REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 75673/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: **YES**

6/8/2019

E.M KUBUSHI DATE

In the matter between:

M C KAU	**Applicant**
and	
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	**First Respondent**
THE ACTING 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**

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] The issue that came for determination in this opposed application was who of the four respondents was responsible to pay the costs incurred by the applicant. The applicant in its papers prayed for an order of costs against the Health Professions Council of South Africa ("the first respondent") and in court the argument was extended to include the Acting Registrar of the Health Professions Council of South Africa ("the second respondent") and the Road Accident Fund Appeal Tribunal ("the third respondent"), jointly and severally. The first, second and third respondents ("the respondents"), in opposing the application are denying that they are liable to pay the costs.

[2] The issue emanates from the application launched by the applicant for the judicial review of the third respondent's decision in finding that the injury the applicant suffered in a motor vehicle collision was non-serious for purposes of the Road Accident Fund Act 56 of 1996 ("the Act") read with its Regulations.

[3] The actual relief sought by the applicant is couched as follows in the review application:

3.1 Reviewing and setting aside the decision of the third respondent dated 1 April 2016 to the effect that the injuries suffered by the applicant are non-serious in terms of section 17 (1A) of the Act and its Regulations.

3.2 That the first respondent is directed to re-appoint a new Appeal Tribunal to determine the dispute reviewed and set aside in paragraph 1 and to further reconsider all medico-legal reports that served before the Tribunal in respect of the applicant's injuries.

3.3 That the applicant be permitted to be present at the Appeal Tribunal hearing; and that the applicant be permitted to provide further evidence pertaining to his/her injuries at the Tribunal hearing if he/she wishes to do so.

3.4 That the first respondent be ordered to pay the costs of this application.

BACKGROUND MATRIX

[4] The review application originated from a claim which the applicant had instituted against the fourth respondent in terms of the Act, for compensation of damages suffered by the applicant as a result of the collision. Amongst others, the applicant claimed for general damages (non-pecuniary damages), which claim in terms of the Act is limited to compensation for serious injury.

[5] In order to succeed in such a claim, the Act requires the injury sustained by the third party to be assessed as serious. The prescribed method of assessment is contained in regulation 3 of the Regulations issued in accordance with the Act. The applicant's injury was, in terms of the narrative test,[1] assessed as serious by Dr D Menge and Dr D Hoffman. According to the doctors' assessment, the applicant was found to have serious long-term impairment or loss of body function as well as

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[1] Regulation 3 (1) (b) provides that –

"(b) The medical practitioner shall assess whether the third party's injury is serious in accordance with the following method:

(i) . . ."

(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 and severe long-term behavioural disturbances or disorder; or

(dd) resulted in loss of a foetus."

(Referred to as The Narrative Test).

permanent serious disfigurement which will cause pain and suffering requiring treatment. This assessment of serious injury was also confirmed by the orthopaedic surgeon who examined the applicant.

[6] Based on such assessment, the applicant submitted his claim for compensation for general damages with the fourth respondent. In terms of the requirements of the Act, for the fourth respondent to compensate the applicant it (the fourth respondent) must be satisfied that the injury was correctly assessed. The fourth respondent was not satisfied with the applicant's assessment and rejected the claim.

[7] When such a claim has been rejected, the applicant must follow a dispute resolution procedure set out in the Regulations.[2] The dispute resolution procedure is in essence an appeal against the decision of the fourth respondent in rejecting the assessment of serious injury. The appeal lies with the third respondent. As prescribed in the Regulations, it is the duty of the second respondent as an official of the first respondent to constitute the third respondent for the adjudication of the dispute.

[8] The applicant complied with all the requirements of the Regulations in lodging the dispute which was finally presented to the third respondent for adjudication. The decision of the third respondent was that the applicant's injury constitutes a non-serious musculo-skeletal injury and the rejection of the assessment by the fourth respondent was confirmed.

[9] The applicant was aggrieved by the decision of the third respondent and launched an application to review and set aside that decision together with an

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[2] Regulation 3 (3) – (9).

ancillary order for costs against the first respondent. The application was opposed by the respondents.

[10] Subsequent to setting the trial action down for hearing in respect of the other heads of damages, and before the review application was heard, the fourth respondent, pursuant to a settlement agreement with the applicant, conceded to the granting of an order that the applicant be awarded compensation for general damages. Based on this order, the applicant transmitted a letter to the first respondent seeking a tender for the payment of costs occasioned in the review application, to date of that letter. Despite the request for the tender of costs, the respondents proceeded to deliver their answering affidavit which necessitated the reply thereto by the applicant.

[11] When the parties appeared before me, the applicant abandoned prayers 1 to 3 in the notice of motion and only the issue of costs was argued.

THE APPLICANT'S ARGUMENT

[12] The applicant's argument in this regard is that as a successful litigant he should be indemnified for the expenses to which he has been put through having been unjustly compelled to initiate the review application. According to the applicant, by virtue of being awarded general damages by the fourth respondent, the substratum of the review application fell off. He was, therefore, successful in obtaining the relief he sought in respect of the prayers abandoned and, thus, entitled to the prayer remaining in the notice of motion for cost.

[13] The applicant's further argument is that he is a *bona fide* applicant and has been awarded the general damages and should not be left out of pocket. He argued

for costs against the first respondent or alternatively against the respondents, jointly and severally. In support of his argument, the applicant referred me to the judgments in *M Kotze v Health Professions Council of South Africa & Others,*[3] *TP Buthelezi v Health Professions Council of South Africa & Others*[4] and *SG May v Health Professions Council of South Africa & Others,* [5] as well as regulation 3 (14) *(a)* and *(b)*. Like in this instance, the three judgments dealt, respectively, with the application for the review of the decision of the Road Accident Fund Appeal Tribunal. In all three judgments the respective applicants were successful and were awarded costs. In *Kotze* and *May*, the respective courts made an order of costs to be paid jointly and severally by the first, second and third respondents, whereas in *Buthelezi* the order for costs was against the first respondent only. The costs orders in the three judgments were granted without any reasons proffered by the respective courts for the cost order awarded.

[14] The applicant argues that if the cost order is granted against the respondents, they would be entitled to recover such costs from the fourth respondent in accordance with regulation 3 (14) *(a)* and *(b)*. The sub-regulation provides that the fourth respondent shall bear the reasonable costs of the first respondent arising from sub-regulations (4) to (13) as agreed between the first respondent and the fourth respondent or as determined by the Minister. The fourth respondent shall also bear the reasonable fees and expenses of the persons appointed in terms of sub-regulation (8) and (10) *(b)*. Sub-regulations (4) to (13) deals with the dispute resolution procedure followed when a party is aggrieved by the fourth respondent's rejection of the serious injury assessment report. In terms of sub-regulation (8) the

[3] (23764/2018) [2019] HGDP (10 May 2019).
[4] (3039/2017) [2019] HGDP (17 April 2019).
[5] (1996/2016) [2017] HGDP (28 November 2017).

second respondent is empowered to appoint members of the third respondent whose services are paid for by the fourth respondent. Whereas in accordance with sub-regulation (10) *(b)* the second respondent has the authority to appoint a person with legal background to consider any legal argument presented to the second respondent by the presiding officer of the third respondent.

THE RESPONDENTS' ARGUMENT

[15] Conversely, the submission by the respondents is that they should not be held liable for the costs of the application. According to the respondents the applicant is not entitled to the costs of the application because: firstly, the application has been abandoned and without any hearing and final determination of the application, there can be no cost order against the respondents. Secondly, the fourth respondent had no authority to settle the award of general damages with the applicant since the matter was now in the hands of the first respondent and/or third respondent. The third respondent having adjudicated the dispute made a decision rejecting the assessment, which decision was final and binding – and until the decision has been reviewed and set aside by a court of law, it stands. In addition there is no provision in the Regulations that authorises the fourth respondent to overrule the decisions of the third respondent. Lastly, there is no specific relief sought against the fourth respondent in the review application and thus the settlement of the general damages' claim has no effect on the review application.

[16] In support of their argument, the respondents relied on the following regulations: regulation 3 (5) *(a)*, *(h)*, (9) *(b)* (iii) and (13) and the judgment in *Master*

of the High Court North Gauteng High Court, Pretoria v Enver Mohamed Motala NO & Others, [6] which dealt with the effect of orders not rescinded.

THE ISSUE

[17] The crux is whether the settlement of the award of general damages by the fourth respondent has any effect on the third respondent's decision to reject the assessment of serious injury of the applicant. Put differently, the crux is whether the concession by the fourth respondent to compensate the applicant has the effect of overruling the decision of the third respondent.

THE DISCUSSION

[18] The applicant's argument is that the fourth respondent can overrule the decision of the third respondent because the third respondent is brought into being by the fourth respondent in terms of the Regulations to serve a specific function. The third respondent is, according to the applicant, not a higher body than the fourth respondent. To the contrary, the respondents' contention is that the fourth respondent cannot overrule the findings of the third respondent which, unless set aside by a court of law, are final and binding.

[19] The process of adjudicating the dispute declared by the third party against the decision of the fourth respondent is provided for in regulation 3 of the Regulations. In terms of regulation 3 (3) *(c)* the fourth respondent shall only be obliged to compensate a third party for non-pecuniary loss as provided for in the Act if such a claim is supported by a serious injury assessment report and the fourth respondent is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in the Regulations. Where the fourth respondent rejects the

[6] (172/11) [2011] ZASCA 238 (1 December 2011).

assessment, the third party must notify the second respondent, in the manner and within the time period provided for in the Regulations, that the rejection or the assessment is disputed. If the second respondent is not notified, the rejection or the assessment shall become final and binding unless an application for condonation is lodged. If late notification is not condoned, the rejection or the assessment shall become final and binding.

[20] Where the third party has notified the second respondent about the dispute, the process is out of the hands of the fourth respondent, so to speak, and falls in terms of the Regulation within the domain of the first respondent. It is the duty of the first respondent, through the second respondent who is its officer, to constitute the third respondent to adjudicate the dispute. In terms of regulation 3 (13), the findings and decisions of the third respondent when adjudicating the dispute, are final and binding.

[21] The respondents rely on paragraph 14 in *Motala* in support of their proposition that the decision on the fourth respondent to settle the applicant's claim for general damages had no effect of the third respondent's decision to reject the serious injury assessment report because the decision of the third respondent is final and binding. The paragraph relied on reads as follows:

> "[14] In my view, as I have demonstrated, Kruger AJ was not empowered to issue and therefore it was incompetent for him to have issued the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect *Schierhout v Minister of Justice* 1926 AD

> 99 at 109). Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing. For as Coetzee J observed in *Trade Fairs and promotions (Pty) Ltd v Thomson & Another* 1984 (4) SA 177 (W) at 183E: '[i]t would be incongruous if parties were bound by a decision which is a nullity until a Court of an equal number of Judges has to be constituted specially to hear this point and to make such a declaration'. (See also *Suid-Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren & Others and the Taxing Master* 1964 (1) SA 162 (O) at 164D-H.)

[22] Although I am in agreement with the respondents that the decision of the third respondent was final and binding and could not be overruled by the fourth respondent's settlement of the applicant's general damages, I, however, do not think that *Motala* finds application in the facts and circumstances of the matter before me, in particular, the passage quoted above. This is so because *Motala* dealt with a decision made by a court of law whereas the decision in this instance is an administrative decision reviewable in terms of the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000.

[23] There are a number of judgments where this principle has been affirmed, like for instance, the judgments of the Supreme Court of Appeal and the Constitutional Court in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,*[7] *MEC for Health, Eastern Cape & Another v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute,*[8] *Merafong City v AngloGold Ashanti Ltd*[9] and *Department of Transport and Others v Tasima (Pty) Ltd.*[10]

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7 2004 (6) SA 222 (SCA).

8 2014 (3) SA 481 (CC).

9 2017 (2) SA 211 (CC).

10 2017 (2) SA 622 (CC).

[24] In *Oudekraal*, the Supreme Court of Appeal developed the principle that an unlawful act may produce legally recognisable consequences. In that judgment the administrator had granted a developer an extension to comply with the conditions for lodgement of a general plan after the expiry of the period of lodgement prescribed by the City's Ordinance. The court having made a finding that the administrator's action was unlawful and invalid at the outset, questioned whether such action should simply be disregarded as if it had never existed. The court came to the conclusion that until the administrator's approval is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.[11]

[25] The principle enunciated in *Oudekraal* was first afforded judicial recognition by the Constitutional Court in *Kirkland* where the court restated the principle as follows at paragraph 101 thereof:

> "[101] . . . invalid administrative action may not simply be ignored . . . until set aside by proper process."

[26] The principle was further reaffirmed by the Constitutional Court in *Merafong* where the Minister had overturned Merafong Municipality's decision to levy a surcharge on water for industrial purposes used by AngloGold. The court found that as a good constitutional citizen, the municipality was supposed to either accept the Minister's ruling as valid or to challenge it in court, but not to ignore it. The court explained the import of *Oudekraal* and *Kirkland* at paragraph 41 that "*government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid*" and that the decision "*remains legally effective until properly set aside*" by a court of law.

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[11] Para 26.

[27] In *Tasima*, the Department sought, by means of a collateral challenge, to impugn a decision of its official to extend an agreement with Tasima on the ground that such extension was in contravention of section 217 of the Constitution, section 38 of the Public Finance Management Act 1 of 1999 and the Treasury Regulations. The court held that although no invalid administrative decision may 'morph into a valid act' it may have a binding effect because of its mere factual existence until it is set aside by a court of law. The court further observed that the principle does not offend the doctrine of objective invalidity as it merely preserves the fascia of legal authority until the decision is set aside by a court and until that happens the decision remains legally effective, despite the fact that it may be objectively invalid.[12]

[28] I find the principle discussed in the aforementioned judgments to be apposite to the facts of the application in this instance. The principle finds application in that a decision once made, exists in fact and it has legal consequences that cannot be simply ignored.

[29] Similarly, in this instance, the findings of the third respondent, once made, were final and binding and unless set aside by a court of law, they should stand. It was not for the fourth respondent and/or the applicant to simply ignore the decision already made by the third respondent when they entered into the settlement agreement to award the general damages.

[30] Even though the substratum of the applicant's claim in the review application fell off, once the general damages were paid, that did not have any effect on the decision of the third respondent which required being set aside by the court before it could be ignored. The applicant instead of arguing the review application opted to

[12] Para 147.

abandon the prayers that formed the substratum of the application which had the effect of having abandoned the application. Since the application has been abandoned the applicant cannot, as such, be entitled to the costs of an abandoned application.

[31] I do agree, as well, that the applicant as the successful party, in the sense that he succeeded in his claim for general damages, ought not to be left out of pocket for the expenses incurred in instituting the review application. However, such costs cannot be placed on the shoulders of the respondents. The respondents are not the cause of the applicant having to unjustly, as he states, being compelled to initiate the review application.

[32] The argument by the applicant that the third respondent is brought into being by the fourth respondent in terms of Regulations to serve a specific function is not sustainable. The authorities stated in paragraph [23] of this judgment, bears that.

[33] Furthermore, since it is common cause that the findings of the third respondent have not been reviewed and set aside, I have to hold, therefore, that the applicant has failed to make out a case for an award of costs against either the first respondent or the respondents jointly and severally. The application stands to be dismissed.

[34] Consequently, the application is dismissed with costs.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel	: Adv P. A. Venter
Applicant's Attorneys	: VZLR Incorporated
The Respondents' Counsel (First, Second and Third Respondents)	: Adv R. Schoeman
The Respondents' Attorneys (First, Second and Third Respondents)	: Ramulifho Attorneys.
Date of hearing	: 14 May 2019
Date of judgment	: 06 August 2019