REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2011/47210

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

EPPINEGE KASEMA Applicant

And

MEMBERS OF THE ROAD ACCIDENT FUND APPEAL TRIBUNAL CONVENCED ON 4 NOVEMBER 2011 First to Sixth Respondents

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA Seventh Respondent

ROAD ACCIDENT FUND Eighth Respondent

J U D G M E N T

KEIGHTLEY, AJ:

INTRODUCTION

[1] This case concerns an application for the review and setting aside of a decision made by the members of the RAF Appeal Tribunal (the Appeal Tribunal) to the effect that the injury suffered by the applicant in a motor vehicle accident did not qualify as a serious injury. Section 17(1) of the Road Accident Fund Act 56 of 1996 (the Act) provides that a claimant only has a claim for general damages from the Road Accident Fund (the Fund) if he or she has suffered "serious injury" as defined in section 17(1A) of the Act. The effect of the Appeal Tribunal's decision is that the applicant has no entitlement to a claim for general damages against the Fund.

[2] Section 17(1A) of the Act provides that the assessment of a serious injury must be done in terms of the method prescribed in the Regulations promulgated in 2008 under the Act (the Regulations).[1] A party who wishes to claim for general damages against the Fund for injuries sustained in a motor vehicle accident is required first to have his or her injuries assessed by a medical practitioner trained in the method of assessment, and such assessment must be submitted to the Fund. The Fund determines whether it is satisfied that the injuries are serious.[2] If it is not so satisfied, the injured person may appeal against this finding to the Appeal Tribunal.[3]

[3] The method of assessment and criteria to be applied for the determination of a serious injury are prescribed in the Regulations. If the injury resulted in a

1 R 769, GG 21 July 2008
2 Regulation 3
3 Regulation 3(8)

30 percent or more “Impairment of the Whole Person” (WPI), as provided in the American Medical Association Guides (AMA Guides), the injury must be assessed as a serious injury.[4] Alternatively, if the WPI is assessed as less than 30%, it may only be assessed as serious if the injury, among others things, has resulted in a serious long-term impairment or loss of bodily function.[5]

[4] The appointment, functioning and powers of the Appeal Tribunal are dealt with under the Regulations. The Appeal Tribunal resides under the Health Professions Council of South Africa (HPCSA). Members of an Appeal Tribunal are appointed by the Registrar of the HPCSA. They are all independent medial practitioners with expertise in appropriate areas of medicine.[6]

THE FACTS

[5] The decision sought to be impugned in this case was made on 4 November 2011. The chronology of the applicant’s claim and appeal may be summarised as follows:

[5.1] The applicant, Mr Kasema, was a pedestrian who was knocked over by a motor vehicle on 15 July 2009. He sustained injuries, more particularly, a fracture, to his left femur.

4 Regulation 3(1)(b)(ii)
5 Regulation 3(1)(b)(iii)
6 Regulation 3(8)(b)

[5.2] His injuries were initially assessed by one Dr Schnaid on or about 8 April 2010. Dr Schnaid completed the requisite RAF4 form (which is known as a Serious Injury Assessment Report). He assessed Mr Kasema's WPI as being 14.8%. As this was below 30%, Dr Schnaid, completed what is called the "narrative test" and concluded that, despite a WPI rating of less than 30%, his view was that on the narrative test, Mr Kasema had suffered a serious long-term impairment or loss of a bodily function.

[5.3] On this basis, Mr Kasema sought to claim for general damages for his injuries against the Fund.

[5.4] On 5 January 2011 the Fund rejected Mr Kasema's serious injury claim in terms of Regulation 3(3)(d)(i) on the basis that the assessment of the injury was premature as Mr Kasema had not yet reached what is terms "maximum medical improvement" (MMI).

[5.5] Mr Kasema's attorneys duly lodged an objection against the Fund's decision on 25 January 2011. The attorneys included all relevant documentation with the objection, including all of Dr Schnaid's reports completed in 2010 and Mr Kasema's hospital records. This is apparent from the record of the Appeal Tribunal's proceedings that was placed before me.

[5.6] On 19 April 2011, the HPCSA wrote to Mr Kasema's attorneys requesting written submissions. In August 2011 the attorney's requested the names of the panel members who would be

nominated to the appeal panel. These names were provided on 13 October 2011. In the same letter, the HPCSA advised Mr Kasema's attorneys that the matter was on the agenda of the Appeal Tribunal for 4 November 2011.

[5.7] On the following day, being 14 October 2011, Mr Kasema's attorneys wrote to the HPSCA and advised it as follows:

[5.7.1] They recorded that they objected to the appointment of all four identified experts on the panel on the basis that according to the attorneys' knowledge, all four of the experts "*are extensively used by the RAF and rely on the RAF for a substantial portion of their work and income*". Mr Kasema's attorneys asserted that "*it would be fundamentally unfair and unconstitutional to subject our clients to an assessment under such partial circumstances*."

[5.7.2] The attorneys averred that the RAF's rejection of Mr Kasema's claim was invalid.

[5.7.3] Importantly, for purposes of this matter, Mr Kasema's attorneys advised the HPCSA that: "*We have furthermore not finalised our quantum preparations in this matter and our client is still to be assessed by further experts. Upon receipt of*

such further reports we will be in a position to further assess our client's medical status which may include an amendment to the initial findings apropos the Serious Injury Report."

[5.8] It is significant to note that the attorneys did not request a postponement of the matter pending the expected further medical reports, nor did they provide any details as to when such reports might be expected.

[5.9] Following this letter the HPCSA advised the applicant's attorneys that two further experts would be added to the appeal tribunal panel. Subsequent to this the attorneys made no further objection to the constitution of the panel.

[5.10] The panel considered Mr Kasema's case at its meeting on 4 November 2011. The Appeal Tribunal's decision was communicated to the applicant's attorneys by way of a letter (the decision letter) dated 16 November 2011.

[5.11] The Appeal Tribunal set out in its decision letter the bases for its rejection of Mr Kasema's appeal. They indicated that although Dr Schnaid had stated that Mr Kasema had not reached MMI, the X-ray indicated that the fracture was well united. The panel stated that in its view Mr Kasema's WPI did not exceed 3%. In addition, the letter stated that the panel was of the view that Dr Schnaid had incorrectly applied the AMA Guide. The letter recorded that the

panel had unanimously agreed that the applicant did not qualify as having suffered a serious injury by way of percentage as well as by way of the narrative test.

[5.12] It is common cause that the letter communicating the Appeal Tribunal's decision was received by Mr Kasema's attorneys. It is also common cause that they took no steps at that stage to review the decision. Nor did they lodge any request for reasons for the decision.

[5.13] Some 17 months later, on 8 April 2013, Mr Kasema's attorneys wrote to the Registrar of the HPSCA. They referred to the Appeal Tribunal's decision of November 2011, and requested the Tribunal to review its decision on the basis that it had been premature. The attorneys attached to the letter new medical reports from Dr Schnaid (dated 6 September 2012); Dr Jivan (6 September 2012) and Prof A Scheepers (dated 22 February 2013). Prof Scheepers had been appointed by the RAF to assess Mr Kasema.

[5.14] It is worth recording that none of these further medical reports assessed Mr Kasema's WPI as over 30%. Dr Jivan assessed the WPI as 7%, and Prof Scheepers assessed it as 3%. Dr Schnaid assessed it as less than 30% but on the narrative test once again indicated his view that Mr Kasema had suffered a serious long-term impairment of loss of bodily function.

[5.15] The HPCSA did not respond to the applicant's attorney's request for a review of the matter.

[5.16] Despite this, it was only some 10 months later, in February 2014, that the applicant instituted the present review proceedings. By this time, a period of 2 years and 3 months had elapsed from the time that the Appeal Tribunal had made the decision that is sought to be reviewed and set aside.

[6] From this chronology of the application it is immediately apparent that the first issue that arises for consideration is whether or not the applicant ought to be non-suited for his delay in instituting these review proceedings.

DELAY

[7] This review is governed by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Unlike under the common law, PAJA prescribes in section 7(1) that an application for review must be brought without unreasonable delay and not later than 180 days after the exhaustion of internal remedies. This prescription is tempered by section 9, which provides for a variation in the time limits set down in PAJA. In terms of section 9(1) read with section 9(2), a court may extend the 180 day time limit for a fixed period "where the interests of justice so require".

[8] In this case, the application for review was made well outside the 180-day outer limit provided for under PAJA. In fact, the review application was instituted over 2 years after the decision of the Appeal Tribunal was made.

The applicant expressly, and correctly, brings his review application under PAJA. However, neither in the Notice of Motion, nor in the affidavits filed in support of his application, does the applicant seek the requisite order for an extension of time under section 9 of PAJA.

[9] The stance adopted by the applicant as regards the timing of the review application in his affidavits was to submit that he had brought the application within a reasonable time. He averred that he had not been provided with reasons for the Appeal Tribunal's decision. In addition, he averred that his physical condition had deteriorated since the decision. He submitted that the court has a discretion to find that his application was brought within a reasonable time.

[10] In the replying affidavit, the applicant still makes no reference to section 9 of PAJA. On the contrary, he asserts that where no specific time limit is set out in the relevant legislation, a review must be brought within a reasonable time. He also denies that there is a prescribed time limit of 180-days for the institution of review proceedings. The applicant points instead to the court's general power to condone non-compliance with the Uniform Rules of Court. He requests the court to grant condonation – it is not clear what condonation is sought for, but it must be assumed that it is for failing to file the review application within a reasonable time in terms of the Rules.

[11] It was only in the heads of argument filed by the applicant that reference to section 9 of PAJA is made. In these heads, Mr Kitching for the applicant

submits that the court has a discretion to grant an extension of time where the interests of justice so require.

[12] Mr Motau on behalf of the first to seventh respondents (the respondents), being the panel members of the Appeal Tribunal and the HPCSA, submitted that the applicant's failure to apply for an order under section 9 of PAJA is fatal to his application. He points in this regard to the fact that no case is made out for such relief in the founding or replying papers.

[13] There is merit in Mr Motau's submissions. It is trite that a party must in their founding papers, or particulars of claim, as the case may be, set out the details of the relief they seek. A party cannot, without amending their notice of motion, seek new relief at the hearing of the matter by placing reliance on the prayer for "further and alternative relief".[7] The applicant in the present case conceded in its replying affidavit that he was bound by his founding papers, which, as I have already indicated, seek to make out a case different to that required for an extension of time under section 9 of PAJA. In addition, although the applicant's heads of argument refer to section 9, the applicant did not seek to amend his notice of motion to include a prayer for relief under section 9 of PAJA.

[14] Be that as it may, in my view it is not necessary for me to decide the matter on this basis. I will assume for present purposes, and without deciding the issue, that the applicant is not non-suited for failing expressly to seek relief under section 9 of PAJA. Proceeding on this assumption, the test I must

---

[7] Johannesburg City Council v Bruma Thirty-two (Pty) Ltd 1984 (4) SA 87 (T) at 91D-E & 92G

apply is whether it would be in the interests of justice in this case to permit an extension of the time period prescribed in section 7 of PAJA. It is only if I am satisfied that the interests of justice dictate an extension of time that I will have authority to entertain the applicant's review application.[8]

[15] The essential requirements for granting relief under section 9(2) of PAJA are that there must be a full and reasonable explanation for the delay, and that this explanation should cover the entire period of the delay.[9] What is in the interests of justice will depend on the facts of each case. A court must take into account all relevant factors in this regard. These include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issues raised, and the prospects of success in the intended proceedings.[10]

[16] Applying these requirements to the present case it seems to me that the applicant falls at the first hurdle: there is simply no explanation for the considerable delay in the applicant instituting the review proceedings, let alone a reasonable and full explanation covering the entire period of the delay.

[17] The chronology of the application set out earlier demonstrates that 17 months passed between the decision of the Appeal Tribunal being communicated to the applicant's attorneys and their request to the same

---

8 Opposition to Urban Tolling v South African National Roads Agency Limited 2013 JDR 2297 (SCA) at para 26

9 Pricewaterhouse Coopers Inc v Van Vollenhoven NO [2010] 2 All SA 256 (SCA)

10 Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) at para 54

body for a review of the decision based on new medical information. A further period of 10 months passed before the institution of the review proceedings. The only explanation attempted by the applicant for the length of time he took to institute the review application in his founding affidavit is that he was never provided with reasons for the decision; and that he suffered a "steady physical decline" of his condition after the decision, which could only be demonstrated by the "slow passage of time". The alleged steady physical decline in the applicant's condition is simply not supported on the papers. As I indicated earlier, Dr Jivan estimated the applicant's WPI as 7% in September 2012. Prof Scheepers in his report (upon which the applicant relies) puts his WPI at 3% and concludes that: "According to the narrative test he does not have serious long term impairment or loss of a bodily function." Prof Scheepers' examination was conducted in February 2013. From this it is apparent that there was no steady decline in the applicant's condition, as all the experts, including Dr Schnaid as early as 2010 calculated the applicant's WPI to be less than 30%. In any event, the applicant delayed for a further year after the last updated report was obtained before instituting the review application. There is simply no explanation for this.

[18] As far as the absence of reasons is concerned, this too cannot be a reasonable explanation for the delay in instituting the review proceedings. Quite simply, the Appeal Tribunal's decision letter set out the reasons therefor. If the applicant or his attorneys were of the view that these reasons were not sufficient, it was open to them to request further or better reasons.

In none of the correspondence between the applicant's attorneys and the HPCSA is a request for reasons made.

[19] The extent of the applicant's delay in instituting his review proceedings was substantial. In the absence of reasons to explain this delay, there is simply no basis upon which I can conclude that it would be in the interests of justice to condone the delay by granting an order under section 9 of PAJA.

[20] This is confirmed by a consideration of the other relevant factors at play. In particular, the applicant's prospects of success in the review are poor. The applicant's complaints about the Appeal Tribunal's decision may be summarised as follows:

[20.1] the HPCSA did not respond to the applicant's objection to the members panel, save for appointing two additional members;

[20.2] accordingly, the Appeal Tribunal was biased and joined interest in the cause with the RAF in that it was a one-sided panel and failed to assess the applicant's injuries impartially and correctly;

[20.3] the Appeal Tribunal failed to provide reasons for its decision, indicating that the Appeal Tribunal's decision was taken without good reason;

[20.4] the Appeal Tribunal failed to assess the applicant's injuries correctly, as is evidenced by subsequent medical reports demonstrating a decline in his physical condition;

[20.5] in addition, it erred in finding that the applicant had reached MMI, contrary to the opinion expressed by Dr Schnaid.

[21] Based on these complaints, the applicant identifies the grounds of review upon which he relies as including bias, bad faith and an ulterior purpose or motive on the part of the Appeal Tribunal; the failure of the Appeal Tribunal to take into account relevant considerations; and the irregular conclusion reached by the Appeal Tribunal, based on "incompetent evidence", that the applicant had reached MMI.

[22] There is not a shred of evidence to support the contention that the Appeal Tribunal was biased. In its answering affidavit, the first to seventh respondents were at pains to point out that panel members are appointed by the Registrar of the HPCSA, and not by the Fund. They are all medical experts who provide their services as a public duty. They are not employed by the HPCSA or by the Fund, and receive a modest stipend for their services.

[23] Apart from this, the facts of the case illustrate that after the applicant's objection, which was in the most general terms, the Registrar appointed two additional panel members to consider the applicant's case. The applicant was informed of this and raised no further objection. Had there been real substance to the objection, no doubt the applicant's attorneys would have taken the matter further.

[24] As I indicated above, the Appeal Tribunal did provide reasons for its decision.

[25] This puts paid to the applicant's attempts to review the decision based on bias, bad faith and an ulterior purpose or motive.

[26] As for the remainder of the grounds of review, it is important to bear in mind that the reviewability of the Appeal Tribunal's decision must be determined on the basis of the information that was before it at the time. For this reason, the applicant's reliance on the additional medical reports obtained in 2012 and 2013 was misplaced.

[27] The question is whether, based on the information before the Appeal Tribunal at the time, its decision was rational and reasonable, and based on all relevant considerations. There is nothing to indicate that it was not so. The first to seventh respondents explained in their answering affidavit that the panel members all reviewed the medical information supplied by the applicant separately, and they applied their own medical knowledge and expertise in analysing the information and reaching a decision.

[28] It is common cause that even Dr Schnaid estimated the applicant's WPI as less than 30%. He nonetheless found on an application of the narrative test that the applicant had suffered a serious long-term impediment. The members of the panel making up the Appeal Tribunal did not agree with this, and they indicated that in their view, Dr Schnaid had not applied the AMA Guide correctly. The test is not whether they were right or wrong in their assessment, but rather whether their conclusion is reasonable and rational based on the information they had before them. There is nothing to indicate that their decision was irrational or unreasonable.

[29] Finally, it is appropriate for me to take into account the public interest element in the need for finality in the decisions of administrative bodies like the Appeal Tribunal.[11] The financial and administrative burden on the Fund is substantial. To ensure that the objectives of the Fund are met, it is important that claims are processed, and funds allocated without undue delay. Whether or not a claimant has an entitlement to a claim for general damages against the Fund is a critical element of any claim, and it is important to reach finality on this issue timeously. Any review of the Appeal Tribunal's decision must, accordingly, be instituted without delay. It is not in the interests of the claimant, the Fund, or the administration of justice to permit reviews of such decisions to remain pending indefinitely.

[30] For all of these reasons, I conclude that it is not in the interests of justice in this case to condone the applicant's delay in instituting the review proceedings. The application must fail for this reason.

ORDER

[31] I make the following order:

1. The application is dismissed with costs.

[11] Gwetha v Transkei Development Corporation Ltd & Others 2006 (2) SA 603 (SCA) at para 22; Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41E-F

R KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 16 October 2014
Date of Judgment: October 2014
Counsel for the Applicants: Adv. J A Kitching
Instructed by: Raphael & David Smith Inc
Counsel for the Respondent: Adv. T Motau SC
Adv K Magan
Instructed by: Geldenhuys Malatji Inc