REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

14/06/2016

CASE NO.A1/2015

14/6/2016

In the matter between:

ROAD ACCIDENT FUND APPEAL TRIBUNAL **APPELLANT**

and

JOSIAS ALEXANDER MALAN **RESPONDENT**

J U D G M E N T

KUBUSHI, J

[1] The appeal before us is against the whole of the judgment of Ebersohn AJ, which was handed down on 15 January 2014, in which the appellant as the first respondent in the proceedings before the court *a quo*, together with the third, fourth and the sixth to the eleventh respondents in the court *a quo* ("the respondents in the court *a quo* proceedings") were ordered to provide the respondent, the applicant in the court *a quo*, with the documents referred to in prayers 2.2, 2.3, 2.4, 2.5, 2.6, 2.7 and 2.9 of the notice of motion to the respondent's application to compel.

[2] The respondent is not opposing the appeal and has filed a notice to abide the decision of the court.

[3] The respondent is a claimant against the Road Accident Fund ("the Fund"), the second respondent in the proceedings before the court *a quo*, for personal injury sustained during a motor vehicle collision. The appellant on the other hand is the Appeal Tribunal that must sit in judgment regarding appeals against certain decisions of the Fund. In this instance, the appellant sat in judgment of the Fund's decision that the injury sustained by the respondent was not a serious injury as envisaged in the Road Accident Fund Act 56 of 1996. The appellant confirmed the decision of the Fund and dismissed the respondent's appeal to it. The respondent has, as such, launched a review application against that decision of the appellant.

[4] The application that served before the court *a quo* was an application, pursuant to the review application, to compel the appellant together with the

respondents in the court *a quo* proceedings, to provide a better response to the respondent's notice in terms of uniform rule 35 (12), alternatively to provide the respondent with a proper record in terms of uniform rule 53 (3).

[5] The application to compel arose after the respondent received the papers opposing the review application and realised that specific reference was made to certain documents which did not form part of the review record; and, it was also clear from the reading of the opposing papers that certain documents exist, to which specific reference was not made, but which are relevant to the determination of the review application.

[6] It is on this basis that a notice in terms of uniform rule 35 (12) was served upon the appellant and the respondents in the court *a quo* proceedings. The appellant and the respondents in the court *a quo* proceedings, replied to the respondent's notice in terms of rule 35 (12) in essence informing the respondent that they are unable to produce any of the documents requested therein. It appears that the respondent was not satisfied by that reply and as such his attorneys of record addressed a letter to the attorneys of record of the appellant and the respondents in the court *a quo* proceedings, insisting on the production of the said documents and explaining why it was necessary that the respondent be provided with the documents in question. Erring on the side of caution, the respondent also delivered a notice in terms of uniform rule 53 (3) in which he sought the same documents as in the rule 35 (12) notice, on the allegation that the review record was incomplete. The respondent did not receive any response to the two notices hence the application to compel.

[7] In their answering affidavit to the respondent's application to compel, the appellant and the respondents in the court *a quo* proceedings responded as follows:

7.1 Except for paragraphs 1.2 and 1.3 of the notice of motion of the application in terms of uniform rule 35 (12), all the other paragraphs in the notice of motion, that is paragraphs 1.1, part of 1.3, 1.4 to 1.10, relate to the production of documents to which no reference is made in the answering affidavit to the review application of the appellant and the respondents in the court *a quo* proceedings.

7.2 As regards the request in paragraph 1.2 (repeated in paragraph 2.2) of the notice of motion, the appellant and the respondents in the court *a quo* proceedings have tendered the chairperson's notes to the respondent. These notes were kept by the appellant regarding its decision in this matter.

7.3 As regards to the notes of the other tribunal members, these are handed back to the case administrator, the third respondent in the court *a quo* proceedings, together with the meeting packs and are then destroyed. In this regard the deponent referred to the confirmatory affidavit of Mr Matome Seisa ("Mr Seisa") the appellant's case administrator at the time.

7.4 Documents requested in paragraph 1.4 to 1.6 and part of 1.3, do not exist.

[8] The submission of the appellant and the respondents in the court *a quo* proceedings, was that the respondent was not entitled to use uniform rule 35 (12) to request the production of documents that are not referred to in the answering affidavit to the review application. The contention being that only documents to which reference is made in the opponent's affidavits or pleadings, may be procured in terms of this subrule.

[9] It was further submitted by the appellant and the respondents in the court *a quo* proceedings that when an incomplete record of proceedings has been handed to the registrar the proper procedure to follow is in terms of uniform rule 30A and not uniform rule 53 (3). The respondent has as such utilised a wrong procedure and is out of time to can rely on the provisions of uniform rule 53 (3).

[10] In its judgment, the court *a quo* decided the matter on the basis of uniform rule 53 (3) and ordered the appellant to provide the respondent with documents referred to in paragraph 2.2 (all the notes of the members of the appellant), 2.3 (the minutes of the appellant's proceedings recorded by the case administrator), 2.4 (records relating to consideration and deliberation on individual rating, etc), 2.5 (record of apportionment and whether the decision was made by way of consensus or not), 2.6 (record relating to factors taken into account and advice received from the additional members, etc), 2.7 (documents which did not form part of the

submissions by the Road Accident Fund) and 2.9 (a log showing a total number of appeals heard and the time spent on each).

[11] In its reasons for judgment, the court *a quo* found that the evidence of the chairperson of the appellant, Dr P R Engelbrecht ("Dr Engelbrecht"), as contained in the appellant's answering affidavit, on which it relied as proof that some of the documents required to be produced were destroyed, was hearsay evidence as it was not confirmed under oath by Mr Seisa, the appellant's case administrator.

[12] It needs to be stated that from the record it seems that Mr Seisa had deposed to an affidavit confirming the allegations in the answering affidavit by the appellant's chairperson, Dr Engelbrecht, to the effect that the notes by the individual members of the Tribunal together with the meeting packs were handed to him (Mr Seisa) and thereafter destroyed. However, instead of confirming the allegation in the answering affidavit of Dr Engelbrecht, he confirmed that of Mr Tshepo Paul Biokanyo ("Mr Boikanyo"). It is on that basis that the court *a quo* rejected the allegations by Dr Engelbrecht as hearsay evidence.

[13] The appellant sought leave, from the court *a quo,* to appeal against its judgment and orders. Leave was also sought to introduce new evidence in order to correct the error in the confirmatory affidavit of the appellant's case administrator, wherein Mr Seisa incorrectly stated that he was confirming the allegations in the answering affidavit of Mr Boikanyo, when he should in fact have referred to the

answering affidavit deposed to by the chairperson Dr Engelbrecht. In deciding the two applications, the court *a quo* concluded that there is no likelihood of another court coming to a different decision and dismissed both applications with costs. The appellant is thus before us having petitioned the Supreme Court of Appeal.

[14] Therefore, at issue in this appeal are the following issues:

14.1 Whether the documents requested by the respondent constituted part of the review record;

14.2 Whether the court *a quo* erred in directing the appellant to produce documents that do not exist; and

14.3 Whether the appellant should be given leave to adduce new evidence in order to rectify the error in Mr Seisa's confirmatory affidavit.

[15] The appellant's argument as contained in his heads of argument is that –

15.1 Firstly, the court *a quo* ought not to have ordered the production of the documents because they do not exist and, in any event, did not form part of the review record.

15.2 Secondly, the court *a quo* ought to have permitted the introduction of the additional affidavit because no prejudice would be suffered, and the

evidence tendered is material to the determination of the matter and it was in the interest of justice to permit the introduction of the limited evidence.

[16] The contention is that the court *a quo* erred in finding that the chairperson did not have personal knowledge of the fact that the documents ordered to be produced did not exist and that all relevant documents had been disclosed as part of the review record. The argument being that the chairperson's evidence in this regard was sought to be confirmed by Mr Seisa in his confirmatory affidavit, but for the error. It was in the interest of justice for the court *a quo* to overlook what was plainly an obvious error and find that by reason of the mistake in Mr Seisa's affidavit there was no valid reason on record *"why copies of the notes regarding the minutes and the discussion notes of the Tribunal members cannot be made available"* to the respondent, so the argument goes.

[17] Sub-rule 35 (12) provides as follows:

> "Any party to any proceedings may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his or her inspection and to permit him or her to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with leave of the court, use such document or tape recording in such proceedings provided that any other party may use such documents or tape recording."

[18] There is *prima facie* an obligation on the applicant to produce documents for inspection if called upon to do so under Rule 35 (12). The rule is subject to a limitation that if the document is not in the applicant's possession and he or she cannot produce it, the court will not compel him or her to do so. The *onus* is, however, on the applicant to set up facts relieving him or her of this obligation. [1]

[19] In my opinion the appellant has discharged the burden placed on it to prove that the documents requested have been destroyed and do not exist. It is evident from the evidence of the appellant contained in the sworn statement of Dr Englebrecht that the documents do not exist. Dr Engelbrecht states in the affidavit that the notes in regard to the other tribunal members are handed back to the appellant's case administrator Mr Seisa, together with the meeting packs and are thereafter destroyed. The trial court ought to have accepted this evidence. There is no evidence by the respondent, on oath, gainsaying this evidence. The respondent merely questioned the regularity of the decision to destroy the documents which is of no moment for purposes of the issues before us. Whether or not the notes should have been destroyed is beside the point. The actual fact is that the notes have been destroyed and are no longer available for production by the appellant.

[20] The court *a quo* misdirected itself in rejecting Dr Engelbrecht's evidence as hearsay evidence merely on the error in the confirmatory affidavit of Mr Seisa. It is evident that Mr Seisa's affidavit contained an obvious error which the court *a quo*

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[1] See Unilever plc and Another v Polagric (Pty) Ltd 2001 (2) Sa 329 (C) At 338c – D.

ought to have condoned. The court *a quo* further misdirected itself in failing to allow the introduction of the new evidence tendered by Mr Seisa which corrected the initial confirmatory affidavit. This new evidence ought to have been allowed because it is material and has an important influence on the outcome of the case.

[21] I am in agreement with the appellant's submission that the documents requested by the respondent do not form part of the record of review and, on that basis alone the court *a quo* should not have ordered their production. The notes requested are not like the minutes and the discussions of the tribunal members during its sitting but are personal notes made by the members in preparation for the Tribunal meetings and can therefore not be said to constitute part of the review record.

[22] In the circumstances the appeal stands to be upheld.

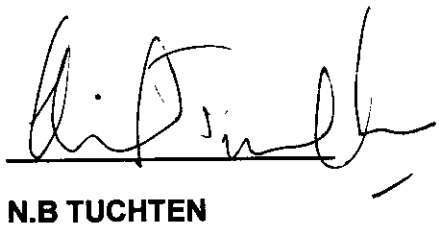
[23] I therefore make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

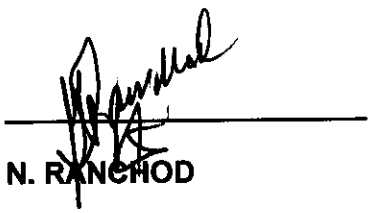
I AGREE



N.B TUCHTEN

JUDGE OF THE HIGH COURT

I AGREE, AND IT IS SO ORDERED



N. RANCHOD

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE	: 01/06/2016
DATE OF JUDGMENT	: 14/06/2016
APPELLANT'S COUNSEL	: ADV. N.H MAENETJE
APPELLANT'S ATTORNEYS	: GILDENHUYS MALATJI INC.
RESPONDENTS' COUNSEL	: NO APPEARANCE
RESPONDENTS' ATTORNEY	: VAN ZYL LE ROUX INC.