

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 16543/2020

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 26 JULY 2023

SIGNATURE

In the matter between:

NCEBO HAMILTON QUTYANA

Applicant

and

**THE HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

First Respondent

**THE REGISTRAR OF THE HEALTH
PROFESSIONS COUNCIL OF SOUTH AFRICA**

Second Respondent

THE ROAD ACCIDENT FUND

Third Respondent

DR N MABUYA

Fourth Respondent

DR JOHN R OUMA

Fifth Respondent

PROFESSOR M NGCELWANE

Sixth Respondent

Summary: *Review of a determination by a Health Professions Council of South Africa (HPCSA) appeal tribunal that plaintiff's injuries not serious, disentitling him to a claim for non-pecuniary damages in terms of section 17 of the Road Accident Fund Act – decision set aside – no*

indication from record that relevant expert's report having been properly considered and inadequate reasons furnished for decision.

ORDERS

1. The necessary extension of the 180 day period contemplated in section 7 of the Promotion of Administrative of Justice Act 3 of 2000, is granted.
2. The decision of the appeal tribunal of the Health Professions Council of South Africa (HPCSA) made on 19 July 2017 regarding the assessment of the applicant's injuries as contemplated in the Road Accident Fund Regulations 2008, is reviewed and set aside.
3. The matter is referred back to the HPCSA to be reconsidered before a newly constituted appeal tribunal, consisting of appropriately qualified medical practitioners, taking into account the previous tribunal's request for assessment by a clinical psychologist.
4. The first respondent is ordered to pay the applicant's costs of the application.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The applicant is a plaintiff in an action wherein he inter alia, claims non-pecuniary (general) damages suffered pursuant to a motor vehicle collision. The defendant in the action is the Road Accident Fund (RAF).

[2] The RAF had rejected the applicant's claim, resulting in a referral to an appeal tribunal of the Health Professions Council of South Africa (HPCSA) for a determination as to whether the applicant's injuries qualified as serious injuries as envisioned in the Road Accident Fund Act 56 of 1996 (the RAF Act) and the regulations promulgated in terms thereof (the Regulations).

[3] The appeal tribunal has similarly rejected the applicant's claim by determining that his injuries were not serious. The present application is for a review of that determination.

The law

[4] Since *RAF v Duma and Three similar cases*¹ (*Duma*) and *K obo M and another v RAF*² (*K obo M*) the law has become settled regarding the procedural aspects relating to claims for non-pecuniary damages where the entitlement to such claims are in dispute.

[5] In summary, the procedure is as follows:

- a plaintiff must submit a serious injury assessment report on the prescribed RAF 4 form in terms of section 17(1A) of the RAF Act read with Regulation 3 of the Regulations.
- Regulation 3(1)(b) sets out the criteria which the medical practitioner who completes the relevant portion of the form must apply to assess whether a plaintiff has suffered serious injury.
- Consideration of a "serious" injury by applying the American Medical Association (AMA) guidelines involves the application of two tests. The

¹ 2013 (6) SA 9 (SCA); [2013] 1 All SA 543.

² 2023 (3) SA 125 (GP).

first is the determination of a whole person impairment (WPI) of at least 30% and, should this threshold not be reached, the second is a determination of whether the plaintiff's injuries could still be considered serious in terms of a "narrative test"

- Should a plaintiff contend that the injuries sustained qualify as serious in terms of either test, the RAF still has to be satisfied that the injuries are indeed serious³.
- Should the RAF not be satisfied that the injuries have been correctly assessed as serious, it must either reject the assessment contained in the report or direct that the plaintiff undergo a further assessment⁴.
- Where a further assessment has been requested and a report in respect thereof has been obtained, the RAF must either accept or dispute the further assessment⁵.
- Should the plaintiff wish to dispute the RAF's rejection of the assessment obtained by the plaintiff or, in the event that the RAF had requested a second assessment, should either the plaintiff or the RAF wish to dispute such further assessment, such a disputant must, within 90 days of being informed thereof, notify the registrar of the HPCSA that the rejection or the assessment is being disputed. This is done by the lodging of a dispute resolution form⁶.
- If a dispute resolution form is not lodged timeously, the rejection or assessment, as the case may be, shall become binding unless a condonation application is also lodged⁷.

³ Regulation 3(3)(c).

⁴ Regulation 3(dA).

⁵ Regulation 3(e).

⁶ Regulation 3(4).

⁷ Regulation 3(5)(a).

- The registrar shall, upon receipt of the above documents, refer them to the HPCSA⁸.
- An appeal tribunal of the HPCSA, consisting of at least three medical experts, must then determine whether the plaintiff has indeed sustained a serious injury.
- The nature of the appeal by the appeal tribunal is one in the “*wider sense, that is a complete re-hearing of a fresh determination of the merits with additional evidence or information, if needs be*”⁹.
- The decision of the HPCSA’s appeal tribunal is reviewable in terms of the provisions of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)¹⁰.

[6] A review in terms of PAJA may be brought on various grounds. In the present instance, the applicant sought to rely on section 6(2)(c) - the administrative action was procedurally unfair; section 6(2)(e)(iii) – irrelevant considerations were taken into account and relevant considerations were not considered; section 6(2)(e)(vi) – the decision of the HPCSA was taken arbitrarily or capriciously and section 6(2)(f)(ii)(dd) – the decision was not rationally connected to the reasons given for it.

[7] The HPCSA finding was made on 7 August 2017 and the application for review was launched on 23 March 2018, that is 45 days beyond the 180 day period contemplated in section 7(1) of PAJA. Accordingly, for the application to be entertained, an extension of time, as contemplated in section 9(1)(b) of PAJA had to be considered.

[8] In terms of section 9(2) of PAJA a court may grant an application for such an extension of the 180 day period “... *where the interests of justice so require* ...”.

⁸ Regulation 3(5)(d).

⁹ Duma at par 26.

¹⁰ *JH v HPCSA* 2016 (2) SA 93 (WCC).

[9] In the words of (then) Maya JA “... *the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issues to be raised in the intended proceedings and the prospects of success*”¹¹.

The merits

[10] On 3 August 2008 the applicant was injured in a motor vehicle accident in which he had been a passenger in the insured motor vehicle which had left the N2 highway near Plettenberg Bay and which had overturned, all as a result of the negligence of the insured driver.

[11] The applicant, then a builder by trade, suffered a head injury and multiple left-side rib fractures. The fractures caused a haemopneumothorax which had required a chest drain insertion.

[12] The applicant's injuries left him with the following reported medical complaints:

1. *“Headaches. These occur almost daily, are severe and require frequent use of analgesics. They are triggered by exposure to sharp light or noise and is often associated with nausea.*
2. *Impaired memory, lack of concentration and distractibility. He reports that he often cannot remember things if he does not write it down immediately.*
3. *Depressed mood, tearfulness and melancholy. Mr Qutyana feels that he is no longer in control of his mood after the accident and that he has thoughts of*

¹¹ *Camps Bay Ratepayers and Residents Association v Harrison* [2010] 2 All SA 519 (SCA), confirmed on appeal by way of a refusal of leave to appeal in *Camps Bay Ratepayers and residents Association v Harrison* 2011 (4) SA 42 (CC).

suicide when he is depressed. He has been told by his doctors to seek psychiatric help.

4. *Chest pains and shortness of breath. He has markedly decreased tolerance to physical exertion and fatigues very quickly since the accident. He is no longer able to perform manual labour productively”.*

He was also left with a scar commensurate with a left sided chest drain in the fifth intercostal space.

[13] On 22 October 2010 a serious injury assessment was done by a Dr Peter Bering, who is properly qualified to do such assessments and on 7 July 2011 a similar assessment was done by a Dr Eugene Burger. These assessments were recorded on prescribed RAF4 forms. The forms were submitted to the RAF on 15 July 2011.

[14] Dr Bering has reported that the haemopneumothorax had left the applicant with permanent pain and weakness in his shoulder girdle. His post-concussion state limited the applicant's ability to concentrate and complete even menial tasks, both domestically and in the work environment.

[15] Dr Burger determined that the applicant had a 14% WPI but further concluded, in applying the narrative test as follows: *“Although the injuries sustained have not resulted in 30% or more Impairment of the Whole Person, I assess his injuries as “serious”- as contemplated in Regulation 3(1)(b)(iii)(aa) of the ... Regulations ... in that, as set out in this report, it has resulted in serious long-term impairment...”*. This was based on an assessment of a *“substantial injury that affects his ability to perform the activities of daily living to perform the activities of daily living with ease and comfort ... and he can no longer work as a manual labourer. In all likelihood he will require future medical care and ongoing treatment including the regular use of medication such as analgesics”*.

[16] Dr Burger had also noted “clear signs of psychomotor retardation” and diminished abstract thinking and idiomatic expression. During his examination the

applicant, although fully awake and alert, was unable to name the president of the country, the exact date or day of the week and failed to remember three common objects after 15 minutes.

[17] The applicant was also further assessed by a psychiatrist, Dr Loebenstein who had also completed a RAF4 form as well as a Dr Kriek who had also completed such a form.

[18] On 18 December 2012 the RAF formally rejected the assessments obtained by the applicant and on 14 March 2013 the applicant's erstwhile attorneys referred his dispute of the rejection to the HPCSA via the lodging of a prescribed RAF 5 form.

[19] On 16 September 2013 an appeal tribunal of the HPCSA convened and directed that the applicant be assessed by a neuropsychologist and that the applicant *"... must be subjected to comprehensive testing to enable the Tribunal to come to a decision on the effect of the brain injury ..."*. Such an assessment was subsequently completed by a Dr Coetzee on 30 April 2014 but her report was only made available more than two years later on 30 September 2016.

[20] Dr Coetzee reported that she had reviewed all previously submitted reports and had obtained collateral information from the applicant's mother and his sister-in-law. She had also performed a battery of eight tests. Her assessment of the applicant included observance of his behavior during the assessments and an evaluation of his general cognitive functioning, his attention and concentration abilities, his motor functioning, his speech and language capabilities, his visuo-perceptual and visuo-spatial information processing, his verbal and visual memory and his executive functioning.

[21] Dr Coetzee discussed the applicant's head injury and its sequelae in the following terms: *"Judging from the estimated duration of post-traumatic amnesia, the head injury would be classified as mild in severity, and would commonly be associated with a reasonable recovery. However, considering the impact of the collision, as well as the neuropsychological difficulties reported both by himself and his family, a comprehensive neuropsychological evaluation seemed to be warranted."*

Complaints included poor mood regulation, fatigue, reduced mental and physical stamina, forgetfulness and low frustration tolerance. He also developed post-traumatic headaches. A degree of spontaneous improvement has occurred over some, but some residual symptoms persist ... On neuropsychological testing, Mr Qutyana presented with the following areas of relative weakness:

- His speed of processing, thinking and communicating was slower than expected.*
- He presented with reduced motor speed and dexterity of his non-dominant hand.*
- His expressive communication was marked by reduced verbal fluency, poor abstract reasoning and rigidity in terms of his thinking. In this regard it is noted that he stuttered as a child, and that his mother reported noticing a return of even more pronounced expressive difficulties since his accident.*
- While his verbal short-term memory and his capacity to encode new learning were found to be reasonable, he was highly susceptible to extinction over time, and was easily confused. His visual memory was excellent, although his incidental recall of symbols was defective.*

In light of his previously having suffered from epilepsy, having stuttered during childhood and possibly having abused alcohol, one can reasonably accept that he had a pre-existing neuropsychological vulnerability, which would have rendered him more susceptible to the effects of even a mild head injury.

Additionally, from the history that was obtained it is clear that the accident has left him with significant psychological and physical challenges, which would compound and exacerbate even mild underlying neuropsychological difficulties ...

It was reported both by Mr Qutyana and by his mother that the accident has had a significant impact on his life. He reported that his physical symptoms (headaches, back pain, fatigue, occasional dizziness, noise sensitivity, reduced hearing in his left ear, a numb sensation on the left side of his face, increased sensitivity to the effects of alcohol and erectile dysfunction) affect his quality of life and make it hard for him to cope with the demands of working in the building industry. Consequently he has lost his career, a stable income, and his role as a provider for his family. He expressed deep sadness and frustration and about the significant losses he has suffered. He was suffering from depression, and was in despair about his future.

When she was interviewed recently, his sister-in-law reported that his personality changed after the accident, but that he is mentally more unstable of late. Her description of his current behavior would suggest that he is indeed suffering from more severe mental illness. His reportedly pressured speech, agitation, restlessness, poor self-care, reduced drive, excessive smoking, poor social judgment and increased alcohol intake would suggest a further deterioration in his functioning with what sounds like manic and possibly even psychotic behavior most likely associated with depression.

Given the history provided by Mr Qutyana and the collateral sources, it is evident that the accident was a watershed event in his life, which brought about numerous losses in terms of his career, marriage, physical well-being and psychological well-being. His life seems to have spiraled out of control, and his future prospects are increasingly a source of concern to his family”.

[22] On 4 July 2017 a second appeal tribunal was constituted. The applicant objected to the composition thereof on the basis that, save for a neurosurgeon, none of the other three medical practitioners had the “appropriate specialisations” to adjudicate the nature of a brain injury. Despite the HPCSA having noted in its appointment letter that the practitioners would have “... expertise in the appropriate

area of medicine to consider the appeal”, the other members were two orthopaedic surgeons and a specialist in occupational medicine.

[23] On 19 July 2017 the HPCSA considered the matter and on 7 August 2017 rendered its findings and reasons as follows:

- (i) *“Patient was born in March 1968. This matter was previously in front of the Panel in September 2013 at which time the injury was indicated to be a minor head injury as assessed by Dr Kieck (Neurosurgeon). Was also assessed by a psychologist and a (GP) Dr Burger. The neurosurgeon then found no indication of a head injury and awarded a WPI of 0% and the matter was referred for the opinion of a psychologist.*
- (ii) *The Panel now have the report of Dr Coetzee in front of us and having gone through this report the panel can find no indication or evidence that this injury is that serious.*
- (iii) *The organic injury was that of a minor head injury with no sequelae.*
- (iv) *On the basis of all evidence in front of this panel it felt that this was not a serious injury”.*

[24] It was against the backdrop of what the HPCSA had “felt” that the review application must be adjudged.

[25] In the answering affidavit, the occupational medicine specialist member of the appeal tribunal dealt with Dr Coetzee’s report as follows: *“I further submit that Dr Mignon Coetzee’s conclusion (is) that the applicant’s injuries are serious enough to warrant save for falling in the narrative test. I deny that the applicant’s injuries fall within the category of serious injuries ... we considered the report by Coetzee, but disagree as 4 (four) independent medical doctors that Coetzee was correct”.*

Ad delay

[26] It is common cause that the review application was launched some 45 days beyond the 180 day period contemplated in section 7 of PAJA. As such, the delay was deemed to be unreasonable and a condonation application was necessary¹². In such an application, an applicant must provide an explanation that covers the entire duration of the delay¹³.

[27] The details regarding the reasons for the delay are rather scant. The applicant's attorney merely explained that the applicant is indigent and that his case is handled on a contingency basis. He further claimed that he had difficulty in obtaining the services of counsel "*to attend to the voluminous and labour intensive scope of work*" to be done on a contingency or pro bono basis. It appears that while the applicant was not remiss, his attorney clearly was.

[28] However, the eventual delay beyond the cut-off point of 180 days was not very long and the only party who would suffer prejudice if condonation is not granted, would be the applicant. Contrary to the position in *Asla*, no other party, including the HPCSA, would suffer any conceivable prejudice if condonation is granted. Whilst a court is not permitted to predetermine the merits of a matter when considering the jurisdictional hurdle of the 180 day period, the prospects of success is a relevant consideration. On a conspectus of the evidence, these prospects appeared to be reasonably good.

[29] Based on the facts of this matter, and in the exercise of my discretion, I find that it would not be in the interests of justice to non-suit an indigent applicant with reasonable prospects of success as a result of his attorney's dilatoriness. The necessary extension of time contemplated in section 9 of PAJA is therefore granted as envisioned in prayer 1 of the applicant's Notice of Motion.

Ad the review itself

[30] For purposes of evaluation of the review application itself two principal issues stand out namely whether the HPCSA had properly considered relevant evidence (section 6(2)(e)(iii) of PAJA) and whether, if the appeal tribunal had considered the

¹² *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA).

¹³ *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) (*Asla*)

evidence of Dr Coetzee, it was evident from the tribunal's reasons that there was a rational basis for differing from Dr Coetzee's conclusions (section 6(2)(f)(dd) of PAJA).

[31] It is clear from the relevant portions of the answering affidavit quoted above, that, apart from the mere say-so regarding the consideration of Dr Coetzee's report, it is of little assistance to the determination of the above two issues.

[32] The source of what the appeal tribunal had actually done when deliberating the appeal or how it came to the conclusion of what it eventually "felt" the position to be, can therefore only be its reasons.

[33] The furnishing of adequate reasons is generally obligatory¹⁴ and the failure to furnish adequate reasons without it being reasonable and justifiable to do so, creates a rebuttable presumption that the administrative action in question was taken "without good reason"¹⁵.

[34] With reference to a decision of the Federal Court of Australia¹⁶ the Supreme Court of Appeal has held as follows in *Minister of Environmental Affairs & Tourism v Pambili Fisheries*¹⁷ as to what the requirement to furnish adequate reasons amounts to: "... (it) requires a decision-maker to explain his decision in a way which enables the person aggrieved to say in effect: even though I might not agree with it, I now understand why the decision went against me. I am now in a position to decide whether the decision had involved an unwarranted finding of facts or an error of law which is worth challenging. This requires a decision-maker to set out his understanding of the relevant law, any findings of fact on which the conclusion depends ... and the reasoning process which led him to choose those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation ...".

¹⁴ Section 5 of PAJA.

¹⁵ Section 5(3) of PAJA.

¹⁶ *Ansett Transport Industries (Operations) (Pty) Ltd & others v Wrath & Others* (1983) 48 LAD 500.

¹⁷ 2003 (6) SA 407 (SCA) at par 40 (*Pambili*)

[35] Cryptic reasons will not pass muster¹⁸ and, although the nature of a decision might dictate the extent or length and detail of the reasons¹⁹, the reasons should at least refer to the relevant facts taken into consideration “... *as well as the reasoning process that led to the conclusions*”²⁰.

[36] In the circumstances of this case, where the HPCSA appeal tribunal had at its first sitting, before the hearing was postponed and the tribunal was reconstituted, specifically requested that an assessment be done by a clinical psychologist, it became incumbent on the HPCSA to explain its reasoning in circumstances where it “felt” that it differed from the conclusions subsequently reached by the clinical psychologist. To merely state such disagreement as a finding without in any meaningful way dealing with the contents of the clinical psychologist’s report or disclosing any contrary facts which may have been taken into account, amount to a failure to furnish adequate reasons.

[37] The consequence is further that it is unclear to what extent the HPCSA had actually considered the relevant expert evidence produced by the clinical psychologist. It was incumbent on the HPCSA to determine to what extent the opinion advanced by the clinical psychologist was not supported by the facts, should the HPCSA hold a competing or contrary view and even in that event, such a competing view must similarly be supported by facts²¹. Where, as in the present instance, it appears that this has not been done, then it must follow that the appeal tribunal has failed to properly take “relevant considerations” into account.

[38] I therefore find that the applicant has discharged the onus to prove that sections 6(2)(f)(ii)(dd) and 6(2)(e)(iii) of PAJA had not been complied with by the appeal tribunal of the HPCSA. The decision is therefore to be reviewed and set aside.

¹⁸ *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) and *Nomola v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844(E).

¹⁹ *Pambili* par 40.

²⁰ Hoexter, *Administrative Law in South Africa*, 2nd Ed, at 478.

²¹ *Lourens v Oldwage* 2006 (2) SA 161 at 175G-H, citing *Michaels and Another v Linksfield Pork Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA).

[39] Having reached the above conclusion, it is unnecessary to deal with the issue of the objection to the composition of the second appeal tribunal (which issue has never expressly been dealt with by the HPCSA). This aspect will in my view, be catered for in the relief which I intend granting.

Relief

[40] In *Trencon*²² the Constitutional Court has laid out the conditions which have to be present to justify the substitution of a court's decision for that of another decision maker. It held: "... *given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias on the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable*".

[41] In *eTV (Pty) Ltd v Minister of Communications and Digital Technologies and others*²³ the same court at par 92 pointed out that, in respect of the first of the aforesaid factors, a primary consideration is "... *whether the decision in question still requires some level of expertise*".

[42] In the present matter, and, having regard to the framework of the Regulations, it is clear that a level of medical expertise has been intended to be required in making the decision. It is in fact this requirement which informed the applicant's objection to the composition of the second appeal tribunal.

[43] In these circumstances it would be improper for the court to "correct" the decision, as envisaged in the Notice of Motion, but more appropriate to refer the

²² *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another* 2015 (5) SA 245 (CC) at par 47.

²³ 2023 (3) SA 1 (CC).

matter back to the HPCSA for a re-hearing before a properly constituted appeal tribunal.

Costs

[44] The general rule is that costs should follow the event. A further rule is that a party requesting an indulgence, should bear the costs occasioned thereby. In the present matter the costs incurred by the section 9 of PAJA extension of time application were not incurred separately and formed part and parcel of the whole review application. Given that the review application was successful, I find no cogent reason not to follow the general rule that the successful party should be entitled to its costs.

Orders

[45] In the circumstances the following order is made:

1. The necessary extension of the 180 day period contemplated in section 7 of the Promotion of Administrative Justice Act 3 of 2000, is granted.
2. The decision of the appeal tribunal of the Health Professions Council of South Africa (HPCSA) made on 19 July 2017 regarding the assessment of the applicant's injuries as contemplated in the Road Accident Fund Regulations 2008, is reviewed and set aside.
3. The matter is referred back to the HPCSA to be reconsidered before a newly constituted appeal tribunal, consisting of appropriately qualified medical practitioners, taking into account the previous tribunal's request for assessment by a clinical psychologist.
4. The first respondent is ordered to pay the applicant's costs of the application.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 17 April 2023

Date of Judgment: 26 July 2023

APPEARANCES:

For the Applicant: Adv M Salie SC together with Adv C Bisschoff

Attorney for the Applicant: Jonathan Cohen & Associates, Cape Town
c/o Adams & Adams Attorneys, Pretoria

For the Respondent: Adv N Felgate

Attorney for the Respondent: Parker Attorneys, Cape Town
KM Mmuoe Attorneys, Johannesburg