IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 18332/2018

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
	DATE: 6 June 2016
	SIGNATURE: .....

In the matter between:

VAN DER WALT: DALENE MAURITA	Applicant
And	
THE ROAD ACCIDENT FUND APPEAL TRIBUNAL	First Respondent
THE ROAD ACCIDENT FUND	Second Respondent
THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA (HPCSA)	Third Respondent

DR. D. LEKALAKALA	Fourth Respondent
DR. T. RAMOKGOPA	Fifth Respondent
DR W.E. WILLIAMS	Sixth Respondent
DR. M. MOKABANE	Seventh Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

[1] This matter concerns the question whether the applicant suffered serious injuries as envisaged in section 17(1A) of the Road Accident Fund Act, 56 of 1996 ("the Act"). The first respondent expressed the opinion that the applicant's injuries are non-serious and the applicant, being unsatisfied with the decision, seeks an order that the decision be reviewed and set aside.

LEGISLATIVE FRAMEWORK

[2] The Road Accident Fund ("the Fund") was established to compensate a person ("third party") for loss or damage suffered by a third party as a result of the unlawful driving of a motor vehicle. [Sec 3]

[3] Section 17(1) of the Act limits the payment of non-pecuniary loss to serious injuries as contemplated in section 17(1A). Section 17(1A) states that the assessment of a serious injury shall be determined on a prescribed method adopted after consultation with medical service providers.

[4] Regulation 3 of the regulations promulgated in terms of the Act pertains to the assessment of a serious injury for purposes of section 17(1A). Regulation 3(1)(b)(ii) and (iii) is relevant and reads as follows:

"(ii) 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.

(iii) 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:

(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."

[5] Regulation 3 prescribes the process to be followed in order to establish whether the injuries in question comply with the criteria *supra*. Should a medical practitioner be of the view that the injuries do comply with the criteria *supra,* a serious injury assessment report (RAF4) is submitted to the Fund. The Fund must determine whether the injuries are serious or not and notify the third party of its decision.

[6] Should the Fund reject the RAF4 an aggrieved third party may, in terms of regulation 3(4)(a) lodge a dispute resolution form. In terms of regulation 3(4)(b), a disputant shall set out the grounds upon which the rejection is disputed and include such submissions, medical reports and opinions the disputant wishes to rely on.

[7] The Registrar of the Health Professionals Council of South Africa ("the Registrar") shall, in terms of regulation 3(8) refer the dispute for consideration by an appeal tribunal.

[8] The appeal tribunal consists of three independent medical practitioners with expertise in the appropriate area of medicine and the Registrar may appoint an additional independent health practitioner with expertise in any appropriate health profession to assist the appeal tribunal. [Reg 3(8)(b) and (c)]

[9] The appeal tribunal has, in terms of regulation 3(11), the following powers:

> *"(11) The appeal tribunal shall have the following powers--*
>
> *(a) Direct that the third party submits 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.*

(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." (Own underlining)

[10] The appeal tribunal must, in terms of regulation 3(12) inform the Registrar of its *"findings"* and the Registrar in turn informs the parties of the *"findings"*.

[11] The decision may be reviewed and set aside by a court if an applicant succeeds in establishing one or more of the grounds of review contained in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

FACTS

[12] The applicant, a 36 year female at the time, sustained injuries as a result of a motor vehicle collision that occurred on 5 May 2014. The applicant's injuries were assessed by various medical practitioners who all agreed that the injuries are serious and will result in life-long impairment. In this respect, the prescribed RAF4 assessment report was delivered to the Fund.

[13] The Fund rejected the RAF4 assessment and on 9 December 2016, the applicant declared a dispute as envisaged in regulation 3(4). In terms of the provisions of regulation 3(4)(b), substantiating documents were attached to the dispute declaration, which documents included, *inter alia*, the following:

i. RAF4 serious injury assessment form and medico legal report by Dr M de Graad, an orthopaedic surgeon;

ii. RAF4 serious injury assessment form and medico legal report by Professor Chait, a plastic surgeon;

iii. RAF4 serious injury assessment form and medico legal report by Ms N Prinsloo, a clinical psychologist;

iv. Medico legal report by Dr Mathey, a psychiatrist;

v. RAF4 serious injury assessment form and medico legal report by Professor van der Jagt, an orthopaedic surgeon;

vi. Joint minutes between the orthopaedic surgeons; and

vii. Joint minutes between the industrial psychologists.

[14] The joint minutes of the meeting between Dr de Graaf and Professor van der Jagt recorded the applicant's physical injuries, the impact the injuries have on her daily functioning and they agreed the applicant's injuries are serious with a serious long-term impairment and loss of body function.

[15] Ms Prinsloo came to the following conclusion in her report:

"8.7 The clinical history, clinical observations, test results and collateral information that were obtained during the assessment indicate that Mrs. Van der Walt suffers from chronic PTSD with symptoms of anxiety and depression."

[16] Ms Prinsloo was of the opinion that the applicant's chronic emotional state which was caused by the collision, is serious and will result in long-term impairment.

[17] On 22 February 2017 the applicant was advised that three orthopaedic surgeons and a neurologist were appointed to the appeal tribunal.

[18] On 29 August 2017, the applicant's attorneys of record were informed that the appeal tribunal resolved as follows:

"i. That the patient was involved in a motor vehicle accident on 05 May 2014.

ii. The patient sustained soft tissues injury, injury cervical spine, injury lumbar spine, injury left shoulder. The injuries were treated conservatively.

iii. He (sic!) *has history of multiple shoulder operations, for recurrent dislocation.*

iv. The panel having assessed the information on file is of the opinion that the injury does not qualify as serious under the narrative test."

[19] The applicant was not satisfied with the decision and launched the present application.

GROUNDS FOR REVIEW

[20] In the founding affidavit filed on behalf of the applicant, the following is, *inter alia*, stated:

> *"16. The conclusion provided by the first and third respondent(s) states that the injury is not considered serious, but does not specifically indicate and/or motivate its findings with regard to both components of the serious injury assessment, namely, the whole body impairment ("WPI") test, as well as under the "narrative test".*
>
> *17. The first and third respondents simply highlight certain facts in their assessment namely, injuries sustained by the applicant and a history of shoulder operations for recurrent dislocation.*
>
> *…*
>
> *19. It is apposite to draw this Honourable Court's attention to the paucity of* ***ANNEXURE A,*** *namely, that the reasons for the first respondent's findings and/or administrative decision are lacking."*

DISCUSSION

[21] The furnishing of reasons for an administrative decision that adversely affects the rights of an individual is the cornerstone of fair administrative action. Cora

Hoexter in *Administrative Law in South Africa* Cora Hoexter, 2nd edition, at 463, explains the importance of giving adequate reasons as follows:

"8.2 WHY GIVE REASONS?

'*The giving of reasons is one of the fundamentals of good administration'. Lord Denning's words echo a common-sense perception that reasoned decisions are generally preferable to unreasoned ones, and that it is fair to inform affected individuals of the reasons for any action which has been taken against them. From a constitutional point of view, the provision of reasons is an important mechanism for making administrators accountable to the people they serve and for achieving the 'culture of justification' our Constitution commits us to. It is also likely to increase public confidence in the administrative process and thus enhance its legitimacy. Citizens are far more likely to have faith in a system of government which respects their interests, and their dignity, in this way.*

From the affected individual's point of view, reasons offer considerable procedural benefits. Indeed, the right to reasons is often regarded as a crucial component of procedural fairness or natural justice, and the PAJA acknowledges this by requiring that affected individuals be informed of their right to reasons. Clearly, the decision whether and how to challenge an unfavourable administrative decision is far more sensibly made once reasons have been given for it. Reasons give one something to work with, for example in deciding whether an administrator has pursued improper purposes, taken irrelevant considerations into account or made an error of law. Thus in Koyabe v Minister for Affairs 2010 (4) SA 327 (CC), where the applicants had been declared illegal foreigners, Mokgoro J recognised that reasons are 'important in

seeking a meaningful review by the Minister and in enhancing the chances of getting the immigration agent's adverse finding overturned'."

[22] In order to determine whether reasons in a particular instance are adequate, it is incisive to have regard to what was stated by Schutz JA in *Minister of Environmental Affairs & Tourism v Phambili Fisheries* 2003 (6) SA 407 SCA at para [40] as follows:

"[40] *What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others (1983) 48 ALR 500 at 507 (lines 23 - 41), as follows:*

> *'The passages from judgments which are conveniently brought together in Re Palmer and Minister for the Capital Territory (1978) 23 ALR 196 at 206-7; 1 ALD 183 at 193-4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging".*
>
> *This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the*

reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.'

To the same effect, but more brief, in Hoexter The New Constitutional and Administrative Law vol 2 at 244:

'(I)t is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information.'

See also Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others 1986 (2) SA 756 (A) at 772I-773A."

[23] *In casu,* the relevant law is contained in regulation 3(1)(b)(iii)(aa) referred to *supra*. In the result, the appeal tribunal had to consider whether the applicant's injuries resulted in a serious long-term impairment.

[24] To this end, it is rather the sequelae of the injuries and not the injuries in isolation, that play a role in determining whether it resulted in a serious long-

term impairment. This aspect is dealt with in the medico-legal reports filed by the applicant in support of the dispute resolution. It is not clear from the reasons provided by the appeal tribunal whether it was aware of the law applicable to the subject matter of its decision.

[25] The next step is for the decision maker to record any findings of fact in respect of the decision to be taken. *In casu the* appeal tribunal did not record any factual findings in respect of the long-term impairment the injuries will have on the applicant. The recording of facts is in respect of the applicant's physical injuries which only forms the basis for the inquiry in question.

[26] Lastly the reasons for the conclusion reached by the decision maker should be set out.

[27] No reasons are given for the conclusion reached by the appeal tribunal that the applicant's injuries will not lead to serious long-term impairment. In the result and due to the insufficient reasons, it is simply impossible to determine whether the decision complies with the constitution imperative of fair and reasonable administrative decisions.

[28] In the result, the review should succeed.

COMMENT

[29] Litigation in respect of decisions taken by the appeal tribunal has increased at an alarming rate. I had no less than four opposed review applications in the

opposed motion court in one week. In each application the reasons furnished by the appeal tribunal pertaining to their decisions were dismally inadequate.

[30] Firstly, the reason may, most probably, be attributed to the wording of regulation 3(12) *supra*, that requires the appeal tribunal to notify the Registrar of its *"findings"*. As stated in *Minister of Environmental Affairs & Tourism v Phambili Fisheries supra* mere findings, without explaining why a decision was taken will not necessarily suffice.

[31] Secondly, the appeal tribunal consists of medical practitioners who are not *au fait* with the intricacies of administrative law.

[32] In order to curtail the flood of litigation at the expanse of the tax payer, I would propose that the medical practitioners who form part of an appeal tribunal be provided with a guideline in respect of the requirements for the furnishing of adequate reasons.

ORDER

[33] In the premises, I grant the following order:

1. The decision of the first respondent dated 29 August 2018, to the effect that the injuries suffered by the applicant are non-serious in terms of section 17(1A) of the Road Accident Fund Act 56 of 1996, and its regulations are reviewed and set aside.

2. The Registrar of the Health Professions Council of South Africa is directed to re-appoint a new appeal tribunal to determine the dispute lodged by the applicant on 9 December 2016.
3. The third respondent is ordered to pay the costs of the application.

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N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD	21 May 2019
JUDGMENT DELIVERED	6 June 2019

APPEARANCES

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