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

CASE NO: 90979/2016

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

20/06/2022
DATE

SIGNATURE

In the matter between:

X BUSO	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

JUDGMENT

MBONGWE J:

A. INTRODUCTION

[1] This is an application for the review of the decision of the Third Respondent that the Applicant's injuries sustained in a motor vehicle accident in June 2009 are not serious and, therefore, do not qualify him for a claim for general damages in terms of both the American Medical Association rating and the Narrative Test.

FACTUAL BACKGROUND

[2] The Applicant submitted a claim to the Fourth Respondent for compensation for general damages in terms of the Road Accident Fund Act 56 of 1996 ("the Act"). The Fourth Respondent rejected the claim on the ground that the injuries sustained were not serious as envisioned in the provision of section 17(1A) of the Act.

[3] The Applicant subsequently filed medico legal reports of experts detailing his injuries and the sequelae thereof. These reports qualified the Applicant to claim for general damages. In particular, Dr Scher, an orthopaedic surgeon, found that the Applicant's main injury, being a fracture of the tibia and fibula, had reached the maximum medical improvement and had united. He, nonetheless opined that the Applicant qualified for a claim for general damages in terms of

the Narrative Test in that the injuries will have a serious long term impact on the employability of the Applicant, an unskilled labourer.

[4] The Applicant's second expert, Dr Badenhorst, a neurologist found that the Applicant has sustained a significant head injury comprising of a bilateral fracture of the temporal bones with extensions into the mastoids on both sides. In completing the RAF 4 form, Dr Badenhorst rated the Applicant's whole body impairment at 34% in respect of the head injury alone thus qualifying the Applicant for a claim for general damages.

[5] The Fourth Respondent engaged its own medical experts who examined the Applicant in light of the reports of his medical experts. The Fourth Respondent's experts found that the Applicant's tibia and fibula fractures had united without any residual complications. They queried Dr Scher's qualification of the Applicant to claim general damages. The report of Dr Badenhorst, particularly his rating of the Applicant's whole body impairment, was also queried by the Fourth Respondent's corresponding medical expert. Having considered the reports of its own experts, the Fourth Respondent maintained its rejection of the Applicant's claim for general damages.

[6] The Applicant filed an appeal to the First Respondent in terms of regulation 3 of the Regulations in terms of the Road Accident Fund Act. The First Respondent duly constituted a panel of experts, the Road Accident Fund Appeal Tribunal (Third Respondent) to consider and adjudicate on the appeal in terms of Regulation 3(8) of the Regulations to the RAF Act. The adjudication by the Tribunal, being the exercise of statutory authority, constitutes

administrative action in terms of section 1 of the Promotion of Access to Justice Administration Act 3 of 2000 (PAJA) and is, consequently, reviewable.

[7] The Appeal Tribunal consisted of Dr N. Mabuya, an expert in Occupational Medicine, two orthopaedic surgeons, being Dr M. Ngcelwane and Dr S.L Biddulph as well as DR R. Ouma, a specialist neurosurgeon.

[8] The answering affidavit deposed to by Dr N. Mabuya, chairperson of the tribunal, sets out the procedure that was followed by the panel, the material that was availed and considered and lays out grounds for the tribunal's rejection of the appeal.

MATERIAL CONSIDERED

[9] The Tribunal were provided with the following documents;

10.1 the abridged medico legal report of Dr. M. A. Scher
10.2 the report by Morton & Partners (Dr. PCG Morton)
10.3 the RAF 4 by Dr. M. Scher
10.4 the medico-legal report by Dr. FH. Badenhorst
10.5 the RAF4 by Dr. FH Badenhorst
10.6 the report by Crouse & Associates (Benita Crouse)
10.7 the neurophysiological assessment by Ispeth Burke
10.8 the medico-legal report by Liza Hofmeyr
10.9 the report by Dr. GJ Vlok
10.10 the RAF4 by Dr. Vlok
10.11 the report by Larry Loebenstein (Clinical Psychologist)
10.12 the report by Dr. CF Kieck (Neurosurgeon)
10.13 the RAF4 by Dr. CF Kieck
10.14 the report by Ulla Worthmann
1O.15 the report by Stephan van Huyssteen
10.16 the letter by A Batchelor & Associates

10.17 the RAF 5

10.18 the affidavit by Xolani Buso

10.19 the affidavit by Anezwa Njikelana

PROCEDURE FOLLOWED BY PANEL

[10] All documents submitted to the Tribunal were provided to each member appointed to determine the Applicant's appeal. Each member independently evaluated the reports and findings therein and considered the documents submitted and prepared properly for the Applicant's appeal. When the Tribunal convened, each member had an opportunity to state his or her opinion on the injury or injuries, the findings thereon and the sequelae thereof. The opinions of each member were then debated between us. It was clear when the Tribunal met that each member of the Tribunal was fully acquainted with the Applicant's matter. In the Applicant's matter the Tribunal unanimously resolved that the Applicant did not qualify under the narrative test and on the AMA rating system, In Annexure "EL2" the Tribunal stated that,

"i. The patient was involved in an accident in June 2009 and sustained a fracture of the tibia and a head injury.

ii. The patient was assessed by Dr. Badenhorst (Neurosurgeon) & Dr. Scher who reported a serious injury.

iii. The fractured tibia- the panel reviewed the evidence from Dr. Vlok and Dr. Kieck.

iv. The fracture tibia on the narrative test – on the reports of the doctors given but the radiologist report shows that the fracture has healed well and the patient was bearing weight fully.

v. Dr. Kieck thought that there was a moderate brain injury but there were no permanent sequelae.

vi. Dr. Vlok felt that the orthopaedic injury was not serious.

vii. The tribunal felt that the injury is not serious both on the narrative test and on the AMA rating system".

[11] The Tribunal was unanimous and rejected the Applicant's appeal and concluded that the injury or injuries were not serious. In coming to its conclusion, the Tribunal properly considered and applied the narrative test. The Tribunal *inter alia* considered and had cognizance of the following statements and findings in the Applicant's documents.

11.1 The abridged medico legal report by Dr M.A Scher *inter alia* stated that the date of assessment was 2 May 2012. The Applicant suffered a closed head injury with bilateral temporal bone fracture, a subdural haemorrhage and suspected concussion. This would be considered a serious head injury. Treatment was conservative. A right tibia segmental fracture. This would be considered a serious injury. Treatment was operative by intra medullary nailing. The current disability was noted and considered. His complaints were mild right lower leg pain and weakness. On examination, the lower limb alignment and muscle status were comparable. Hip, knee, ankle and foot function were satisfactory. X-rays of the *tibia* confirmed a healed right tibia fracture in satisfactory alignment. A locking intra medullary nail was in situ and the fibula was intact.

11.2 Dr. Scher's report furthermore *inter alia* stated that:

11.2.1 The prognosis and future treatment was noted. The right leg function may be further improved by an appropriate rehabilitation regime under the direction of a biokinetistor physiotherapist. The

Applicant may in the future experience the occasional painful twinge in the right leg related to the healed fractures. His symptoms will probably respond to supportive measures such as topical gels, analgesics- anti-inflammatories and physiotherapy.

11.2.2 His employability and working capacity "have" probably been compromised in respect of heavy work because of accident related musculoskeletal disability.

11.2.3 The healed right tibia fracture will probably result in serious long-term impairment. The Applicant has been left with a decompensated right leg which will impact on more physical demanding activities with which he may be involved. The Applicant is an unskilled labourer who is dependent on his physical fitness to hold down a job. The Applicant would be considered unsuited for heavy work including working from heights because of the added safety hazard.

11.3 The report by Morton & Partners *inter alia* stated that in respect of both lower legs the medullary nail bridging the proximal and mid shaft fractures of the right tibia is noted in good position with proximal and distal screw fixation and good alignment across the fracture sites. The fractures are effectively completely united. There is a small fibrous component persistent in the distal tibial fracture. The right fibula is intact and normal. There is no evidence of effective tibial shortening on the right in comparison with the left. No abnormality seen at knee or ankle articular surfaces. The left side for comparison is normal.

11.4 Dr. Scher's RAF 4 stated *inter alia* that his current symptoms and complaints were mild right leg, painful and weakness. Dr. Scher's diagnosis was specifically noted as healed right tibia fracture. Dr. Scher's RAF4 attachments state that Dr. Scher found a 4% WPI but Dr. Scher's own report stated 3% WPI.

11.5 Dr. FH Badenhorst (Neurologist) report *inter alia* stated that:

12.5.1 The Applicant sustained a head injury, with sub Dural heamatoma as well as an undisplaced fracture of the right tibia and fibula. ACT scan showed a bilateral temporal fracture of the skull, extending to the mastoids on both sides. The Applicant was seen by the neurosurgical department and there was no need for intervention.

11.5.2 At the time of the accident the Applicant was unemployed. In 2008 the Applicant sustained an injury to the right index finger that resulted in a terminal amputation of the finger. At the age of 5 years he fell and broke his left leg.

11.5.3 The Applicant has never been employed. The Applicant was 18 at the time of the accident.

11.5.4 Since the accident the Applicant has permanent anosmia, with appropriate changes in taste. He is still aware of some discomfort, sometimes pain, in the right leg.

11.5.5 The findings and observations under examination was noted and considered. Dr FH Badenhorst found that the Applicant sustained a significant head injury as well as a fracture of the right tibia and fibula and that the accident resulted in permanent residual symptoms. The findings under mechanism and severity of head injury was noted and considered.

11.5.5.1 assessment of the severity of the head injury was difficult with little information available.

11.5.5.2 the components of the head injury were noted as a fracture of the vault and base of the skull, moderately severe axonal injury, with LOC and a

period of post-traumatic amnesia of more than 24 hours, small extra Dural haemorrhage, without mass effect and focal injury is not mentioned in the report of the CT scan.

11.5.6 That represented a significant, moderately severe head injury. Given the injury as described, the expectation was that the Applicant would make a good recovery. Some changes in cognitive function and behaviour as a consequence of traumatic brain injury would have been expected, but it was likely this would be subtle, probably covert, but with at least some functional significance.

11.5.7 In respect of the orthopaedic injuries, the Applicant sustained a displaced fracture of the right tibia and fibula. Open reduction and internal fixation was performed. The fracture united in good position. His residual symptoms were dependent on his activities, with discomfort, sometimes with pain. Future treatment may be necessary.

11.5.8 The consequences of the head injury were noted and considered. In respect of the anosmia, the Applicant had permanent and total anosmia, with appropriate changes in taste. The impairment was described as "mild". In respect of the impairment of cognitive function and memory, the Applicant was aware of some impairment of cognitive function and memory.

11.6 The Impairment Evaluation Report noted the Applicant's WPI as greater than 34%.

11.6.1 attention was noted as reduced

11.6.2 memory was noted as impaired

11.6.3 intellectual function was noted as compromised

11.6.4 higher cognitive function was noted as compromised

11.6.5 the Neurologic Impairment due to Alteration in Mental Status, Cognition, and Highest Integrative Function (MSCHIF) was noted as Class 3 (21%-35%) referring to severe abnormalities. It was noted as a 28% WPI which may be amended after MRI of the brain and neuropsychological assessment.

11.6.6 under emotional or behavioural disturbances it was indicated as 31 to 49 (20%) meaning some impairment in reality testing or communication or major impairment in several areas.

11.6.7 under cranial nerve impairments total anosmia was noted as 5% WPI

11.6.8 under combined evaluation the finding was 28% + 5% = 34% (sic)

11.6.9 added to this was the impairment as a result of the fracture of the tibia which equalled + - 2 – 5%

11.7 The findings and conclusions under the narrative test were noted and considered.

11.8 The findings and conclusions noted in Dr. Badenhorst's RAF4 were noted and considered. He specifically concluded that the Applicant suffered a serious long-term impairment or loss of a body function and severe long-term mental or severe long-term behavioural disturbance or disorder.

11.9 the report by Crouse & Associates *inter alia* stated that:

11.9.1 In 2005 the Applicant, out of his own, left school. After his sister's intervention he then continued with schooling in Cape Town. His current complaints were noted. Prior to the injury he was able to pass his grades and he did not fail once, yet following the injury he struggled with his schoolwork, to such an extent that he left school after he had two failures. The Applicant was of opinion that he struggled with his concentration in class following the accident and therefore he could not focus on his work.

11.9.2 The Applicant uses pain medication as needed. He suffers from intermittent pain in his lower leg. The pain is not described as constant, yet present walking for long distances.

11.9.3 His level of functioning in everyday life was noted. In respect of self-care everything was noted as independent. In respect of home management, it was noted that his sister stated that the Applicant does not assist. It was not stated that he cannot assist. In respect of community access, the Applicant walks to where he need to be or he relies on public transportation.

11.9.4 In respect of his employment it was noted that the Applicant did some duties for one day for someone and thereafter the Applicant was a bricklayer assistant for one month.

11.9.5 The opinion was that the Applicant should be referred to a neuropsychologist.

11.10 The report by Ispeth Burke (Clinical Psychologist) stated *inter alia* that;

11.10.1 The findings and conclusions were noted and considered.

All are not repeated herein for sake of brevity.

11.10.2 The current difficulties were noted and considered. The findings and conclusions drawn under neuropsychological assessment were noted and considered. The Applicant battled to sustain focus and concentrate. On tasks of single mental tracking the Applicant was able to recall one string of 4 digits forward, which was below the expected for his age group, and on the single visual tracking and scanning task his time of 72 seconds was in the severely defective range. The conclusion was "impaired".

11.10.3The accident is responsible for altering the trajectory of the Applicant's life, of truncating his schooling and impacting on his career choice. The report indicated that doing occasional piece jobs was the Applicant's occupational ceiling. Neurocognitively the Applicant does not have the capacity to learn or rely on his intellectual abilities and physically he is handicapped by a weaker leg, headaches and the most disabling difficulty sustaining relationships unless others compromise.

11.10.4The report concluded by stating that the Applicant sustained a significant head injury and that the sequelae heave left the Applicant neurocognitely and intellectually compromised altering his future choices and prospects.

11.11 The report by Liza Hofmeyr stated *inter alia* that:

11.11.1 The accident occurred in 2009. The report was done in 2015.

11.11.2 The Applicant was a slow learner before the accident but copied.

11.11.3 In 2011 the Applicant worked for Economic Motor Spares as a casual general worker involved in spray painting for approximately a month. His employment was discontinued as his employer did not have much work. He then secured employment in Stellenbosch as a general worker on a construction for two months. His employment was discontinued when the contract expired. In 2012 the Applicant secured casual employment at Woolworths. He was deployed as a Merchandiser for two months. His employment was discontinued when his manager shouted at him when he made a mistake. In 2014 the Applicant was again employed at Woolworths. His employment ended when his agent's contract with Woolworths expired. In November 2014 he secured employment as a general worker at Ross Demolition until February 2015. His employment ended due to the fact that there was not enough work. In May 2015 the Applicant worked at Supercare Services as a cleaner. At the time of the report he was still employed there.

11.11.4 Benita Crouse reported that most of the Applicant's brothers and sister passed away many years ago, which was inconsistent with the information provided. Ms. Crouse furthermore noted that before the injury the Applicant was able to pass his grades and reportedly did not fail once.

11.11.5 The Applicant presented as an individual who was probably rather slow, regardless of the accident in question. The Applicant was a pedestrian and indicated that he recalled the car hitting him, which was inconsistent with information provided to other experts.

11.11.6 According to the Applicant he has no difficulty lifting heavy object. The Applicant is not an anxious passenger or pedestrian. His nerves after the accident were not more.

11.11.7 The Applicant's sister-in-law indicated that she has not noted significant memory difficulties. She confirmed that the Applicant seems to work, but to her knowledge only goes to work at times. The Applicant did not have much insight into his residual difficulties.

11.11.8 The report indicated that it could be assumed that the Applicant would in any event have pursued employment on an unskilled level, even if he matriculated. Considering his family background and presentation, employment in the informal labour market was more likely. Significant career progression beyond unskilled employment is not anticipated, regardless of the accident in question. The Applicant would probably have worked until 60 years. Most unskilled workers retire when they become eligible for State Pension.

11.11.9 The post-accident scenario was noted and considered. The report indicated that at the same time, it could be assumed that the Applicant has always been slow and may in any event have battled with increased demands as he reached higher grades.

11.11.10 With regards to the Applicant's employment history, it was noted that the information provided to various experts were not entirely consistent. The report indicated that Ms. Duiker also stated that the applicant is unreliable and during the last week did not come in for four days, when he could have been working and generating an income. Sustained employment was not anticipated, especially when

feedback from Ms. Duiker and his poor attendance record was considered. Information provided by the Applicant regarding time frames was also not entirely consistent with information provided by his employer.

11.11.11 The findings and conclusions drawn under loss of income/earning potential were noted and considered.

11.12 The report by Dr. G.J Vlok *inter alia* stated that

11.12.1 The report was made during 2013

11.12.2 The Applicant gets a headache once a month for which he uses one Grand Pa.

11.12.3 Dr. Vlok's diagnosis was a head injury with skull fractures and a mid-shaft tibia fracture on the right-hand side.

11.12.4 The tibia fracture was treated with an open reduction and internal fixation and healed uncomplicated.

11.12.5 The Applicant will be able to work in the open labour market until retiring age. The report indicated that further restrictions such as heavy labour were not foreseen and it was specifically indicated that the Applicant would be able to do that.

11.12.6 The findings and conclusions under the narrative score were noted and considered. His alignment was normal, the fracture was stable, the applicant was neurologically intact and the writer was of the opinion that the Applicant will be able to work in the open labour market until retiring age from an orthopaedic point of view. Possible restrictions were his head injury where there were still problems with

smelling, verbal abuse and forgetfulness. The whole body impairment, due to the tibia fracture did not indicate a serious injury, but seeing in combination with his head injury will dictate the later consequences of the injury of which the orthopaedic part is just a minor part.

11.13 The RAF4 of Dr. Vlok indicated the injury to the right tibia and the head injury as non-serious injuries. Attached thereto was the report by Dr. RJ Martin which *inter alia* stated that intramedullary pin was noted fixating the known midshaft tibia fracture. This fracture had healed well and no fracture line was seen at present. Cortical thickening was also seen posteriorly in relation to the proximal 3rd of the tibia. No complication due to the fixation noted. The ankle mortise was well aligned and the knee joint also appeared with normal limits.

11.14 The report by Larry Loebenstein (Clinical Psychologist) stated *inter alia* that;

11.14.1 When asked about his overall functioning following the accident the applicant stated that he returned to school for the balance of the 2009 academic year but was not motivated to learn and stated that he found it difficult to concentrate. He again attempted to repeat Grade 9 in 2010 but again found it difficult to motivate himself and that he could not concentrate.

11.14.2 The Applicant stated that he did not experience major problems at work except that when he was exposed to challenging work in which he had to exert himself he would experience pain in his right leg.

11.14.3 The Applicant's sister confirmed that prior to the accident teachers told her that the Applicant was a slow learner. The findings and conclusions drawn under neuropsychological

testing were noted and considered. On the Rey Auditory Verbal Learning Test following five trials of his test of list learning the Applicant was able to recall 56 words. This score was in the average range (52.2 words). His retention score of 9 was. 83 standard deviations below the mean and still within the average range. He obtained a recognition score of 15 which is above the mean of 12.8. However, his response included 3 intrusions from a distractor list.

11.14.4 The report indicated that an objective neuropsychological assessment is particularly challenging in this matter as the substantial contradictory evidence given to Dr. Badenhorst at his consultation from the Applicant and his sister regarding his immediate post-accident functioning, the absence of important admission notes to the GF Jooste Hospital or any ambulance report, the lack of information regarding the Applicant's schooling and specifically why he was 18 years of age in Grade 9 after only repeating one year and the reasons why he was apparently considered to be slow learner by his teachers.

11.14.5 On the basis of the evidence given to Dr. Badenhorst one would consider that the Applicant suffered a brain injury of moderate severity whereas on the information at the time of the consultation it is considered that he suffered a somewhat complicated mild traumatic brain injury even though demonstrable changes to the brain matter were not evident.

11.15 The report by Dr. CF Kieck (neurosurgeon) *inter alia* stated that;

11.15.1 The Applicant denied any cognitive dysfunction and personality changes. The Applicant did complain that his

smell was affected and although he ca taste food, he can't smell it. Testing with alcohol swabs, indicated that he could smell.

11.15.2 Cerebral function test was normal. Gait was normal. The Applicant could walk rapidly, he could turn and he could jump on one or other leg without any discomfort. On clinical examination the Applicant did not offer any neurocognitive complaints. The Applicant appeared normal on clinic examination.

11.15.3 Regarding his brain injury it was specifically states that one would not expect any permanent neurocognitive sequelae. The doctor furthermore specifically stated that on his evaluation he though the Applicant to be normal against his background. The Applicant did complain that his smell was affected but no testing he could certainly smell. The doctor stated that his smell is probably partially affected, however this is not of any functional disability.

11.15.4 In the setting of the mild traumatic brain injury with no structural damage to the brain, the Applicant's risk for developing post traumatic epilepsy was certainly very low.

11.15.5 The doctor could not demonstrate any abnormalities in the Applicant's legs. The doctor deferred to the opinions of orthopaedic surgeons in that regards.

11.16 In Dr. Kieck's RAF4 he stated "NO" to both serious long-term impairment or loss of a body function and severe long-term mental or severe long-term behavioural disturbance or disorder. In the document attached to the RAF the neurosurgeon indicated mild abnormalities under MSCHIF.

11.17 The report by Ulla Worthmann (Occupational Therapist) stated *inter alia* the following

11.17.1 The report was made during July 2014

11.17.2 Under injuries and illnesses after the accident (but before the reports) it was indicated that in December 2011 the Applicant was stabbed in the upper back between his shoulder blades.

11.17.3 In June 2013 the Applicant attended a one-week grade E, D & C security guard training course. He passed a written test in English.

11.17.4 The work history and discrepancies were noted.

11.17.5 Under pain it was indicated that during winter he regularly experiences pain but during summer he hardly experiences pain. Pain medication alleviates pain. The Applicant described it as a mild pain. No objective signs of pain were observed during the physical assessment.

11.17.6 The Applicant could carry a 28kg box over 25 meters with a normal gait. He did not experience pain in his lower limbs.

11.17.7 The Applicant was able to recall long and short-term information. He was able to answer questions coherently and provide detailed information. The Applicant understood all questions in English and was able to respond in English to most questions. When more detailed information was required he conversed in Xhosa with the interpreter. The Applicant was able to concentrate for the duration of the assessment.

11.17.8 The Applicant was unable to periom serial seven during the MMS assessment. However, when looking at notes and coins he was able to do simple and complex addition and subtraction sums at a fast pace and without making mistakes. The Applicant was unable to correctly follow 3 verbal commands from memory during MMS assessment. However, during the physical assessment he had no difficult following 5 verbal commands from memory.

11.17.9 The Applicant is independent in his personal activities of daily living. He uses a plastic basis to wash. He stands while washing himself. He washes laundry by hand, hangs the washing outside to dry, irons the clothing, sweeps the house and yard, washes dishes, goes shopping and cook's basic meals without reported problems.

11.17.10 Under "difficulties at work" it was noted that the Applicant reported no difficulties performing his work tasks, working as a general manager did not aggravate right knee pain, he could however feel in his body that he was working hard. The Applicant stated that he does not feel restricted in his ability to work.

11.17.11 The findings and conclusions under "conclusion" were noted and considered. It was stated that although cognitive problems were reported this does not appear to have an impact on the Applicant's functional performance and he should therefore have sufficient cognitive ability to perform unskilled work.

11.18 The report by Stephan van Huyssteen (Industrial psychologist) *inter alia* stated the following:

11.18.1 His date of assessment was noted as during 2013. A follow up telephonic interview was done in 2015 and the report was done during 2015.

11.18.2 The Applicant failed Grade 1 and 6 prior to the accident. The writer deferred to an educational psychologist opinion regarding his highest probable pro-morbid education level, however in the absence of this it was postulated that he would probably have only obtained Grade 9 as his highest level of education history, the Applicant was a slow learner, his families reported education history and his disadvantaged socio-economic and education background.

11.18.3 The writer was of the opinion that the Applicant will probably follow the same career path as indicated in the pre-morbid scenario. However, his physical restrictions and limited behavioural changes could possibly have a negative impact on the Applicant's earning capacity.

11.18.4 The medical experts did not indicate a change in the Applicant's retirement age as a results of the injuries. The Applicant will retire as indicated in the pre-morbid scenario.

11.19 The Applicant affidavit was deposed to during 2012. The Applicant's sister's affidavit was deposed during 2009. In his affidavit, the Applicant refers to an injury to his back.

SUMMARY

[12] The Applicant's history is *inter alia* that in 2008 the Applicant sustained an injury to the right index finger that resulted in a terminal amputation of the finger. In 2009 the Applicant was in the accident in question. In 2011 the Applicant was

stabbed in the upper back between his shoulder blades. In this regard the Applicant and the Applicant's sister refers to a back injury in his affidavit. The Applicant suffered a head injury with skull fractures and mid-shaft tibia fracture on the right-hand side. The tibia fracture was treated with open reduction and internal fixation and healed uncomplicated. When Dr Scher examined the Applicant, his complaints were *inter alia* mild right lower leg pain and weakness. X-rays of the tibia confirmed a healed right tibia fracture in satisfactory alignment.

12.1 The report by Morton & Partners state that the right tibia was noted in good position and good alignment. The fractures are effectively "completely united". The right tibia is intact, and normal. No abnormality was seen at knee or ankle articular surface. When the Applicant was seen by the neurological department after the accident they indicated that there was no need for intervention.

[13] In Dr. Scher's report he found that the Applicant had a 3% WPI but in the attachments to the RAF4 Dr Scher stated 4%. Clearly these findings were not comparable. Dr Badenhorst however found greater than 3% WPI and under combined evaluation he found 28% + 5% = 34% WPI. Dr Badenhorst found that the Applicant's attention was reduced, memory was impaired, intellectual function was compromised and that the Applicant's MSCHIF was Class 3 (Severe abnormalities) Dr. Kleck stated that the Applicant's MSCHIF was only "mild abnormalities". Dr. Badenhorst's findings were clearly the outlier and was

rejected by the Tribunal.

[14] Dr Scher found that the Applicant's employability and working capability have "probably been compromised" in respect of heavy work and that the healed right tibia fracture will probably result in s serious long-term impairment. This is not competent. The RAF4 clearly states that if the injury is not on the list of non-serious injuries and did not result in 30% WPI, as provided in the AMA guides, consider whether the injury resulted in any of the consequences set out in paragraph 5.1 to paragraph 5.4 thereof. In contrast to Dr. Scher's finding the Applicant specifically stated in another report that he has no difficulty lifting heavy objects and the Applicant could even carry a 28 kg box over 25 meters with a normal gait without experiencing pain in his lower limbs. This was in line with Dr. Vlok's findings that further restrictions such as heavy labour were not foreseen and that the Applicant will be able to do those types of tasks.

[15] Dr Badenhorst's report was made in 2012. He stated that the Applicant has never been employed. In another report the Applicant stated that he worked at Economic Motor Spares in 2011 and in Stellenbosch. The Applicant furthermore worked at Woolworths thereafter. The Applicant attended a no-week grade E, D & C security guard training course, wrote a test in English and passed. The Applicant thereafter worked at Ross Demolition in 2014 and in 2015 at Supercare Services. The report indicated that, mostly, the Applicant's employment ended because there was not enough work.

[16] The Applicant's sister-in-law indicated that the Applicant seems to work, but her knowledge only goes to work at times.

16.1 Ms. Duiker specifically noted that the Applicant is unreliable and during the "last week did not come in for four days, when he could have been working and generating an income". In another report the Applicant stated that he has no difficulties performing work tasks and that he does not feel restricted in his ability to work. One expert stated that the Applicant will probably follow the same career path as indicated in the pre-morbid scenario. One finding noted the Applicant will be able to work in the open labour market until retiring age.

16.2 The Applicant stated that he did not experience major problems at work except when he was exposed to challenging work in which he had to exert himself when he would experience pain in his right leg. Dr. Badenhorst indicated that the Applicant was still aware of some discomfort, sometimes pain, in the right leg. Another expert stated that Applicant could walk rapidly, he could turn and he could jump on one leg or the other without any discomfort.

16.3 In respect of pain the Applicant uses pain medication as needed. he suffers intermittent pain in his lower leg. The Applicant indicated that he experiences pain in winter but during summer he "hardly experiences pain". Pain medication furthermore alleviated the pain. The Applicant specifically described the pain as a "mild pain".

[17] In respect of the anosmia

17.1 Dr. Badenhorst stated that the Applicant has permanent anosmia, with appropriate changes in taste. He later found that in respect of the anosmia that It was permanent and total anosmia. This impairment was specifically noted as mild. He found that under cranial nerve impairment total anosmia was 5% WPI.

17.2 When Dr. Kieck made his report the Applicant also complained that his smell was affected. Testing with alcohol swabs the finding was that the

Applicant could smell. He concluded by stating that the Applicant could "certainly smell" and that his smell is probably "partially affected" but that this was not any functional disability.

[18] Dr. Badenhorst found that the Applicant sustained a significant head injury as well as a fracture of the right tiba and fibula and that the accident resulted in permanent residual symptoms, He, however, specifically noted that the assessment of the severity of the head injury was difficult with little information available.

18.1 He later indicated that it was a significant, moderately severe head injury. He further found that the expectation was that the Applicant would make a good recovery.

18.2 Dr, Vlok found that the Applicant was neurologically intact.

18.3 One report found that on the basis of the evidence given to Dr. Badenhorst one would consider the Applicant suffered a brain injury of moderate severity, whereas on the information at the time of that consultation he suffered a somewhat complicated mild traumatic brain injury. The Applicant denied any cognitive dysfunction and personally changes when the one report was made.

18.4 When Dr. Kieck's report was made he found that on clinical examination the Applicant did not offer any neurocognitive complaints, that the Applicant appeared normal on clinical examination and that one would not expect any permanent neurocognitive sequela from the Applicant's brain injury. The Applicant was normal against his background. He found

that there was no structural damage to his brain and that his risk of developing post traumatic epilepsy was "certainly very low".

[19] In respect of the assessments

19.1 one report noted, that on tasks of single mental tracking the Applicant was able to recall one string of 4 digits forward, which was below the expected for his age group, and on the single visual tracking and scanning task his time of 72 seconds was in the severely defective range.

19.2 the Applicant's sister-in-law indicated that she has not noted significant memory difficulties.

19.3 on the Rey Auditory Verbal earning test, following five trails, the Applicant was able to recall 56 words. The score was in the average range. His retention was in the average range. His recognition score was above the average mean.

19.4 another report indicated that the Applicant was able to recall long and short-term information. He was able to answer questions coherently and provide detailed information.

19.5 one report indicated that an objective neuropsychological assessment was challenging as substantial contradictory evidence was given to Dr. Badenhorst regarding his post-accident functioning, the absence of important admission notes and reports and *inter alia* the lack of information regarding the Applicant's schooling.

[20] One report found that the accident was responsible for altering the trajectory of the Applicant's file, of truncating his schooling and impacting on his career

choices and that neurocognitively the Applicant does not have the capacity to learn or rely on his intellectual abilities and physically he is handicapped by a weaker leg and headaches.

20.1 Dr. Vlok specifically stated that the Applicant only gets a headache once a month for which he uses one Grandpa. Other reports found that the Applicant was a slow learner before the accident.

20.2 a further finding was that, regardless of the accident, the Applicant presented as an individual who was probably rather slow. One report indicated that it could be assumed that the Applicant would in any event have pursued employment on an unskilled level, even if he matriculated and that he may in any event have battled with increased demands as he reached higher grades.

[21] The Applicant stated that he is no longer an anxious passenger or pedestrian. His nerves after the accident were no more. In respect of self-care everything was noted as "independent". The Applicant uses a plastic basis to wash. He stands while washing himself. He washes laundry by hand, hangs the washing outside to dry, irons the clothing, sweeps the house and yard, washes dishes, goes shopping and cooks' basic meals without reported problems.

[22] The Applicant failed Grade 1 and 6. The Applicant left school by his own decision during 2005. He was thereafter re-enrolled after his sister intervened. One report postulated that the Applicant would probably have only obtained Grade 9 as his highest level of education.

[23] One report indicated worrying facts relating to contradictions. In one report it was reported that most of the Applicant's brothers and sisters passed away many years ago, which was inconsistent with other reports, and that before the

accident the Applicant was able to pass his grades and reportedly did not fail once. He also indicated that he recalled the car hitting him, which was inconsistent with other reports.

[24] Dr. Scher specifically found that the right leg function may be improved by an appropriate rehabilitation regime under the direction of a biokineticist or physiotherapist. His symptoms will probably respond to supportive measures such as topical gels, analgesics, anti-inflammatories and physiotherapy. He indicated the Applicant's current symptoms and complaints as mild right leg, painful and weakness.

[25] The Tribunal was satisfied that we were provided with enough medical reports and findings to enable us to consider the Applicant's appeal, and that further submissions, whether oral or written, or a physical examination of the Applicant, was not required or necessary. The members of the Tribunal applied their minds to all findings and statements in the documents provided and made a value judgement. The Tribunal consisting of two orthopaedic surgeons, one specialist neurosurgeon and one occupational medicine practitioner, unanimously concluded, by applying their experience, expertise and knowledge to the documents submitted and the findings made, that the Applicant's injury or injuries were not serious both on the narrative test and on the AMA rating system. The Tribunal considered and applied the narrative test by *inter alia* considering the consequences of the injury or combination thereof on the Applicant. The Tribunal made a value judgement which, with respect, was rational.

[26] The Tribunal also had cognizance of the Road Accident Fund Amendment Regulations, 2013 ("the Regulations") where it is stated that any sequelae in the form of pain or discomfort as a result of an injury listed in terms of (aa) to (nn) and any mild or moderate form of depression, anxiety, chronic headaches or post- traumatic stress disorder are not to be regarded as a serious injury.

[27] The Tribunal's decision was with respect justified on the acceptable evidence and a reasonable person in the position of the Tribunal on the evidence disclosed in the record could have reached the same conclusion. The decision by the Tribunal was a value judgement exercised in good faith. The Tribunal, with respect, exercised and performed the function entrusted to it and the weight or lack of it attached to certain findings and considerations was within the Tribunal's discretion. The Tribunal had due regard to all documents before it and considered and debated the reports fairly and reasonably.

ANALYIS OF THE GROUNDING OF APPLICANT'S CASE

[28] The gravamen of the Applicant's contention for seeking a review of the tribunal's decision appears on paragraphs 59 of its heads of argument as follows;

> *"The appeal tribunal further does not indicate which documents they apparently considered and/or did not consider as listed above in the adjudication of the dispute which falls foul of the test premised on an error of fact as well as separately and distinct therefrom renders the decision irrational and therefore an illegality."*

[29] There simply is no basis for the above contention by the applicant in light of the contents of paragraphs, wherein the third respondent sets out its composition, the material available to it and considered, the analysis of each of the parties'

respective expert reports, including information the applicant's experts had extracted from the relatives as well as an employer of the applicant as well as the reasons for its findings and conclusions. The detailed analysis, which the applicant does not poignantly assail, could not have been possible, unless the relevant reports of the experts were considered. The applicant's disagreement with these well-reasoned conclusions does not entitle it to a relief.

[30] I get the impression, from the applicant's contention in paragraph 29, above, that the applicant had not been in possession of the entire report of the Third Respondent when it launched these motion proceedings which, by their nature, preclude the amendment of the founding papers, leaving the applicant with no choice, but to proceed to argue its case from an incorrect footing. It should be noted that this is my assessment of a possible.

[31] Relying on the distortion in that statement, the applicant, for the greatest part in its heads of argument, makes unsubstantiated and untenable arguments against the decision of the tribunal and the manner it was arrived at. Without laying any basis whatsoever, the applicant contends that the decision of the tribunal:

31.1 is materially unreasonable,

31.2 irrational,

31.3 influenced by an error of fact and of law,

31.4 was reached in circumstances that amounted to arbitrary action,

31.5 is procedurally unfair.

[32] Having pointed out the oasis of the applicant's unfounded criticism of all aspects in the work of the third respondent, I do not deem it necessary to consider the aspects raised by it and stated in para 30, above, save to state that the applicant expresses a preference for its own procedure, what material ought to have been considered and what weight the tribunal ought to have put to the various factors forming the subjects for determination by the tribunal disregards the discretionary powers of the tribunal in so far as the relevance of those factors and/or the determination of the extent of the role impact they have is concerned.

[33] The legal position in this regard is succinctly set out in the judgment of the Supreme Court of Appeal in the matter of MEC for Environmental Affairs and Development Planning v Clairisons CC [2013 (6) SA 235 SCA] in the following terms:

> *"When the law entrusts a functionary with a discretion, it means just that: the law gives recognition to the valuation 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 the 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 application, 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."*

This principle holds equally true to any challenger, including the applicant, of the discretionary powers of a functionary such as the third respondent in the present matter. Thus the applicant's sought substitution, by this court, of the findings of the third respondent is impermissible.

[34] Further illustration of the principle in the Clairisons matter is to be found in Brown v Health Professionals Council of South Africa and Others [2016 (2) All SA 62 (WCC) at para 40] where Bozalek J stated thus:

> *"It was further contended on behalf of the applicant that the Tribunal had failed to take into account various considerations in reaching the decision. In making this argument reference was made to various medical findings or prognosis on the part of those experts who concluded that the applicant had suffered a serious injury. When these various examples are considered, however, it seems to me that this is merely a different manner of stating that the Tribunal should have given more weight to certain factors, and possibly, less weight to others. As was trenchantly pointed out in Clairison's CC; where the original administrative decision-maker is entrusted with a discretion to decide what weight must be given to certain factors, it is not for the court to second-guess this and to substitute its opinion for that of the decision-maker, even if it disagrees with that functionary's assessment. To do so under the guise of relevance would be for the court to exercise a power of appeal rather than a power of review."*

[35] As pointed out earlier, the applicant's disagreement with the decision of the Tribunal or the basis thereof does not entitle it to a review of that decision. That the applicant fails to distinguish between a review and an appeal appears at paragraph 87 of its heads of arguments where it is stated;

> *" Despite the benefit of the expertise of the members of the Third respondent, it is submitted that there is clear and unequivocal evidence available to illustrate that the injuries are in fact serious as contemplated in the Act and the regulations and it is submitted that this is a case where the Honourable Court may replace the decision with the finding that the appeal succeeds and the injuries are found to*

be serious as contemplated in the Act (as amended) by virtue of the application of the Narrative Test."

This contention by the applicant goes against the grain of settled legal principles quoted in the cases referred to above and displays the applicant's blurring of the distinction between appeal and review proceedings.

CONCLUSION

[36] I am satisfied that the third respondent had executed its statutory duties in accordance with the law and, in so doing, had left nothing warranting the intervention by this court in review proceedings. The principle in this regard was aptly enunciated by Froneman DJP in Carephone v Marcus N.O. & Others in the following terms;

> *"In determining whether an administrative action is justifiable in terms of the reasons given for it, real judgment will have to be made which will almost inevitably, involve the consideration of the "merits" of the matter in some way or the other. As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion of the correctness of the decision, but to determine whether the outcome is rationally justifiable the process will be in order."*

[37] On the contrary, the applicant has argued its case based on an unfounded contention that that relevant material and facts were not considered by the Third Respondent resulting in the applicant contending that the decision of the Third Respondent was materially unreasonable, irrational, influenced by an error of fact and of law and reached in circumstances that amounted to arbitrary action. As stated earlier, these contentions lack merit on the facts of this case and

stand to be rejected. Consequently, the application ought to fail.

ORDER

[38] Following the findings and conclusion in this judgment, the court makes this order;

1. The application for the review of the decision of the Third Respondent is dismissed.

M. MBONGWE, J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUTENG
DIVISION, PRETORIA.

APPEARANCES

For the Applicant:	ADV P A VENTER
Instructed by:	VZLR ATTORNEYS INC.
For the Respondent:	ADV N MATIDZA
Instructed by:	RAMULIFHO INC. ATTORNEYS

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Applicant's and Respondent's legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be ___ JUNE 2022.