficult to adjust. As the colloquial expression goes, 'we are all on a learning curve'".

In this contribution, the facts and important decision of the Supreme Court of Appeal judgment in *RAF v Faria* will be referred to. A commentary will follow on important aspects alluded to in the decision by Willis JA which has an impact in practice on claims for general damages against the RAF. Shortcomings of the prescribed procedure on the assessment of "serious injury" and claims for general damages will also be referred to before the concluding remarks.

2 Facts

The claimant was involved in a motor vehicle accident while riding his bicycle in the vicinity of Johannesburg on 26 January 2011. As a result of the accident: he sustained a head injury (which rendered him comatose for four and a half days); four fractured ribs; injuries to the right shoulder (which required further surgery); and abrasions to his shoulder, buttocks, knees, back, hands and wrists (*RAF v Faria* para 4). The claimant in *Faria v RAF* sued the Road Accident Fund (the defendant, hereinafter referred to as the "RAF") in the High Court (*Faria v Road Accident Fund* case no 2210/12 dated 12 March 2013) claiming compensation for damages in the amount of R850 000. The claimant's version was the only version placed before the court, resulting in the claimant being awarded 100% of his proven damages (*Faria v RAF* para 3; *RAF v Faria* para 5). With regard to

the *quantum*, past and future hospital and medical expenses were agreed upon by both parties but what remained in dispute was the claim for general damages (encompassing the claim for loss of earnings, *RAF v Faria* para 6).

In support of his claim for general damages, the claimant underwent a medico-legal assessment by an orthopaedic surgeon of his choice, Dr De Graad, on 30 April 2012, who completed a medico-legal report as well as the RAF 4 form "Serious Injury Assessment report" (which is required in respect of a claim for general damages against the RAF. There are two tests used to assess whether the claimant's injuries are "serious", the "whole person impairment" test and the "narrative test" – see paras 3 and 4 3 3 *infra*). Dr De Graad's final assessment with regard to the "Whole Person Impairment" rating (hereinafter referred to as the "WPI rating") in terms of the American Medical Association Guides to the Evaluation of Permanent Impairment (Rondelli *et al American Medical Association guides to the evaluation of permanent impairment* (2008) hereinafter referred to as the "AMA guides"), was 4%, but according to the "narrative test" found the claimant's injuries to be "serious" in that the injuries resulted in "permanent serious disfigurement", as well as "severe long-term mental or long-term behavioural disturbance or disorder". The claimant subsequently underwent further assessments, in particular, one by the orthopaedic surgeon appointed by the RAF, Dr Swartz, and one by a clinical psychologist appointed by the plaintiff, Dr Cramer. Dr Swartz did not complete the required RAF 4 form but awarded a WPI rating of 8% in his medico-legal report. He did not regard the claimant's injuries as "serious" as per the "narrative test" (*RAF v Faria* paras 7–10). The clinical psychologist, Dr Cramer, completed an RAF 4 form and concluded that the claimant's injuries were "serious" as per the "narrative test", in that the injuries resulted in "severe long-term mental or severe long-term behavioural disturbance or disorder" (*Faria v RAF* para 36, *RAF v Faria* para 13).

Prior to the trial, the two orthopaedic surgeons drafted a joint minute in which they both agreed that the claimant's injuries were "serious" resulting in "serious long-term impairment" as per the "narrative test" due to scarring on the claimant's shoulder (*Faria v RAF* para 37, *RAF v Faria* para 11).

Archetypal of the RAF's *modus operandi*, just a day before the trial, the RAF's legal representatives "rejected" the RAF 4 form completed by the claimant's appointed orthopaedic surgeon. They stated that it failed to comply with the provisions of regulation 3(3)(d)(i) of the Road Accident Fund Regulations 2008 and provided the following reasons (see *RAF v Faria* para 12, *Faria v RAF* para 34):

> "[1] The plaintiff did not suffer long-term impairment and/or permanent disability and/or loss of bodily function.
>
> [2] The plaintiff has not reached his MMI at the time of completion of the RAF 4 form.
>
> [3] If the plaintiff intends to dispute the rejection and/or objection he is obliged to follow the procedures set down in regulation 3(4) to (10) of the Road Accident Fund Regulations."

In *Faria v RAF* paras 6–7, the RAF argued that the court may decide the *quantum* but not whether the claimant's injuries are "serious", entitling the claimant to claim compensation for general damages from the RAF. In support of this assertion, the RAF relied on *RAF v Duma* para 19 where Brand J held that:

> "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

> [RAF] and not on the court. That much appears from . . . Regulation 3(3)(c) that the [RAF] shall only be obliged to pay general damages if the [RAF] – and not the court – is satisfied that the injury has been assessed in accordance with the RAF 4 form as serious. Unless the [RAF] 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 [RAF] is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the [RAF]. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the [RAF], not the court, that his or her injury was serious."

Weiner J in *Faria v RAF* found that the facts *in casu* differed from that of *RAF v Duma* and agreed with the claimant's assertion (para 40) that based on the orthopaedic surgeons' joint minutes, the RAF had conceded that the claimant's injuries were "serious". The RAF therefore was not entitled to reject the RAF 4 form and insist that the claimant undergo further assessment by another medical practitioner and final declaration of whether the claimant's injuries were "serious" by the appeal tribunal. She pointed out that "Maximum Medical Improvement" ("MMI") had indeed been reached (that is, where no further deterioration or recovery is expected, see *Mgomezulu v RAF* case no 4643/2010 dated 8 September 2011 para 54; Steynberg and Ahmed 2012 *PER* 249) as stated in both the orthopaedic surgeons filed reports (see *Faria v RAF* paras 35 42 47 48 50). She further found that the RAF 4 forms were completed and submitted as per the prescribed regulations (*Faria v RAF* paras 44–45). She awarded general damages in the amount of R350 000 (as previously agreed on between the parties if the court found that it was entitled to award the claimant compensation for general damages *RAF v Faria* paras 16–17).

The RAF then compensated the claimant in full, including the R350 000, in error, in respect of the award for general damages, as it thereafter appealed the court *a quo*'s decision on whether the courts are indeed entitled to find a claimant's injuries as "serious" (*RAF v Faria* para 18). The RAF agreed not to recover the amount paid out for general damages, the issue between the parties was in fact moot, but both parties sought clarity from the Supreme Court of Appeal as to whether the RAF can, *inter alia*, reject its own expert's report (RAF 4 form – *RAF v Faria* para 20). The appeal to the Supreme Court of Appeal was thus allowed (*RAF v Faria* para 24).

3 Supreme Court of Appeal's decision

The issue before the court was a "crisp" one (*RAF v Faria* para 21), namely, "whether the regulations provide for the RAF to reject its own expert's finding in respect of determining a serious injury and to require that there should be compliance with the procedures provided for in the regulations in determining whether or not an injury is 'serious'" (para 20).

Irrespective of the mootness between the parties themselves, this case dealt with an issue that was a question of law and had to be decided on the merits of the case (*Absa Bank Ltd v Van Rensburg* 2014 4 SA 626 (SCA) para 12; *Port Elizabeth Municipality v Smit* 2002 4 SA 241 (SCA) para 10). The outcome of which would impact on a number of postponed cases and litigation involving the RAF as a litigant (*RAF v Faria* paras 22–23).

In determining whether the regulations provided for the RAF to reject its own expert's finding, the court had regard to the methods prescribed in the regulations and the sequence in which they appear. The court first considered regulation 3(3)(c) (*RAF v Faria* para 27), which provides that the RAF is only obliged

to compensate a claimant for general damages (non-pecuniary loss) if the claim is supported by an RAF 4 form and submitted in terms of the Act (and the regulations thereto). Furthermore, the RAF must be "satisfied that the injury has been correctly assessed as serious". This administrative power conferred on the RAF was confirmed in *RAF v Duma* (para 19; see also Slabbert 2013 *Obiter* 623–630). The RAF 4 form that must accompany a claim for general damages must be completed by the medical practitioner who must assess the claimant's injuries in terms of the AMA guides. The claimant's injuries will be deemed "serious" if the WPI rating is 30% or more (regulation 3(1)(b)(ii)) and, if not, that is if the WPI rating is assessed as less than 30%, then the medical practitioner must assess whether the claimant's injuries fall within the "narrative test" (regulation 3(1)(b)(iii)) resulting in either: a 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; or loss of a foetus (*RAF v Faria* paras 28–29; see Slabbert and Edeling "The Road Accident Fund and serious injuries: The narrative test" 2012 *PER* 268–288; Edeling *et al* "HPCSA serious injury narrative test guidelines" 2013 *SAMJ* 763–764)).

If the RAF is not satisfied with the assessment of the injury, the RAF has three options as set out in regulation 3(3)(d). It can accept the RAF 4 form, reject it and furnish reasons for such rejection, or direct the claimant to submit to a further assessment at the RAF's expense (*RAF v Faria* paras 30–31).

Thereafter the RAF must in terms of regulation 3(3)(e) either accept the further assessment or dispute it. It is clear how the court reached the conclusion that this provision is preceded by regulation 3(3)(d)(ii), which makes provisions for the further assessment to be undertaken by a medical practitioner designated by the RAF and, thereafter, make provision that the RAF can dispute such further assessment (regulation 3(3)(e)). The court agreed that the RAF can reject its own expert's finding and furthermore that the dispute can be directed to the appeal tribunal (*RAF v Faria* paras 30–31).

The court referred to *Road Accident Fund v Lebeko* where it was held that the high court could not make an order for payment of general damages and the court ought to have postponed the hearing in regard to the claim so that the procedures for which legislative provisions have been made, could be followed (*RAF v Lebeko* paras 27 and 28). The court further indicated that the high court in the present matter ought to have done the same (*RAF v Faria* para 33).

Willis JA (*RAF v Faria* para 34), pointed out that the RAFAA together with the regulations has introduced two "paradigm shifts" which affect the assessment and award for general damages in personal injury claims. Firstly, general damages can only be awarded for injuries that have been assessed as "serious" and, secondly, the assessment of injuries as "'serious' has been made an administrative rather than a judicial one". Whereas in the past a joint minute compiled by medical practitioners from opposing parties would have been accepted as conclusive, this is no longer the case (*RAF v Faria* para 34). Willis JA reiterated the *dictum* of Brand J in *RAF v Duma* para 19 verbatim that the court has no jurisdiction in determining whether a claimant's injury is "serious", the claimant must satisfy the RAF "not the court, that his or her injury is serious" (*RAF v Faria* para 35). The court's decision in *Faria v RAF* was overturned and the appeal was upheld. The High Court's order that the RAF is to pay the claimant compensation for general damages in the sum of R350 000 was set aside (*RAF v Faria* para 37).

4 Comments

4 1 Is the determination of whether the claimant's injury is "serious" thereby entitling the claimant to compensation for general damages an "administrative one" and not a "judicial one"?

It seems that the intention of the legislature behind the enactment of the RAFAA and regulations was that the determination of whether a claimant's injury is "serious" or not should be an "administrative one" (see regulation 3(3)(c)). In this regard, the case of *RAF v Duma* is instructive, where Brand JA held:

> "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 the court" (para 19).

This administrative power conferred upon the RAF is of such a nature, according to Brand JA, that if the RAF rejects an RAF 4 form (with or without proper reasons), the requirement that the RAF has to be satisfied that the injury is "serious" has not been met and, therefore, the court has no jurisdiction to hear the matter. The claimant will have to take the rejection on appeal in terms of the provisions in regulation 3(4) (*RAF v Duma* para 20). Willis JA in *RAF v Faria* para 35 agreed with the Supreme Court of Appeal's decision in *RAF v Duma*.

Pillay JA in *RAF v Lebeko* (para 20) held that

> "the power to establish whether or not an injury is serious lies ultimately with the tribunal (of experts) and not the courts, [the] agreement on whether or not the injury is serious, cannot be assumed. If the court proceeds with the claim for general damages on that basis, it would be exceeding its powers".

Brand JA in *RAF v Duma* para 25 held that the internal appeal processes must be utilised. Regulation 3(4) created the mechanism of an internal appeal procedure which could culminate in a decision (of whether or not an injury is "serious") by the appeal tribunal consisting of medical specialists. The regulations set out how the appeal tribunal functions and, further, that they are not bound by the reasons given by the RAF when they reject a serious injury assessment report. Referring a dispute to the appeal tribunal is thus a re-hearing of the matter and a determination on additional medical reports, assessments, and further information as required (see Slabbert 2013 *Obiter* 630). The RAF shall bear the costs encountered (regulation 3(14)) and the entire procedure must be finalised within 90 days (regulation 3(12)).

This is of particular significance in light of the recent Constitutional Court decisions that placed strong emphasis on the need for internal remedies to be pursued, particularly those that lie with specialised appeal tribunals (Mokgoro J in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 4 SA 327 (CC) paras 35–37 pointed this out).

If a claimant wants to dispute the assessment of a medical practitioner or the rejection of the RAF 4 form; *or* if the RAF disputes the finding of the further assessment (regulation 3(3)(d)(i) and (ii) and regulation 3(3)(e); see also Steynberg and Ahmed 2012 *PER* 251–252), the procedure in regulation 3(4) must be followed and the dispute must be lodged within 90 days. Provision is made for condonation (reg 3(5)) if the dispute is brought after the prescribed period. The entire procedure of the dispute resolution is detailed in regulation 3(4) to 3(10). The appeal tribunal shall, thereafter, exercise any of the powers conferred upon it in terms of regulation 3(11). The appeal tribunal has to notify the Registrar of its findings within 90 days from the date that the dispute was referred to it (reg 3(12)).

This referral to the appeal tribunal does not extinguish the claimant's cause of action in a court (in respect of general damages). The appeal tribunal cannot decide on the *quantum* for general damages, but only whether the injury qualifies as "serious" entitling the claimant to a claim for general damages (*Faria v RAF* para 6). The court has to take a decision on the *quantum* for general damages. If a claim for general damages is prematurely brought to the court (that is, if the determination of whether the injuries are "serious" are not finalised), such claim for general damages will not be ripe for hearing and will have to be stayed pending the determination of the appeal tribunal (*RAF v Lebeko* paras 28–30).

As much as one can agree with the decisions of the Supreme Court of Appeal in *RAF v Faria* and *RAF v Duma*, one cannot help but wonder if the RAF will abuse these administrative powers conferred upon them. The RAF is known to give blanket rejections for claims for general damage (*Smith and Ngobeni v the Road Accident Fund* case no 47697/09 dated 2 June 2011 paras 3–5; *Mokoena v the Road Accident Fund* case no 2010/38170 dated 15 December 2011 paras 38–40; *Meyer v the Road Accident Fund* case no 2010/48788 dated 20 February 2012 para 4; *Mngomezulu v RAF* para 43; *RAF v Duma* para 15; *Faria v RAF* para 34). This stance frustrates and delays the procedure and knowing that the court cannot intervene gives the RAF an upper hand. This could also result in the RAF now rejecting more RAF 4 forms without proper reasons (see *Louw v Road Accident Fund* 2012 1 SA 104 (GSJ) para 82).

In *RAF v Faria*, the two orthopaedic surgeons and the clinical psychologist all agreed that the claimant's injuries were serious (paras 11 13). The RAF, however, still rejected the claimant's RAF 4 form. In all probability, if the claimant lodged a dispute and referred the matter to the appeal tribunal, the tribunal of independent medical practitioners probably also would have found that the injuries were "serious" (entitling the claimant to a claim for general damages in any case). So in the end, all that transpired as a result of this decision (para 31) is that the RAF is allowed to reject its own expert's findings and the claimant must follow the procedure provided for in the regulations in determining whether or not an injury is "serious" (para 34). The claimant will, in all likelihood, be in a better position if the dispute is referred to the appeal tribunal as soon as possible, as the tribunal is made up of experts with the required skill and expertise to opine on matters of a medical nature, unlike the claim handlers at the RAF. Furthermore, the RAF has to pay for this procedure, so the claimant will not encounter exorbitant fees, which include fees for an array of expert witnesses usually required at a trial. In practice, however, we can expect more delays from the RAF's side via abuse of the administrative powers conferred upon them (rejecting RAF 4 forms to buy themselves more time), and there will be more of the taxpayers' money being expended on costs incurred for every dispute that is lodged with the appeal tribunal. It will be interesting to compare the costs of the whole appeal process with the compensation claimed by the claimant, especially in instances where the tribunal finds that the claimant's injuries are not serious. Satchwell J in *Motswai v Road Accident Fund* 2013 3 SA 8 (GSJ) para 89 indicated that the RAF and its legal representatives have no regard of the manner in which the fuel levy is expended.

It is understandable why some judges are getting frustrated, as they are fully aware of the RAF's tactics (*Mngogomezulu v RAF* para 50; *Bvuma v Road Accident Fund* case no 2010/17220 dated 14 December 2012 para 12; *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC) paras 132 135; *Motswai v RAF*

paras 76 80 89; and see the Report of the Road Accident Fund Commission (2002) 731).

For example, Satchwell J in *Motswai v RAF* para 80 stated that "one must question whether a RAF claims handler can even read the claim form and medical report attached thereto. It would certainly seem, even if the form and medical report was read, that no one applied their mind thereto".

4 2 Under which circumstances would a party resort to the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")?

The Supreme Court of Appeal has now made it clear that the process of establishing whether a claimant is entitled to general damages falls exclusively within the ambit of the Act and may ultimately depend on the decision of the appeal tribunal (this is of course subject to a court's power of review). To determine on what grounds a matter can be brought under review to a court, one has to have regard to the PAJA.

When a claim is rejected, the RAF *must furnish reasons for the rejection* (reg 3(3)(d)(i)) which was technically provided in *Faria v RAF*, albeit partially factually incorrect and unpersuasive (paras 50–51). The RAF's decision to reject the RAF 4 form constitutes an administrative action. The claimant's request (in respect of the claim for general damages) will remain valid and binding until it is set aside by a court on review or overturned in an internal appeal process (*RAF v Duma* para 24; Slabbert 2013 *Obiter* 629–630). The Supreme Court of Appeal has further held that a court cannot disregard the RAF's rejection of the RAF 4 form on the basis that the reasons given were not valid, or given without medical or legal basis, or even if the reasons were proven to be incorrect by expert evidence (*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 26; *RAF v Duma* para 24). Therefore, a court cannot override the RAF's decision under a review as section 7(2) of PAJA stipulates that no court shall entertain a review of an administrative decision unless an internal appeal provided for has been exhausted (*RAF v Duma* para 25). This section does allow the internal remedy to be circumvented in exceptional circumstances and upon application by the person concerned (s 7(2)(c) of PAJA); there was no application to this effect in *RAF v Faria* and no exceptional circumstances that presented itself to warrant a departure from the internal appeals procedure provided for in the regulations.

If an RAF 4 form is rejected, the parties will have to direct the dispute to the appeal tribunal (reg 3(4) explains the appeal process) and, thereafter, seek the judicial intervention of the court if still not satisfied (see Slabbert 2013 *Obiter* 630 and Edeling *et al* 2013 *SAMJ* 763–764).

Upon receipt of the findings of the appeal tribunal, the claimant can request reasons from the tribunal for its decision (s 5 PAJA).

Only once the administrative task is completed can the claimant approach the court for a review (s 7(2) PAJA; see also *Kasema v Members of the Appeal Tribunal* case no 2011/47210 dated 16 October 2014). Since the review is governed by PAJA, the provisions have to be adhered to. The application for review must be brought to the High Court without unreasonable delay and within 180 days after the exhaustion of internal remedies (s 7(1) of PAJA). This prescription can be circumvented in instances "where the interests of justice so require" (s 9(1) read with s 9(2) of PAJA). The claimant referring a tribunal decision for review is entitled to all relevant documentation that the tribunal utilised in

reaching its decision (*Malan v Road Accident Fund Appeal Tribunal* case no 29722/12 dated 16 January 2014 para 12).

The court that is approached for a review will have to ensure that the administrative action or decision was performed in compliance with the relevant constitutional and legal standards (*RAF v Duma* para 25). The court has to determine whether the tribunal acted procedurally fair in terms of the provisions in the regulations. It should be noted that the tribunal does not have to take into consideration all the powers it could exercise in terms of regulation 3(10) and 3(11) to call for further information if it does not deem it necessary (*Maluka v Road Accident Fund Appeal Tribunal* case no 48032/2011 dated 11 June 2014 paras 42 44).

The court will also have to determine if the tribunal acted with reasonableness and rationally. In other words, the court will have to consider the tribunal's decision with reference to the record of proceedings. This determination cannot be measured by the decision the court could or would have taken as the court cannot substitute its own views on the merits of the claimant's appeal to the tribunal. However, if the court finds that the tribunal did not act reasonably or that it was not rational when making its finding, the court can substitute its own views on the merits (s 8 PAJA; *Muleka v Road Accident Fund Appeal Tribunal* paras 41 47).

O'Regan J stated that the court's task is to ensure that decisions taken by administrative agencies fall within the reasonableness requirement as mandated by the Constitution (Constitution of the Republic of South Africa, 1996 s 33; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2003 6 SA 407 (SCA) para 45). The test is whether in making the decision, the functionary concerned struck a balance fairly and reasonably open to him (Nugent JA in *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 5 SA 457 (SCA) para 59 found this test to be exact for reasonableness; this test was also cited with approval in *Bato Star Fishing v Minister of Environmental Affairs* para 44).

4 3 Shortcomings of the prescribed procedure on the assessment of serious injury and claims for general damages

The courts and legislature have over time provided clarity on a number of aspects relating to the assessment of serious injury and claims for general damages which are of practical importance to all those involved in RAF claims and, therefore, worth mentioning. Although it is always difficult to envisage what sort of challenges could have been faced with the assessment of serious injury, it is submitted that some of these challenges (listed below in no particular order) could have been avoided if comprehensive research was undertaken as to whether foreign methods of assessment are compatible within the South African context, proper guidelines and training courses were provided, supporting structures, and other vital communication in the assessment of serious injury were communicated to all relevant parties involved in RAF claims timeously.

4 3 1 Guidelines and training course in the assessment of serious injury for medical practitioners not published

To begin with, much-needed guidance on how the serious injury assessment should be conducted was lacking. Regulation 3(1)(iv) states that the AMA guides "must be applied by the medical practitioner in accordance with operational guidelines or amendments, if any, published by the Minister . . . in the

Gazette", and regulation 3(1)(vi) states that 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 course". More than six years have passed and still no such course or operational guidelines have been published by the Minister (and the RABS Bill, 2013 is expected to be implemented some time in the near future).

The RAF website under "Serious Injury Assessment" states that even though no course is prescribed by law, the "American Board of Independent Medical Examiners" (ABIME) provides training on the use of the AMA Guides and a list of South African medical practitioners who have completed such training are published on its website (see www.abime.org; http://bit.ly/1yuWphS (accessed on 20 March 2015)). The Health Professions Council of South Africa has also provided some guidelines in respect of the "narrative test" (Edeling *et al* 2013 *SAMJ* 763–766; cf Slabbert and Edeling 2012 *PER* 268–288).

The "WPI" test is supposed to be an objective test but, as shown in *RAF v Faria* where the one orthopaedic surgeon rated the claimant's injuries (as per the "WPI" test) at 4% and the other at 8%, comprehensive training and guidelines are required as these differences in awards can be significant, especially in borderline cases (where the injury is close to 30% WPI). A further example was pointed out in *RAF v Duma* paras 12–13, where the medical practitioner who signed the RAF 4 form admitted that he did not understand the term "MMI" as he was not acquainted with the AMA guides (see also Slabbert 2013 *Obiter* 626). It is hoped that the Minister will prescribe a training course and provide guidelines as a matter of urgency (while the RABS Bill, 2013 is being reviewed).

4 3 2 Delay in the establishment of the appeal tribunal

Even though the regulations did provide, at the outset, for a method of assessment of "serious injury" on paper, the supporting component, the appeal tribunal, was required to rule on whether the claimant's injuries are indeed serious in cases of dispute between the parties was initially not operational (the court in *Mgomezulu v RAF* para 50 referred to the appeal tribunal as a "phantom body" and "mystical tribunal" when it was not given a clear answer by the representatives of the RAF as to whether it was in existence and operational; see also Steynberg and Ahmed 2012 *PER* 256–257). Proper communication and an indication of when the appeal tribunal was formed and operational would have been useful to all parties involved in RAF claims. This delay not only frustrated the claimants and their legal representatives, but also the judiciary. It was only recently that the Supreme Court of Appeal pronounced in *RAF v Duma* that any dispute concerning whether a claimant's injury is serious should be referred to the appeal tribunal and not the courts (this was then confirmed by the Supreme Court of Appeal in *RAF v Faria*).

4 3 3 Foreign methods of assessment of serious injury in respect of claims for general damages enforced in South Africa

The method of assessing "serious injury" is based on the "WPI" test in terms of American guides (the "AMA guides"), and the "narrative test" is based on the definition of "serious injury" (verbatim) in section 93(17) of the Australian Transport Accident Act 111 of 1986. The enforcement of these two foreign methods of assessing "serious injury" with regard to claims for general damages in a South African context was not a wise decision on the part of the legislature.

Inter alia it is an undebated fact that our current national health care system is not on par with first world countries like America and Australia. Full and comprehensive research should have been conducted before implementing such methods of assessment (for a full discussion of the shortcomings of the regulations to the RAFAA, the AMA Guides, the narrative test, the administrative process, and the appeals tribunals, see Slabbert and Edeling *PER* 2012 270ff).

4 3 4 Cost of the "serious injury assessment"

In *Daniels v RAF* (case no 8853/2010 delivered on 28 April 2011, para 87) the costs of the serious injury assessment was then noted as R7 000. Fortunately, regulation 3 was amended by *Government Gazette* 36452 on 15 May 2013 and regulation 3(2)(a)(i) capped the cost of the assessment to R2 650 (excluding VAT). The exorbitant cost of the assessment was not easily affordable and, in fact, resulted in a hindrance in the assessment of serious injury and claim for general damages.

4 3 5 Which medical practitioners are entitled to complete the RAF 4 form?

Regulation 3(1)(a) only states that a claimant must undergo a medical assessment by a "medical practitioner" registered under the Health Professions Act 56 of 1974. The court in *RAF v Duma* para 33 considered the definition of a "medical practitioner" and concluded that certain health practitioners, such as occupational therapists, dieticians, oral hygienists (and others who are registered under other professional bodies) are not medical practitioners registered under the Health Professions Act and, therefore, not entitled to complete an RAF 4 form.

4 3 6 Does the claimant need to be physically examined by the medical practitioner?

Brand JA in *RAF v Duma* para 29 also clarified that a medical practitioner must physically examine the claimant as some practitioners were completing the RAF 4 form using reports and were not physically examining the claimant.

4 3 7 Delay in the publication of the list of non-serious injuries

Regulation 3(1)(b) states that the medical practitioner must assess the claimant by first checking whether the injuries fall within the list of non-serious injuries. The RAFAA as well as the regulations thereto were applicable from 1 August 2008, but the list of non-serious injuries was only published on 15 May 2013 (*GG* 36452 – see reg 3(1)(b)(i)(aa)–(pp)). If the claimant's injuries are on the list, then it is possible that the claimant will not be entitled to general damages. It is submitted that if this list was provided at the outset, it could have averted unnecessary litigation, waste of time and money (see, eg, *Motswai v RAF* where general damages were claimed even though the medical records revealed soft tissue injuries of the ankle).

4 3 8 May the medical practitioner conduct either the "WPI" or "narrative test" in order to determine whether the claimant's injuries are serious?

There was much confusion as to whether the "WPI" test and the "narrative test" were alternative tests, and furthermore whether a practitioner could opt to omit the "WPI" test and just assess the plaintiff's injuries as per the "narrative test". The Supreme Court of Appeal in *RAF v Duma* para 37 (see also Slabbert 2013 *Obiter* 627–628) confirmed that the "WPI test" must be completed before the "narrative test".

4 3 9 The RAF's decision to reject a RAF form or request a claimant to undergo a further assessment in terms of regulation 3(3)(d) must be done within a reasonable period of time

The regulations did not initially provide the time period within which the RAF had to reject a serious injuries assessment, which ultimately delayed finalisation of the claim and led to frustration. This was also addressed by Brand JA in *RAF v Duma* para 20 where he recommended relief through PAJA (an application "for judicial review of the failure to take a decision"). Fortunately, the regulations were revised and as from 15 May 2013 (as per *GG* 36452), the period of time within which the RAF has to either accept, reject or refer the claimant for further assessment is set at 90 days (see reg 3(3)(dA)); *RAF v Faria* para 25).

4 3 10 Should reasons for the rejection of a RAF form be provided by the RAF?

If the RAF is not satisfied that the injury has been correctly assessed, regulation 3(3)(d)(i) states that the RAF must reject the RAF 4 form and furnish the claimant "with reasons for the rejection". Clearly, this provision states that *reasons must be provided*. It is submitted that the courts should emphasise this. As stated (para 4 1 above), the RAF has in the past merely rejected RAF 4 forms without furnishing reasons (see *Mgomezulu v RAF* para 43; *Smith and Ngobeni v RAF* paras 3 5; *Mokoena v RAF* paras 38–40; Steynberg and Ahmed 2012 *PER* 262; but see *RAF v Duma* para 26 where Brand JA stated that if the RAF does not provide reasons, the claimant could request reasons as per section 5 of PAJA. However, the claimant should rather accept the rejection even without reasons and approach the appeal tribunal as provided for in the regulations).

4 3 11 Can the RAF reject its own expert's finding in respect of determining a serious injury?

The Supreme Court of Appeal in *RAF v Faria* has confirmed that the RAF can indeed reject their own expert's RAF 4 Form.

4 3 12 When should the RAF 4 form be submitted?

The RAF 4 form may be submitted separately after actual lodgement of the claim but should be submitted before expiry of the claim, that is, before the prescribed prescription periods (in terms of lodgement of the claim as per section 23 of the Act, which is either two or three years from the date of cause of action depending on whether the claim is identified or unidentified. In respect of both unidentified and identified claims, the initial period of prescription (two or three years) is then extended to five years, provided the claim was lodged as per the provisions of the Act). In *Van Zyl v Road Accident Fund* (case no 34299/2009 dated 11 June 2012) Satchwell J stated that the RAF 4 form could be lodged within the five year period (the extended period). This judgment was taken on appeal by the RAF, but subsequently withdrawn. However, similar judgments on this aspect of prescription of the RAF 4 form have been taken on appeal and further clarity on this may still be forthcoming from the courts.

5 Conclusion

At the advent of the proposed new legislation governing personal injury claims in South Africa (RABS Bill, 2013), it is hoped that the legislature will, in general, acknowledge the shortcomings of all the previous acts and amendments with the regulations thereto. The RAF is a public institution providing compensation to

road accident victims and relieving them of the financial expenses they incurred and are still to incur, depending on their injuries or loss as a result of the motor vehicle accident. It is of the utmost importance that it is managed effectively, professionally and efficiently in the most cost-effective manner possible. The intended beneficiary of the social legislation involving claims by road accident victims was always the road accident victim (see *Aetna Insurance v Minister of Justice* 1960 3 SA 273 (A) para 285) and sight should not be lost of that. All parties involved with RAF claims should not need to go through a steep learning curve, experience abuse of the administrative procedures and delays in finalising of claims. This only causes frustration for the judiciary, the claimants, and their legal representatives, further illustrating the inefficiency of the RAF which, unfortunately, also impedes justice.

R AHMED

R MAHOMED

University of South Africa

AANTEKENINGE OOR DIE WYSIGINGSWET OP HUURBEHUISING 35 VAN 2014

1 Inleiding

Die Wet op Huurbehuising 50 van 1999 (hierna "die Wet" genoem) het op 1 Augustus 2000 in werking getree. Opsommenderwys kan gesê word dat hierdie Wet huurbehuising en die verhouding tussen huurders en verhuurders van huurbehuising reguleer. Die Wet maak ook vir die beslegting van geskille tussen huurders en verhuurders deur die Huurbehuisingstribunaal voorsiening. Die Wet is in die verlede vir sy tekortkominge gekritiseer (sien Mohamed "Enforcement of Rental Housing Tribunal orders" Junie 2008 *Property Law Digest* 3–5; Stoop "The law of lease" 2008 *Annual Survey of South African Law* 891–895; Mohamed "RHT's 'exclusive' jurisdiction over unfair practice" Junie 2012 *Property Law Digest* 9–12). Die Konstitusionele Hof het egter onlangs in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 5 BCLR 449 (KH) opnuut die belangrikheid van die Wet en die Huurbehuisingstribunaal beklemtoon. Hierdie saak en ander faktore het waarskynlik tot die daaropvolgende promulgering van die Wysigingswet op Huurbehuising aanleiding gegee.

Op 5 November 2014 is die Wysigingswet op Huurbehuising 35 van 2014 (hierna "die Wysigingswet" genoem) gepubliseer. Die Wysigingswet tree in werking op 'n datum wat deur die President afgekondig moet word.

Die Wysiginswet is net in Engels beskikbaar en die amptelike weergawe word die *Rental Housing Amendment Act* genoem. Die doel van die Wysigingswet is om: (i) sekere omskrywings in die Wet te vervang of te wysig, (ii) die regte en verpligtinge van huurders en verhuurders duidelik uiteen te sit, (iii) die toepassing