REPUBLIC OF SOUTH AFRICA

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

CASE NO: 100/2017

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

02/08/2020
DATE SIGNATURE

In the matter between:

NOMOEBELO FEIKI MOTLOUNG	Applicant
and	
ROAD ACCIDENT FUND APPEAL TRIBUNAL	1st Respondent
REGISTRAR: HEALTH PROFESSIONS COUNCIL OF	
THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
ROAD ACCIDENT FUND	3rd Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] This is an application to review and set aside the decision of the Health Professionals Council of South Africa (“the first respondent”) and ancillary relief as more fully set out in the Notice of Motion.

[2] The applicant's judicial review application is premised on the provisions of the Promotion of Administration Justice Act, 3 of 2000, ("PAJA") because inadequate reasons for the administrative decision so reached (section 5(2) of PAJA) and that the action was materially influenced by an error of law (section 6(2)(d) of PAJA) and / or because irrelevant considerations were taken into account and all relevant consideration were not considered (section 6(2)(e)(iii) of PAJA) and that the decision amounts to arbitrary action and been procedurally unfair (section 6(2)(e)(iv) of PAJA).

[3] The applicant sought the following relief:

3.1 an order reviewing and setting aside the decision of the first respondent, dated 26 May 2015, pertaining to the effect of the injuries suffered by the applicant and replacing it with a finding that the applicant's injuries constitute serious injuries in terms of section 17(1A) of the Road Accident Fund Act, 56 of 1996, ("RAF Act") and its Regulations;

3.2 an order referring the matter to a newly constituted Appeal Tribunal to determine the abovementioned dispute reviewed and set aside

and to reconsider all medico-legal reports that served before the Tribunal in respect of the applicant's injuries;

3.3 costs against the first respondent or any other respondent opposing this application.

[4] In terms of section 17(1) and 17(1A) of the Road Accident Fund Amendment Act, which came into effect on 1 August 2008 and Regulation 3, a third party may only claim general damages against the Road Accident Fund (“the third respondent”), where he or she has suffered a "serious injury". A third party who wishes to claim for compensation for non-pecuniary damages is required to submit to an assessment by a medical practitioner in accordance with Regulation 3(1)(a) and the third party shall obtain from the medical practitioner concerned a Serious Injury Assessment Report in terms of Regulation 3(3)(a).

[5] A Serious Injury Assessment Form (RAF 4) must be completed, which indicate that the person claiming suffered from a Whole Person Impairment ("WPI") as set out in the Regulation of more than 30%, alternatively on a narrative test, suffered from a serious injury as prescribed.

[6] The applicant has obtained, completed and submitted the RAF 4 form as contemplated in section 17 read with Regulation 3 of the Act to the first respondent.

[7] Regulation 3(1)(b) of the Act prescribed the criteria that such a medical practitioner must apply to assess whether a third party has suffered serious injuries. In the event that the first respondent is not satisfied that the injury has correctly been assessed as serious, it must reject the report or direct the third party to undergo a further assessment.

[8] The third respondent rejected the Applicant's RAF 4 form.

[9] Pursuant to the aforesaid rejection, the applicant has declared a dispute by lodging a prescribed dispute resolution form ("RAF 5") with the Acting Registrar of the Health Professions Council ("the second respondent") within 90 days of being informed of the rejection or the impugned assessment.

[10] The second respondent has to appoint a Tribunal of at least three (3) independent medical practitioners with expertise in the appropriate area of medicine.

[11] In terms of Regulation 3(13) of the Act the determination by the Appeal Tribunal is final and binding.

[12] A procedure by which the Appeal Tribunal enquires into the dispute is laid down by Regulations 3(4) to 3(13) of the Act. It includes, *inter alia*, the following:

12.1 both sides may file submissions, medical reports and opinions.

12.2 the Appeal Tribunal may hold a hearing for the purpose of receiving legal arguments by both sides and seek the recommendation of a legal practitioner in relation to the legal issues arising at the hearing.

12.3 the Appeal Tribunal has wide powers to gather information, including the power to direct the third party to submit to a further assessment by a medical practitioner designated by the Tribunal; to do its own examination of the third party's injury; and to direct that further medical reports be obtained and placed before it.

[13] The Appeal Tribunal is not bound by the reasons, if any, provided by the third respondent for the rejection of the RAF 4. The Appeal Tribunal is entitled "in the exercise of its wide investigative and fact-finding powers,...(2) establish for itself whether or not to assess the injury as serious, whatever the reasons of the Fund might have been[1].

[14] A need for the Narrative Test arises in any case where the injuries are found to have resulted in a Whole Person Impairment of less than 30% according to the method of the American Medical Association Guides ("AMA"), but the medical practitioner, nonetheless regards the injuries as serious.

[15] An injury which, as the position *in casu*, does not result in at least 30% Whole Person Impairment may only be assessed as serious if that injury

[1] *RAF v Duma and Three similar cases* 2013 (6) SA 9 (SCA).

resulted in a serious long-term impairment or loss of a body function. This entails that the following has to be determined:

15.1 the objective nature of the Third Party's injuries;

15.2 whether, objectively spoken, those injuries have resulted in an impairment of a body function (or loss thereof);

15.3 whether, objectively spoken, that impairment or loss is of a long- term nature;

15.4 the objectively determined personal circumstances of the Third Party; and

15.5 the influence, objectively spoken, the injuries, as determined above, has on a Third Party's personal circumstances.

[16] Dr Oelofse examined the applicant on 1 February 2021 and completed the RAF 4 form. He found that according to the narrative test, the applicant sustained a serious long-term impairment which could cause loss of body function and has a permanent serious disfigurement. Dr Oelofse concluded that the Applicant has to be assessed in terms of the narrative test to qualify for compensation for non-pecuniary loss.

[17] The Fund rejected the applicant's RAF4 assessment. The applicant declared a dispute as envisaged in regulation 3(4). Substantiating documents necessary to assess the Applicant's injuries were attached to the dispute declaration, *inter alia*, the following:

17.1 the RAF 4 form completed and accompanied by medical, legal report by Dr LA Oelofse;

17.2 medico-legal report from W van der Walt (Occupational Therapist);

17.3 medico-legal report from S van Jaarsveldt (Industrial Psychologist);

17.4 medico-legal report from Dr GJH Swartz (Orthopaedic Surgeon)

[18] On 26 May 2016 the Applicant was informed that the appeal tribunal resolved as follows:

"(I) Impairment evaluation is low, at WPI3%. In spite of the absence of radiology confirmation of any bone injury, the diagnosis of a fractured pelvis is made.

(II) Clinical examination findings are bizarre with an alleged excruciating pain and all movements of the affected hip (which hip is not stated).

(III) The assertion that there is 'some instability with the weight bearing on the right leg' is unsustainable. This is regarded as non-serious injury."

[19] The applicant complained that the appeal tribunal only took cognisance of her physical injuries and ignored how the physical injuries affected her physically and emotionally. Furthermore, she stated that the first to third respondents did not consider the experts' reports properly and therefore failed to take very relevant and pertinent information into consideration. In her supplementary affidavit, the applicant states that the appeal tribunal,

who did not clinically examine her, concluded in the face of the finding of the specialist doctors and experts who had clinically examined her that her injuries are not serious. She states that she was not provided with the reasons why contradictory findings were made. In addition, she states that she was not requested to present herself to be clinically examined in person by any member of the Tribunal.

[20] PAJA requires that a person whose rights have been materially and adversely affected is entitled to adequate reasons[2]. The Act does not prescribe criteria for determining what is considered adequate. Schutz JA in *Minister of Environmental Affairs & Tourism v Phambili Fisheries*[3] stated the following guidelines to determine whether the reasons given in a particular instance are adequate:

> "[40] What constitutes adequate reasons have 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] FCA 179; (1983) 48 ALR 500 at 507 (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

[2] Sections 5(2), (3) and (4).
[3] 2003 (6) SA 407 SCA.

> 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."

[21] It follows that the reasons must provide the person requesting the reasons with a clear understanding of why and how the decision was arrived at. Put differently, there must be a factual and legal basis for justifying an administrative action. In the present case, regulation 3(1)(b)(iii) require the third respondent to consider whether the applicant's injuries resulted in a serious long-term impairment. The sequelae and not only the injuries play a role in determining whether it resulted in a serious long-term impairment.

[22] The first respondent did not record any factual findings in respect of the long term impairment the injuries will have on the applicant, there is, therefore, no evidence of a fair procedure visible in the reasons given. There are also no reasons are given for the deviations from the opinions of specialist doctors who clinically examined the applicant.

[23] The Appeal Tribunal has the right to examine a claimant or to appoint an expert to do so. In this instance, the Tribunal chose not to do so without providing any reasons for not making such an appointment.

[24] A decision maker acting reasonably would have directed that further or alternative medical reports be obtained or applicant make further submissions in terms of the provisions of regulation 3(11) before deviating from the opinions of experts who examined the applicant. If the Appeal Tribunal had a complete re-hearing of and fresh determination on the merits, the result might have been different. The conclusion is inescapable that the first respondent acted arbitrarily in arriving at its decision.

[25] I find that the administrative action of the first respondent was so unreasonable that no reasonable person or body could have taken the decision it has taken. The first respondent has failed to consider all the facts relevant to the application of the narrative test. In my view, the Appeal Tribunal had acted arbitrarily as its decision could not be justified on the acceptable evidence, and as such, the decision taken by the Appeal Tribunal is reviewable.

[26] The applicant is seeking a punitive cost order against the respondents. I am of the view that the circumstances of this case do not warrant a cost order sought as the respondents were within their rights to oppose the application.

[27] In the result the following order is made:

1. That the decision of the third respondent, dated 19 February 2016, 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, is reviewed and set aside.
2. That the second 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. That the first to third respondents are ordered to pay the costs of this application.

_____

N P MNGQIBISA
Judge of the High Court

Appearances

Date of hearing: 03 August 2020
Date of judgement: 02 August 2021

For Applicant: Adv W R Du Preez (instructed by VZLR Inc)

For Respondents: Adv M E Manala (instructed by VZLR Inc)