IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

11/8/2014

CASE NO.: 29722/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTERESTTO OTHERS JUDGES: NO
(3) REVISED

10/8/2014 .....
DATE SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL	Applicant
and	
JOSIAS ALEXANDER MALAN	First Respondent
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	Second Respondent
THE ROAD ACCIDENT FUND	Third Respondent
N P MADUBE	Fourth Respondent
THE MINISTER OF TRANSPORT	Fifth Respondent
DR P ENGELBRECHT N.O.	Sixth Respondent
DR K BLOEM N.O.	Seventh Respondent
DR F P DU PLESSIS N.O.	Eighth Respondent
DR C DE BEER N.O.	Ninth Respondent
DR K D ROSMAN N.O.	Tenth Respondent
DR R RAMDASS N.O.	Eleventh Respondent

CORAM: P Z EBERSOHN AJ

HEARD ON: 1 AUGUST 2014

DATE JUDGMENT HANDED DOWN: 11 AUGUST 2014

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

EBERSOHN AJ:

[1] The applicant for leave to appeal is the Road Accident Appeal Board. The first respondent is the plaintiff in a Road Accident Fund matter.

[2] The grounds of appeal are that the court erred in granting the order it did and that the court should have accepted the defective affidavit of one Seisa. It is the applicant's case that the court should have found that there were no documents available to disclose and that it was impossible for the applicant to comply with the court's order. The applicant also brought an application to put fresh evidence before the court namely an affidavit deposed to by Seisa after the matter was heard and belatedly supporting the affidavit of Dr. Engelbrecht. The principles applicable to an application to receive further evidence have been set out in ***SIMPSON v SELFMED MEDICAL SCHEME AND ANOTHER*** **1995 (3) SA 816 (A) at 824 - 825:**

> ".....Since leave to bring forward fresh evidence on appeal is an indulgence, it is incumbent upon the appellant to satisfy us that it was not owing to any remissness on her part that she failed to adduce the evidence in question before Brand AJ. For purposes of the appeal I shall assume in her favour that she is able to discharge this onus. It is trite that in general further evidence will be allowed only where special grounds exist. In *Shein v Excess Insurance Company Ltd* 1912 AD 418 it was further pointed out at 428-9 that a Court will be particularly chary of granting such an application where the evidence sought to be brought forward involves points contested and decided upon at the trial. Here the evidence tendered by the appellant bears directly upon the very issue contested before and decided by Brand AJ in the motion proceedings before him.
>
> Although each case falls to be decided on its own peculiar facts, certain guiding principles to govern an application for the hearing of further evidence

on appeal have been enunciated by this Court in *Colman v Dunbar* 1933 AD 141 at 161-2. For purposes of the present case it is necessary to do no more than to apply to the facts before us the third of these principles. It is described by Wessels CJ (at 162) in the following words:

'3. The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality ...".

[3] The court can only deal with material which is properly before the court at the time of the hearing. It is impertinent and most rude to expect from a judge to communicate before the hearing with a party and to advise it that it's papers are not in order as was suggested this court should/could have done.

[4] The failure to correctly place evidence before the court in the application is on the admission of the applicant due to the fault of the applicant. How such a simple mistake could have been made is not clear. Seisa can read and has no excuse. He clearly signed the affidavit, which is an important document, without reading it at all. It was gross remissness on the part of the applicant that caused this. Somebody gave incorrect instructions to the typist. Nobody checked the typed document before it was given to Seisa to sign. Counsel did not checked what she typed. The legal representatives of the applicant did not chech the papers. The incorrect affidavit was just dumped in the court file.

[5] Even if the application to accep the fresh evidence is granted it will not resolve the many other problems the applicant has.

[a] The applicant seeks leave to appeal in an interlocutory application that was aimed at ensuring all relevant factors and documents being placed before the Court for later review. This has been delayed further by the opposition and this appeal.

[b] It seems as if it is the case of the applicant that the court should have accepted, on the mere hearsay and unsupported and not verified assertion of Dr. Esterhuizen that ALL the documents and notes, everything of all the members of the Appeal Tribunal Board, were destroyed. There is no proof on record that anybody checked with the Board Members whether they still have their papers and notes with them or not.

[c] It is noted in the founding papers regarding the application to replace Seisa's affidavit and to introduce fresh evidence that the founding affidavit of Seisa was deposed to on the 4th February 2014 and these papers, for some apparently calculated reason, <u>were not served</u> omn the other panel members i.e. on either of the fourth, sixth, seventh, eighth, ninth, tenth and eleventh respondents to take notice of and perhaps to comment on it and to contradict it, but instead were served on a certain Bridget, whoever that may be, at the "HPCSA Legal Services Dept." wherever that may be. It is clear that the other respondents have a clear interest in this matter as their notes and documents were allegedly destroyed by Seisa, and they may have been able to contradict him and state that they still had them. There is no

documentary proof provided that any one of these respondents knew about this latter application and have been approached to ascertain whether they still have copies of the documents and or their notes and whether they agree with Seisa and the allegations by Seisa to the effect that their documents and notes were destroyed. Not one verifying affidavit of one of these respondents is attached. There is also no allegation by Seisa that he in fact communicated with any of the respondents to ascertain whether he perhaps had copies of the papers and/or a copy of his notes. The court is totally left in the dark. That is not good enough.

[6] Dr. Engelbrecht did not state that he has personal knowledge thereof that every document of each of the other Board Members have actually been destroyed. It is, in the court's opinion, a ludicrous practice to destroy documents before the ruling of the Board has been made known and before the period in which it could have been brought under judicial attack in a court, has expired. The problem is now that of the Appeal Board and the Road Accident Fund and not that of the plaintiff.

[7] There is also nothing on record as to why a copy of the record, the notes of the Board Members, the papers and the ultimate report of the Board was not or could not be reconstructed. There is no allegation that it was tried at all. All that is said was that the papers were destroyed. This non-compliance with the court- and practice rules and the failure to prepare satisfying court papers that are in order and are complete and comply with the minimum norms required by the courts

have resulted in this court not seeing its way open to come to the assistance of the applicant.

[8] The court has again studied Dr. Engelbrecht's answering affidavit wherein he deals with the applicant in the main application under the heading MEETINGS AND DECISIONS OF THE TRIBUNAL (pages 256-265 paragraphs 48-74). It is not clear whether the third respondent's attorneys of record responded and provided the Registrar of the Appeal Tribunal with submissions, medical reports and opinions in dispute or any medical reports and opinions relied upon by the third respondent and which Dr. Engelbrecht referred to. Anyhow, the mere reading of the passage and the other reports and documents and annexures relating to the plaintiff, takes more than 11 minutes and to read it thoroughly and to discuss the contents and the other reports and listen to and discuss the opinions of the other experts in depth with the panel of experts, what Dr. Engelbrecht said they did in each of the 31 matters, would in fact have taken up rather a long period of time most likely several hours compared to the calculated 11 minutes per case which totally destroys the average of 11 minutes per case relied upon by the panel. Reading the particulars of some of the other cases on the agenda for that day also indicated that those cases would take many hours to resolve. The court formed the *prima facie* opinion that perhaps the Board unduly rushed matters. According to Seisa, after the other Board Members had left, he destroyed their papers. That left Dr. Engelbrecht with his own set of papers and his own notes. Dr. Engelbrecht came back about two months later and singlehandedly wrote the findings of the Board in a most cryptic manner. The question then arises whether

justice was done to the applicant and the other 30 persons whose cases were "dealt" with on that day.

[9] Somewhere something may be wrong, but it is not the function of this court to ferret it out and perhaps another body, if the matter is referred to it, could.

[10] As there is no likelihood of another court coming to a different decision the application to substitute the affidavit of Seisa and the application for leave to appeal will be refused with costs.

[11] The following order is made:

1. The application by the respondents in the main matter to present fresh evidence in the matter by replacing in the record the affidavit deposed to by one Seisa with a fresh affidavit deposed to by Seisa, is refused with costs payable by the respondents jointly and severally, payment by the one absolving the other.
2. The application for leave to appeal by the respondents is refused with costs with the costs payable by the eleven respondents jointly and severally, payment by the one absolving the others.

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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