IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

4/4/16

CASE NO:41191/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

4/4/2016 .....
DATE SIGNATURE

In the matter between:

J O LE ROUX **APPLICANT**

and

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL **FIRST RESPONDENT**

THE ROAD ACCIDENT FUND **SECOND RESPONDENT**

THE REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL **THIRD RESPONDENT**

JUDGMENT

RANCHOD J:

Introduction

[1] The applicant in this matter applies to review and set aside a decision by an Appeal Tribunal constituted by the Registrar of the Health Professions

Council of South Africa, the third respondent. The Tribunal comprised of four members. The decision was that the injuries which the applicant sustained as a result of a motor vehicle accident on 17 October 2008 are not 'serious', as contemplated in Regulation 3(1)(b)(iii)(aa) of the Regulations promulgated under the Road Accident Fund Act 56 of 1996 in the Government Gazette 31249 dated 21 July 2008 (the Regulations).

[2] The applicant's notice of motion dated 17 July 2012 was amended by notice dated 11 September 2012 by the addition of a new first paragraph and the inclusion of an additional phrase in the alternative prayer. The first and third respondents filed a notice to oppose the application but did not file an opposing affidavit nor was it opposed during the hearing. In the result the application was granted as well as the application for condonation for the late filing of the application to amend.

[3] In terms of the new first paragraph the applicant seeks a declaratory order to the effect that the findings of Dr J.D Erlank (a plastic and reconstructive surgeon) as set out in his medico-legal report and in the Serious Injury Assessment Report (the RAF4) completed by him have not been rejected by the second respondent (the Fund), are not affected by the appeal proceedings before the Tribunal and remain valid for purposes of the applicant's claim against the Fund including the findings that the applicant's permanent brain damage and forehead scar with the accompanying high pain levels, qualify as serious injuries.

[4] The applicant also seeks a finding that the RAF4 submitted to the Fund on 21 October 2011 (as supplemented by the medical report of Dr Erlank and the further RAF4 completed by him) is accepted.

[5] The applicant seeks the following relief in the alternative:

'1. That the first and third respondents provide applicant's attorney with the names of the medical practitioners who determined his dispute.

2. That the matter be considered *de novo* before a re-constituted tribunal panel (of whom at least one should be a plastic surgeon) in terms of Regulation 3(8).
3. That the applicant's attorneys be informed who the persons are who have been appointed to the re-constituted panel in accordance with Regulation 3(9)(a).
4. That the Tribunal's resolution (decision) be substituted with one in the following terms:

   (a) The Applicant is directed in terms of Reg 3(11)(c) to provide further medical reports to the appeal tribunal (with copies to the RAF), as envisaged in par 3-4 of the letter of the Applicant's attorney of record to the appeal tribunal (dated 2011-11-28) and par 7-9 of the Applicant's 'Notification of Dispute Annexure RAF5 Form'.

   (b) The Applicant is directed in terms of Reg 3(11)(e) to make further submissions to the appeal tribunal (and the RAF is also invited to do so), within 7 days after submission of the further medical reports contemplated above.'

[6] On 21 September 2015 the applicant launched an interlocutory application to supplement his notice of motion in the main review application by the addition of a new prayer which reads as follows:

'1. Reviewing and setting aside the rejection of the serious injury assessment report by the second respondent (dated 11 November 2011), which is attached hereto as annexure "B".
2. Ordering the second respondent to consider de novo (in accordance with the applicable provisions), whether the assessment that the injury is serious, is correct, with due consideration of all the serious injury assessment reports furnished to it by the applicant and such further assessment to which it might direct that the applicant should submit himself'.'

[7] In his affidavit in support of the application to supplement the notice of motion, the applicant states as follows:

'5. The further alternative prayer concerns the unacceptable way in which the second respondent dealt with the question of the seriousness of my injuries.'

[8] In so far as the applicant seeks the review and setting aside of the decision of the Tribunal on the basis of alleged flaws in the decision of the Fund (the second respondent) is concerned, it is misconceived. The Appeal Tribunal considers and decides an appeal independently of the decisions taken by the Fund. It conducts its own assessment of the injuries sustained by an applicant and its decision is final and determinative of the applicant's claim. The Tribunal is unencumbered by the considerations or position taken by the Fund in rejecting the applicant's SIA Report. This is apparent from Regulation 3(11) which provides:

'(11) The appeal tribunal shall have the following powers:

(a) Direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations, by a medical practitioner designated by the appeal tribunal.

(b) Direct, on no less than five days written notice, that the third party present himself or herself in person to the appeal tribunal at a place and time indicated in the said notice and examine the third party's injury and assess whether the injury is serious in terms of the method set out in these Regulations.

(c) Direct that further medical reports be obtained and placed before the appeal tribunal by one or more of the parties...'.

[9] The review application is opposed by all the respondents.

Background

[10] Prior to the promulgation of the Regulations a claimant seeking compensation for injuries sustained in a motor vehicle accident could, *inter alia*, claim general damages, which is a claim for non-pecuniary loss.

[11] The new dispensation ushered in by the Road Accident Fund Amendment Act 19 of 2005 and the regulations which came into effect on 1 August 2008 deal with the entitlement of a person who has been injured in a motor vehicle accident to claim damages from a statutory insurer, namely, the Fund. General damages may now only be claimed where a 'serious injury' has been suffered by the claimant and where this has been accepted by the Fund or proved in the manner prescribed by regulation.

[12] The rationale for the new dispensation and a full description of the procedures which must be followed in order to prove a 'serious injury' are set out in paras [3] – [10] of *Road Accident Fund v Duma and 3 similar cases 2013(6) SA 9 (SCA)*. The eligibility for general damages is to be determined with reference to the American Medical Association Guides (the AMA Guides) to impairment rating for all human organ systems. The threshold of impairment to qualify for general damages is 30%. The threshold is not a requirement of the AMA Guides. It has been set in Regulation 3(1)(b).

[13] The question whether a third party has suffered 'serious injury' must be determined in the manner prescribed by the Regulations. Section 17(1) provides that a third party is entitled to compensation for non-pecuniary loss only if he or she suffered 'serious injury as contemplated in subsection (1A)'. The concept of 'serious injury' accordingly bears the meaning contemplated by s 17(1A). Section 17(1A) states that the assessment of a serious injury 'shall be based on a prescribed method' and 'shall be carried out by a medical practitioner'. These provisions must be read with Section 26(1A) of the Act, which provides that the Minister may make regulations regarding 'the method of assessment to determine whether ... a serious injury had been incurred' and 'the resolution of disputes arising from any matter provided for in this Act'. The Act gives no substantive and objectively determinable content to the concept of 'serious injury'. Regulation 3 prescribes the method by which it must be determined and provides a dispute resolution mechanism. The procedure includes the following requirements:

13.1 A third party who wishes to claim for compensation for a non-pecuniary loss is required to submit to an assessment by a medical practitioner[1].

13.2 Regulation 3(1)(b) prescribes the criteria the medical practitioner must apply in the assessment of whether a third party has suffered serious injury.

13.3 A third party whose injury has been assessed as serious is required to obtain a Serious Injury Assessment Report (the SIA report) from the medical practitioner concerned[2].

13.4 The Fund is only required to compensate a third party for non-pecuniary loss if a claim is supported by a SIA Report and it is satisfied that the injury has been correctly assessed as serious in accordance with the prescribed method[3].

13.5 If the Fund is not satisfied that the injury has been correctly assessed as serious, it must reject the SIA report or direct the third party to undergo a further assessment[4].

13.6 If the third party is not satisfied with the Fund's rejection of the SIA report, he or she may lodge a dispute with the Registrar of the Health Professions Council of South Africa (the Registrar) within 90 days[5].

13.7 Once a dispute has been declared, the Registrar constitutes an appeal Tribunal of three medical experts to determine whether the third party does have a serious injury[6].

13.8 The Tribunal determines the dispute and its determination is final and binding[7].

[14] The scheme of the RAF Act and Regulations is therefore quite clear. It is for the Fund and, thereafter, the Tribunal to determine whether an injury is

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[1] Regulation 3(1)(a)
[2] Regulation 3(3)(a)
[3] Regulation 3(3)(c)
[4] Regulation 3(3)(d)
[5] Regulation 3(4)
[6] Regulation 3(8)
[7] Regulation 3(13)

'serious'. There is no provision for a further appeal and a court may only entertain the matter to the extent permitted by PAJA[8].

The criteria for assessing the seriousness of the injury.

[15] The criteria to be applied by the Fund and the Tribunal in assessing the seriousness of the injury are set out in Regulations 3(1)(b)(ii) and (iii) as follows:

> '(ii) If the injury resulted in 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious.
>
> (iii) An injury which does not result in 30 per cent or more Impairment of the Whole Person may only be assessed as serious if that injury:
>
> (aa) resulted in a serious long-term impairment or loss of a body function;
>
> (bb) constitutes permanent serious disfigurement;
>
> (cc) resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or
>
> (dd) resulted in loss of a foetus.'

[16] The test in Regulation 3(1)(b)(iii) is referred to as the narrative test. It is not intended to be the primary assessment method and not intended to allow the Whole Person Impairment (the WPI) test to be bypassed. Rather, the narrative test may only be used after the WPI test has been completed and the claimant has not achieved the 30% rating which would automatically result in a finding of serious injury[9]. The test is no more than a 'safety net' to ensure that deserving cases falling below the 30% threshold are nevertheless classified as serious[10].

[17] The difference between the narrative test and the WPI assessment is that the former is inherently open to more disagreement and debate. It does

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[8] Promotion of Administrative Justice Act 3 of 2000. See Road Accident Fund v Duma and three Similar Cases 2013(6) SA 0 (SCA) at para 19(e)

9 Duma and Three Similar Cases, supra at paras 34-37

10 Law Society of South Africa and Others v Minister of Transport and Another, 2010(11) BCLR 1140 (GNP) at paras 63-65

not involve a precise measurement of impairment which can be reduced to a percentage, as is the case with the WPI test. Rather, it requires an expert opinion of whether a given injury is, for example, 'serious' or 'severe' and whether the impairment is 'permanent' or 'long-term'.

[18] The applicant's SIA report returned a WPI score of less than 30%. The applicant therefore relies on the narrative test.

The applicant's grounds for review

[19] The applicant raises the following grounds of review:

19.1 The tribunal was not properly constituted in terms of Regulation 3(8)(b) and therefore its decision must be declared null and void[11]

19.2 The tribunal failed to apply its mind properly to the factual information and legal principles applicable to the assessment when it failed to consider evidence regarding the narrative test and therefore disregarded the provisions of regulation 3(1)(b)(iii)[12].

19.3 The tribunal failed to apply its mind when it dismissed the appeal without obtaining additional medical reports[13].

19.4 The tribunal failed to apply its mind when it proceeded to dismiss the appeal despite there being no other evidence to contradict the applicant's RAF4 forms by Dr Enslin and Dr Erlank and therefore, the tribunal did not dispute the assessment by Enslin and Erlank on rationally relevant grounds[14].

19.5 The tribunal failed to apply its mind and acted unreasonably, when it made its decision without affording the applicant an opportunity to make further submissions in terms of Regulation 3(11)(e), given the circumstances of the case[15].

[11] Page 339-341 para 5-9 of the applicant's Replying Affidavit
[12] Page 10, para 9.2 of the applicant's Founding Affidavit
[13] Page 11, 12 and 13 of the Applicant's Founding Affidavit
[14] Page 12, para 14 of the applicant's Founding Affidavit
[15] Page 13 & 14, para 15.3 Applicant's Founding Affidavit

19.6 The decision by the tribunal was procedurally unfair in that the Registrar ignored the applicant's request to be furnished with the names of the medical practitioners appointed to determine the dispute and thus deprived him of the opportunity to exercise his right to object to the appointment of any practitioner, as provided for in Regulation 3(9)(a) and 3(9)(b)[16].

The distinction between an appeal and a review

[20] This being a review application, it would be apposite to set out the distinction between a review and an appeal and the ambit of a court's discretion and powers on review. In *Bato Star*[17] O'Regan J emphasised that:

'Although the review functions 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 decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[21] The learned Judge stated further at paragraph [48]:

'In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker.'

[16] Page 13, para 15.2 of the Applicant's Founding Affidavit
[17] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004(4) SA 490 (CC) at para [45]

[22] In so far as questions of reasonableness and rationality are concerned it was held by the Constitutional Court in *Pharmaceutical Manufacturers Association*[18] that:

> 'Decisions [of administrative bodies] must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.'

[23] The Supreme Court of Appeal dealt with the question of relevance or irrelevance of different factors in the decision-making process in *MEC for Environmental Affairs and Development Planning v Clairson's CC*[19]:

> '18. We think it apparent from the extracts from her judgment we have recited, and the judgment read as a whole, that the learned judge blurred the distinction between an appeal and a review. It bears repeating that a review is not concerned with the correctness of a decision made by a 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

[18] Pharmaceutical Manufacturers Association of South Africa and another: in re: Ex Parte President of the Republic of South Africa and Others 2000(2) SA 647 (CC) at para [85]

[19] MEC for Environmental Affairs and Development Planning v Clairison's CC (408/2012) [2013] ZASCA 82 at para [18] and [22]

performed the function with which he was entrusted. Clearly the court below, echoing what was said by Clairisons, was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted.

...

22. The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and so long as it acts in good faith (and reasonably and rationally) a court of law cannot interfere.'

[24] The case law that I have referred to shows that the mere fact that I might on the merits have reached a different conclusion would not justify a finding that the Tribunal acted arbitrarily, capriciously or irrationally.

[25] It is also to be borne in mind that a medical expert's evaluation of the injuries as serious for purposes of the narrative test is a value judgment – be it that of the third party's expert or that of a member of the Tribunal.

The History of the Applicant's claim

[26] The applicant was injured in a motorcycle accident on 17 October 2008 when he sustained a minor head injury, a soft tissue injury to his neck, an injury to his left and right knees, an injury to both his left and right wrists, a soft tissue injury to his upper and lower back, a laceration on his forehead and a rib fracture. He was taken by ambulance to the Midmed Hospital where he was stabilised. The laceration on his forehead was sutured, neck collar fitted and an ultrasound of his abdomen processed. He received conservative treatment and was sent home. In other words, he was not admitted to hospital on the day of the accident. He was only admitted several days later on 22 October 2008 until 26 October 2008 for treatment of generalised pain.

According to Dr D.A Birrell (who chaired the Tribunal and who deposed to its answering affidavit in this review application) it appeared that since then, there was no evidence of (or none was supplied) that the applicant had any notable treatment. It appears from the record that the applicant had seen Dr Anton de Munnik a few days after his discharge from hospital. Dr Munnik issued a medical certificate certifying that he had treated the applicant on 29 October 2008 for 'evaluering na motorfietsongeluk, (evaluation after motorcycle accident) 17 Oktober 2008' and recommended sick leave/light duty for the period 17 October 2008 until 11 November 2008 for 'herstel' (recovery).

[27] The applicant duly lodged a RAF1 claim form with the Fund.

[28] In September, 2011 Dr T.J Enslin completed a serious injury assessment report (Form RAF4) and a medico-legal report titled 'Narrative Test'. These were lodged with the RAF, which rejected the serious injury assessment.

[29] The applicant's attorneys duly lodged a RAF5 form, declaring a dispute, with the Registrar in terms of Regulation 3(4). In the covering letter dated 28 November 2011 the applicant's attorneys state in paras 3-5:

> '3. You are kindly referred to the content of the document attached as annexure to the RAF5 form (page 8 to 11). You will note that we make the submission that before the appeal tribunal can consider this dispute, the medico-legal examinations by the experts recommended by Dr. Theo Enslin who performed this serious injury assessment, should first be completed. Our reasons appear from pages 8 to 11 to this bundle of documents.
>
> 4. We have already arranged for medico-legal examinations to be conducted by the following experts:
>
> 4.1 Dr JD Erlank, plastic and reconstructive surgeon.
>
> 4.2 Mrs Eidde Francke, clinical and neuro-psychologist.
>
> 4.3 Dr Hans Enslin, orthopaedic surgeon.
>
> 4.4 Mr PC Diedericks, industrial psychologist.

4.5 Ms Liesel Keyser, occupational therapist.

5. We shall provide you with the medico-legal reports as soon as same come to hand.'

[30] The Registrar acknowledged receipt of the dispute notification in a letter dated 30 November 2011 and thereafter in a letter dated 7 May 2012 informed applicant's attorneys that the Tribunal will consider the matter on 25 May 2012 and mentioned the names of medical experts appointed to determine the appeal. They were four orthopaedic surgeons, a neurologist, an occupational therapist and an industrial psychologist. As will be apparent later, ultimately the Tribunal consisted of only four members.

[31] One of the grounds for review of the Tribunal's decision is that the applicant's attorneys were not informed of the names of the medical experts on the Tribunal. However, in a supplementary affidavit the applicant confirmed that the information was indeed supplied in a letter to his attorney who accepts, said counsel during argument, that it reached his office but did not come to his attention - which is something that the respondents cannot be faulted for. Nothing further needs to be said about that issue.

[32] Almost six months after the letter of 28 November 2011, on 14 May 2012, the applicant's attorney addressed a letter to the Registrar to supplement the previous letter. Attached to the letter was a medico-legal report and a further RAF4 form – both compiled by Dr JD Erlank. The applicant contends that Dr Erlank's report proves that he has sustained permanent brain damage, and the scarring of his forehead and accompanying high pain levels qualify as serious injuries.

The Tribunal's decision and its reasons

[33] The Tribunal was duly constituted and sat to consider the dispute on 25 May 2012. It unanimously found that the applicant's injuries could not be regarded as serious. This decision was conveyed to the applicant's attorneys in the form of a resolution in the following terms:

'The Tribunal are (*sic*) unanimous that this patient does not qualify under the narrative test as a serious injury. They (*sic*) do not regard the scarring of the forehead as significant.

Dr Shahzad has pointed out that there is no evidence in the documentation received whatsoever that this patient sustained a head injury and he does not qualify as a 5% Whole Person Impairment because of this.

The left knee injury is also of a minor nature and all-in-all this patient does not qualify as a serious injury under the narrative test.'

[34] In the answering affidavit, Dr Birrell, explains that in arriving at is decision the Tribunal considered all the medico-legal reports and X-ray reports that were placed before it, as well as the hospital records from Midmed Hospital and the Medi-Cross Middleburg Medical Centre. The Tribunal noted the injuries as stated in its resolution. It also noted that the lacerations were sutured, a neck collar applied and ultrasound of the applicant's abdomen was processed. The Tribunal noted that the applicant was treated conservatively and discharged on the same day and thereafter admitted to Midmed Hospital on the 22 to 28 October 2008 where he was treated for general pain. No evidence of further treatment after this was produced.

[35] The Tribunal noted that the applicant was examined by Dr Theo Enslin, a General Practitioner, on the 22 September 2011, who completed an RAF4 Form and compiled a medico-legal report. According to Dr Enslin, the applicant, on assessment of the upper and lower extremities, had reached a 4% WPI; further that he had unsightly scars of a disfiguring nature on the forehead and that he therefore suffered a permanent serious disfigurement. No mention is made of a brain or head injury. However, Dr Enslin does go on to state that the applicant sustained a minor head injury in the accident on 17 October 2008 and recommends that he be evaluated by a neuropsychologist for the sequlae following the head injury, as well as by a clinical psychologist. The basis for concluding that the applicant suffered a head injury is not clear.Dr Enslin circled 5.2 of the RAF4 Form to show that the applicant

qualified for general damages under the narrative test in that he sustained permanent serious disfigurement. However, when the Tribunal compared Dr Enslin's report with that of Dr Erlank, the plastic and reconstructive surgeon who examined the applicant on 6 February 2012, it concluded that Dr Enslin's finding that the scarrings were a permanent serious disfigurement could not be sustained. Dr Erlank had said in his report that the applicant's scars could be improved by 30%. Consequently, the Tribunal did not find the applicant's scars to constitute a serious injury.

[36] Dr Erlank concluded his report by stating that the applicant qualifies under the narrative test, because of his brain injury. Dr Birrell says the Tribunal had great difficulty in accepting this conclusion for a number of reasons. Firstly, no diagnosis had been made that the applicant suffered a brain injury and nor was there any evidence whatsoever to show this. Secondly, Dr Erlank is only a plastic surgeon and is therefore not qualified to make an assessment regarding brain injury.

[37] The Tribunal also disagreed with Dr Enslin's evaluation of the applicant's soft tissue injury to the spine. Dr Enslin reported that the applicant had neck pain 'now and then'. In the opinion of the Tribunal, this did not result in a 2% WPI in that part of his injuries.

[38] Dr Enslin was of the view that the accident resulted in negative effects on the behavioural and psychological condition of the applicant. However, he added that post-traumatic stress could be a contributing factor and recommended that the applicant be evaluated by *inter alia*, an industrial psychologist and a clinical psychologist. Dr Birrell says no medico-legal reports from such experts were submitted by the applicant. I will revert to this aspect when I deal with the applicant's contention that the Tribunal should have waited for these reports which, it was informed, the applicant was obtaining.

[39] One of the experts on the panel was Dr Shahzad, a neurosurgeon (a specialist in head and brain injury) who pointed out during the Tribunal

meeting that there was no evidence in the documents before the Tribunal to show that the applicant had sustained a head injury. Neither Dr Enslin nor Dr Erlank provide a basis for saying the applicant suffered a head or brain injury. It is to be noted that Drs Enslin and Erlank conducted their examination of the applicant in 2011 and 2012 respectively. The Tribunal *inter alia* had the applicant's medical records of the date of the accident in 2008.

[40] Dr Birrell goes on to say that none of the X-ray reports submitted by the applicant showed any fractures. In fact, the X-ray report of Dr Deon Eksteen taken on the day of the accident showed no noticeable fractures of the skull base and skull roof, as well as no visible facial bone fractures.

[41] Normally, says Dr Birrell, decisions are made by consensus. Where there is no consensus amongst the three Tribunal members appointed in terms of Regulation 3(8)(b), taking into account advice from the additional member(s) acting in an advisory capacity, the matter is referred back for further information. It did not deem it necessary in this instance.

[42] In my view, the Tribunal's decision, based on the information before it cannot be said to have been irrational or unreasonable or that it failed to apply its mind to the facts before it. The fact that Drs Enslin and Erlank concluded that the applicant's injuries were 'serious' does not in itself justify a finding of irrationality.

[43] The question arises however, whether the Tribunal failed to take into account relevant considerations by deciding not to wait for the medico-legal reports that applicant's attorney said he was obtaining before it made its decision. The applicant contends that the Tribunal's decision was unreasonable in that no reasonable tribunal could have exercised its discretion to disregard the request. In so far as the ground of unreasonableness is concerned, it was held in *Trinity Broadcasting (Ciskei) v ICASA*[20]:

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[20] 2004(3) SA 346 (SCA) at para [20]

'In requiring reasonable administrative action, the constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand a review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively *unreasonable*: cf *Bel Porto School Governing Body & Others v Premier, Western Cape & Another [2002 (3) SA 265 (CC) at 282-3 para [46]]*.. As made clear in *Bel Porto*, the review threshold is *rationality*. Again, the test is an objective one .... Rationality is, as has been shown above, one of the criteria now laid down in s 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it'[21].

[44] When he submitted Dr Erlank's report under cover of his letter dated 14 May 2012 the applicant's attorney did not attach any of the other expert reports alluded to in his letter of 28 November 2011, nor was it indicated that the balance of the reports were to follow. Instead, the attorney said the following:

'We refer to previous correspondence herein and attach hereto a copy of a medical legal report by Dr. JD Erlank as well as a further RAF4 form, completed by Dr. JD Erlank. You will note that Dr. Erlank comes to the conclusion that the injury was a serious injury on the grounds of a serious long term impairment or loss of body function as well as on the ground of a permanent serious disfigurement.

You are requested to inform us of the names of the medical practitioners appointed to determine the dispute as well as the date upon which the appeal tribunal will decide the dispute.'

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[21] Section 6(2)(h)

[45] The distinct impression created is that that was the only report being submitted. In my view, to now claim that the Tribunal should have waited for the further reports is opportunistic.

[46] Applicant says further that the Tribunal failed to exercise its investigative powers, when it opted not to call for further evaluations and did not examine the applicant which it had the power to do in terms of the Regulations[22] . It is to be noted that these are powers – not obligations- which the Tribunal may exercise in its discretion based on the facts of each case.

[47] In this case before me the Tribunal did not think it necessary to direct that further submissions be made but rather adopted the view that the applicant's case can be decided on the available medical evidence which was supplied by the applicant himself. In *JH v Health Professions Council*[23] Rogers J held:

> '23 Where the RAF's [the Fund's] rejection of a claimant's serious injury assessment report is disputed, the lawmaker has entrusted to the tribunal the function of determining whether or not to uphold that rejection. There is no appeal from the tribunal to this court. The

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[22] Regulation 3(11) inter alia provides: The appeal tribunal shall have the following powers:
(a)Direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations, by a medical practitioner designated by the appeal tribunal.
(b)Direct, on no less than five days written notice, that the third party present himself or herself in person to the appeal tribunal at a place and time indicated in the said notice and examine the third party's injury and assess whether the injury is serious in terms of the method set out in these Regulations.
(c)Direct that further medical reports be obtained and placed before the appeal tribunal by one or more of the parties.
(d)Direct that relevant pre- and post-accident medical, health and treatment records pertaining to the third party be obtained and made available to the appeal tribunal.
(e)Direct that further submissions be made by one or more of the parties and stipulate the time frame within which such further submissions must be placed before the appeal tribunal.
(f)Refuse to decide a dispute until a party has complied with any direction in paragraphs (a) to (e) above.
(g)Determine whether in its majority view the injury concerned is serious in terms of the method set out in these Regulations.
(h)Confirm the assessment of the medical practitioner or substitute its own assessment for the disputed assessment performed by the medical practitioner, if the majority of the members of the appeal tribunal consider it appropriate to substitute.
(i)Confirm the rejection of the serious injury assessment report by the Fund or an agent or accept the report, if the majority of the members of the appeal tribunal consider it is appropriate to accept the serious injury assessment report.

[23] 2016(2) SA 93 (WCC) at para [23]

distinction between appeal and review must not be blurred...'. Appropriate respect for the administrative agency in the present case is particularly apposite, bearing in mind that one is concerned with a question of medical judgment in regard to which the members of the tribunal, unlike the court, have qualifications and expertise.'

[48] I turn then to the contention that the panel was irregularly constituted in that more than three medical practitioners were appointed and, further, that the medical practitioners appointed did not have the expertise in the appropriate areas of medicine as contemplated in Regulation 3(8)(b) and (c) which provides:

'(b) The appeal tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine...

(c) The Registrar may appoint an additional independent health practitioner with expertise in any appropriate health profession to assist the appeal tribunal in an advisory capacity.'

[49] The tribunal consists of three medical practitioners and an additional health practitioner, who is not a medical practitioner, who may be appointed in an advisory capacity to assist the Tribunal. Dr Birrell says the Tribunal constituted of three orthopaedic surgeons, a neurosurgeon and an industrial psychologist. Seven experts were originally appointed to the Tribunal but three of them, Dr Close, Dr Sekele and Dr Blignaut could not attend the meeting and their apologies were noted. Dr De Graad, an orthopaedic surgeon was then appointed on the panel. In my view Regulation 3(8)(b) should be read to mean a minimum number of members as opposed to a maximum. The appointment of more than three experts can in any event only serve to benefit an appellant as his or her case would be decided by a wider pool of experts. In the *JH case* (*supra*) the Tribunal comprised of four experts.

[50] Another contention of the applicant is that the panel did not include a plastic and reconstructive surgeon to determine whether disfigurement on the

forehead was serious. It is apparent from Dr Birrell's affidavit that the issue of disfigurement was assessed by the Tribunal on Dr Erlank's report. In terms of Regulation 3(8)(b) the Tribunal must consist of medical practitioners with 'expertise in the appropriate areas of medicine'. The panel in question consisted of three orthopaedic surgeons, a neurosurgeon, and an industrial psychologist. In *Brown v Health Professions Council of South Africa case No 6449/2015* (Western Cape Division) Bozalek J said at para 46:

> 'It does not follow from Regulation 3(8)(b) that, should the report of a particular medical specialist or practitioner such as an occupational therapist serve in front of them, the panel is incomplete or improperly constituted unless it too comprises an occupational therapist. Such an interpretation or requirement would be an example of what O'Regan J referred to in Residents of *Joe Slovo Community, WC v Thubelisha Homes* 2010(3) SA 454 CC at para 296 when she stated:
>
> '... the obligations of fair process imposed upon organs of State must be approached with a clear eye on the purpose for which we insist on process. That purpose is to give affected parties an opportunity to be heard on a decision before it is finally made. Fair process improves the quality of decisions and establishes their legitimacy. However, it should not result in unnecessary and prolix requirements that may strangle government action.' (Footnotes omitted).

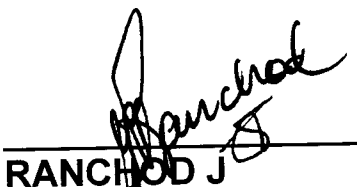
I respectfully align myself with this view.

[51] The applicant submitted his claim and dealt with his appeal in a rather haphazard fashion. Dr Enslin had recommended that medico-legal reports be obtained from several medico-legal specialists. Instead of first obtaining the reports, the applicant's attorneys submitted Dr Enslin's report to the Fund. When the Fund rejected the applicant's serious injury assessment, he obtained a report from Dr Erlank and submitted it to the Registrar with another RAF4 form. An RAF4 form, according to the Regulations is to be submitted to the Fund. As I understand the Regulations there is no provision for multiple RAF4 forms to be submitted to the Fund. Nor is there provision for submitting an RAF4 form directly to the Tribunal via the Registrar; it may only be submitted to the Fund, which then has the opportunity to accept or reject the

RAF4 assessment. It is against a rejection by the Fund of the assessment that the claimant may appeal in terms of Regulation 3(4). Submitting the RAF4 directly to the Tribunal would amount to the Tribunal being asked to be the determinant in the first instance and not as an appeal tribunal. Accordingly, the application for a declaratory order in paragraph 1 of the amended notice of motion has no merit and must be refused.

[52] It was on the basis of all the evidence before it that the Tribunal arrived at its decision. That decision, in my view, is rationally connected to and supported by the evidence that was placed before the Tribunal. The Tribunal's decision is also reasonable in the circumstances. The applicant has accordingly failed to make out a case for the relief sought.

[53] The application for review falls to be dismissed with costs.



RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv L Kok
Instructed by	:Christo Botha Attorneys Inc.
Counsel on behalf of first and third Respondents	: Adv Maodi
Instructed by	:Gildenhuys, Lessing Malatji Inc.
Counsel on behalf of third Respondent:	No appearance
Attorneys for third Respondent	: Lindsay Kellar
Date heard	: 26 November 2015
Date delivered	: 4 April 2016