



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

**CASE NO: 96672/16**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) DATE DELIVERED: 14/12/2018

(4) SIGNATURE: 

In the matter between:

**E MALULEKE**

Applicant

and

**HEALTH PROFESSIONS COUNCIL**

First Respondent

**OF SOUTH AFRICA**

**THE ACTING REGISTRAR OF THE HEALTH**

Second Respondent

**PROFESSIONS COUNCIL OF SOUTH AFRICA**

Third Respondent

**THE ROAD ACCIDENT FUND APPEAL TRIBUNAL**

Fourth Respondent

**THE ROAD ACCIDENT FUND**

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**JUDGMENT**

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**MAKHUVELE J**

***Introduction***

[1] The applicant seeks an order to review and set aside the decision of the third respondent ("the Appeal Tribunal") dated 24 February 2016 in terms of which she was advised that having considered her reports, the Appeal Tribunal had "concluded that this

*matter is not serious and it does not qualify both under the narrative test and the AMA rating system"*<sup>1</sup>.

She also seeks an order to direct the second respondent to re-appoint a new Appeal Tribunal to reconsider her medical reports and that she be permitted to be present at the hearing and to provide further evidence pertaining to her injuries.

[2] The review is launched in terms of various subsections of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") on the basis that the decision was materially influenced by errors of law or facts, irrelevant considerations were taken into account, relevant considerations were not considered and that the action of the Tribunal was arbitrary and or procedurally unfair.

### ***Relevant legislative framework***

[3] The Road Accident Fund Amendment Act No. 19 of 2005 has imposed restrictions or limitations on amongst others, compensation for non-pecuniary loss. In this regard, the assessment of claims is regulated by Regulations promulgated in terms of Section 26 of the Road Accident Fund Act No. 56 of 1996, as amended (the Act).

[4] Regulation 3 prescribes the procedure for assessment of a serious injury in terms of section 17 (1A) of the Act.

[5] The assessment by a medical practitioner is based on one of the following methods;

[5.1] considering whether the injury is included in the list of injuries published by the Minister in the Gazette from time to time; (Regulation 3(b) (i), and if not,

[5.2] if the injury has resulted in 30% or more of the Whole Body Impairment in accordance with the American Medical

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<sup>1</sup> The decision was communicated to her attorneys by letter dated 25 April 2016

Association's Guides to the Evaluation of Permanent Impairment, 6<sup>th</sup> Edition ("AMA Guides"); (Regulation 3(b)ii), and if not;

[5.3] if the injury falls in one of the categories listed in Regulation 3(b) (iii) which includes a consideration as to whether the injury has resulted in a serious long-term impairment or loss of a body function. The enquiry under Regulation 3(b) (iii) is referred to as 'the narrative test'.

[6] The RAF is entitled to challenge an assessment of an injury as a 'serious injury' and to this extent it has an option to reject the assessment report or direct that the claimant undergo further assessment.

[7] Regulation 3(4) prescribes the procedure that a claimant who is not satisfied with a rejection of his serious injury assessment report should follow to declare a dispute and lodgement of documents in that regard.

[8] Referral of a dispute to the Appeal Tribunal is in terms of Regulation 8 which also prescribes appointment of a panel of three independent medical practitioners with expertise in the appropriate areas of medicine. One of them is designated as Chairperson.

[9] In terms of Regulation 3(8) (c), the Registrar "*may appoint an additional independent practitioner with expertise in any appropriate health profession to assist the appeal tribunal in an advisory capacity*".

[10] The parties (RAF and the claimant) are entitled to be notified in writing "who the persons are that have been appointed as appeal tribunal". (Regulation 3(i)).

[11] Anyone of the parties is entitled to object to the composition of the Appeal Tribunal in writing. The Registrar is enjoined to allow the other party to respond to the objection, and then make a final decision



on the appointment, which may be to substitute the member complained about or to stick with the appointment. The decision is final and binding. (Regulation 3(10)).

[12] The Appeal Tribunal is entitled to decide whether a hearing to consider legal arguments is necessary and to this extent it must communicate with the Registrar and give reasons. The Registrar then appoints an Advocate or Attorney recommended by the Bar Council or Law Society to give advice on the need for a hearing. If there is a need, and the recommendation is accepted by the Appeal Tribunal, the hearing to consider legal argument is then presided by the appointed Advocate or Attorney. The parties are duly informed and are entitled to legal representation at such a hearing.

[13] If on consideration of a recommendation a hearing is not warranted, or if the legal issues have been determined, the Appeal Tribunal's powers are prescribed by Regulation 3(11) and they include directing further assessment and submission of reports, confirmation or substitution of the assessment report of the medical practitioner or confirmation of rejection of the serious injury assessment report by the RAF or an agent.

[14] The decision of the Appeal Tribunal is final and binding. (Regulation 3(13))

[15] The application before me is based on the applicant's right to administrative action that is procedurally fair which is enshrined in Section 33(1) of the Constitution of the Republic of South Africa. This entitles her to launch review proceedings in terms of PAJA as indicated above.

In this regard, as it will be seen hereunder, the applicant's case is limited to procedures that were adopted by the Appeal Tribunal and not the merits of the assessment of her injury. The decision is attacked

on three (3) main grounds based on allegations of errors of fact and law.

***The relevant facts relating to submission of the assessment for serious injury***

[16] The applicant's serious injury does not fall in the list gazetted by the Minister. At 12% WPI, she is also far below the 30% threshold. Therefore, the only applicable criteria in terms of what I have elaborated above is if she satisfies one of the 4 categories in terms of the 'Narrative Test'.

[17] According to the assessment report (RAF 4) signed by Dr. Enslin, the injury falls within the category of "Serious long-term impairment or loss of a body function"

[18] The RAF rejected the assessment by letter dated 11 August 2015 from its attorneys of record. The reason indicated was that according to the RAF's own RAF 4 signed by one Dr Van den Bout, the applicant does not qualify under both the WPI and narrative test.

[19] The applicant duly lodged a dispute and filed a RAF 5, RAF 4 forms as well as her medico-legal reports<sup>2</sup> for assessment by the Appeal Tribunal.

[20] The appeal was set down for consideration by the Appeal Tribunal on 24 February 2016. The applicant was duly notified by letter directed to her attorneys of record dated 01 February 2016. It was also mentioned in the letter that the Appeal Tribunal was constituted by four (4) medical experts, being two Orthopaedic Surgeons, a Specialist Neurosurgeon and one indicated as "Occupational Medicine".

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<sup>2</sup> The reports of Dr Theo Enslin (Independent Medical Examiner), Rita van Biljon (Occupational Therapist), Dr AC Strydom (Industrial Psychologist), Karin Havenga (Counseling Psychologist)



[21] The decision of the Appeal Panel was communicated on 25 April 2016 as indicated above.

### **Grounds of review**

[22] I will not dwell on the grounds of review based on the merits of the injury in the main affidavit because they were not pursued during argument in court. The applicant submitted that the Appeal Panel should have called for her to be examined and also called for additional evidence or even summoned her to attend the hearing. A point was also made that the Appeal Tribunal failed to apply the narrative test properly and that it relied on submitted papers whereas it should have called for oral evidence and legal argument.

[23] It appears from the record of proceedings filed by the respondents (and a reading of their answering papers) that the only documents that served before the Appeal Tribunal were the documents submitted by the applicant when she lodged the dispute as indicated above.

[24] In her Supplementary affidavit, the applicant noted that from a reading of the minutes of the Appeal Tribunal dated 24 February 2016, it was clear that the RAF did not make any submissions and that the only documents in the record were hers.

[25] The applicant re-iterated her stance that the Appeal Tribunal failed to apply the Narrative Test correctly. The contention put forward is that the Appeal Tribunal should have considered the subjective circumstances of the applicant as indicated in the various medico-legal reports.

[26] Various instances from the reports were quoted to illustrate the effect of the injuries on her from a psychological, clinical and occupational perspective. For instance, Dr Enslin has indicated that she has symptoms of depression and has pain in the lower lumbar spine.

The Occupational Therapist has indicated that she resigned from her work because the pain had affected her work speed.

[27] She repeated the grounds of review in the main affidavit relating to the failures by the Appeal Tribunal to call her to be clinically examined, to present oral evidence for instance or even to obtain alternative medical reports.

***Issues arising from the Answering affidavit***

[28] In its answering affidavit, the Appeal Tribunal contended, amongst other things that the RAF did not make submissions to it and that they were satisfied that the applicant's reports were enough to enable them to consider the appeal. Furthermore, there was no need for oral or written submissions.

[29] The Appeal Tribunal deliberated on the contents of the applicant's reports and resolved that her injuries were not serious and do not qualify under the narrative test and AMA rating.

[30] The Appeal Tribunal defended the procedure adopted when considering the applicant's matter. Each member spends hours reading the reports. If further improvement on the injury has been noted it cannot be regarded as permanent.

[31] Although the AMA Guides and the Narrative Test are different, according to the Appeal Tribunal they are related, with the former as a starting point because it gives an indication of the severity of the injury.

[32] The decision was taken after considering the applicant's injuries, the RAF 4 form completed by Dr Enslin which indicated that the injury qualify as serious under the narrative test. This was contrasted with the views expressed by Dr Van Den Bout who indicated that the injury does not qualify under both the WPI and the narrative test.

[33] All in all, the Appeal Tribunal demonstrated in its answering affidavit that it took into account all the medico-legal reports, not by just reading them, but interrogating the issues holistically.

[34] It appears from a reading of the replying affidavit that the applicant has maintained her stance that indeed her injury is serious as contemplated in the Regulations and the Act.

### **Submissions**

[35] Counsel for the both parties submitted heads of argument and also handed up various authorities that were not referred to in the written submissions. I am indebted to the parties for the assistance.

### **Applicant**

[36] During argument in court the applicant's grounds of review were limited to allegations of procedural irregularities. These are the alleged errors committed by the Appeal Tribunal. It was submitted on behalf of the applicant that these errors, indicated below, render the decision of the Appeal Tribunal to be reviewable in terms of PAJA. Furthermore, it was argued that the decision is reviewable because it has a detrimental effect on the applicant.

[36.1] The report of Van den Bout referred to in the third respondent's affidavit did not serve before it when the appeal was considered. This is the report that was referred to in the letter rejecting the serious injury assessment. Therefore, the Appeal Tribunal contravened the Regulations by taking it into consideration.

[36.2] The Appeal Tribunal considered the reports and issues raised by a Clinical Psychologist (Karen Havenga). However, there was no Clinical Psychologist in the panel. The applicant's



argument is that Regulation 3(8) (c) should have been invoked and a Clinical Psychologist be appointed into the panel.

[36.3] The AMA Guides and the Narrative Tests are not related. Counsel for the applicant handed up a judgment of Kgomo J in the matter of Zamokwakhe Comfort Mngomezulu v RAF, South Gauteng High Court Case No. 0463/2010 (reportable, but citation not provided). The learned Judge had rejected the concept of Maximum Medical improvement because it is irrelevant when considering the seriousness of injuries in terms of the narrative test.

The argument advanced here is that the Appeal Tribunal committed an error of law by stating in the answering affidavit that the AMA Guides and the Narrative Test are related.

[37] A further argument on behalf of the applicant was that even though the soft tissue injury does not fall in the list of gazetted injuries, it is clear from a reading of the legislative framework that any complications arising from any injury would qualify as a serious injury.

[38] It was also argued that the Appeal Tribunal cannot rely on an analysis of the experts report because it is not in the answering affidavit.

[39] The applicant contended that the test of a reasonable person is not applicable because the review is based on procedural irregularities.

[40] Finally, it was submitted on behalf of the applicant that the prayer for condonation of late filing of the appeal was not competent because there had been an oversight on calculation of dates. Seemingly this is common cause between the parties as there was no objection to this submission.

## Respondents

[41] The Counsel for the respondents submitted that the procedure followed by the Appeal Tribunal was correct. The applicant was advised about the composition of the panel but did not object as she is entitled to in terms of the Regulations.

[42] He denied that the alleged errors would affect the decision of the Appeal Tribunal, even if they existed. It was also submitted on behalf of the respondents that it is clear from the various medical reports filed by the applicant that even accepting her version of her injuries, they can never constitute 'serious injury' in terms of the Act/Regulations.

## **Legal principles**

[43] In the matter of MEC For Environmental Affairs and Development Planning v Clairison's CC<sup>3</sup>, Nugent JA and Swain AJA<sup>4</sup> reiterated the distinction between a review and an appeal.

*"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."*

## **Analysis and Conclusions**

[44] Having outlined the procedure for assessment of a serious injury, the dispute resolution and what actually happened, I find it difficult to

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<sup>3</sup> (408/2012) [2013] ZASCA 82 (31 May 2013)

<sup>4</sup> Ponnann and Tshiqi JJA and Willis AJA concurring

comprehend the criticisms levelled against the Appeal Tribunal. I will limit my analysis to the three grounds of review argued in court;

[44.1] The composition of the Appeal Tribunal is regulated by Regulation 3(8) which I have referred to above.

It is clear from a reading of the Regulation that the Registrar has a discretion to appoint an independent Health Practitioner. It is common cause from the chronology of events that the applicant was notified in writing about the set down of the appeal and the composition of the Appeal Tribunal. The applicant was entitled to object, which objection would have been considered by the Registrar, after affording the RAF an opportunity to comment. There is no evidence that any objection was raised. Therefore, there is no merit on this ground of review.

[44.2] The comment in the answering affidavit that AMA Guides and Narrative Test are related.

Well, the deponent to the answering affidavit made it clear that these are different tests, but, that the AMA guides provide a starting point when contemplating the question of the permanent nature of the injury. It is so that the applicant relies on the first part of paragraph 5.1 of RAF 4 Form which states that "*serious long term impairment or loss of body function*". There is nothing wrong in considering the IMM. It may be that in the context of the judgment of Kgomo J this was not relevant due to the nature of the injury contemplated in Section 5 of RAF 4.

Therefore, I do not find reference to these tests as 'related' to be an error that would entitle a review of a decision.

[44.3] Lastly, the presence or absence of the report of Van den Bout in the list of documents that were considered by the Appeal



Tribunal is in my view of no consequence because that report was relied on by the RAF when it rejected the serious assessment report. It was the basis of the appeal before the Appeal Tribunal. Therefore, I do not find reference to it in the answering affidavit as an error that would entitle the applicant to a review of the decision of the Appeal Tribunal.

[45] Accordingly, there is no merit in this application and it therefore stands to be dismissed. There is no reason why costs should not follow the cause.

[46] I make the following order,

[46.1] The application is dismissed with costs.



**TAN MAKHUELE J**

Judge of the High Court

### **APPEARANCES**

**Applicant:**

**Adv. WR Du Preez**

Instructed by:

VZLR INC.

Monument Park, PRETORIA

Ref: B Singh / J Rabie/mdp/MAT94962

**First, Second and Third Respondents:**

**Adv. R Schoeman**

Instructed by:

Ramulifho Inc. Attorneys

Garsfontein, PRETORIA

Ref: NKL/HPCSA

Heard on: 28/11/2018

Judgment delivered on: 14/12/2018