REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2014/40325

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

29/9/2017
DATE

SIGNATURE

In the application of:

NAOME SEANOKENG MAIMANE Applicant

and

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA First Respondent

ROAD ACCIDENT FUND Second Respondent

J U D G M E N T

MAKUME, J:

[1] In this application the Applicant seeks an order to review the decision taken by the Appeal Tribunal of the First Respondent. On the First March 2014 the Tribunal concluded that the Applicant had not

sustained serious injuries as contemplated by Regulation 3 of the Road Accident Fund Regulations.

[2] The effect of that decision is that the Applicant will not be entitled to compensation for non-pecuniary loss otherwise known as general damages.

[3] It is common cause that this application is in terms of Rule 53 of the Uniform Rules of Court read with Section 6 of the Promotion of Access to Administrative Justice Act No 3 of 2000 ("*PAJA*")

[4] The Applicant relies on the following grounds for seeking review namely:

4.1 That the Registrar of the 1st Respondent refused to allow the Applicant and her legal representative to attend and make representation to the Tribunal prior to them taking the decision.

4.2 That the Registrar of the First Respondent failed to make available to her the submissions of the Second Respondent which it made to the Appeal Tribunal to enable the Applicant t respond thereto.

4.3 That in arriving at their decision the Tribunal failed to properly have regard to the contents of the report prepared by Dr Earle

on behalf of the Applicant.

[5] The Application is opposed by both Respondents and in their Answering Affidavit further simplified in the heads of argument the Respondents raised the following defences:

i) Firstly it is denied that Second Respondent made any submissions to the Tribunal safe for the expert reports filed.

ii) Secondly that Section 3 (4) (b) of the Regulations make no provision for oral submissions to be made to the Tribunal. The Section provides that when an aggrieved party in this instance the Applicant raises a dispute with the findings of the Fund he or she lodges a dispute with the Registrar and sets out his or her grounds of rejecting the assessment. The submission by the Applicant must be in writing and shall include all medical reports as well as opinions by experts.

iii) Thirdly the Respondents deny that the Tribunal which comprised of three Orthopaedic surgeons and a neurosurgeon failed to apply their minds to the relevant issues raised in the report by Dr Earle.

[6] An attempt was made in the heads of argument for the first time by the Applicant to introduce a further ground of review being the perceived

unconstitutionally of Regulation 3. It was argued by the Applicant that the Regulation is ultra vires and violates Section 34 of the Constitution by not allowing the Applicant to be heard orally and that such refusal constitutes substantive and procedural unfairness to the substantial right of the Applicant. (the Audi Alteram parte rule). The Applicant submits that the Regulation should be referred back to the legislator to rectify the anomaly. This contention is not in the founding papers it is not properly before me the Respondents were not granted an opportunity to deal with it.

THE STATUTORY LEGAL FRAMEWORK OF THE ROAD ACCIDENT FUND SCHEME

[7] In terms of ***Section 17(1) and 17(1A) of the Road Accident Fund Act*** read with Regulation 3 of the Regulations promulgated in accordance with the Act a person injured in a motor vehicle accident may only claim general damages against the Fund on proof that such a person has suffered "serious injury".

[8] Section 17(1A) provides that assessment of a serious injury must be done by a medical practitioner on the basis of a method as prescribed in Regulation 3 (1)(b). The assessment involves applying a vigorous method to the various body function of a claimant in order to determine the extent of the impairment caused by the accident. If the medical practitioner in scoring the various tests arrives at a score of 30% or

more on the Whole Person Impairment (WPI) test then the injuries is regarded as serious.

[9] Once a dispute has been declared it is in terms of Regulation 3(8) referred by the First Respondent to an Appeal Tribunal comprising of 3 independent medical practitioners who are experts in the particular type of injury complained of.

[10] The powers of the Tribunal are to be found in Regulation 3(4) (b); 3(7); 3(10); 3(11) (a) to (f). The Tribunal calls for written submissions from the claimant and the Fund which may comprise of written memos, medical reports and opinions.

[11] Regulation 3(10) confers a discretion on the Tribunal to receive legal argument if it deems it necessary otherwise the Tribunal sits and deliberates on all issues placed before it in the various medico legal reports as well as other written submissions submitted by all the interested parties.

[12] In terms of Regulation 3(11) (g) to (i) and 3 (12) the Tribunal produces its report and determination after consideration of all submissions which report and determination is in terms of Regulation 3(13) final and binding and can only be challenged by way of a review.

THE APPLICANTS CASE FOR REVIEW

[13] It is common cause that on the 8th of June 2013 the Applicant lodged her RAF 5 form to which was annexed medico legal reports completed in respect of her, five medico legal reports by the Second Respondent including joint minute from five corresponding experts. The Applicant followed up with a further medico legal report by Dr Earle which report was also placed before the Tribunal.

[14] In paragraphs 12 and 14 of the answering affidavit Dr Engelbrecht on behalf of the First Respondent tells the court that when they met as a Tribunal on the 01st March 2014 the three of them were satisfied that enough medical reports had been provided to enable them to consider the appeal and that further submission whether oral or written were not necessary. As indicated the report by Dr Earle although submitted late was also placed before them. Dr Engelbrecht concludes by saying that the Regulations do not oblige them to hear oral submissions from the parties. The Tribunal determines disputes based on medical reports and written submissions. It is only when they formulate a view that they would like to receive oral submission that they direct the parties to do so.

[15] It is clear that the Tribunal has a discretion which they exercise after taking into consideration all facts and aspect of the case. Accordingly the Applicant's allegations that a refusal to allow her legal

representatives personal appearance at the hearing is procedurally unfair and a violation of her constitutional right is flawed because the Regulations do not prescribe that the Applicant should be granted the right of personal appearance.

[16] It is important to be reminded that fairness varies and depends on circumstances of each case what is critical is that a court in considering the principle of procedural fairness should take into consideration whether or not the empowering provisions impose a particular procedure that should be followed. The Constitutional Court in ***AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 Cc at page 40*** usefully formulated the legal position as follows:

"Once a particular administrative process is prescribed by law it is subject to the noms of procedural fairness codified in PAJA. Deviation from the procedure will be assessed in terms of norms of procedural fairness. That does not mean that an administrator may never depart form the system put in place or that deviation will necessarily result in procedural unfairness. But it does mean that where administrator depart from procedure, the basis for doing so will have to be reasonable and justifiable and the process of change must be procedurally fair."

[17] The second ground of review which is also misplaced is the assertion by the Applicant that the Appeal Tribunal failed to apply their mind to the relevant issues because they did not accept the opinion of Dr Earle her own expert.

[18] In the letter addressed to the Applicant's attorneys by the Tribunal dated the 5th March 2014 the Applicant was told that the report by Dr Earle dated the 24 January 2014 does not support a brain injury of note. Dr Engelbrecht in his Answering Affidavit refers to the report by Dr Earle. In my view this clearly indicates that the Tribunal did consider and apply their minds to the report by Dr Earle.

[19] The role of this court is not to determine if the Tribunal made a correct or wrong decision. The question is whether the Tribunal performed the function which was entrusted to it. The SCA in ***MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 at para 18*** sets out the functions of review court in the following words:

"It bears repeating that a review is not concerned with the correctness of a decision made by the functionary but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that, the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted and it is not open to a court to second guess his

evaluation. The role of a court is no more than to ensure that the decision maker has performed the function with which he was entrusted."

THE RESPONDENTS CASE

[20] The functions of a review court is to examine the reasonable and rationality of the impugned decision having regard to the requirements of Rule 53 read with the relevant provisions of PAJA.

[21] It is common cause that the power assigned by the Act and the Regulations to the Tribunal is to decide finally whether the injuries sustained by victims of road accidents are serious or not. The reason why the power was granted was aimed at limiting liability of the Fund to serious injuries only. Accordingly the decision by the Tribunal in this matter which was taken after considering all submission was in furtherance of that purpose. There is therefore a rational connection between the decision and the purpose of the Regulation it can never be said to have been arbitrary.

[22] In the present matter there is no indication that the Tribunal in exercising its power, failed to do so in a reasonable and rational manner. The mere fact that the Tribunal was able to accommodate the report by Dr Earle at a late stage is clear indication of the diligence with which the appeal tribunal dealt with the issues.

[23] It would seem to me that the Applicants complaint is more about the findings and the result which complaint cannot be dealt with by a review court. O'Regan J in the matter of ***Bato Star Fishing (Pty) Ltd vs Minister of Environment Affairs and Tourism & Other 2004 (4) SA 490 (CC) at page 45*** set it out authoritatively as follows:

"Although the review function of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decision taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

[24] I am accordingly not persuaded that the Applicant has made out any case to review the decision of the First Respondent and in the result I order as follows:

24.1 The Application is dismissed with costs.

DATED at JOHANNESBURG this the 29 day of SEPTEMBER 2017.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	29 AUGUST 2017
DATE OF DELIVERY	:	SEPTEMBER 2017
FOR THE APPLICANTS	:	ADV M WITZ
INSTRUCTED BY	:	BOVE ATTORNEYS
FOR THE FIRST RESPONDENT		ADV T MAUDI
INSTRUCTED BY		GILDENHUYSE MALATJI INC