14/2/2018

# IN THE HIGH COURT OF SOUTH AFRICA
## GAUTENG DIVISION, PRETORIA

CASE NO:54182/2016

14/2/18

DELETE WHICHEVER IS NOT APPLICABLE

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

14/2/2018 .....
DATE SIGNATURE

In the matter between:

**NN VILANE** **APPLICANT**

**and**

**HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA** **FIRST RESPONDENT**

**THE REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA** **SECOND RESPONDENT**

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

**THE ROAD ACCIDENT FUND** **FOURTH RESPONDENT**

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## JUDGMENT

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**RANCHOD J:**

[1] The applicant sustained injuries in a motor vehicle accident on 17 February 2013 as a passenger. She was 15 years old at the time and a scholar in grade 8.

[2] The applicant seeks the review and setting aside of a decision by the third respondent (the Tribunal) which was communicated to the applicant's attorneys in a letter dated 9 February 2016 to the effect that the injuries sustained by the applicant are non-serious in terms of s17(1A) of the Road Accident Fund Act 56 of 1996 and the regulations framed thereunder ("the Act" and "the regulations" respectively). Where I refer to the first to third respondents collectively they will simply be called 'the respondents' for the sake of convenience.

[3] The applicant further seeks an order that the second respondent be directed to appoint a new appeal tribunal "to determine the dispute reviewed and set aside in paragraph 1 and to further consider all medico-legal reports that served before the Tribunal in respect of the Applicant's injuries".

[4] The applicant submitted an RAF4 form (Serious Injury Assessment Report) completed by Dr JJ Schutte to the fourth respondent (the RAF) as she was claiming, *inter alia*, non-pecuniary loss. The requirement for the completion of an RAF4 form is in terms of the Act and the regulations.

[5] Dr Schutte determined that the applicant's Whole Person Impairment (WPI) was 15% which was below the threshold of 30%. However, in accordance with the serious injury narrative test he determined that the applicant had a serious long-term impairment or loss of a body function.

[6] The RAF rejected the assessment and the applicant thereafter appealed to the third respondent.

[7] The second respondent constituted the appeal tribunal comprising of four medical specialists, viz.: -

a) Dr J. Sagor (Orthopaedic Surgeon);

b) Dr R. Melville (Neurosurgeon);

c) Dr M. Hannah (Orthopaedic Surgeon); and an additional member; and

d) Dr J.P Driver Jowett (Orthopaedic Surgeon).

[8] The tribunal met on 16 December 2015 to consider the appeal and resolved – as set out in the first applicant's letter dated 9 February 2016 to the applicant's attorneys that –

"Right elbow doesn't constitute a serious injury.
Does not qualify for general damages".

[9] The applicant contends that the letter did not provide substantial reasons for the conclusion or how such decision was reached by the tribunal.

[10] The applicant contends further that the tribunal 'failed to consider all medico-legal reports in respect of the applicant's injuries and did not take the narrative test or serious long-term impairment or loss of a body function into account when deciding the matter.'

[11] The applicant says the Tribunal failed to exercise any of the options available to it i.e. –

- to have regard to all expert reports, and/or;
- direct that the applicant be assessed by another expert, and/or;
- follow a proper procedure of a hearing in order to decide the issues in dispute.

[12] In the result, so it is submitted -

'the Tribunal materially misdirected itself by not paying proper heed to the opinions as expressed in the expert reports filed of record which lead to a materially unreasonable decision in respect of the finding under review, *alternatively* there was a failure on the part of the majority to properly apply the narrative test on the available evidential material and that they were therefore materially influenced by an error of law and/or fact *alternatively* the decision made in the circumstances

amounted to arbitrary action and is procedurally unfair hence the decision of the Tribunal stands to be reviewed and set aside.'

[13] Dr Mourad Hanna deposed to the answering affidavit on behalf of the respondents in which, although he makes a number of legal submissions, firstly raises a *point-in-limine* in which he challenges the authority of the respondent's attorney to depose to the founding affidavit on behalf of the applicant. The *point-in-limine* cannot be sustained as the respondents did not avail themselves of the procedure laid down in Rule 7(1) of the Uniform Rules of Court[1].

[14] Subsequent to the filing of the record by the respondents in terms of Rule 53, the applicant delivered a supplementary founding affidavit. In it the applicant says the tribunal applied the incorrect test to determine whether the applicant qualified for non-pecuniary loss. "The question that should have been addressed is not whether the injury is serious but whether the injury resulted in a serious long-term impairment of a body function. The issue was not considered by the Tribunal."

[15] Dr Hanna, who was the chairman of the tribunal that considered the applicant's case, says the tribunal considered all the documents before it, including all the medico-legal reports. It is not clear at all on what basis the applicant alleges that the tribunal did not consider the medico-legal reports.

[16] Section 17(1) of the Act provides that the obligation of the RAF to compensate a party for non-pecuniary loss–

16.1 'shall be limited to compensation for a serious injury as contemplated in subsection (1A) . . . .'

16.2 Subsection 17(1A)(a) provides for the-

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[1] Rule 7(1) provides:
'Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

'Assessment of a serious injury . . . .'

16.3 Regulation 3(1)(b) provides –

'The medical practitioner shall assess whether the third party's injury is serious . . . .'

16.4 Regulation 3(1)(b)(ii) provides that where the WPI is more than 30%-

'it shall be assessed as serious.'

16.5 Regulation 3(1)(b)(iii) provides that where the WPI is less than 30% (as is the case in this matter before me) an injury-

'may only be assessed as serious if that injury:

(aa) resulted in a serious long-term impairment or loss of a body function;

(bb) . . . .' (My underlining).

[17] It is clear from the wording of the relevant sections of the Act and the regulations that an assessment must be made whether an injury is serious. The tribunal said the injury to the right elbow did not constitute a serious injury. It said it considered the clinical and medico-legal reports of the applicant's specialists as well as that of Dr Vlok, who provided a medico-legal report for the RAF, in conjunction with the RAF4 form. It applied the narrative test to assist to determine 'whether the injury has resulted in a serious long-term impairment or loss of body function.' The tribunal says that in making the assessment it also took into account the circumstances of the applicant.

[18] Hence, the submission that the tribunal applied the wrong test is without merit.

[19] The applicant sustained the injuries in February 2013.

19.1 Dr Oelofse, an orthopaedic surgeon, examined the applicant on 6 November 2013 and said the applicant has a loss of function in her right elbow and is unable to carry even light objects. He was of the view that the injury could lead to osteoarthritis and that the applicant would be an unfair competitor in the open labour market in future.

19.2 Dr Andre Vlok, also an orthopaedic surgeon, examined the applicant at a much later date, i.e., on 16 February 2015. It appears that the applicant informed him that apart from her current injury to the right elbow she had sustained a previous supracondylar fracture of the same elbow when she was nine years old. She had a closed reduction done of the fracture and reportedly had no problems with the elbow following this injury. Dr Vlok's conclusion is that there is presently a loss of 15 degrees of full extension of the right elbow. The range of movement in her right wrist and shoulder was, however, found to be normal. He concluded that the loss of 15 degrees of extension was not of any functional significance and did not require any further treatment. He also stated that while the applicant did complain of intermittent discomfort in the right elbow there was no apparent cause for it and it should be treated conservatively. Dr Vlok was of the view that the prognosis of the elbow injury was good and that it was extremely unlikely that she will develop degenerative changes in the right elbow requiring treatment or injury. The latter view appears to have been based on the X-ray report which states that there is no evidence of any degenerative changes in the elbow and apart from the loss of extension of the elbow she has made a very good functional recovery from the injury. He says from an orthopaedic perspective the applicant will be able to do 'medical' engineering work until retirement age. The reference to 'medical' engineering is no doubt an error as the applicant had told all the experts who had interviewed her that she wanted to pursue 'mechanical' engineering studies in the future. As far as playing netball is concerned, Dr Vlok was of the view that she can resume playing but it is possible that she will probably not be able to return to playing at the same she would have been able to had the accident not occurred.

19.3 The occupational therapist Elna Kingsley evaluated the applicant on 24 February 2015 and concluded that she has

suffered a loss of amenities in that she experiences pain on an occasional basis in the right elbow, feels self-conscious about the scars on her right elbow and right knee and has not been able to participate in netball since the accident due to the right elbow pain. Ms Kingsley is of the opinion that the applicant has suffered a loss of earning potential but that her work capacity is expected to improve with successful treatment although she may be restricted in terms of choices of work. She concludes that it is not advisable for the applicant to perform medium to heavy work in future as she could develop osteoarthritis in her right elbow joint.

19.4 The occupational therapist Ms Gale Vlok who assessed the applicant on 16 February 2015 concludes in her medico-legal report that the results of the tests conducted on the applicant indicate that the applicant should be able to meet the physical demands of light to occasional medium range physical work. According to Vlok the applicant's physical capacity is expected to improve when she reaches full maturity. She reports that although the applicant reported pain in her right elbow and both wrists her pain did not impact on her overall performance and opines that the applicant tends to overstate her pain. According to Vlok the pain and discomfort in her right elbow and both wrists does not impact on the applicant's ability to work.

19.5 As I understand the industrial psychologist Dr AC Strydom's report, the applicant would not be able to attain a degree in mechanical engineering as she has a below average level of reasoning ability and she is likely to experience some difficulty fully comprehending complex logic and subtle shades of meaning. She is of the view that the applicant has the ability to complete mechanical subjects at an FET institution.

19.6 The industrial psychologist Dr LA Fourie concluded that the applicant is potentially slightly limited in terms of her career options. He is also of the opinion that, taking cognisance of the applicant's socio-economic circumstances and her relatively

poor academic performance, she was not likely to have completed grade 12 or would only have completed it at a low level.

[20] These were in essence the findings of the various experts. However, in view of the elbow injury, it is apparent that the views of the orthopaedic surgeons are of importance as well as that of the occupational therapists. As I said, Dr Vlok examined the applicant at a much later stage than Dr Oelofse. At that later stage there was no evidence of degenerative changes in the right elbow.

[21] There are certain differences of opinion between the experts of the applicant and those of the RAF. The appeal tribunal included three orthopaedic surgeons. Dr Hannah says the tribunal considered, *inter alia*, all the medical reports and came to the conclusion that they did. The tribunal considered the various opinions and came to its own conclusion. It is not for this court to second-guess the opinions of the experts.

[22] The applicant says the tribunal failed to exercise its option to direct her to be assessed by another expert, or hold a hearing (presumably where the applicant can be present) founds grounds for review. The relevant statutory provisions do not provide that the tribunal *must* have the applicant assessed by another expert or *must* hold a hearing. It is an option (a choice) that it may elect to exercise depending on the circumstances of a case. It determined that in this case it was not necessary.

[23] In all the circumstances the submission that the tribunal did not pay proper heed to the expert reports which led it to a materially unreasonable decision alternatively, that it was materially influenced by an error of law and/or fact alternatively that the decision amounts to arbitrary action and is procedurally unfair cannot stand up to scrutiny.

[24] 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*[2] 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.'

[25] 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.' (My emphasis.)

[26] In so far as questions of reasonableness and rationality are concerned it was held by the Constitutional Court in *Pharmaceutical Manufacturers Association*[3] 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

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[2] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004(4) SA 490 (CC) at para [45]

[3] 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]

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.'

[27] 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 Clairisons CC*[4]:

'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 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 applicant, 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.

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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.'

[28] 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.

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[4] MEC for Environmental Affairs and Development Planning v Clairisons CC (408/2012) [2013] ZASCA 82 at paras [18] and [22]

[29] 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.

[30] The application is dismissed with costs.

**RANCHOD J**
**JUDGE OF THE HIGH COURT**

Appearances:

Counsel on behalf of Applicant : Adv. E.P Van Rensburg

Instructed by : Van Zyl Le Roux Inc.

Counsel on behalf of First to Third Respondent: Adv I.P Ngobese

Instructed by : Moduka Attorneys

Date heard : 6 September 2017

Date delivered : 14 February 2018