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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO/~~YES~~
(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~
(3) REVISED: NO/~~YES~~

CASE NUMBER: 26463/2017

10/7/2019

BL MALEKA

Applicant

[ID NO: [...]]

[REF: RAFA/009051/2014]

and

HEALTH PROFESSIONS COUNCIL OF SOUTH

1st Respondent

AFRICA

THE ACTING REGISTRAR OF THE HEALTH PROFESSIONS
COUNCIL OF SOUTH AFRICA

2nd Respondent

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL

3rd Respondent

THE ROAD ACCIDENT FUND

4th Respondent

JUDGMENT

SM MARITZ, AJ

Introduction

- [1] This is an application to review and set aside the decision of the Third Respondent (*“the RAF Appeal Tribunal or Tribunal or Third Respondent or Appeal Tribunal”*), dated 19 February 2016, and ancillary relief as more

fully set out in the Notice of Motion.

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- [2] The Applicant's judicial review application is premised on the provisions of the Promotion of Administration Justice Act, 3 of 2000, ("PAJA ") on the grounds that the action was materially influenced by an error of law and/or fact (section 6(2)(d) of PAJA) and/or because irrelevant considerations were taken into account or relevant considerations were not considered (section 6(2)(e)(iii) of PAJA) and/or that it amounts to arbitrary action (section 6(2)(e)(v) of PAJA) and being procedurally unfair. In argument, Counsel for the Applicant, raised a further point for review, being that the Appeal Tribunal failed to provide adequate reasons for its decision.
- [3] The application was heard on 2 May 2019 and the judgment was reserved.

Relief sought

The Applicant sought the following relief:

- [4] An order reviewing and setting aside the decision of the Third Respondent, dated 19 February 2016, pertaining to the effect of the injuries suffered by the Applicant and determining same to be non-serious in terms of section 17(1A) of the Road Accident Fund Act, 56 of 1996, ("RAF Act") and its Regulations;
- [5] An order referring the matter to a newly constituted Appeal Tribunal to determine the abovementioned dispute reviewed and set aside and to reconsider all medico-legal reports that served before the Tribunal in respect of the Applicant's injuries;
- [6] An order that the Applicant be permitted to be present at the Appeal Tribunal hearing and that the Applicant be permitted to provide further evidence pertaining to his injuries at the Tribunal hearing if he wishes to do so; and
- [7] Costs against the First Respondent (*"Health Professionals Council of South Africa or HPCSA or First Respondent"*). In paragraph 74 of the Applicant's heads of argument he requested that the First and/or Third Respondents be ordered to pay the costs of the Applicant on a scale

between party and party, jointly and severally, the one paying the other to be absolved.

The First, Second (*"The Acting Registrar of the Health Professions Council of South Africa or the Acting Registrar of the HPCSA or Second Respondent"*) and the Third Respondent sought the following relief:

- [8] An order that the Applicant's application be dismissed with costs on an attorney and client scale.

Brief Background

- [9] The Applicant, **BENTJIE LUCAS MALEKA**, a self-employed taxi business owner and a taxi driver of Maleka's Taxi's and owner of Cornerdrive Restaurant and Tavern and a Dairy Agent and owner of Maleka's Bottle Store, was a passenger in a minibus taxi vehicle, which was involved in a motor vehicle accident, which occurred on 10 December 2009. The accident occurred while he was asleep. The taxi rolled over and the Applicant was thrown out of the said vehicle and as a result thereof he sustained various injuries, as set out in the various medico-legal reports, attached to the Applicant's Founding Affidavit. After the accident he was taken by ambulance to the Boitumelo Hospital, Kroonstad and later transferred to St Helena Private Hospital, Welkom.
- [10] The Applicant's family structure consists of his spouse and three children.
- [11] The Applicant has instituted a claim for compensation for non-pecuniary damages (*"general damages"*) against the Road Accident Fund (*"The RAF or the Road Accident Fund or the Fourth Respondent"*) and submitted the prescribed RAF 4 form in terms of section 17 of the RAF Act. The Road Accident Fund has rejected the Applicant's claim and the matter was referred to RAF Appeal Tribunal, which found that the injuries suffered by him were non-serious.
- [12] A claim for general damages is a claim stemming from pain and suffering, which includes pain, general discomfort and shock resulting from the bodily injury of a person, loss of amenities of life and disfigurement.

General damages can also be claimed in respect of shock, shock induced by physical injury, loss of general health and shortened life expectancy. The Road Accident Fund has an obligation to pay such damages only in circumstances where the injuries causing such damages have been determined as serious. The RAF Act and the Regulations prescribe the process of determination and the RAF Act requires pertinently that the injuries should be assessed in relation to the circumstances of the Claimant.

Legal Framework

- [13] The matter is subject to the new regime set out in the Road Accident Fund Act, 56 of 1996, read with the Regulations promulgated in terms of the Act.
- [14] In terms of section 17(1) and 17(1A) of the Act and Regulation 3, a third party may only claim general damages against the Road Accident Fund, the Fourth Respondent, where he or she has suffered a " *serious injury*" . A third party who wishes to claim for compensation for non-pecuniary damages is required to submit to an assessment by a medical practitioner in accordance with Regulation 3(1)(a) and the third party shall obtain from the medical practitioner concerned a Serious Injury Assessment Report in terms of Regulation 3(3)(a).
- [15] A Serious Injury Assessment Form (RAF 4) must be completed, which indicate that the person claiming suffered from a Whole Person Impairment ("WPI") as set out in the Regulation of more than 30%, alternatively on a narrative test, suffered from a serious injury as prescribed.
- [16] The Applicant has obtained, completed and submitted the RAF 4 form as contemplated in section 17 read with Regulation 3 of the Act, to the Fourth Respondent.
- [17] Regulation 3(1)(b) of the Act prescribed the criteria that such a medical practitioner has to apply to assess whether a third party had suffered serious injuries. If the Fourth Respondent is not satisfied that the injury has correctly been assessed as serious it must reject the report or, direct the

third party to undergo a further assessment.

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[18] The Applicant's RAF 4 form was rejected by the Fourth Respondent.

[19] Pursuant to the aforesaid rejection the Applicant has requested dispute resolution in terms of Regulation 3(4) of the Act and has declared a dispute by lodging a prescribed dispute resolution form ("RAF 5") with the Acting Registrar of the Health Professions Council ("HPCSA") within 90 days of being informed of the rejection or the impugned assessment.

[20] The Registrar of the HPCSA has to appoint a Tribunal of at least three (3) independent medical practitioners with expertise in the appropriate area of medicine.

[21] In terms of Regulation 3(13) of the Act the determination by the Appeal Tribunal is final and binding.

[22] A procedure by which the Appeal Tribunal enquires into the dispute is laid down by Regulations 3(4) to 3(13) of the Act. It includes, *inter alia* , the following:

(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.

[23] It is important to note that the Appeal Tribunal is not bound by the reasons, if any, provided by the Road Accident Fund for the rejection of the RAF 4. The Appeal Tribunal is entitled " *in the exercise of its wide investigative and fact-finding powers,...(2) established for itself whether or not to assess the injury as serious, whatever the reasons of the fund might have been.*¹

¹ RAF v Duma and Three similar cases 2013 (6) SA 9 (SCA)

- [24] In view of the nature of general damages, the investigation must centre around the amount of pain and suffering which the Third Party suffered as a result of the injuries which have caused the long-term impairment or loss of a body function and the extent to which the Third Party's injuries caused the Third Party to suffer from a loss of amenities of life. If these consequences can be regarded as serious consequences for the Third Party, the injuries must be regarded as serious.
- [25] The test to determine whether an injury is serious, is explained as follows in *HB Klapper: The Law of Third Party Compensation*², the learned author set out that " *Pain and suffering include the pain, general discomfort and shock resulting from the bodily injury of a person and encompass both past and future pain and suffering as well as psycho-symptomatic experiences of pain after the amputation of a limb and pain and suffering resulting from medical procedures rendered necessary as a result of the bodily injury*" and " *Loss of amenities of life refers to the loss of a claimant's drive and capability to actively participate in the normal activities of life, recreation and social events which the claimant was accustomed to or participated in prior to the injury. This includes sexual urge and ability, infertility, loss of prospects or marriage, loss of general health, change of personality, loss of mental faculties, neurosis, insomnia, loss of life expectancy and the general anguish of having to cope with a disability.*"
- [26] The circumstances which have traditionally been taken into account is the nature and extent of the claimant's disability, the activities, enjoyment, recreation and sport which the claimant enjoyed prior to the injury, the age, sex, social status, physique and general health of the claimant prior to the injury.
- [27] The HPCSA's Serious Injury Narrative Test Guidelines were prepared by Dr HJ Edeling, Dr KO Rosman, Dr DA Birrell and others as the guidelines by which a Narrative Test should be prepared so as to streamline the process.
- [28] A need for the Narrative Test arises in any case where the injuries are

² 3rd Edition , pp 152-160

found to have resulted in a Whole Person Impairment of less than 30% according to the method of the American Medical Association Guides ("AMA"), but the medical practitioner, nonetheless regards the injuries as serious.

[29] An injury which, as the position *in casu*, does not result in at least 30% Whole Person Impairment, may only be assessed as serious if that injury resulted in a serious long-term impairment or loss of a body function. This entails that the following has to be determined:

- (a) The objective nature of the Third Party's injuries;
- (b) Whether, objectively spoken, those injuries have resulted in an impairment of a body function (or loss thereof);
- (c) Whether, objectively spoken, that impairment or loss is of a long-term nature;
- (d) The objectively determined personal circumstances of the Third Party; and
- (e) The influence, objectively spoken, the injuries, as determined above, has on a Third Party's personal circumstances.

[30] It is important to note that Doctor JJ Schutte and Dr RS Kahn, who completed the RAF 4 form found that according to the narrative test, the Applicant has a serious long-term impairment, which could cause loss of body function and has a permanent serious disfigurement of his anterior chest wall.³ As such, the Applicant has to be assessed in terms of the narrative test in order to qualify for compensation for non-pecuniary loss.

[31] In *JH v Health Professions Council of South Africa and Others*⁴ where Rogers J discusses the meaning of the words "serious" and "severe" and also comments on the purpose of the restrictions which the Act places on the obligation to pay general damages and concludes as follows:

"[18] The words serious and severe in these items are not defined.

³ Founding Affidavit : Medico-legal reports: Dr JJ Schutte (pp 21-22) & Dr R Khan (p 36)

⁴ 2016 (2) SA 93 (WCC) para [18] and [19]

They connote a degree of impairment or disturbance or disorder which cannot be fixed by quantitative measure. The assessment requires value judgment, though one to be performed on the basis of a correct interpretation of the words used in the Narrative Test."

The applicable legal principles in terms of the Promotion of Administrative Justice Act, 3 of 2000, ("PAJA") are as follows:

- [32] In *RAF v Duma and Three similar cases*⁵ the Supreme Court of Appeal held that the High Court may only become involved to the extent that the provisions of the PAJA permits.
- [33] It is not disputed that the decision of the Appeal Tribunal constitutes administrative action and thus susceptible to review in terms of the provisions of PAJA.⁶
- [34] This judicial review application is premised on the provisions of PAJA and more specifically on the grounds that the administrative action was materially influenced by an error of law and/or fact (section 6(2)(d) and/or because irrelevant considerations were taken into account or relevant considerations were not considered (section 6(2)(e)(iii)) and/or that it amounts to arbitrary action (section 6(2)(e)(vi)) and being procedurally unfair (section 6(2)(c)). In argument, Counsel for the Applicant, raised a further point for review, being that the Appeal Tribunal failed to provide adequate reasons for its decision.
- [35] The relevant sections of PAJA read as follows:

"6. Judicial review of administrative action. - (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it- (i)-(iii)...;

⁵ 2013 (6) SA 9 (SCA) at para 19

- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken-
 - (i) to (ii)...;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) to (v)...;
 - (vi) arbitrarily or capriciously;
- (f) the action itself- (i)...(ii)(aa)-(dd)...;
- (h) the exercise of the power or the performance of the function authorised by the empowering provisions, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

[36] Cora Hoexter⁷: Administrative Law in South Africa: states that rationality is the first element of "*reasonable*" administrative action as expressed in section 33(1) of the Constitution. She states the meaning of rationality as follows:

" This means in essence that a decision must be supported by the evidence and information before the administrator as well as the reason given for it. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken."

⁶ RAF v Duma *supra* and JH v HPCSA and Others *supra*

⁷ Cora Hoexter: Administrative Law in South Africa, 1st Ed : at p 307

- [37] In *Pepcor Retirement Fund and Another v Financial Services Board*⁸ the Supreme Court of Appeal held that administrative decision has to be taken on an accurate factual basis as a result of which a material mistake of fact renders an administrative decision subject to review. See also: *Dumani v Nair and Another*⁹.
- [38] The factual mistake is required to be uncontentious and objectively verifiable. The material error of fact will render a decision subject to review if the relevant decision has been made in ignorance of the true facts material to that decision such as for example not considering relevant material and/or all of the material provided and/or personal circumstances.¹⁰
- [39] An error of law which has a material impact on the decision renders the decision subject to review¹¹ where it was decided that a material error of law is an error that influence the outcome of a decision.
- [40] Section 33(1) of the Constitution of the Republic of South Africa, 108 of 1996, gives anyone a right to administrative action that is procedurally fair. Section 6(2)(c) of PAJA allows review of an administrative action on the ground that the action was procedurally unfair. Hoexter points out that procedural fairness is a principle of good administration where context is all important. She states that "*the content of fairness is not static but must be tailored to the particular circumstances of each case.*"¹² Procedural fairness is one of the grounds of review in terms of PAJA. Section 6(2)(c) of PAJA allows review of administrative action on the ground that the action was procedurally unfair. In terms of sections 3 and 4 of PAJA, the right to procedural fairness is given content.¹³
- [41] The principle of legality requires rational decision-making. Both the process by which the decision is made and the decision itself must be

⁸ 2003 (6) SA 38 (SCA)

⁹ 2013 (2) SA 274 (SCA) at para [29]

¹⁰ Minister of Home Affairs and Others v Somali Association of South Africa and Another 2015 (3) SA 545 (SCA)

¹¹ Section 2(d) of PAJA & Hira and Another v Booysen and Another 1992 (4) SA 69 (A)

¹² Hoexter *supra* p 3-6

¹³ Hoexter *supra* p 3-8

- [42] In *Dumani v Nair and Another*¹⁵ the Supreme Court of Appeal held that in taking the decision of an Appeal Tribunal on review, entails an enquiry which is not one whether the Appeal Tribunal was correct in its conclusion but whether the Appeal Tribunal's decision is so unreasonable that no reasonable person could have reached it. The point that the Appeal Tribunal would have acted arbitrarily if it were to be found that the Appeal Tribunal's decision could not be justified on the acceptable evidence.

Application of the Law to the Facts

- [43] The Applicant's claim for compensation for non-pecuniary damages (also referred to as general damages), in the prescribed form ("*RAF 4 form*"), was submitted to the Fourth Respondent in terms of section 17 of the RAF Act read with the Regulations. It specifically provides for the envisaged two test reliance i.e. the Whole Body Impairment and/or the narrative test as set out in the reports by Dr JJ Schutte and Dr RS Kahn.
- [44] The Road Accident Fund ("*the Fund or Fourth Respondent*") rejected the Applicant's RAF 4 form and stated as bases for its rejection that the Applicant has failed, neglected and/or refused to submit himself to the statutorily prescribed serious injury assessment by a medical practitioner in terms of Regulation 3(1)(a) and (b) of the Regulations, alternatively the Applicant has failed, neglected and/or refused to submit a duly completed statutorily prescribed serious injury assessment report and, if applicable, narrative test opinion in terms of Regulation 3(3)(a), (b) and (c) of the Regulations read with sections 17(1A) and (24)(4) of the Road Accident Fund Act, 56 of 1996, (as amended) ("*the Road Accident Fund Act*").
- [45] On 6 December 2013 the Applicant notified the First and Second Respondents of the rejection of his claim by the Fund and that a dispute was declared. On or about December 2013 the Applicant's legal representatives lodged an appeal with the Registrar, in terms of

¹⁴ Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC) para [33] - [34] & [36] - [37]

¹⁵ 2003 (2) SA 274 (SCA) at par [22]

Regulation 3(4) of the Regulations made in terms of section 26 of the Road Accident Fund Act against the RAF's decision to reject the Serious Injury Assessment Report(s). The Applicant then provided the Second Respondent with the RAF 5 form and all medico-legal reports necessary to assess his injuries before the Tribunal.

[46] The following documents, medico-legal reports and submissions, attached to the RAF 5 form, were submitted:

- RAF 5 Form : Referral of Dispute;
- Submissions by the Applicant's legal representatives;
- RAF 4 Form completed by Dr R Kahn, dated 12 November 2012 and Dr JJ Schutte, dated 29 October 2014;
- Medico-legal report compiled by Ms Marli Grabler (Rita van Biljon Occupational Therapists), dated 11 November 2015 (Occupational Therapist);
- Medico-legal report by Dr M Prins, dated 6 December 2015 (Pulmonologist);
- Medico-legal report by Dr LF Oelofse, dated 29 October 2014 (Orthopaedic Surgeon); and
- Medico-legal report by Dr DA Birrell, dated 25 November 2013 (Orthopaedic Surgeon)

[47] On 1 February 2016, the First Respondent sent a letter to the Applicant's attorney of record informing them that the matter was scheduled for hearing by the Third Respondent on 19 February 2016. The Applicant's attorney was further informed that the Registrar of the Health Professions Council of South Africa has appointed 4 (four) independent medical practitioners with expertise in the appropriate area of medicine to consider the appeal. The following experts were appointed:

- Dr D Lekalakala (Orthopaedic Surgeon);
- Dr FA Booyse (Orthopaedic Surgeon);

- Dr T Ramokgopa (Orthopaedic Surgeon); and
- Dr M Mokabane (Neurosurgeon)

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[48] On 6 June 2016 the First Respondent informed the Applicant's attorney of record, *inter alia*, that the Applicant's injuries did not qualify as serious. A copy of this letter is attached to the Applicant's Founding Affidavit, marked Annexure "E". The relevant part of the aforementioned letter reads as follows:

" RE: RAF APPEAL TRIBUNAL//BENJIE LUCAS MALEKA

We refer to the above matter and hereby inform you that the Road Accident Fund Appeal Tribunal resolves at its meeting held on 19 February 2016 as follows:

- i. Date of birth 27 July 1958. Date of accident 10 December 2009.*
- ii. Sustained multiple rib fractures with bi-lateral haemopneumothoraces.*
- iii. Was treated by a way of intercostal drains.*
- iv. The panel is agreeable that he does not quality as serious injury due to the fact that the provided lung function tests are within normal range."*

[49] Counsel for the Applicant argued that it appears from the abovementioned decision of the Appeal Tribunal that it was decided on a majority basis that the Applicant's injuries were non-serious in light of the fact that the Applicant suffered multiple rib fractures with bi-lateral haemopneumothoraces, which was treated by way of intercostal drains and that the Applicant's lung function was within a normal range. Counsel for the Applicant further submitted that it appears from the decision of the Appeal Tribunal that the injuries recorded therein constituted the totality of the injuries considered by the Tribunal. He further submitted that the

Tribunal had failed to consider the report of Dr LF Oelofse, which report makes specific reference to a T8 compression fracture with adjacent level spondylosis that was diagnosed.

[50] On 1 September 2016, Dr LF Oelofse provided the Applicant with an addendum report based on the decision by the Third Respondent, dated 19 February 2016. A copy of this addendum report is attached to the Applicant's Founding Affidavit, marked Annexure "F". In the addendum report he pointed out that the Tribunal has failed to consider, *inter alia*, a TB compression fracture with adjacent level spondylosis that was diagnosed by him and stated in his medico-legal report, dated 29 October 2014, chapter/paragraph 8.8 thereof. He pointed out that in his opinion it is not normal for a man of his age to have compression fractures or to have thoracic spondylosis. He further pointed out that prior to the accident the Applicant did not experience problems or stigmata of osteoporosis. In his opinion the Applicant does qualify for the narrative test for his TB compression fracture and five years later there are radiological signs of adjacent level spondylosis. He further mentioned that the decision by the Tribunal, dated 19 February 2016, make no reference to his report, where he concluded that the Applicant suffered post- traumatic osteo-arthritis of the left sterno-clavicular joint as well as adjacent disc degeneration of the thoracic spine and that same should have been considered by the Tribunal. Although Dr Oelofse's addendum report was not before the Appeal Tribunal at the time when it considered the seriousness of the Applicant's injuries , it is accepted that Dr LF Oelofse's report, dated 29 October 2014, was furnished to the Appeal Tribunal prior to taking its decision and that the Appeal Tribunal could have and should have considered and addressed the post-traumatic osteo-arthritis of the left sterno-clavicular joint as well as adjacent disc degeneration of the thoracic spine.

[51] Counsel for the Respondents, as proof of the fact that the Appeal Tribunal had considered Dr Oelofse's report, referred to paragraphs 60 to 60.5 of its Answering Affidavit. In my view the Tribunal did not duly considered Dr

Oelofse's report as no reference is made in their decision, dated 19 February 2016, to Dr Oelofse's report, where he concluded that the Applicant suffered post-traumatic osteo-arthritis of the left sterno-clavicular joint as well as adjacent disc degeneration of the thoracic spine. No reference is made in the decision of the Tribunal to the thoracic spine injury, as diagnosed by Dr Oelofse.

- [52] Dr DA Birrell (Orthopaedic Surgeon) ("Dr Birrell"), who was instructed by the Road Accident Fund (*"the Fourth Respondent"*), has confirmed the diagnosis as mentioned in the report of Dr Oelofse and further stated that the Applicant did not return to driving his taxi after the accident and that he had consequently employed taxi drivers to assist him with his business. He has stated that the Applicant can no longer drive due to the sternum pain that he experiences. Dr Birrell states further that:

"There is a marked anterior deformity over the sternum and again X-rays will be requested of this area. He is tender to palpation."

- [53] The Tribunal made no mention in its decision of the thoracic spine injury (T8 compression fracture) although it was also dealt with by Dr Schutte when completing the RAF 4 form.

- [54] In *Pepcor Retirement Fund and Another v Fincancial Services Board and Another*¹⁶ Cloete JA held that administration action must be taken on an accurate factual basis. A mistake of fact renders an administrative action subject to review. The Supreme Court of Appeal cautions in paragraph [32]:

"Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or ma/a fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant

¹⁶ 2003 (6) SA 38 (SCA) at par [47]

considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter: Johannesburg Stock Exchange v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152C-D; Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 938 -C. There are decisions in other jurisdictions, however, which go further."

[55] In this instance the Appeal Tribunal clearly made an error of fact when not taking the abovementioned injury into consideration when deciding whether general damages should be awarded and thereby ignored relevant facts. See: SG May v The Health Professions Council of South Africa and 3 Others : Case No: 1996/2016: Gauteng Division of the High Court, Pretoria : Pretorius J at [34]. On this ground alone the decision of the Third Respondent is reviewable in terms of PAJA (section 6(2)(e)(iii)).

[56] Dr JJ Schutte, Dr R Khan and Dr LF Oelofse, in their respective reports, have recommended the narrative test to be applied due to serious long-term impairment. Dr R Khan stated in her report as follows:

"The chest wall deformity is causing Mr. Maleka to have activity limitation viz. he cannot stand for longer than 2 hours, walk a distance of 2km, crawl 3 meters, hammer something, and wrap a sting around a parcel due to chest pains and cramps after the accident. Since the accident he struggles to roll over in bed, sleep, perform sexual activity, struggles to do shopping, push a vacuum cleaner and drive a car due to his chest and posterior chest wall pains. He finds he can only drive a car with power steering. He also struggles to place an object on a shelf above his head, sit for longer than 2 hours, run and play sports, carry a 20 kg weight 10 metres and struggles to grasp a broom due to his chest pains. He therefore also has a serious long term impairment."

[57] Dr Oelofse dealt with the Applicant's productivity and found that he had

been impaired due to the injuries he had sustained. He found ~~that~~ the Applicant has had to employ 2 (two) assistants to help him with his duties that he has difficulty performing due to the injuries he sustained. In his opinion the Applicant's productivity will increase with successful treatment, but will decline again as his degeneration progresses and that the Applicant's injuries caused him to be an unfair competitor in the open labour market. He further stated that the Applicant should be referred to an Occupational Therapist and an Industrial Psychologist with regards to his future productivity and working ability. The Tribunal failed to deal with the long-term impairment suffered by the Applicant due to his injuries sustained.

[58] Counsel for the Applicant correctly pointed out that the Tribunal failed to consider the report by Rita van Biljon Occupational Therapists ("Rita van Biljon" or "Occupational Therapist"). The Occupational Therapist evaluated the Applicant on 11 November 2015. A period of 5 years and 11 months has elapsed since the accident (10 December 2009). Counsel for the Applicant further pointed out that there was no Occupational Therapist and/or Industrial Psychologist on the panel of the Tribunal.

[59] Under the heading "Problems experience following the accident" Rita van Biljon states as follows:

- Painful chest and back when engaging in sitting and driving - he has therefore discontinued the taxi driving as well as the delivering and purchasing of stock.
- Fatigue , when engaging in physically demanding tasks, even when walking while supervising.

[60] Rita van Biljon concluded in paragraph 14.3 as follows:

- "1. The plaintiff should be able to continue in his current reduced capacity where he mainly tends to the execution of sedentary administrative type tasks at the bottle store and occasional light supervisory tasks at the bottle store and of the taxi drivers.
2. Coping with light demands (including regular long distance taxi

driving) and long working hours, as required prior to the accident, will most likely be problematic at present, as a result of the plaintiff's mid-back symptoms and what appears to be a reduced pulmonary output."

- [61] In paragraph 14.5 Rita van Biljon further states that after considering the findings of the consulted Orthopaedic Surgeon, Dr LF Oelofse, who confirms post-traumatic osteo-arthritis of the left sterno-clavicular joint as well as adjacent level disc degeneration of the thoracic spine, she is of the opinion that: "*It will be best for maintenance of the affected joint health, if the plaintiff continues functioning at the reduced capacity of sedentary to low level light tasks for the remainder of his working life.*"
- [62] It is patently clear that the Appeal Tribunal did not consider the relevant information as stated in the reports of Dr Schutte, Dr Khan, Dr Oelofse and Rita van Biljon as if duly considered it would be patently clear that the Applicant has sustained a serious long-term impairment, which would qualify him in terms of the narrative test. The Tribunal failed to consider these relevant information. A material error of fact will render a decision subject to review if the relevant decision has been made in ignorance of the true facts material to that decision such as for example not considering relevant material and/or all of the material provided and/or personal circumstances.¹⁷
- [63] Counsel for the Applicant argued that the Third Respondent failed to provide adequate reasons for its decision, dated 19 February 2016. He referred to the unreported case of *NS Monjane v The Health Professions Council of South Africa and 3 Others : Case No: 54184/2016, Gauteng Division, Pretoria : Janse van Nieuwenhuizen J at [14]* where the Court held as follows:

"[14] The furnishing of adequate reasons for a decision forms the

¹⁷ Minister of Home Affairs and Others v Somali Association of South Africa and Another 2013 (3) SA 545 (SCA)

cornerstone of a person's constitutional right- 10- fair administration action. The principle is not novel and was articulated by Schultz JA in *Minister of Environmental Affairs & Tourism v Phambill Fisheries* 2003 (6) SA 407 SCA at para [40] as follows: 'What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of *Ansett Transport Industries (Operations) Pty Ltd v Another v Wraith and Others* (1983) 48 ALR 500 at 507 (lines 23-41), as follows: 'The passage from judgments which are conveniently brought together in *Re palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206-7; 1 ALO 183 at 193-4, serve to confirm my views 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."

To the same effect, but more brief, in *Hoexter: The New Constitutional Administration Law Vol 2* at 244:

"It is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information."

See also Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others 1986 (2) SA 756 (A) at 7721-773A."

[64] The decision taken by the Tribunal, dated 19 February 2016, does not explain why the specific decision/action was taken as the Tribunal failed to furnish adequate reasons for its decision and as such the administrative action is reviewable.

[65] It was further the case of the Applicant that no reasonable person, in the position of the Appeal Tribunal, with the relevant facts to consider, would have come to the conclusion that the Appeal Tribunal did (section 6(2)(h) of PAJA). Counsel for the Applicant referred to the unreported case of *SG May v The Health Professions Council of South Africa and 3 Others : Case No: 1996/2016 : Gauteng Division of the High Court, Pretoria : Pretorius J at pars [35] & [36]* where the Court held in paragraph [36] as follows:

"[36] The test is clear as explained in Duma's case¹⁸ whether the Appeal Tribunal's decision is so unreasonable that no reasonable person would have reached it. The question that must be answered, in the present circumstances, is whether this court is satisfied that a reasonable person, in the position of the Appeal Tribunal, on the evidence before it, could have reached the conclusion that it had reached. The decision maker, in this

¹⁸ 2013 (6) SA 9 (SCA)

instance the Appeal Tribunal, had to take into consideration all matters which a reasonable person would have done, having the same information at its disposal at the time the decision was taken."

- [66] It is clear from the documents before court that the Appeal Tribunal did not examine the Applicant, or studied the reports of Dr Oelofse, Dr Khan and Dr Schutte, who explicitly suggested that the injuries suffered by the Applicant should be dealt with in terms of the narrative test in order to determine whether it qualifies as serious or not neither did they study the report of the Occupational Therapist, Ms Rita van Biljon, in respect of her findings pertaining to the Applicant's serious long-term impairment and significant changes in his personal circumstances and impact on his future productivity in the labour market. The Appeal Tribunal did not consider and/or address the thoracic spine injury (TB compression fracture) of the Applicant as well as the daily pain and discomfort he suffers.
- [67] Counsel for the First to Third Respondents conceded, during argument, that it has not been stated in the Answering Affidavit that the Appeal Tribunal had considered and addressed the report by the Occupational Therapist, although it had the information at its disposal, neither did the Appeal Tribunal address the Occupational Therapist's report in their decision, dated 19 February 2016.
- [68] The Appeal Tribunal has the right to examine a claimant or to appoint an expert to do so, but in this instance they chose to ignore the thoracic spine injury (TB compression fracture) and failed to exercise their discretion to examine the Applicant. Further examination and investigation may have resulted in a different conclusion. If the Appeal Tribunal had followed the finding in *Duma's case*¹⁹ and had "*a complete re-hearing of and fresh determination on the merits*" the result would in all probability have been different.
- [69] Upon consideration of the aforementioned as well as for reasons stated

¹⁹ *Supra*

above, I find that the administrative action of the Appeal Tribunal was so unreasonable that no reasonable person or body could have taken the decision it has taken. The Appeal Tribunal's decision that the Applicant's injuries did not have "*significant life changing effects*" is so unreasonable that no reasonable Tribunal seriously considering the question objectively, could have reached the conclusion which the Appeal Tribunal reached. The Appeal Tribunal has completely failed to consider all the facts relevant to the application of the narrative test. In my view the Appeal Tribunal had acted arbitrarily as its decision could not be justified on the acceptable evidence and as such the decision taken by the Appeal Tribunal is reviewable.

[70] The Applicant relies *inter alia* on an error of fact as well as a failure on the part of the majority of the tribunal to apply the narrative test on the available evidential material and that no reasonable person or body could have so exercised the power or performed the function. In my view the Appeal Tribunal decision was not taken on an accurate factual basis and as a result thereof this material mistake of fact renders its decision and administrative action subject to review. The Appeal Tribunal made a material error of fact as its decision has been made in ignorance of the true facts material to that decision such as for example not considering relevant material and/or all of the material provided and/or the personal circumstances pertaining to the Applicant. The Appeal Tribunal did not consider the thoracic spine injury (T8 compression fracture) of the Applicant as well as the daily pain and discomfort he suffers and his loss of amenities of life as referred to in the medico-legal reports of Dr LF Oelofse, Dr JJ Schutte, Dr RS Khan and the report of Ms Rita van Biljon (Occupational Therapist) and as such the decision and administrative action of the Appeal Tribunal is subject to review.

[71] The grounds for review are cast in wide terms and are adequate to conclude that the decision of the Appeal Tribunal, dated 19 February 2016, is reviewable for reasons stated above.

[72] In respect of the constitution of the Appeal Tribunal the following:

- (a) The Registrar of the Health Professions Council had appointed 3 Orthopaedic Surgeons and a Neurosurgeon.
- (b) Although the injuries suffered by the Applicant appear to be Orthopaedic in nature, Dr DA Birrell recommended that the Applicant should obtain the opinion of a Cardiothoracic Surgeon or Thoracic Surgeon in respect of his sternal fracture (T8 compressor fracture: thoracic spine injury). The Registrar did not appoint an expert in this field.
- (c) Although Dr JJ Schutte, Dr R Khan, Dr LF Oelofse and Ms Rita van Biljon recommended that the narrative test be applied in determining whether the injuries suffered by the Applicant are serious or not, due to their findings of possible long-term impairment by the Applicant pertaining to his personal circumstances, his future productivity and working ability, the Registrar did not appoint any expert in the relevant field of expertise.

[73] 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.

Order

[74] In the premises the following order is made:

1. That the decision of the Third Respondent, dated 19 February 2016, to the effect that the injuries suffered by the Applicant are non-serious in terms of Section 17(1A) of the Road Accident Fund Act, 56 of 1996 and its regulations, is reviewed and set aside;
2. That the Second Respondent be directed to re-appoint a new Appeal Tribunal to determine the dispute reviewed and set aside in paragraph 1 and to further reconsider all medico-legal reports that served before the Tribunal in respect of the Applicant's injuries;
3. That the Applicant be permitted to be present at the Appeal Tribunal

- Hearing; and that the Applicant be permitted to provide evidence pertaining to his injuries at the Tribunal hearing if he wishes to do so;
4. That the First Respondent be ordered to pay the costs of this application on a scale as between party and party.

BY ORDER

SM MARITZ, AJ

**ACTING JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA**

Counsel for Applicant:	Adv M Jacobs
Applicant's Instructing Attorneys:	Van Zyl Le Roux Inc
Counsel for the First to Third Respondents:	Adv MC Makgato
First to Third Respondents Attorneys:	Ramushu Mashile Twala Inc