



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

Case Number: 9299/17

In the matter between:

MASILO EVELYN RAMOSOEU

Applicant

and

HEALTH PROFESSIONS COUNCIL OF SOUTH

AFRICA

First Respondent

THE ACTING REGISTRAR OF THE HEALTH

PROFESSIONS COUNCIL OF SOUTH AFRICA

Second Respondent

THE ROAD ACCIDENT FUND TRIBUNAL APPEAL**TRIBUNAL**

Third Respondent

THE ROAD ACCIDENT FUND

Fourth Respondent

JUDGMENT

POTTERILL J

- [1] The applicant, Masilo Evelyn Ramosoeu (“Ramosoeu”) is seeking a review and setting aside of the third respondent’s, the Road Accident Fund Appeal Tribunal’s (“the Appeal Tribunal”) decision confirming the finding of the fourth respondent, the Road Accident Fund (“RAF”) in finding that Ramosoeu did not qualify for general damages due to the injuries she suffered not constituting a serious injury.
- [2] The application is seemingly brought in terms of the Prevention of Administrative Justice Act 3 of 2000 (“PAJA”). Neither in the finding nor the supplementary affidavits are grounds of the review in terms of PAJA even alluded to, yet alone expanded on. What is even more surprising is that in the replying affidavit new evidence, an affidavit of the Minister of Transport, a party in another matter, is attached and relied on. It is apposite to at this stage remark that applicants intending to review and set aside the decisions of the Appeal Tribunal, cannot do so as par for the course. The applicant and his or her attorney should advisedly decide whether these decisions should be reviewed and set aside. If good grounds exist, these grounds should be set out explicitly in the founding affidavit and cannot

haphazardly be done in a replying affidavit for the first time. Any new evidence in a replying affidavit, not flowing from an answering affidavit and which could have been foreseen in the founding affidavit, is simply to be seen as *pro non scripto*.¹

- [3] Before the merits of the application is considered two points *in limine* were raised that require an address.

The lack of confirmatory affidavits

- [4] There were no confirmatory affidavits of Drs Duma and Beddulp attached to that of the deponent who was the third member of the Tribunal. All the members agreed with the decision and it was not a majority decision. This point *in limine* is purely formalistic, does not take the matter any further and is to be rejected. There is simply no prejudice to Ramosoeu and there is no *lacuna* in the Appeal Tribunal's opposition. This could however be a valid point raised if the decision was a majority decision, i.e. one member did not agree and the Appeal Tribunal should in future at least aver that the deponent has the authority to depose on behalf of the other Tribunal members and not only on: "*I am duly authorised to depose to this affidavit on behalf of the first and second Respondents ...*"²

The answering affidavit does not comply with the Uniform Rules of Court

¹ *Standard Bank of South Africa v Sewpersadh* 2005 (4) SA 148 (C) at 153H-154J

² Page 110 para 4

- [5] The Appeal Tribunal did not respond to the allegations set out in Ramosoeu's affidavit *ad seriatim*, but chose to set out background and preliminary submissions in answer to paragraphs 5 to 8 of the founding affidavit. The Appeal Tribunal did however address each of the review grounds individually. This method of reply does not conform to normal practice and deviating from such practice is a risky means of addressing an applicant's founding averments. But, on the papers, the Constitution of South Africa, the Act, the Rules and the Appeal Tribunal's functions and powers and its work method generally, and pertinent to this matter, is common cause negating *ad seriatim* responses. There is simply no prejudice to Ramosoeu, Ramosoeu is not left to speculate about the Appeal Tribunal's answer to her application. This point *in limine* is thus dismissed.

Grounds of review

The Appeal Tribunal did not provide reasons, alternatively not adequate reasons.

- [6] In oral argument on behalf of Ramosoeu the main argument was that the Appeal Tribunal did not provide reasons for its decision, or at the very least, not adequate reasons. The problem with this argument is that it is not founded on any ground of review raised in the founding or supplementary affidavits. This ground of review surfaced for the first time in the replying affidavit. The application should be dismissed on this ground alone as a court would not permit an applicant to make a case in reply when no case was made out in the original application.³ In application

³ *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 316A

proceedings the affidavit must contain the essential evidence which would have been led at a trial.⁴

- [7] What is even more surprising is that Ramosoeu requested reasons from the Appeal Tribunal for its decision. Before receiving same Ramosoeu withdrew the request for reasons. Ramosoeu then on advice of the attorneys acting on her behalf applied directly for the review and setting aside of the Appeal Tribunal's decision. The law is not a game; one cannot ask for reasons, withdraw the request and then rely on the lack of reasons as a ground of appeal in a replying affidavit. This stratagem was obviously utilised for strategic advantages; i.e. that in terms of s5(3) of PAJA, if no reasons were provided a court is to presume "*subject to subsection (4) and in the absence of proof to the contrary*" that the administrative decision was taken without any good reason. However, taking this route could land an applicant in hot water because it could be argued that from the "*inadequate*" reasons provided by the Tribunal an applicant could discern the reasons sufficiently to set up grounds as to why a decision should be reviewed and set aside.
- [8] This ground of review is simply not an initial ground of review, was added as an afterthought in the replying affidavit, is prejudicial to the Appeal Tribunal and is accordingly not entertained and dismissed.

The Appeal Tribunal's lack of procedural fairness

- [9] In the founding affidavit it was submitted that Ramosoeu is astonished that the Appeal Tribunal did not call her to appear before them and examine her injuries thus

⁴ *Molusi v Voges NO* [2015] 3 All SA 131 (SCA) at paras [20] and [39]

enabling the Tribunal to form an opinion with regards to the long-term effect of her serious impairment or loss of a bodily function.

[10] In terms of Regulations 3(a) and 3(1)(b) a medical practitioner is to assess whether the third party's injury is serious in accordance with the criteria stated in Regulation 3(1)(b)(iii). I agree with my sister Pretorius in *Maluka v The Road Accident Fund and Others* (48032/2011) [2014] ZAGPPHC 340 paras 22 and 24 that it should be stressed that there is no obligation on an Appeal Tribunal to request additional information and the same applies to the Tribunal's power to call persons to appear before it. On the facts placed before RAF and the Appeal Tribunal there is simply no reason to call Ramosoeu and/or to call for further evidence.

[11] Upon perusal of the documents before RAF and the Appeal Tribunal this court, cannot find that the Appeal Tribunal and RAF's assessment of the serious injury as not constituting a serious injury in terms of the narrative test was a mistake of fact or error in law. But, in any event, nowhere in Ramosoeu's founding affidavit is it alluded to as what the mistake of fact, or error in law is that the Appeal Tribunal made and these averred grounds also need no further address.

[10] I accordingly make the following order:

10.1 The applicant's application is dismissed with costs.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 9299/17

HEARD ON: 20 June 2019

FOR THE APPLICANT: ADV.H.A.A. KRIGE

INSTRUCTED BY: VZLR Incorporated

FOR THE 1ST AND 2ND RESPONDENTS: ADV. I.P. NGOBESE

INSTRUCTED BY: Moduka Attorneys

DATE OF JUDGMENT: 29 July 2019