REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6449/2015

In the matter between:

MOGAMAT ISMA-EEL BROWN	Applicant
And	
HEALTH PROFESSIONALS COUNCIL OF SOUTH AFRICA	1st Respondent
DR APJ BOTHA N.O.	2nd Respondent
PROF AA ADEN N.O.	3rd Respondent
DR D IRSIGLER N.O.	4th Respondent
DR D.M. MANYANE N.O.	5th Respondent
THE ROAD ACCIDENT FUND	6th Respondent

Coram: BOZALEK J
Heard: 2 November 2015
Delivered: 23 November 2015

JUDGMENT

BOZALEK J:

[1] The applicant applies to review a decision by an Appeal Tribunal constituted under the auspices of the Health Professionals Council of South Africa, the first respondent, and comprising of the medical practitioners who are the second to the fifth

respondents. The decision was that the injuries which the applicant sustained as a result of a motor vehicle accident in July 2010 are not *'serious'*, as contemplated in Regulation 3(1)(b)(iii)(aa) of the Road Accident Fund Regulations.

[2] As further relief the applicant seeks a finding that he has in fact sustained a serious injury as contemplated in the aforesaid Regulation, alternatively an order remitting the matter back to an Appeal Tribunal constituted by first respondent but comprising different medical practitioners.

[3] The application is opposed by the first to fifth respondents whilst it would appear that the sixth respondent, the Road Accident Fund ('RAF'), abides the decision of the court.

BACKGROUND

[4] The review application arises, generally speaking, out of a new dispensation which has prevailed since July 2008 dealing with the entitlement of a person who has been injured in a motor vehicle accident to claim general damages from a statutory insurer, namely, the RAF. In a nutshell, general damages may now only be claimed where a *'serious injury'* has been suffered by the claimant and where this has been either accepted by the RAF or proved in the manner prescribed by regulation.

[5] The rationale for the new dispensation and a full description of the procedures which must be followed in order to prove a *'serious injury'* are set out in paras [3 – 10] of *Road Accident Fund v Duma and 3 similar cases* 2013 (6) SA 9 (SCA) and it is unnecessary for me to repeat or summarise that description.

THE HISTORY OF THE APPLICANT'S CLAIM

[6] The applicant was injured as a passenger in a motor vehicle accident. On admission to hospital it was established that he had sustained a compression fracture to his C5 vertebrae and damaged to the soft tissue of his cervical spine. On 28 July 2010 his C5 vertebrae was surgically repaired by means of a C5 corpectomy and a C4-6 instrumented anterior fusion. He was discharged from hospital after some 5 days wearing a hard neck brace which he wore for approximately 3 weeks. Thereafter he wore a soft neck brace for another month.

[7] In December 2011 the applicant lodged a third party claim form (RAF1) and, in July 2012, a serious injury assessment report (RAF4 form) backed up by a medico legal report from a neurosurgeon, Dr Z Domingo. A further such report, backed up by a medico-legal opinion from Dr T Le Roux, an orthopaedic surgeon, was also lodged on behalf of the applicant. When nothing was heard from the RAF in response to these reports, summons was issued on behalf of the applicant in February 2013 claiming damages, including the sum of R180 000.00 for general damages. Obviously, in order to be awarded these general damages it was incumbent on the applicant to prove, in the prescribed manner, that he had sustained a *'serious'* injury as contemplated in sec 17 of the Act read together with the Regulations.

[8] In April 2013 the Fund directed the applicant to submit himself to further medical assessment by Ms L Pringle, an occupational therapist, Dr R Marks, an orthopaedic surgeon and Dr CF Kieck, a neurosurgeon. All of them examined the applicant and furnished medico-legal reports which concluded that the applicant's injuries were not serious. Finally, the applicant's attorney appointed an occupational therapist, Ms M

Stander, to prepare a medico-legal report and this was duly submitted in order to supplement those of Drs Domingo and Le Roux.

[9] In September 2013 the RAF advised the applicant's attorneys that it had accepted the report of Dr Marks. In that report Dr Marks evaluated the applicant's WPI (whole person impairment) at 4% and, under the *'narrative test'* embodied in RAF 4 concluded that the applicant was fit for all forms of work and by clear implication, that he had not suffered a serious injury. In a footnote Dr Marks noted *'The narrative test covers situations where mild or moderate objective impairment may cause significant disability. Good examples are a stiff ankle in a ballerina, loss of a little finger in a concert pianist, or minor scars on the face or legs of a model'*.

[10] In October 2013 the applicant's attorneys completed a RAF 5 notification of dispute challenging the aforementioned assessment relying also on a supplementary report by Dr Le Roux containing his comments in respect of Dr Marks' report.

[11] The Appeal Tribunal ('the Tribunal)' was duly constituted and sat to consider the dispute on 13 October 2014. It found that the applicant's injuries could not be regarded as serious. This decision was conveyed to the applicant's attorneys in the form of the Tribunal's resolution in the following terms:

> *'1. Injuries: Compression fracture of C5 vertebrae. Concussive head injury*
>
> *2. Outcome: Neck pain. Cannot play soccer as used to.*
>
> *3. Tribunal Finding: The tribunal finds that the injuries are not serious. There is only a small chance to develop adjacent segment disease. The narrative issues do not apply for future potential impairments. The tribunal notes that normal activities and sport and recreational involvements have not been affected.'*

[12] In March 2015 the applicant's attorneys requested the first respondent to provide full reasons for the decision in terms of sec 5 of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') within 90 days of receipt of the request. No such reasons having been received within a month, the applicant launched these review proceedings citing the following main grounds of review:

1. the decision was taken arbitrarily or capriciously and/or relevant considerations were not considered;

2. the decision was not rationally connected to the information before it;

3. the decision was procedurally unfair in that, despite the applicant's request, the Tribunal/panel did not include an occupational therapist.

ANALYSIS

[13] Before turning to consider the various review grounds it is appropriate to rehearse the well-established principles of our law relating to the ambit of a court's discretion and powers on review, particularly in relation to the distinction between a review and an appeal.

[14] In *Bato Star*[1] O'Regan J emphasised that:

> *'Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'*

[1] *Bato Staff Fishing (Pty) Ltd v Minister of Environmental Affairs and* Others 2004 (4) SA 490 (CC) at para [45]

[15] And at para [48] she stated further:

> *'In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker.'*

[16] Insofar as the applicant alleges that the first respondent's decision was taken arbitrarily or capriciously questions of rationality and reasonableness come into play. In the Pharmaceutical matter[2] the Constitutional Court held:

> *'Decisions [of administrative bodies] must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement.'*

[17] However, Chaskalson P warned that:

> *'The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately'.*

[18] Finally, in regard to the question of the relevance or irrelvance of different factors in the decision-making process the Supreme Court of Appeal in *MEC for Environment Affairs and Development Planning v Clairison's CC* stated as follows:

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[2] *Pharmaceutical Manufacturers Association of South Africa and another: in re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 647 (CC) at para [85]

'[18] We think it apparent from the extracts from her judgment we have recited, and the judgment read as a whole, that the learned judge blurred the distinction between an appeal and a review. It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. 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.

…

[22] … The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and so long as it acts in good faith (and reasonably and rationally) a court of law cannot interfere.'

THE VARIOUS MEDICAL OPINIONS

[19] Dr Z Domingo evaluated the applicant's whole person impairment ('WPI') at 11% and in his summary concluded that the applicant had sustained a significant cervical spine injury with cervical fractures which required an instrumented fusion of his cervical spine. He concluded further that the applicant would develop degenerative changes above and below the level of the fusion, was likely to have on-going symptoms due both

to the soft tissue component of the injury as well as the anticipated degenerative changes, that he would require medical treatment for pain control and that there was a significant chance of him needing further surgery. In his report proper he estimated that there was a 50% chance of the applicant requiring cervical spine surgery in future. This condition is also referred to '*symptomatic adjacent segment disease (SAG*)'.

[20] Dr T Le Roux concluded his report as follows:

> *'Alhoewel die gevolge van die beserings wat tydens die ongeluk opgedoen is, nie tot 30% WPI volgens die AMA gids aanleiding gegee het nie, veroorsaak hulle wel ernstige, langtermyn aantasting of verlies van 'n ligaamlike funksie soos item [5.1] vereis.'*

[21] Under the heading *'Funksionele Inkorting'* he stated:

> *'Weens pyn en ongemak wat in sy nek ontwikkel:*
>
> *Kan hy net in 'n sekere posisie lê.*
>
> *Kan hy nie lank met sy kop en nek in een posisie sit nie soos lees, televisie kyk, lank in 'n motor ry of lank 'n motor bestuur.*
>
> *Kan hy nie swaar voorwerpe optel of lank met sy arms voor hom uitgestrek werk nie'*

[22] Dr Le Roux was also of the opinion that there would be increased degeneration above and below the fused vertebrae which would require future treatment and he evaluated the applicant's WPI at 8%.

[23] Dr R Marks, an orthopaedic surgeon, evaluated the applicant's WPI as 4% and, under the RAF 4, narrative test, concluded as follows:

> '*With an excellent and functional outcome, mild symptoms and a full range of movement, I regard him as fit for all forms of work. In general it is wise to avoid contact sport after this kind of cervical injury, in spite of recent literature that suggests that this precaution is not necessary.*

I do not identify criteria to designate this injury as 'serious' in terms of the narrative test. In my opinion he is fit for any kind of work… The prediction that he will suffer inexorable deterioration of adjacent segments (ASD) is inaccurate, …'

and proceeded to furnish scholarly reasons for this conclusion.

[24] Dr RA Kieck, a neurosurgeon, concluded in his initial medico legal report that the applicant did not fall into the category of fusion patients prone to progressive degeneration *'as he has got no pre-existing degeneration, he has a good fusion with a normal sagittal balance of his neck and therefore the risk of him developing symptomatic adjacent degeneration which may need surgery, must be very low and certainly not 50% as being stated in the various reports'*. He stated that he saw no problem in the applicant going back to his previous job as a van assistant.

[25] In a supplementary report dealing with the narrative test Dr Kieck stated that he found the applicant to be *'fully functional and able to do whatever within certain limitations such as severe loading of his neck or playing contact sport'*. He concluded that he could not identify a loss or impairment of body function which had a significant or severe consequence for the applicant presently or that might develop resulting in a significant disability in the future.

[26] Ms M Stander, an occupational therapist, concluded that the applicant *'sustained a serious and permanent injury to his neck that has long term implications on his activity tolerance and activities of daily living. Degenerative changes may occur with probable surgery anticipated from age 50+. Should this happen, pain will increase and his ADL's (activities of daily living), including his work would be increasingly affected. Considering all factors, he is considered capable of performing any semi-sedentary work with no*

more than medium manual requirements with reasonable accommodation until normal retirement age. His current work falls within the category, but not his job as a van assistant. He has been limited in future choices'. It should be noted that at the relevant time the applicant was working as a gardener/general labourer.

[27] Ms L Pringle, an occupational therapist engaged by the RAF concluded that the applicant had *'made a good recovery from a cervical injury'* … that *'slight tenderness with extreme ranges of lateral flexion of his neck is not a functional significance. Lateral flexion of the neck is at best an uncomfortable position for anyone …'* and that *'no functional impairment has been identified in terms of the narrative test. He will be able to perform any type of work that he wants to. There are no restrictions or accommodations applicable, nor is Occupational therapy treatment recommended'*.

DISCUSSION

[28] Thus there was an even divide between the four medical specialists consulted, being two neurosurgeons and two orthopaedic surgeons, and the two occupational therapists, regarding whether the applicant had suffered a *'serious injury'* and no WPI evaluation of the applicant exceeded 11%.

[29] Having regard to the Regulations the result was that the only basis upon which the applicant could be evaluated as having suffered a *'serious injury'* was in terms of Regulation 3(1)(b)(iii) which provides that:

> '(*a)n injury which does not result in 30 percent or more Impairment of the Whole Person may only be assessed as serious if that injury :*

(aa) resulted in a serious long term impairment or loss of a bodily function ,

(bb) constitutes permanent serious disfigurement;

(cc) resulted in severe long term mental or severe long term behavioural disturbance or disorder or…'

[30] The narrative test was discussed at length in a scholarly article published in the South African Medical Journal in October 2013[3]. There it is described as *'a medical instrument prescribed by the Road Accident Fund which 'stands apart' from the American Medical Association (AMA) guides to evaluation of permanent impairment'* and which cannot be defined or interpreted in terms of these. The authors state that the Regulations do not provide any guidelines to the structure, content or criteria of the narrative test and that the article is published by the HPCSA Appeals Tribunal as a guideline to the performance of the narrative test, as well as the required structure, contents and criteria thereof.

[31] The authors further explain that the need for the narrative test arises where the injuries are found to have resulted in less than 30% WPI according to the method of the AMA guides and the medical practitioner nonetheless regards the injuries as serious. They explain that two reasons for the narrative test are the failure of the AMA guides to take the *'circumstances of a third party'* into account properly or effectively and *'inherent shortcomings of the AMA guides especially with respect to estimating the life-altering impact of injuries that have resulted in more abstract and subjective impairments and suffering'*. Commenting on the *'levels/degree of changes in the 'circumstances of a third party'*, the authors state that a medical practitioner's report:

[3] The Health Professionals Council of South Africa Serious Injury narrative test Guidelines, by Drs HJ Heedling NB Mabuya, P Engelbrecht, KD Rosman, DA Barelle published in the South African Medical Journal as SAMJ Vol 103 no 10 2013

'Should, therefore, include comment by (such person) and/or the other relevant experts, based on reported facts as well as application of mindful professional judgment, in relation to the level or degree of activity limitations, participation restrictions and subjective suffering, i.e. the significance or otherwise of the changes to the life of the injured person. Whereas it is not feasible to express such opinions in a rigid quantitative manner (eg a percentage rating of permanent disability) it is both feasible and necessary to express meaningful semi-quantitative opinions using terminology, e.g. insignificant, trivial, inconsequential, mild, moderate, severe, intrusive, overwhelming, devastating, significant'.

[32] As Mr Maodi, who appeared on behalf the respondents, submitted, these reports or opinions inevitably contain a value judgment. This of course applies not only to the medical experts who examined and evaluated the applicant and applied the narrative test but also to the Tribunal which must in turn consider these opinions and arrive at its own conclusions in regard to the severity of the injury.

[33] I turn to deal with the grounds of review relied upon by the applicant. It was contended that the Tribunal's findings were *'incomprehensible'* in the light of the contrary medical opinions provided on behalf of the applicant and that no reasons were furnished by the Tribunal for the rejections of these views; instead the Tribunal incorrectly focussed on the prospects of the applicant developing adjacent segmented disease in future. It was also contended that the Tribunal's finding that applicant's normal activities and sport and recreation involvement had not been affected was unfounded and contradictory of its own finding.

[34] The starting point is that the applicant cannot make out a case for review of the impugned decision by attempting to show that the Tribunal's findings were *'wrong'* for the simple reason that we are not here concerned with an appeal and, secondly, at least

half of the expert medical opinions which were obtained favoured the view which the Tribunal ultimately adopted.

[35] The applicant's next complaint is that the Tribunal provided no reasons for the rejection of the findings of those experts whose view it was that his injury was serious. This is not correct, however. In his opposing affidavit the presiding officer of the Tribunal pointed out that Drs Domingo and Le Roux based their findings of serious long term impairment only on the risk of deterioration and not actual evidence of permanent damage and further that the factual narrative issues provided in those reports did not meet the requirements of serious long term impairment or loss of body function referred to in the narrative test; similarly that Ms Stander also relied on possible future degenerative changes in reaching her finding. As the extracts from reports of those experts show, each of them did indeed rely, inter alia, on this aspect of the applicant's condition as contributing towards his *'serious injury'*. At the very least, however, the prospects of such future degenerative change in the applicant's condition was a disputed issue when the opinions of all the specialists were considered.

[36] On behalf of the applicant Mr Bisschoff also relied on two alleged misdirections on the part of the Tribunal. Both of them have to be gleamed from a critical reading of the brief letter from the HPCSA dated 24 November 2014 setting out the Tribunal's reasons for this decision. The first such misdirection relates to the remark under the heading *'Outcome'* that the applicant cannot play soccer as he used to. However, directly thereafter under the heading *'Tribunal Finding'* it noted that the applicant's normal activities and sports and recreational involvement had not been affected.

[37] I do not consider that the Tribunal's decision and brief reasons as contained in its letter dated 24 November must be read so critically and closely as to preclude any other explanation for its findings or reasons. After the letter in question was received the applicant's legal representative wrote requiring full reasons within a period of 90 days but less than a month later launched the review proceedings without waiting for these reasons. In the circumstances the first opportunity which the first respondent had to furnish full reasons came in its opposing affidavit. These make it clear that it accepted that the applicant's physical abilities, including his ability to play casual soccer, had been limited by his injury. Nonetheless this factor, and others, did not meet the requirement of serious long term impairment or loss of body function referred to in the narrative test.

[38] The other misdirection relied upon by the applicant was the statement in the brief reasons that *'the narrative issues do not apply for potential future impairments'*. To the extent that this means that future possible impairment could not be considered as part of the narrative test, this is clearly misconceived. However, the Tribunal stated its position in this regard more clearly in the reasons it furnished in its opposing affidavit, when it explained that it could not support '*a diagnosis of serious long term impairment on the basis of future risk only'* **[my underlining]**. In the circumstances of this matter this is not an irrational position to hold. Apart from these considerations the question of the materiality of any alleged misdirection also arises since whether or not an erroneous interpretation of the narrative test or the law renders the decision invalid depends on the materiality of the error. As stated by Corbett CJ in *Hira v Booysen 'Whether or not an erroneous interpretation of a statutory criterion …. renders the decision invalid depends*

on its materiality. If, for instance, the facts found by the Tribunal are such as to justify its decision even on the correct interpretation of the statutory criterion, then normally (i.e. in the absence of some other review ground) there would be no ground for interference'.[4]

[39] Having regard to the preponderance of the evidence on the question of the prospects of the applicant suffering future degenerative change, I consider that even if one accepts that the statement of the Tribunal complained of was a misdirection, any failure to take into account the possibility of future degenerative change in determining whether there was a serious injury is not a sufficiently weighty factor as to materially influence the Tribunal's decision as to the existence of a serious injury in the whole.

[40] It was further contended on behalf of the applicant that the Tribunal had failed to take into account various relevant considerations in reaching its decision. In making this argument reference was made to various medical findings or prognoses 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 the 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.

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[4] 1992 (4) SA 69 (A) at 93 G - H

[41] Mr Bisschoff repeatedly emphasised that the applicant's functioning impairment interfered with his ability to perform manual work and to play soccer competitively. This submission, however, takes the question of whether the applicant has suffered a serious injury as defined no further. In most cases where there has been an appreciable WPI one would expect that this will be reflected in an impairment of the claimant's ability to perform certain physical functions. The question, rather, is at what stage that impairment, although falling below thirty percent, nevertheless has such far-reaching consequences for the claimant that his injury must nonetheless be seen as serious. In answering this question it is useful to go back to the examples cited by Dr Marks, namely, the ballerina with a stiff ankle or the concert pianist who loses the tip of his finger. These are, undoubtedly, extreme examples but they illustrate the point, namely, that one is looking for consequences of an injury which take it appreciably beyond the face value or WPI assessment of the injury insofar as its consequences for the applicant's life, functioning or lifestyle.

[42] The Tribunal was unpersuaded that such consequences existed. Even were I clothed with appeal powers and could substitute my decision for that of the Tribunal, I can find no decisive evidence which points unerringly, or even establishes on a balance of probabilities, that these consequences have been visited upon the applicant. His physical impairment seem relatively limited and appears not to have had a significant effect on his career choice or his recreational capacities or lifestyle. By way of example this is not a case of a middle-aged man manual labourer who is now excluded from finding any work as a manual labourer as a result of his physical impairment. Nor is it a

case of someone for whom playing soccer was an extremely important component of his life and that has now been taken from him.

[43] Mr Bischoff also launched an attack on the first respondent's approach to the correct application of the narrative test based on what its presiding officer stated in para [65] of the opposing affidavit, namely, that although the AMA guides and the narrative test constitute two different tests of assessment they are nonetheless related to each other. The deponent went on to say:

> *'The criteria under the AMA guides is always the starting point in the performance of an assessment and would ordinarily give one a good indication as to the severity or seriousness of the injury, even where the injury does not qualify as serious injury under that criteria.'*

[44] Applicant's counsel strenuously criticised this approach contending that it amounted to a misdirection and was *'simply wrong'*. He submitted further that the narrative test was a completely separate test and that for the first respondent to adopt an approach where any regard was had to the result of the AMA guides test revealed a fundamental flaw in its approach to the narrative test. I disagree. The Supreme Court of Appeal in Duma's case ruled that the first test i.e. the AMA guides test must first be undertaken and cannot be circumvented by immediately going to the narrative test. It is also quite logical, in my view, that although the narrative test is separate that test cannot be applied in a vacuum and regard can be had, as relevant background information, to the outcome of the AMA guides test. This viewpoint was shared by Pretorius J in

Maluka v Road Accident Fund and others[5] when she stated in para [27] of her judgment:

> *'[27] Although the applicant argues that the score of 14% WPI should have been taken into account it cannot be disregarded as irrelevant. The narrative would have to be extreme to justify the Appeal Tribunal finding that the applicant has suffered a 'serious injury'.'*

For these reasons I consider that this criticism of the first respondent's approach to the application of the narrative test is unfounded.

[45] Finally, the applicant raised a procedural ground of review, namely, that no occupational therapist has been appointed to sit on the Tribunal and that its members therefore lacked the necessary expertise to determine how the applicant's injuries impacted upon his participation in all activities of daily living, including work and participation in sport. For this reason, it was contended, they were in no position to reject Ms Stander's findings.

[46] This ground of review was not pressed in oral argument, understandably so. In terms of Regulation 3(8)(b) the Tribunal must consist of medical practitioners with expertise in the appropriate areas of medicine. The panel in question comprised a neurosurgeon, an orthopaedic surgeon, a family physician and a specialist physician. The first two persons clearly have direct expertise in the relevant area of medicine, namely, a cervical spine injury. The latter two specialists would, in the nature of their all-round medical expertise, also be qualified to deal with the issue in dispute. It does not follow from Regulation 3(8)(b) that, should the report of a particular medical specialist or

[5] Case No 48032/2011 GPD

practitioner such as an occupational therapist serve in front of them, the panel is incomplete or improperly constituted unless it too comprises an occupational therapist. Such an interpretation or requirement would be an example of what O'Regan J referred to *Residents of Joe Slovo Community, WC v Thubelisha Homes*[6] when she stated:

> *'The obligations of fair process imposed upon organs of State must be approached with a clear eye on the purpose for which we insist on process. That purpose is to give affected parties an opportunity to be heard on a decision before it is finally made. Fair process improves the quality of decisions and establishes their legitimacy. However, it should not result in unnecessary and prolix requirements that may strangle government action.'*

[47] It also bears mentioning that the applicant had a right to object to one or more of the appointments to the panel in terms of Regulation 3(9)(c)(i). He chose, however, not to exercise this right at least not in clear terms. Instead the applicant's legal representatives were content to propose the appointment of an occupational therapist adding the qualification that if this was not done they trusted that the Tribunal would accept the opinion of Ms Stander. Needless to say this indirect attempt to fetter the Tribunal's decision-making power was unjustified.

CONCLUSION

[48] It follows from what I have said that I see no basis to review the decision of the first respondent. Thus the question of whether the Court should substitute its own decision for that of the Tribunal or remit the matter back to it does not arise. It bears repeating that the impugned decision was taken by a panel of medical experts who considered all the medical reports before them, at least half of which supported the

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[6] 2010 (3) SA 454 (CC) at para [296]

decision which they ultimately took. That decision was, in so small part, a value judgment and it is quite conceivable that even had there been no countervailing medical opinions the Tribunal could justifiably have arrived at a different conclusion to that of the experts. For the Court to intervene in the circumstances of this matter would be for it to act as a court of appeal, a role which is not the Court's for sound constitutional reasons. Doing so would incidentally tend to undermine the scheme of the legislative amendments to the RAF system and, if widespread, would carry the potential to render it unworkable. These comments must not, however, be understood as suggesting that decisions of the Tribunal in similar matters are sacrosanct or immune to review. Whether such decisions are sound, however, will depend in each case on the particular circumstances. There will, no doubt, be cases where the conclusion whether to intervene is much more difficult to make, particularly given the inherent imprecision of the concept of a *'serious injury'*.

[49] In the circumstances the application for review falls to be dismissed.

COSTS

[50] There is no reason why costs should not follow the result. The only qualification I add to this is that by reason of the respondents' filing their opposing affidavits late there was a hearing on 28 June 2015 when the matter came up in the unopposed court and was postponed by agreement for hearing in fourth division. In the circumstances I consider that the respondents must bear the applicant's wasted costs arising out of that hearing.

ORDER

[51] The application is dismissed with costs save for the costs occasioned by the postponement of the hearing on 28 June 2015 which costs must be borne by the first respondent.

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BOZALEK J

APPEARANCES

For the Applicants:	Mr C Bisschoff Instructed by: Sohn Wood Attorneys
For the Respondents:	Mr T Maodi Instructed by: Gildenhuys Malatji Inc c/o Werksmans Attorneys