



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

CASE NUMBER: 27004 / 2017

1) REPORTABLE: YES / <u>NO</u> 2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u> 3) REVISED.	<u>31 May 2019</u> DATE
..... SIGNATURE	

M POTGIETER obo M

Applicant

And

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

First Respondent

THE ACTING REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL

Second Respondent

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL

Third Respondent

THE ROAD ACCIDENT FUND

Fourth Respondent

JUDGEMENT

M Snyman, AJ

Relief sought

- [1] The applicant seeks an order reviewing and setting aside a decision of the third respondent (*"the Appeal Tribunal"* or *"Tribunal"*) that the injuries suffered

by the minor child as a result if a collision in which he was involved, did not qualify as a serious injury as contemplated in Regulation 3 of the Regulations issued in terms of the Road Accident Fund Act 56 of 1996, as amended (“the *Regulations*”). An order referring the matter to a newly constituted Appeal Tribunal and costs are also sought.

Brief Background

- [2] After having submitted a claim against the Fund the applicant instituted action against the Road Accident Fund (“*the Fund*”) on behalf of her minor child under case number 60398/2014 for the injuries sustained after the child was involved in a motor vehicle collision on 10 May 2011, at the time, 2 years old.
- [3] At the time of the decision by the Tribunal in 2017, the child was 8 years old and in primary school.
- [4] Applicant *inter alia* claimed for “non-pecuniary damages” (also referred to as “general damages”) suffered as a result of the injuries sustained.

Legal Framework

- [5] In order to claim for and be compensated for any non-pecuniary damages, the minor child had to be examined by a medical practitioner who must then complete a Serious Injury Assessment Form (RAF 4) indicating that the person claiming, suffered from a Whole Person Impairment (WPI) as set out in the Regulations of more than 30%, alternatively on a narrative test, suffered from a serious injury as prescribed.

- [6] The applicant obtained and submitted the RAF 4 forms as contemplated in section 17 and read with Regulation 3 of Act, to the Fund.
- [7] Regulation 3 prescribes the method contemplated in section 17(1A) for the determination of "serious injury".
- [8] As a starting point regulation 3(1)(a), stipulates that a third party who wishes to claim general damages (referred to in the Regulations as "non-pecuniary damages") *"shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations"*.
- [9] Regulation 3(3)(a) requires that a third party who has been so assessed, *"shall obtain from the medical practitioner concerned a serious injury assessment report"*. This is defined as a duly completed RAF 4 form.
- [10] The RAF 4 form itself, read with regulation 3(1)(b), requires the medical practitioner to assess whether the third party's injury is "serious" in accordance with three sets of criteria:
- (a) In terms of regulation 3(1)(b)(i), the Minister may publish a list of injuries which do not qualify as serious. In 2013 such a list was published when the rules were amended. If the third party's injury falls within that description, it shall not be assessed as serious.
 - (b) Regulation 3(1)(b)(ii) provides that the third party's injury must be assessed as "serious" if it "resulted in 30 % or more Impairment 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".

- (c) If an injury does not qualify as "serious" (i.e not reach a 30 % impairment) in terms of regulation 3(1)(b)(ii), it may nonetheless be assessed as serious under the so-called "narrative test" provided for in regulation 3(1)(b)(iii), if that injury:
 - (i) resulted in a serious long-term impairment or loss of a body function;
 - (ii) constitutes permanent serious disfigurement;
 - (iii) caused severe long-term mental or severe long-term behavioural disturbance or disorder; and
 - (iv) the loss of a foetus.

[11] In terms of regulation 3(3)(c), the Fund is only liable for payment of general or non-pecuniary damages if: -

- a) a claim is supported by a RAF 4 form submitted in terms of the Act and the Regulations; and
- b) the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in the Regulations.

[12] If the Fund is not satisfied that the assessment was done correctly it must, either: -

- a) reject the third party's RAF 4 form and give its reasons for doing so; or
- b) direct that the third party submits himself or herself to a further assessment at the Fund's expense by a medical practitioner designated

by the Fund in accordance with the method prescribed in regulation 3(1)(b).

- [13] Regulation 3(4) provides for an appeal process should the third party dispute the Fund's rejection of the RAF 4 form (under regulation 3(3)(d)(i)) or if either the third party or the Fund wishes to challenge the assessment by the medical practitioner designated by the Fund (under regulation 3(3)(d)(ii)).
- [14] The aggrieved party must formally declare a dispute by lodging a prescribed dispute resolution form ("RAF 5") with the registrar of the Health Professions Council within 90 days of being informed of the rejection or the impugned assessment. Regulation 3(5)(a) then goes on to say that if this is not done within the time period prescribed or such longer period as may be granted on condonation by the Tribunal, the rejection of the RAF 4 form or the assessment by the Fund's designated medical practitioner, as the case may be, shall become final and binding.
- [15] If a dispute is declared as prescribed, Regulation 3(8) provides for the determination by an Appeal Tribunal of three (3) independent medical practitioners with expertise in the appropriate area of medicine, appointed by the registrar of the Health Professions Council.
- [16] In terms of regulation 3(13), the determination by the Appeal Tribunal is final and binding. A procedure by which the Appeal Tribunal enquires into the dispute is laid down in detail by regulations 3(4) to 3(13). It includes *inter alia*, the following features:

- a) Both sides may file submissions, medical reports and opinions.
- b) The Appeal Tribunal may hold a hearing for the purpose of receiving legal argument by both sides and seek the recommendation of a legal practitioner in relation to the legal issues arising at the hearing.
- c) The Appeal Tribunal has wide powers to gather information, including the power to direct the third party to submit to a further assessment by a medical practitioner designated by the Tribunal; to do its own examination of the third party's injury; and to direct that further medical reports be obtained and placed before it.

[17] What is clear from the forgoing, and taking into consideration the purpose of the Appeal Tribunal, i.e., to ascertain whether the serious injury assessment was done correctly in order to qualify for a claim for general damages, is an assessment by the Tribunal of the medical expert's findings.

[18] From the Regulations it is clear that the RAF 4 form must be completed by a medical practitioner. In *Duma v RAF*,¹ the Supreme Court of Appeal found that a person not so registered as a medical practitioner may not complete a valid RAF 4 serious injury report. It is however not a requirement of the Regulations that the RAF 4 form be completed by an expert in the specific field of assessment. The result is that a general practitioner may complete the form and conclude that the claimant suffered a serious brain injury without the

¹ *Duma v RAF* 2013 (6) SA 9 (SCA)

assessment having to be done by a Neurosurgeon, Neurologist or a Psychiatrist.

- [19] The Appeal Tribunal on the other hand, as stated above, must consist of medical practitioners in the relevant field of expertise. This can only mean that the expertise must be ascertained having regard to the injuries sustained by the claimant.
- [20] The logic behind this seems clear. The Appeal Tribunal must consist of medical experts in the relevant field in order to assess the correctness of the conclusion of the medical practitioner completing the RAF 4 form as the person completing the form need not be such expert.
- [21] What is furthermore clear, is the fact that the panel consists of experts in the particular medical field. These experts are not experts in the assessment of fact, but may report on what they find. One would therefore expect that a medical practitioner will, in his expert report or in the RAF 4 serious injury report, indicate that there are signs of previous injuries, surgical procedures, scarring, fractures according to physical observation, X-ray reports, et cetera.
- [22] The medical practitioner completing the RAF 4 form and the Appeal Tribunal is called upon to, as medical experts, give an opinion on the seriousness of the injury by assessing the current condition of the claimant. The medical practitioner completing the RAF 4 form is more often than not, the expert who will testify on behalf of one of the parties. In that sense he/she is an expert in the true sense of the word.

Finding by Tribunal

[23] The Tribunal made the following finding:

- i) *"This 80 year old patient was involved in a motor vehicle accident, 10/05/2011. He sustained abrasion to the scalp, contusion above lived here and right elbow, injury to right thumb as well as superficial haematoma left forehead.*
- ii) *He was seen by Dr Oelofse, this who indicated 10% of whole person impairment, due to head injury as well as injury to right thumb. It is noted that a shocked tissue mass was present on X-rays of right thumb with no indication of fractures all obvious injuries to thumb.*
- iii) *Dr J Earle (neurosurgeon), 05/08/2015, indicates a mild traumatic brain injury.*
- iv) *taking all the evidence into account, it is resolved that patient's injuries be classified as non-serious."*

[24] The decision however, contains a number of factual inaccuracies. The patient was at the time of the accident 2 years old. The distinct impression obtained from the letter quoted above as well as the answering affidavit is simply that the tribunal did not apply its mind properly to the matter facts of the matter.

[25] A question that immediately arises, is whether the tribunal in fact properly investigated the matter referring to a two-year old child injured, as an 80-year old patient. No explanation is given in the papers that it might simply have been a typing error, counsel for the respondents correctly so, did not venture

any answer not contained in the papers. There was however no answer in that respect from the papers.

Injuries sustained and expert evaluations

- [26] The applicant submitted one serious injury report (RAF 4 form) Dr Oelofse, an Orthopaedic surgeon after an evaluation on 11 March 2013. As already indicated he is properly qualified to complete such a form even in respect of injuries not falling within his field of expertise.

- [27] In his report, he classified the injury in terms of the AMA guides as 10% whole person impairment (WPI). He however continues stating that on the narrative test the patient suffered a serious long-term impairment loss of bodily function

- [28] He indicates in paragraph 4 of the assessment report, that the patient was a passenger in a car sitting in the rear middle. He continues stating that the patient was treated at the casualty department, x-rays were taken and he sustained an abrasion of the scalp, contusion above the left ear, a contusion to the right elbow, a superficial haematoma on the left forehead and was treated symptomatically. This is confirmed by the RAF one form, treated by the treating medical practitioners at the it does hospital. The serious injury the report continues that he received trauma counselling and add to fits afterwards and was hospitalised for observation.

- [29] In paragraph 4.3 it is specifically indicated that the child's nightmares and his parents have difficulty in waking him when it happens. And indicates that he

has difficulty sleeping and that his right thumb is skewed resulting in difficulty in handling heavy objects.

- [30] His diagnosis post-concussion syndrome in a soft tissue injury of the right thumb.
- [31] The applicant also filed two further reports, one by Dr Earle, a Neurosurgeon and the second by Me Grootboom, a Clinical Psychologist. In the report of the neurosurgeon he refers to the report by Dr Oelofse.
- [32] He concludes that "overall they suffered no more than a mild traumatic brain injury from which one does not expect intellectual or cognitive deficits".
- [33] He continues to then note the events after the discharge of the child. He suffered two episodes of fits afterwards and was hospitalised for observation only. Details of the episodes were not available.
- [34] He also indicated that the child at present suffers from nightmares and these parents have difficulty in waking him when it happens. He has difficulty sleeping, waking a lot during the night. He also indicated that he suffers with concentration impairments.
- [35] But is furthermore confirmed by Dr Earle is that the child's right thumb appeared skill. He indicated that he found it difficult in handling heavy objects. The report of Dr Earle was completed in 2015, at the time a Grade R scholar.
- [36] In conclusion he stated that although the child suffered a mild traumatic brain injury he had early fits which different from very early concussive convulsions and must be regarded as an increased risk factor for developing post-

traumatic epilepsy. He placed him in the 5 to 7% tending to reach a normal population within the next 2 to 3 years. The doctor could not find any intellectual cognitive deficits. I must state that it is not expected of a neurosurgeon to make such findings as this field of expertise are more in respect of the physical injuries sustained. The report of Dr Earle is more than two years after that of Dr Oelofse and the same symptoms are still found in respect of the left thumb of the patient.

- [37] Non-pecuniary damages are ever claimed in respect of the impact the injuries have on that individual's life. More often than not it is found that a severe brain injury resulted in a very small impact on the person's life after the injuries. The opposite is also through. As a rule of thumb one can hardly then state that because it is a mild a minor injury the person did not suffer a serious injury i.e. the sequentially I suffered a lot of the serious nature. it is this impact on the person's life which is sought to be compensated by non-pecuniary all general damages.
- [38] The assessment of the Psychologist is therefore of paramount importance having regards to the impact the injuries might have on the patient's quality of life and be indicative of the seriousness of the injury as a result.
- [39] In a report she also refers to the minor still struggling with his right thumb, still being skewed. From the test results she concluded that it indicated a borderline impaired ability for the right-hand but average manual dexterity for fine motor skills in the left hand this suggests that the minor is still suffering from residual symptoms from the soft tissue injury to his right hand as the diagnosed by the Orthopaedic Surgeon.

- [40] She concludes that from the collateral information and the interview as well as test results it seems the minor is not experiencing any emotional symptoms of significance.
- [41] Nearly 2 years after the reports the Tribunal concludes that the child did not suffer any serious injury in spite of the report of Dr Oelofse.
- [42] The tribunal did not enquire further reports, comment, evidence or submissions by the applicant or even arranged for an evaluation by one of the members of the panel or an independent medical practitioner.
- [43] Of importance is the fact that in all the reports of further reports are required by educational psychologists and the like. Those of not been supplied nor requested.

Constitution of the tribunal

- [44] Furthermore, the Registrar of the Health Professions Council must appoint 3 experts in the relevant field of expertise, as set out above. To those members so appointed he/she may appoint one further advisor.
- [45] The Registrar appointed 3 Orthopaedic Surgeons and a Neurosurgeon. It is not indicated who are the 3 appointed members of the Tribunal and who is the advisor. The injuries suffered by the minor are not, according to the hospital record provided and those documents submitted to the Tribunal, Orthopaedic in nature, but is a head and brain injury.

- [46] On the face of it and having regard to the requirement that the members of the Tribunal must be appointed from experts in the relevant field, the Tribunal is not correctly constituted.

Review

- [47] The applicant relies *inter alia* on an error of law, an error of fact as well as a failure on the part of the Tribunal to apply the narrative test correctly on the available evidential material.
- [48] I am furthermore of the view that the failure by the Tribunal to properly evaluate the patient, especially in the light of the fact that the tribunal did not itself conduct any examination or assessment, it can hardly be said that the patient did not suffer a serious injury.
- [49] The grounds for review are cast in wide terms and are adequate to conclude that the decision is reviewable.

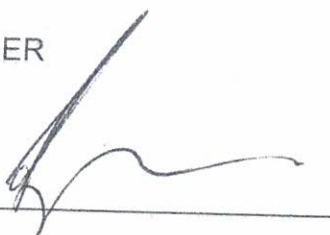
Conclusion

- [50] I therefore find that the Tribunal was not correctly constituted, being more than 3 members and that the tribunal did not properly assess the matter.
- [51] As a result, the application must succeed.

Order

- [52] The decision of the 3rd respondent dated 27 February 2017 that the applicant's minor child did not suffer as serious injury as contemplated in section 17(1A) of the Road Accident Fund Act, 56 of 1996, as amended as read with the Regulations issued thereunder, is reviewed and set aside;
- [53] The 2nd respondent is directed to re-appoint a new tribunal, properly constituted as set out in Regulation 3(8), i.e, consisting of only 3 members and if needs be, one advisor, and in the appropriate fields of expertise;
- [54] The re-constituted Tribunal is ordered to allow the applicant to be represented at the hearing and make submissions and provide such further evidence, documents as she wishes to;
- [55] The first respondent is ordered to pay the costs of the application.

BY ORDER



M SNYMAN, AJ

Counsel for Applicant:	Adv PA Venter
Applicant's Instructing Attorneys:	Van Zyl Le Roux Inc
Counsel for First Respondent:	Adv MC Makgato
Respondents' Instructing Attorneys:	Ramushu Mashile Twala Inc