

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

2/11/16

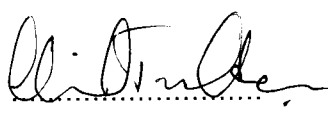
CASE NO: 26553/2015

In the matter between:

LARTZ GOUWS

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
<u>31/10/16</u> DATE		 SIGNATURE

ROAD ACCIDENT FUND APPEAL TRIBUNAL

First Respondent

ROAD ACCIDENT FUND

Second Respondent

**HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

Third Respondent

PROF GJ VLOK NO

Fourth Respondent

DR CF KIECK NO

Fifth Respondent

DR C LIEBETRAU NO

Sixth Respondent

DR RK MARKS NO

Seventh Respondent

JUDGMENT

Tuchten J:

- 1 The applicant was involved in an accident allegedly caused by or arising from the driving of a motor vehicle. He decided to claim compensation for his alleged injuries from the second respondent (the Fund). Under s 17(1) of the Road Accident Fund Act, 56 of 1996 (the RAF Act), the Fund is liable, subject to the RAF Act, to compensate any person (the third party) for loss or damage sustained by the third party in such circumstances.
- 2 Before the substitution of s 17 of the RAF Act effected pursuant to Act 19 of 2005, the Fund was generally liable to compensate a third party for both pecuniary and non-pecuniary loss. But under the new regime instituted in 2005, s 17(1) was made subject to a proviso: the obligation of the Fund to compensate a third party for non-pecuniary loss is limited to compensation for “serious injury” as contemplated in s 17(1A).¹
- 3 There are presently three methods of determining what is and what is not a serious injury for purposes of the RAF Act. They are identified in reg 3 of the Road Accident Fund Regulations (the Regulations).² Firstly, the responsible minister may publish after consultation with the

¹ Section 17 (1) provides: Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

² Published under Government Notice R770 in GG 31249 of 21 July 2008.

Minister of health, a list of injuries which are for purposes of section 17 of the RAF Act not to be regarded as serious injuries. No injury shall be assessed as serious if that injury meets the description of an injury which appears on the list. Secondly, if the injury resulted in 30 percent or more Impairment of the "Whole Person as provided in the AMA Guides", the injury shall be assessed as serious. Thirdly, an injury which does not result in 30 percent or more Impairment of the Whole Person may only be assessed as serious if that injury resulted in a serious long-term impairment or loss of a body function, constituted permanent serious disfigurement, resulted in severe long-term mental or severe long-term behavioural disturbance or disorder or resulted in loss of a foetus.

- 4 The applicant's case is that his claim for compensation for serious injury should be assessed under the third basis. He alleges that his injuries resulted in a serious long-term impairment or loss of a body function.
- 5 Reg 3(1) requires a claimant in the position of the applicant to submit himself to an assessment by a medical practitioner. The applicant was assessed for that purpose by Dr de Graad. She concluded for this purpose that the applicant required a shoulder replacement on the left and an arthrodesis of the left thumb. At the time of his accident on 24

July 2010, the applicant was a shiftboss at a mine. Dr de Graad believed that the injuries restricted the applicant from doing his normal work.

- 6 Dr de Graad's findings were submitted to the Fund in the prescribed manner in what the Regulations call a serious injury assessment report. Under reg 3(d), the Fund itself³ must consider the assessment. Under reg 3(d)(i), the Fund is empowered to reject the serious injury assessment report. That is what the Fund did.
- 7 A third party in the applicant's position who disputes the rejection of the serious injury assessment report has a right of appeal to an appeal tribunal consisting of three independent medical practitioners.⁴ In addition, the Registrar of the third respondent (the HPC) may appoint an additional independent health practitioner with appropriate expertise to assist the appeal tribunal in an advisory capacity.
- 8 The applicant duly lodged his appeal and the appeal was adjudicated at a formal level in accordance with the Regulations. The tribunal upheld the Fund's rejection of the serious assessment injury report.

³ I omit the reference in the legislation to an agent of the Fund, something of no relevance for present purposes.

⁴ Reg 3(8)

It did so not on the basis relied upon by the Fund but, having found that the applicant was a karate instructor, as follows:

With all the information available, the [tribunal] cannot find a link between his left shoulder and his right thumb as well as the carpal tunnels.

The [tribunal] must take notice that [the applicant] was a karate instructor and with the information available cannot bring the accident to his present condition as well as the surgeries he had.

- 9 The tribunal thus found that the injuries which the applicant had suffered had not been caused by the accident on 24 July 2010. The applicant took the decision of the tribunal on review. The applicant asks that the decision of the tribunal be set aside and the matter remitted for consideration afresh. Whether the review should succeed is before me for adjudication. It was common cause between counsel that it was implicit in the decision of the tribunal that the tribunal had found that its jurisdiction extended to the issue of causation.
- 10 I was not referred to any previous decisions in this regard. Counsel for the third to seventh respondents (the first and second respondents abided) submitted that it was implicit in the legislation to which I have referred that the tribunal correctly treated causation as falling within the tribunal's remit. Counsel conceded that legal causation remained

indeed for the court to decide in due course but submitted that the question whether medical causation was established in a particular case had been entrusted in first instance to the Fund and then to the tribunal. Medical causation, counsel said, was to be found in the interrelationship between the injury and the pathology which gives rise to it. But counsel had difficulty in identifying the separate scopes, if any of medical and legal causation in relation to the present dispute. I do not see any myself.

- 11 Furthermore, I think division of the duty to decide causation between the Fund and the Tribunal on the one hand and the court on the other would potentially give rise to intolerable confusion as to the boundaries of jurisdiction. To compound the confusion, this suggested role of the Fund and the tribunal would only arise when the issue of a serious injury was raised. In all other cases, on the analysis of counsel for the opposing respondents, the court would retain complete (ie not merely partial) jurisdiction to determine causation. It seems to me improbable and unwieldy for certain aspects of causation arising in certain categories cases to be withdrawn from the jurisdiction of the court while other aspects of other categories remain.
- 12 If counsel's submission is correct, then if a tribunal finds an injury or set of injuries to be serious, on whatever ground, then the Fund would

be disabled from arguing at the trial that the plaintiff had not established causation. This could have far reaching and even absurd consequences.

- 13 The courts have for decades determined causation. Difficult questions arise in this regard from time to time. In my view the courts, duly informed by expert evidence and argument, are better suited to make this adjudication than the administrative decision makers in question.
- 14 Finally, at the level of language, I find nothing in the legislation which enjoins the Fund or the tribunal to consider anything more than whether the injuries identified in the serious injury assessment report are or are not serious injuries for the purposes of the legislation. In making the assessment, the Fund or tribunal, as the case may be, may be called upon to consider whether certain consequences followed upon the injury (*“resulted in a serious long-term impairment or loss of a body function, severe long-term mental or behavioural disturbance or disorder or loss of a foetus”*). But that is not the same as the question whether the injury in question was caused by or arose from the driving of a motor vehicle.

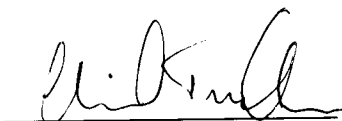
15 The applicant has established that the decision of the tribunal was affected by the fact that the tribunal's decision was taken for a reason not authorised by the legislation which empowered the tribunal to act and that the tribunal took irrelevant considerations into account in conflict with ss 6(2)(e)(i) and (iii) of the Promotion of Administrative Justice Act, 3 of 2000. I therefore conclude that the tribunal misconceived its jurisdiction and that the review must succeed. Of course nothing that I have said should be read as confirming or rejecting the existence of a causative link between the injuries found in the serious injury assessment report to be present and the driving of the motor vehicle which the applicant says caused his injuries. That, as I have been at pains to state, is a matter for the trial court.

16 The applicant asks for the costs of two counsel. I think that the novelty of the issue raised justified the employment of both senior and junior counsel.

17 I make the following order:

1 The decision of the first respondent of 1 August 2014 under reference no. RAFA/001125/2013 is reviewed and set aside.

- 2 The matter is remitted to the Road Accident Fund Appeal Tribunal (the first respondent) for reconsideration by a different panel to be constituted by the Registrar of the third respondent.
- 3 The tribunal constituted in terms of paragraph 2 above must take into account all relevant material including such further documents and material which may be made available to it before the hearing of the appeal.
- 4 The third respondent must pay the costs of this application including the costs consequent upon the appointment of both senior and junior counsel.


NB Tuchten
Judge of the High Court
24 October 2016

LartzRAF26553.15

For the applicant:
Adv FA Ras SC and Adv M Tromp
Instructed by Potgieter Inc
Pretoria

For the first and third to seventh respondents:
Mr T Maodi
of Gildenhuys Malatje Inc
Pretoria