

REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NUMBER: 3540/2015
DATE HEARD: 27/10/2016
DATE DELIVERED: 01/11/2016

In the matter between:

MARINDA NIEUWENHUIS

APPLICANT

and

**REGISTRAR HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

1st RESPONDENT

**THE HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

2nd RESPONDENT

THE ROAD ACCIDENT FUND

3rd RESPONDENT

JUDGMENT

NAIDU AJ:-

INTRODUCTION:

[1] The Applicant has approached the Court for the following relief:

"Please take notice that the Applicant will apply to court to have the failure on the part of the First Respondent to comply with the duties imposed upon him/her in terms of Regulation 3 of the Road Accident Fund Regulations of 2008 (the regulation) (published under GNR.770 of July 2008 in Government Gazette No 31249 as amended by GNR.347 of 15 May 2013, which in turn was published in Government Gazette 36452) to be reviewed, being inter alia

- a) The duty to refer the dispute to an appeal tribunal (as required in terms of sub-regulation 5(d) and 8(a) of the regulation); and*
- b) The duty to inform the applicant and the third respondent of who the persons are that were appointed as the appeal tribunal (as required in terms of sub-regulation 9(a) of the regulation.)*

Take further notice that the Applicant will seek a cost order against the Third Respondent, as is contemplated in terms of sub-regulation 14 of the regulation; alternatively the Applicant will seek an order that the Second Respondent shall pay the costs of the application; and further alternatively the Applicant will seek an order that the Second Respondent shall pay the costs of all other parties to these proceedings.

Take further notice the Respondents are hereby called upon to show cause why such review and cost order should not be granted.

NOTICE IN TERMS OF RULE 53(1) (b)

The First Respondent is hereby called upon, to dispatch, within 15 days after receipt of this notice of motion, to the registrar of this Honourable Court the record of the proceedings, which is sought to be corrected, together with such reasons as he/she is by law required or desires to give or make, and to notify the applicant that he/she has done so."

[2] It is common cause that the Applicant only persists with the prayer for costs as set out above.

BACKGROUND

[3] The Applicant a 51 year old women, was injured in a motor vehicle collision that occurred on the 1st August 2011. She approached her current legal representatives for assistance in lodging a claim against the Third Respondent.

[4] It is trite that a claim for compensation for injuries she sustained in the motor vehicle collision was lodged with the Third Respondent under reference number 72/1963184/030/0.¹

[5] A medico-legal report was drafted on her behalf by Doctor L.A Oelofse, who saw the Applicant some two years after the accident.

¹ Indexed Bundle page 9

[6] The following facts are common cause:

[6.1] On the 06th June 2014, the Applicant's Attorneys of record received an email from an employee of the Third Respondent, one Thamsanqa Mafanya, that the Third Respondent had rejected the Applicant's claim in essence on the basis that her whiplash type injury did not qualify as a serious injury.² The Applicant's attorneys were also advised that an appeal could be lodged with the Second Respondent.

[6.2] On the 28th August 2014, the Applicant's attorneys formally declared a dispute and dispatched a letter to the First Respondent herein advising of the disputed assessment and attaching various documentation, including the duly signed RAF form 5.

[6.3] On the 29th October 2014, the Applicant's attorneys drafted a letter to the Second Respondent requesting a response to the letter of the 28th August 2014. The Second Respondent only responded to such correspondence on the 23rd January 2015, some 102 days after the referral of such dispute.³

[6.4] In its reply to the Applicant's attorneys, the Second Respondent advises *inter alia* that the Third Respondent and/or its attorneys would be advised of the dispute and that they (the Fund) would be granted 60 days to respond to the

² Page 17 of the Indexed Bundle.

³ Page 54 of the Indexed Bundle.

Applicant's dispute. The Applicant is further advised that the First Respondent herein would advise her of the names of the medical practitioners that would be appointed to determine her dispute.

The Applicant is further advised that the Appeal Tribunal would determine her dispute and that the First Respondent herein would advise her as to the outcome.

[6.5] On the 22nd April 2015 the Applicant having received no further feedback from either the First or Second Respondent's herein, drafted further correspondence to the Second Respondent requesting a status report. No response was forthcoming from the Second Respondent in this regard.

[6.6] As a result of receiving no reply from the First or Second Respondent's herein, the Applicant instituted the present application against the Respondents on the 14th September 2015. Copies of the application were duly served on the First and Second Respondents on the 06th October 2015, and on the Third Respondent on the 13th November 2015.

[6.7] On the 25th January 2016, after various correspondence by the attorneys for the Third Respondent to the Second Respondent requesting a decision as to the Applicant's appeal, the Second Respondent finally advised the attorneys for the

Third Respondent per email, that the Appeal Tribunal had indeed sat on the 20th January 2016 to consider the Applicant's appeal, and had decided that the Applicant's injuries did not qualify for general damages.⁴

[6.8] the attorneys for the Third Respondent were further advised that a formal letter confirming the refusal would be furnished to them once the chairperson had authorized that such minutes could be communicated.⁵

[6.9] It is trite that the Second Respondent had made such decision some 508 days after the Applicant had filed her dispute with them.

[6.10] On the 15th March 2016 the Applicant's attorneys of record conveyed a letter to the First and Second Respondents, drawing their attention to the present application and the potential cost implications against them. To date there has been no reply from neither the First nor the Second Respondent.

APPLICABLE LEGISLATION

⁴ Page 105 of the Indexed Bundle

⁵ Page 105 of the Indexed Bundle

[7] Section 17 (1A) of the Road Accident Fund Act 56 of 1996 ("The Act"), read with regulation 3 of the Road Accident Fund Regulation 2008 (Government Gazette No.331249) sets out the basis of upon which a claimant may claim damages sustained as a result of a motor vehicle collision against the Road Accident Fund ("The Fund"). It is common cause that compensation will only be made in the event of a serious injury.

[8] In terms of regulation 3 (1) (b) (ii), an injury will only be considered serious if there is a 30 percent impairment or more of the whole person as provided in the AMA Guides, which is defined in regulation 1 as the "American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition." ⁶

[9] Regulation 3(4) sets out the procedure to be followed should a third party or claimant dispute the serious assessment injury form. Such dispute must be lodged with the Registrar of the Health Professionals Council, within 90 days of being advised of the rejection.⁷ This was complied with by the applicant who lodged such dispute on the 28th August 2014. Regulation 3(4) and to 3(13) sets out the procedure by which the appeal tribunal enquires into the dispute.

[10] Regulation 3(6) then sets out the procedure to be followed once the Registrar has indeed received the notification as set out above. The Registrar must within 15 days of having been notified of such dispute, advise other parties to the dispute, in writing and

⁶ Regulation 3 of the Road Accident Fund Regulation 2008 (Government Gazette No.331249)

⁷ Regulation 3(4)(a) Road Accident Fund Regulations 2008 (Government Gazette No.331249)

provide copies of such dispute application with the necessary documentation. The First Respondent herein acknowledged the Applicant's dispute only some 150 days later.

[11] In terms of Regulation 3(7), the so-called "other party" then has 60 days to refute the submissions made by the claimant. This procedure was evidently not followed by the First Respondent herein.

[12] In terms of Regulation 3(8) (a), after receiving notification by the other party or after the expiry of the 60 day period, the Registrar must refer the dispute for consideration by an appeal tribunal paid for by the Fund (Third Respondent herein);

[13] Regulation 3(9) provides in essence that the Registrar must in writing inform that parties whom the persons are that constitute the appeal tribunal. The sub-regulation also provided procedures to be followed in the event that a party is aggrieved by the appointment of any person/s on the appeal tribunal.

[14] Regulation 3(10) (a)-(h) sets out the machinations of the appeal tribunal in assessing the dispute and Regulation 3(11) (a)-(i) sets out the powers of the tribunal in assessing such dispute.

[15] In the event of the tribunal being satisfied in the assessment of the dispute, Regulation 3(12) confirms that the appeal tribunal shall notify the Registrar of its findings within 90 days after the referral of the dispute. In this instance the appeal tribunal only made a decision in upholding the Third Respondent's decision in dismissing the applicant's claim, on the 20th January 2016, some approximately 508 days after the applicant lodged a formal dispute on the 28th August 2014.

[16] Regulation 3(13) then confirms that the Registrar shall then inform the parties of the findings of the appeal tribunal, which are considered to be final and binding on the parties. The Second Respondent via one Busisiwe Ngobeni, advised the attorneys of the Third Respondent of the appeal tribunals decision on the 25th January 2016.

[17] It must be noted that once a dispute has been lodged with the First Respondent, there rests no further obligations upon the Third Respondent in the further conduct of the matter other than those set out in regulation 3(6) and 3(7).

APPLICANT'S CASE

[18] The Applicant's initial application was for the review of the First Respondent's failure to comply with regulations 3(5) (d), 8(a) and 9(a) of the Act. This application was

served on the First and Second Respondent's on the 05th October 2015 and upon the Third Respondent on the 13th November 2015.⁸

[19] The initial application only sought costs against the Third Respondent herein. The Third Respondent filed a Notice of Acting on the 04th January 2016, and then filed a formal Notice of Opposition on the 26th January 2016, on the day when the application was set down for hearing on the unopposed motion court roll.

[20] The matter was postponed on the 26th January 2016, to allow the Third Respondent an opportunity to file its opposing papers, the costs of such postponement being reserved. The Third Respondent then then filed its opposing papers on the 10th March 2016.⁹

[21] Having regard to the Third Respondent's opposing papers, it appears that the Applicant and Third Respondent are *ad idem* as to the culpability of the First and Second Respondents in their non-compliance with the regulations.

[22] It is argued by counsel for the Applicant that as a result of the submissions proffered in the Third Respondent's pleadings regarding the *culpa* of the First and Second Respondents, the Applicant then amended her Notice of Motion to submit a prayer in the alternate, that the Second Respondent be held liable for the costs of the

⁸ Pages 64-66 of the Indexed Bundle

⁹ Page 83 of the Indexed Bundle.

application and further that the Second Respondent would also be held liable for the costs of all other parties to the proceedings.¹⁰

[23] In support of the submission that the Third Respondent must be held responsible for the costs of the application, the Applicant relies on the interpretation of Regulation 3(14), which reads as follows:

“ 3(14) (a) The Fund shall bear the reasonable costs of the Health Professions Council of South Africa arising from sub-regulations (4) to (13), as agreed between the Fund and the said Council, or, failing such agreement, as determined by the Minister after consultation with the Minister of Health.

(b) The Fund shall bear the reasonable fees and expenses, as determined or approved by the Fund, of the persons appointed in terms of sub-regulation (8) and (10) (b).”

[24] Mr Marais for the Applicant relies on the unreported matter of *Buthlezi and others v HSPCA and Others*.¹¹ Mr Marais submits that in terms of such judgment the Fund was held liable for the payment of costs in applications where the applicant succeeded to

¹⁰ Pages 1 and 2 of the Indexed Bundle.

¹¹ [2014] ZAGPPHC 675 (29 August 2014)

review certain actions of the Second Respondent and members of various appeal tribunals which were constituted in terms of the regulation.

THE THIRD RESPONDENT'S CASE

[25] The Third Respondent being the Road Accident Fund has opposed the present application. *Mr Nyameko* for the Third Respondent submitted that the Fund cannot be held liable for the cost of the application, and that the rationale upon which the Applicant claims against the Third Respondent is flawed.

[26] In respect of holding the Fund liable in terms of the provisions of Regulation 3(14) (a), *Mr Nyameko* submitted that the Third Respondent disputed that the interpretation of the applicable regulation, as proffered by Counsel for the Applicant, could be read to be interpreted that the Third Respondent is liable for the Applicant's costs of the Application.

[27] *Mr Nyameko* further submitted that regulation 3(14) (a) reflects an internal agreement between the Fund and the Second Respondent, and their respective heads, being the Minister of Transport and the Minister of Health. He submits that on a clear reading of the regulation, no mention is made of legal costs incurred by a third party, nor

is there any reference to the Fund being liable for the legal costs of a third party in the present context.

[28] Having regard to the second leg of the Applicant's argument, being a reliance on the *Buthelezi* Judgment, Mr Nyameko submits that the decision the court made in Buthelezi, was not based on an interpretation of regulation 3(14) (a), but on the discretion of the Court, in such instance.

[29] The Third Respondent then prayed that the present application for costs be dismissed with costs.

DISCUSSION

[30] It is common cause that both the Applicant and Third Respondent are *ad idem* as to the culpability of the Second Respondent in these proceedings. In this regard the

Applicant has amended her Notice of Motion to include a prayer in the alternative to include that the Second be held liable for the costs of the application.

[31] It is also not in dispute that the Applicant was entitled to bring the present application having regard to the obvious dilatory actions of the Second Respondent.

[32]The only issue that falls to be determined is the issue of whether the Third Respondent should be held liable for the costs of the present application. A proper determination of this issue would then necessitate an analytical discussion of the two grounds on which the Applicant submits that the Third Respondent should be held liable for the costs of the application.

AD REGULATION 3(14) (a)

[33] The question to be determined in terms of the argument proffered by the Applicant is whether a reading of the regulation lends itself to the drawing of a conclusion that the Third Respondent should be held liable for the Applicants costs of the Application.

[34] Our Courts have held that the primary rule of interpretation is that if the meaning of the words are clear, it should be put into effect and must be equated with the Legislature's intention. There are various theories of interpretation that have been

postulated by our courts. In *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) at paras 16-19, the relevant authorities regarding the issue of interpretation were collected and summarized.¹²

[35] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA), the Court per Wallis AJ held as follows at page 603-602:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in the document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all these factors. The process is objective not subjective."

[36] In my opinion the dictum in the above matter should be regarded as the *locus classicus* for issues pertaining to interpretation.

¹² *Bastian Financial Service (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA).

[37] The question then to be decided is having regard to Regulation 3(14) (a), and utilizing the guideline in *Natal Joint Municipal Pension Funds* case above, could it possibly be construed that the Third Respondent can be held liable for the Applicant's costs herein.

[38] The words and grammar used in the relevant regulation are to me, on an objective reading of the regulation are clear and unambiguous. It leaves no room for vagueness or an alternate interpretation.

[39] On the reading of the Act and the regulations as a whole, it clear that the Legislature clearly distinguishes between the various parties to which the Act and the regulations would be applicable to. When the Act or the regulations makes reference to the "Third Party", it is clear to me that such reference is made to a claimant. Regulation 3(4) in this regard clearly states that *"If a Third Party wishes to dispute the rejection of the serious in jury assessment report, or in the event of either the third party or the Fund or the agent disputing the assessment performed by a medical practitioner in terms of these Regulations, the disputant shall:...."* The reference to this point has a direct bearing on the interpretation of regulation 3(14) (a).

[40] Regulation 3(14) (a) makes no reference whatsoever to a "Third Party". There can also be no insinuation of any other interpretation. It is clear to me that had the Legislature intended to allow a claimant like the applicant to claim legal costs against the Third Respondent in terms of the regulation, it would have clearly provided for same

by at the very least making reference to a "Third Party". Having regard to the context of the Act and the regulations as a whole I can find no reason as to why the Legislature would make reference to "Third Parties", yet fail to make such reference in regulation 3(14) itself.

[41] It is quite apparent to me that regulation 3(14) was designed specifically to determine the issue of costs between the Third Respondent and the Second Respondent only. The Second Respondent is entitled to recover costs for services rendered and which costs the Third Respondent would be held liable for irrespective of the outcome on a claimant.

[42] The intention of the Legislature in my view was clearly to provide a dispute resolution mechanism to resolve disputes between claimants and the Third Respondent where the Third Respondent has rejected claims that fail the standard of a "serious injury" as described. Regulation 3(14) elucidates the pecuniary relationship between the Second Respondent and the Third Respondent and the concomitant obligations between the parties relating in particular to the assessment of disputed claims and the Second Respondent's compensation attendant upon deliberating upon such claims. There can be in my view, no other interpretation.

[43] Consequently I find the Applicant's submissions regarding the Third Respondent's liability for her costs in this regard to be without merit.

AD BUTHELEZI JUDGMENT

[44] The *Buthelezi* matter¹³ concerned nine separate review applications that related to the Appeal Tribunal dismissing the applicants' claims for damages. The Appeal Tribunal had upheld the Fund's view that the injuries sustained by the claimants were not serious injuries either under the "AMA Guides" or the Narrative Test.

[45] The Applicants' had approached the Court in terms of Section 8 (1) (c) (ii) (aa) of the Promotion of Administration of Justice Act 3 of 2000 ("PAJA"). The Applicants' all challenged the conclusions reached by the tribunal in dismissing their dispute.¹⁴

[46] At the conclusion of the matter, the Court as per Molefe J, made certain findings regarding each of the applicants' cases. In the cases where the court felt that a proper case for review of an applicant's case had been made out, the Appeal Tribunal's decision was set aside and was sent back to the Tribunal for reconsideration. The Fund was ordered to pay the costs of the application in such instant. In instances where a proper case for review had not been made out, the application was dismissed and it was ordered that each party would pay its own costs.¹⁵

¹³ [2014] ZAGPPHC 675 (29 August 2014)

¹⁴ Page 2 and 3 of the Judgment

¹⁵ Pages 43 to 47 of the Judgment

[47] The Applicant's reliance on *Buthelezi* in the present case, is based purely on *Molefe J* finding the Fund liable for costs of the successful litigants in the review application.

[48] The reliance purely on this finding is myopic in my view, as the *Buthelezi's* case must be distinguished from the present matter. In the *Buthelezi* matter, the applicants therein had clearly prosecuted their application for review of the Tribunals Decision to the end. In the present case it is trite that the Applicant has chosen not to proceed in reviewing the Tribunals decision in dismissing her dispute. The Applicant in the present circumstance has chosen to proceed to argue the present matter only on the aspect of costs.

[49] Had the Applicant chosen to prosecute a review application against the Second and Third Respondents herein against the decision to declare her injuries as non-serious, and had she been so successful a costs order in her favour in all likelihood would have been granted. Conversely, had the Applicant not been successful there also would have been a great likelihood that she would not have been mulct with costs associated thereto.

[50] Having regard to the above, I find no grounds to hold the Third Respondent liable for the costs of the present application. Having regard to the initial application seeking costs solely against the Third Respondent, the Third Respondent was entitled to oppose the application on the premise that the applicant incorrectly sought a cost order against it.

[51] It is clear to me that the Third Respondent plays no role in the final determination of a dispute before the appeal tribunal. The time limits regarding the institution and finalization of a claimants' dispute has been clearly set out in the Act and the Regulations thereto. The Third Respondent has no authority to expedite the process other than to make enquiries from the Second Respondent as to the status of the matter, which it did in the present case.¹⁶

[52] The applicant's insistence that the Third Respondent be held liable for costs in the present application is ill founded in my view. It should have been quite apparent that it was the Second Respondent that was dilatory in its action, and accordingly that the Second Respondent should be held solely liable for the costs.

¹⁶ Annexures TM1-TM9 of the Indexed Bundle

[53] *Mr Marias* for the Applicant submitted that in the event that I am not swayed by the argument proffered regarding the culpability of the Third Respondent for the costs of the application, his argument as I correctly understand it, is that at the time of launching the application due regard was had to the *Buthelezi* judgment which related to review proceedings, and the orders relating to costs made therein. The present application is also a review application of sorts and accordingly although unsuccessful as per the *Buthelezi* decision, I should not hold the Applicant liable for costs.

[54] *Mr Marais* further argued that in the alternative the Second Respondent should bear the cost of the application or further *alternatively* that the Second Respondent be liable for costs of all the parties in the application. *Mr Nyameko* for the Third Respondent submitted that he had no submissions to make regarding the Applicant's alternate prayers.

[55] *Mr Marias* also referred me to the matter of *Road Accident Fund v Duma and three related cases (Health Professions Council of South Africa as amicus curiae) [2013] 1 ALL SA 543 (SCA)*, where the court held that due to the uncertainty regarding the interpretation of regulation 3 it was equitable not to grant a cost order against the unsuccessful Plaintiff's in the matter.¹⁷ *Mr Marais* consequently entreated me to follow the ratio in this judgment pertaining to the issue of costs and the judicial discretion exercised therein in not granting a cost order against the applicant herein.

¹⁷Page 559 paragraph 41 of the Judgment.

[56] In attempting to reach a sagacious decision in the matter, regard must be had to the fact that the applicant has acted *bona fide* in attempting to resolve her dispute with the Fund. The Applicant had every right to have her dispute adjudicated upon in terms of the provisions of the Act and the regulations thereto.

[57] The Applicant's argument in trying to convince the Court of the Third Respondent's liability for costs of the application based on the interpretation of regulation 3(14) (a) whilst ill-founded, was also *bona fide* in my view and so was the reliance on the *Buthelezi* judgment. In the circumstances I do not deem it equitable to mulct the Applicant with the costs of the application.

[58] Notwithstanding that the present application was served timeously on the First and Second Respondents, and further notwithstanding correspondence being addressed by the attorney for the Applicant to the First and Second Respondents on the 15th March 2016, which was served by the Sheriff of this Court, reminding the First and Second Respondents of the pending application and the potential cost implications for the First and Second Respondents, these Respondents remained stoic in their silence. It is common cause that the Second Respondent to date has yet to provide the applicant with a formal response to the outcome of the Applicant's appeal to the tribunal. The conduct of the Second Respondent must be frowned upon.

[59] It is a well-established principle in our law that the award of costs is a matter wholly within the discretion of the Court.¹⁸ Such discretion however must be exercised on grounds that a reasonable person could have come to the conclusion arrived at.¹⁹ The trier of facts must have regard to the circumstances of each case, carefully weighing up the conduct of each party and other factors which may have a bearing upon the question of costs and to then make a such order as to costs as would be fair and just between the parties.²⁰

[60] The apathetic conduct of the Second Respondent cannot be condoned. To not effectively sanction the Second Respondent for its conduct in these proceedings would in my view be to effectively condone such conduct which would have a direct impact on claimants raising disputes with the Appeal Tribunal. A proper assessment needs to be conducted as to the reasons for the Second Respondent's dilatory action and as such I do not present to make an order *in vacuo* in this regard. The Court's displeasure must be conveyed to the relevant authority.

[61] Having regard to the above principles, and the particular circumstances of this case and the conduct of the parties in the matter, I make the following Order:

¹⁸ Graham v Odendaal 1972(2) SA 611 (A) at 616

¹⁹ Herbstein and Van Winsen, "The Civil Practice of the High Courts of South Africa, 5th Edition, at page 955.

²⁰ Erasmus v Grunow 1980(2) SA 793 (O) at 797B-D

(1) The Second Respondent is ordered to pay the costs of the application;

(2) The Registrar of the Court is hereby directed to serve a copy of this Order on the
Minister of Health.

V NAIDU

ACTING JUDGE OF THE HIGH COURT

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Date Heard:

27 October 2016

Date Delivered:

01 November 2016