

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



Case number: 27242/19

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE

.....
SIGNATURE

In the matter between:

SIYABONGA SOKHELA

APPLICANT

and

ADV PHELELANI KHUMALO

FIRST RESPONDENT

ACTING REGISTRAR OF THE HEALTH

PROFESSIONS COUNCIL OF SOUTH AFRICA

DR J CROSIER

SECOND RESPONDENT

DR J REID

THIRD RESPONDENT

DR AJ LAMBRECHTS

FOURTH RESPONDENT

ROAD ACCIDENT FUND

FIFTH RESPONDENT

JUDGMENT

VAN STADEN, AJ:

INTRODUCTION

- [1] The applicant lodges an application wherein he, although not framed in the exact words, requests the review and setting aside of the ruling of the Road Accident Fund Appeal Tribunal.
- [2] He cites the Acting Registrar (the Registrar) of the Health Professions Council of South Africa as first respondent, the members of the Road Accident Fund Appeal Tribunal (the Appeal Tribunal) as the second, third and fourth respondents, and the Road Accident Fund (RAF) as the fifth respondent.
- [3] The issues in dispute involve the question whether the Appeal Tribunal's decision that the applicant does not suffer from a serious injury be reviewed, due to the applicant not being granted opportunity of addressing the Appeal Tribunal, as well as because the Appeal Tribunal failed to consider relevant considerations.

APPLICANT'S FOUNDING AFFIDAVIT

- [4] The applicant was injured in a motor vehicle collision on 5 July 2016. By means of letter dated 12 September 2018 the RAF's attorneys rejected the applicant's serious injury assessment report, RAF Form 4, lodged on behalf of the applicant. On 9 October 2018 the applicant submitted the RAF 5 Form to commence appeal proceedings, requesting the Registrar to appoint an Appeal Tribunal to determine the dispute concerning the RAF's rejection of the serious injury assessment report.
- [5] The applicant's RAF Form 4 was completed by Dr Julius Preddy, an orthopaedic surgeon. He opined that the applicant's Whole Person

Impairment (WPI), according to the American Medical Association's Guides (AMA Guides), is 14%. He submitted that the applicant's injury is serious in accordance with the Narrative Test contained in paragraph 5.1 of the RAF Form 4, serious long-term impairment or loss of a body function. Paragraph 5 of the RAF 4 Form addresses the Narrative Test in respect of non-serious injuries and requires that the expert opinion be supported by reports attached as annexures.

- [6] In the RAF Form 4 attachment dated 14 May 2018, Dr Preddy opines that the applicant has reached maximum medical improvement as far as the loss of his left knee is concerned, which is associated with pain. He indicates that the applicant has had ongoing problems related to his left knee, cannot fully flex his knee, has severe pain in his left knee and can only ambulate with the usage of crutches.
- [7] In Dr Preddy's comprehensive expert report dated 2 May 2018 he inter alia opines that the applicant may benefit from a manipulation under anaesthesia of his left knee to try and regain full movement. He also opines that there is a small chance that the applicant may require an open procedure where scarring of the quadriceps mechanism would be released. He may also require a lengthening procedure of the left quadriceps to regain full movement.
- [8] The RAF's rejection of the applicant's serious injury report by letter dated 12 September 2018 is premised on the expert report of Dr Tony Birrell, an orthopaedic surgeon. Dr Tony Birrell examined the applicant on 2 August 2018 and prepared a report on his examination. He compiled a separate assessment summary in respect of the Narrative Test. Therein he opines that the applicant's WPI is 6% and that his injury does not qualify as a serious injury under the Narrative Test.
- [9] In his comprehensive expert report Dr Birrell points out that there is considerable symptom magnification when comes to the examination of the left knee. Initially with the applicant sitting on the edge of the

examining couch, the knee flexed to 90°, but with him lying down he refused to flex his left knee for more than 30°. As far as Dr Birrell can ascertain, the knee is stable and there is certainly no effusion present.

- [10] Dr Birrell indicates that the applicant's gait is normal and that he carries a crutch, which is clearly no more than a stage prop and is not used as a proper walking one. He notes that the applicant walked out of the consulting room down a fairly long passage, not using the crutch at all, holding it in his left hand. Dr Birrell believes that after an arthrotomy of the left kneecap the applicant ought to have a very good prognosis. After he has had this minor surgery he is not expected to suffer any loss of note.
- [11] On 21 January 2019 the Registrar informed the applicant that an Appeal Tribunal, consisting of the second respondent, an orthopaedic surgeon, the third respondent, a neurologist, and the fourth respondent, an orthopaedic surgeon, has been appointed to consider the appeal.
- [12] Under letter dated 1 March 2019 the applicant was informed of the Appeal Tribunal's determination, that the applicant's injury probably does not qualify as a serious injury under the Narrative Test. The Appeal Tribunal referred to the comments by Dr Birrell in respect of the applicant's complaints that he cannot walk without crutches. The Appeal Tribunal found that the applicant's upper limbs are clinically normal, and that there is painful restricted flexion of the left knee, with the ligaments stable. It found that the left knee injury has residual symptoms. The Appeal Tribunal also referred to Dr Preddy's WPI assessment of 14% and that of Dr Birrell of 6%. The Tribunal's decided that the applicant suffers from non-serious musculoskeletal and neurological injuries on the available information.
- [13] The applicant's grounds of review are twofold. He firstly contends that the Appeal Tribunal's decision, the administrative action sought to be

set aside, is procedurally unfair in terms of the provisions of section 6(2)(c) of the Promotion of Administrative Action Act 3 of 2000 (PAJA). The applicant says he was denied the right to be present and advance submissions in support of the applicant's case.

- [14] The applicant secondly contends that in terms of section 6(2)(e)(iii) of PAJA relevant considerations were not considered. He alleges that the Appeal Tribunal did not have regard to the full contents of Dr Preddy's reports wherein he unequivocally states his view. He contends that in terms of the disagreement between Drs Preddy and Birrell the Appeal Tribunal ought to have exercised its powers in determining that the applicant be examined by an independent orthopaedic surgeon. He submits that the members of the Appeal Tribunal failed to apply their minds to the relevant issues. The decision they arrived at in finding that the applicant didn't suffer a serious injury has been arrived at arbitrarily.

RESPONDENT'S ANSWERING AFFIDAVIT

- [15] The second respondent deposes to the answering affidavit on behalf of the first four respondents. He raises two points in limine. He submits that the first respondent was incorrectly cited and that the applicant should have cited the Appeal Tribunal. He also contends that the fifth respondent was incorrectly cited, that it plays no role in the appeal procedure.
- [16] The second point in limine raised is that the applicant doesn't rely on the provisions of PAJA in bringing the application.
- [17] As far as procedural unfairness is concerned, the second respondent points out that the RAF 5 Form, indicating the method to approach the Appeal tribunal, specifically states "*if asked to do so, the Appeal Tribunal may say that legal argument should be made on certain issues and an attorney or advocate will then be appointed to hear such argument.*" From this it is evident, according to the second respondent,

that the discretion to consider evidence or submissions from the applicant lies solely with Appeal Tribunal. The applicant or its legal representatives do not have any per se right per se to attend the Appeal Tribunal hearing. The second respondent points out the provisions of regulation 3(11) of the regulations (the Regulations) promulgated in terms of the Road Accident Fund Act 56 of 1996 (the RAF Act), in this regard.

[18] The second respondent asks what further contribution could have been made by the presence of the applicant and his attorney at the Appeal Tribunal hearing. The Appeal Tribunal consists of two more orthopaedic surgeons, who agree with Dr Birrell. All documentation, reports and record were at hand and considered by the Appeal Tribunal.

[19] The second respondent submits that the applicant is cherry-picking from the evidence available. He contends that the applicant makes no substantial averments or offers no facts in relation to substantive grounds of review.

APPLICANT'S REPLYING AFFIDAVIT

[20] In reply the applicant relies on the Constitution in contending that the applicant, and his representative, should have been granted the opportunity to address the Appeal Tribunal. A bland refusal to address the Appeal Tribunal cannot be said to amount to a prudent exercise of such discretion. No valid or justifiable reason was given for the refusal to permit the applicant's attendance and for him to make submissions, which amounts to a violation of the provisions of section 5 of PAJA.

[21] The applicant submits that Dr Preddy's report is not mentioned in the Appeal Tribunal's minute and the Tribunal didn't indicate why it disagreed with him.

LEGISLATIVE FRAMEWORK

- [22] In terms of section 3 of the RAF Act the object of the Act is the payment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicles.
- [23] Section 26(1) and (1A) of the RAF Act provides for the regulation making powers of the Minister of Transport:
- “(1) The Minister may make regulations regarding any matter that shall or may be prescribed in terms of this Act or which it is necessary or expedient to prescribe in order to achieve or promote the object of this Act.
 - (1A) Without derogating from the generality of subsection (1), the Minister may make regulations regarding-
 - (a) the method of assessment to determine whether, for purposes of section 17, a serious injury has been incurred;
 - (b) injuries which are, for the purposes of section 17, not regarded as serious injuries;
 - (c) the resolution of disputes arising from any matter provided for in this Act.”
- [24] Section 17(1) of the RAF Act limits the payment of non-pecuniary loss to serious injuries as contemplated in section 17(1A). The latter section determines that the assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.
- [25] Regulation 3 of the Regulations prescribes the method for the assessment of a serious injury. Regulation 3(1)(b)(ii) and (iii) prescribes the criteria for the assessment of a serious injury:
- “(ii) If the injury resulted in 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious.
 - (iii) An injury which does not result in 30 per cent 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 body function;
 - (bb) constitutes permanent serious disfigurement;
 - (cc) resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or
 - (dd) resulted in loss of a foetus.”

- [26] In terms of Regulation 3(3)(c) the RAF shall only be obliged to compensate a third party for non-pecuniary loss if a claim is supported by a serious injury assessment report (RAF Form 4) and the RAF is satisfied that the injury has been correctly assessed as serious in terms of the method provided in Regulation 3. In terms of Regulation 3(3)(dA) the RAF must, within 90 days from the date on which the serious injury assessment report was delivered, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment. Regulation 3(4)(a) determines that if the RAF rejects the serious injury assessment report, a third party has 90 days within which to lodge a dispute resolution form (RAF Form 5).
- [27] In terms of Regulation 3(8)(a) the Registrar shall within 60 days refer the dispute for consideration by an appeal tribunal paid for by the RAF. Regulation 3(8)(b) provides for the appeal tribunal to consist of three independent medical practitioners with expertise in the appropriate areas of medicine, appointed by the Registrar, who shall designate one of them as the presiding officer.
- [28] In terms of Regulation 3(10) a hearing is afforded to a party under the following circumstances:
- “(a) If it appears to the majority of the members of the appeal tribunal that a hearing for the purpose of considering legal arguments may be warranted, the presiding officer of the appeal tribunal shall notify the Registrar to this effect in writing, stating reasons.
 - (b) When the Registrar receives the notification he or she shall request the chairperson of the bar council, alternatively the chairperson of the law society, of the jurisdictional area concerned, to appoint an advocate of the High Court of South Africa, or an attorney of the High Court of South Africa, with at least five years of experience in practice.
 - (c) The advocate or attorney, once appointed, shall consider the reasons submitted to the Registrar by the presiding officer of the appeal tribunal and shall within 10 days of his or her appointment make a recommendation in writing on whether a hearing is warranted.
 - (d) The appeal tribunal shall consider the recommendation made by the advocate or attorney and determine, in writing, whether the nature

of the dispute warrants a hearing for the purpose of considering legal arguments.”

[29] In terms of Regulation 3(11) an Appeal Tribunal has the following powers:

- “(a) Direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations, by a medical practitioner designated by the appeal tribunal.
- (b) Direct, on no less than five days written notice, that the third party present himself or herself in person to the appeal tribunal at a place and time indicated in the said notice and examine the third party's injury and assess whether the injury is serious in terms of the method set out in these Regulations.
- (c) Direct that further medical reports be obtained and placed before the appeal tribunal by one or more of the parties.
- (d) Direct that relevant pre- and post-accident medical, health and treatment records pertaining to the third party be obtained and made available to the appeal tribunal.
- (e) Direct that further submissions be made by one or more of the parties and stipulate the time frame within which such further submissions must be placed before the appeal tribunal.
- (f) Refuse to decide a dispute until a party has complied with any direction in paragraphs (a) to (e) above.
- (g) Determine whether in its majority view the injury concerned is serious in terms of the method set out in these Regulations.
- (h) Confirm the assessment of the medical practitioner or substitute its own assessment for the disputed assessment performed by the medical practitioner, if the majority of the members of the appeal tribunal consider it appropriate to substitute.
- (i) Confirm the rejection of the serious injury assessment report by the Fund or an agent or accept the report, if the majority of the members of the appeal tribunal consider it is appropriate to accept the serious injury assessment report.”

DISCUSSION

Points in Limine

[30] Insofar as the respondent submits that the applicant doesn't rely on the provisions of PAJA in bringing the application, I find that the applicant indeed relies thereon. Albeit not always in the clearest terms, the applicant does refer to and relies on the relevant provisions of PAJA in bringing the application.

[31] In respect of the point in limine concerning the non-joinder of the Appeal Tribunal, I find that the applicant should have cited the

chairperson of the Appeal Tribunal, instead of the individual members of the Appeal Tribunal, in their capacity as such¹. In the Safcor Forwarding matter² the citing of the incorrect person was dealt with by Corbett JA as follows:

“The position then is that appellant ought to have cited the chairman of the Commission, as representative of the Commission; instead it merely cited the Commission. Did this merit the dismissal of the application with costs? In my opinion, it did not. I am whole-heartedly in agreement with the view of SCHREINER JA that:

'... technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

... In this case there is no suggestion of prejudice. In fact the notice of motion directed to the Commission effectively brought it before the Court and the only defence raised in the opposing affidavit was the jurisdictional point. ... The learned Judge a quo also seems to have proceeded on the finding that 'the wrong person (was) before the Court' (judgment a quo at 1117B). In my opinion, the Judge a quo erred. In all the circumstances a formal application for condonation was unnecessary, particularly as it was contended by appellant's counsel that the application complied with Rule 53 (1) and condonation could only arise if this were held to be incorrect. The various factors which I have mentioned - the practice in the past, the absence of prejudice and the minimal difference between citing the chairman as representative of the Commission and the Commission itself - amply provide good cause. And finally it was not a case of the wrong person being before the Court, but a case of the right person having been incorrectly cited.

In my view, therefore, this slight deviation from Rule 53 (1) ought to have been condoned and the objection based on the non-citation of the chairman of the Commission dismissed.”

[32] I am prepared to condone the non-citing of the correct person, the chairperson of the Appeal Tribunal. The fact the applicant instead cited the individual members of the Appeal Tribunal, in their capacity as such, means that the Appeal Tribunal, including its chairperson, has effectively been cited as a party. It is not a case of the wrong person being before the Court, but a case of the right person having been

¹ *Safcor Forwarding (Johannesburg) (PTY) Ltd v National Transport Commission* 1982 (3) SA 654 (A).

² 673A to H.

incorrectly cited. The applicant's failure to cite the correct person is a less than perfect procedural step which I am prepared to condone.

[33] Furthermore, there has been no prejudice. The second respondent answered on behalf of the Appeal Tribunal, including its chairperson.

[34] Insofar as the point in limine regarding the misjoinder of the Registrar and RAF is concerned, it is of course so that the RAF has a direct and substantial interest in the litigation and is a necessary party to the litigation. The first respondent, being responsible for the implementation of the provisions of Regulation 3, has an interest in the subject matter of the litigation. As such he has not unnecessarily been joined.

[35] Accordingly I dismiss the points in limine.

Merits discussion

[36] In order to interpret the Regulations one must follow the now familiar process of assessing the text, context and purpose of the provision³.

[37] The Regulations circumscribe the circumstances whereunder a party may attend and present submissions to an Appeal Tribunal. The Regulations do not provide for a third party requesting attendance or automatically being entitled to attend an Appeal Tribunal hearing and to make representations. The initiative for attendance of the third party and his representative emanates from an Appeal Tribunal.

[38] The Regulations provide for an attenuated right to procedural fairness. Why is this so?

[39] De Ville⁴ deals with the context-sensitive nature of the right to procedural fairness as follows:

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 19; *Cloete and Another v S and a Similar Application* 2019 (4) SA 268 (CC) at para 28.

“The courts have frequently emphasised the flexibility and context-sensitive nature of the requirements of procedural fairness (pointing out that a hearing is not always a requirement). The closer a decision approximates the judicial process, the stricter the application of the requirements of procedural fairness. On the other end of the spectrum lie issues that are of a highly policy nature. The closer one gets to this end of the spectrum, the more minimal the requirements of procedural fairness. Action which qualifies as “administrative action” takes up part of the spectrum, but does not exhaust it. This is in line with the approach in other Commonwealth countries where the emphasis has shifted away from an enquiry into the scope of application of the requirements of procedural fairness, to its content in specific cases.”

- [40] In mandating the enactment of national legislation to give effect to the constitutional right to administrative justice, section 33(3)(c) of the Constitution requires that such legislation must “*promote an efficient administration*”⁵.

- [41] The legislature prescribes that the determination of a serious injury assessment dispute be undertaken by a tribunal consisting of independent experts, instead of leaving it in the hands of our courts. Such determination is furthermore done with reference to a specialist document, the AMA Guides. Under limited circumstances an attorney or advocate may be called in to assist with the determination of the dispute.

- [42] The legislature has entrusted the determination of the dispute to a system of independent peer experts for a reason. It has done so to effect an expeditious and effective system of dispute determination, in order to promote efficient administration. In order to achieve the expeditious and effective determination of the dispute by independent peer experts, third parties and the RAF are not automatically entitled to attend an appeal hearing, and have limited rights of attendance.

- [43] The Regulations do not provide for a fully blown hearing with all attendant rights. The Regulations do not provide for automatic

⁴ Judicial Review of Administrative Action in South Africa, p221.

⁵ *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) at footnote 19.

attendance by a third party or that a third party be provided with reasons if he is not called upon to attend the Appeal Tribunal hearing and make submissions.

[44] The applicant has furthermore not requested any declaratory relief in respect of the Regulations. I accordingly decide the application of the Regulations and not their possible invalidity.

[45] I find that the applicant has not made out a case in terms of the Regulations entitling him to attend the Appeal Tribunal hearing and make representations. As such I find no merit in the applicant's submissions regarding non-attendance at the Appeal Tribunal hearing.

[46] This leaves me to consider the applicant's submissions concerning the members of the Appeal Tribunal failing to consider relevant considerations and not having regard to the full contents of Dr Preddy's reports.

[47] The fact that the Appeal Tribunal did not have regard to the full contents of Dr Preddy's reports, does not equate to the Appeal Tribunal failing to consider relevant issues. Failing to have regard to the full contents of Dr Preddy's reports, or that Dr Preddy differed from Dr Birrell, does not in itself constitute a ground for this court to review and set aside the Appeal Tribunal's finding.

[48] In the matter of *MEC for Environmental Affairs and Development Planning v Clarison's CC*⁶ the review ground of failing to consider relevant considerations was dealt with as follows:

"[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

⁶ (408)/2012) [2013] ZASCA 82 (31 May 2013).

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...

[20] It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker. As it was stated by Baxter:

'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'

[21] That was expressed by this court as follows in *Durban Rent Board and Another v Edgemount Investments Ltd*, in relation to the discretion of a rent board to determine a reasonable rent:

'In determining what is a reasonable rent it is entitled and ought to take into consideration all matters which a reasonable man would take into consideration in order to arrive at a fair and just decision in all the circumstances of the case How much weight a rent board will attach to particular factors or how far it will allow any particular factor to affect its eventual determination of a reasonable rent is a matter for it to decide in the exercise of the discretion entrusted to it and, so long as it acts bona fide, a Court of law cannot interfere'.

[22] What was said in *Durban Rent Board* is consistent with present constitutional principle and we find no need to re-formulate what was said pertinently on the issue that arises in this case. 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 as he acts in good faith (and reasonably and rationally) a court of law cannot interfere. That seems to us to be but one manifestation of the broader principles explained – in a context that does not arise in this."

- [49] The applicant has not made it clear what relevant considerations the Appeal Tribunal has failed to consider. Dr Preddy, despite his unequivocal view in the RAF 4 Form that the applicant suffers from a serious injury in terms of paragraph 5.1, that the injury to the left knee has resulted in a serious long-term impairment or loss of a body function, is more equivocal in his comprehensive expert report. Therein he opines that the applicant may benefit from a manipulation

under anaesthesia of his left knee to try and regain full movement as well as that he may require a lengthening procedure of the left quadriceps to regain full movement. The full contents of Dr Preddy's reports point towards the opposite end of what the applicant contends.

[50] It is not open to this court to second-guess the Appeal Tribunal's evaluation. The role of a court is to ensure that the decision-maker has performed the function with which it was entrusted. I am satisfied that the Appeal Tribunal has fulfilled its task and that there is no merit in the applicant contending that the Appeal Tribunal has failed to consider relevant considerations.

ORDER

1. Accordingly, I order as follows:

The application is dismissed with costs.

M VAN STADEN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 13 FEBRUARY 2020

DATE OF JUDGMENT: 19 FEBRUARY 2020

ATTORNEY FOR APPLICANT:	BOVE ATTORNEYS INC
ADVOCATE FOR APPLICANT:	ADV A POLITIS
ATTORNEY FOR RESPONDENTS:	DYASON ATTORNEYS
ADVOCATE FOR RESPONDENTS:	ADV M AUGOUSTINOS