



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: 16102/17

In the matter between:

ANTONIO TRIPACHES FRAY

Applicant

and

HEALTH PROFESSIONS COUNCIL OF SOUTH

AFRICA

First Respondent

THE REGISTRAR OF THE HEALTH PROFESSIONS

COUNCIL OF SOUTH AFRICA

Second Respondent

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL

Third Respondent

JUDGMENT

POTTERILL J

[1] The third respondent, the Road Accident Fund (“RAF”) rejected the plaintiff, AT Fray’s (“Fray”) claim for general damages due to the injuries not constituting a serious injury in terms of the definition as set out in Regulation 3(1)(b)(ii) and (iii) which provides as follows:

“3. *Assessment of serious injury in terms of Section 17(1)(A)*

(1)(b) The medical practitioner shall assess whether the third parties injury is serious in accordance with the following method:

(iii) An injury which does not result in thirty percent or more IMPAIRMENT of the WHOLE PERSON may only be assessed as serious if that injury:

(aa) resulted in a serious long term impairment of all loss of body function;

(bb) constitute permanent serious disfigurement;”

[2] Fray then declared a dispute and the issue of whether the injuries in fact did constitute a serious injury was referred to the Road Accident Fund Appeal Tribunal, the first respondent (“the Appeal Tribunal”). It was common cause that the injuries

to Fray did not result in a 30 % or more impairment of the whole person and that the injury accordingly had to be assessed in terms of the so-called narrative test. The Appeal Tribunal rejected the injuries as constituting a serious injury in terms of the narrative test and Fray is thus asking this court to review and set aside this finding of the Appeal Tribunal in terms of the Prevention of Administrative Justice Act, Act 3 of 2000 ("PAJA").

- [3] The review is brought in terms of s6(2)(d) in that the decision was materially influenced by an error of law and/or that in terms of s6(2)(e)(iii) irrelevant considerations were considered or relevant considerations were not considered and/or that the decision amounted to arbitrary action constituting procedural unfairness in terms of s6(2)(e)(iv).

The function and powers of the Appeal Tribunal

- [4] The Appeal Tribunal functions are set out in Regulation 3. Regulation 3(8)(b) stipulates that the Tribunal shall consist of three independent medical practitioners with expertise in appropriate areas of medicine. One of these practitioners functions as the Tribunal's presiding officer. Regulation 3(11) sets out the powers of a Tribunal. Its main function is set out in Regulation 8(11)(h) and (i):

“(h) To 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 Tribunal consider it appropriate to substitute;

- (i) *To confirm the rejection of the serious injury assessment report by the Fund or accept the report, if the majority of the members of the Tribunal consider it appropriate to accept the serious injury assessment report.”*

[5] Fray’s main bone of contention with the Appeal Tribunal’s decision is that the Appeal Tribunal did not invite Fray to attend the hearing of the appeal. The Tribunal accordingly did not examine Fray. The Tribunal also failed to call for additional evidence. These points are raised because in terms of Regulation 3(11) the Appeal Tribunal has the following powers:

- “(11)(a) *Direct that the third party submit himself/herself at the costs of the Fund or an agent for further assessment to assess whether there is serious injury in terms of the methods set out in this regulation by the legal practitioner designated by the Appeal Tribunal;*
- (b) *Direct, on no less than 5 days written notice, that the party present himself/herself in the presence of the Appeal Tribunal at a place and time indicated in the said notice and examine the third party’s injury and assess whether the injuries 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 the relevant pre- and post-accident medical, health and treatment record pertaining to the third party to be obtained and made available to the Appeal Tribunal;

(e) Direct further submissions to be made by one or more of the parties and stipulated timeframe in which the further submissions must be placed before the tribunal.”

The facts before the Appeal Tribunal

[6] Fray has the onus to put the necessary documentation as proof that he has in fact suffered a serious injury before the Appeal Tribunal. Fray submitted the following documents:

1. RAF5 form;
2. RAF4 form completed by Dr. J.J. Schutte;
3. The rejection letter; and
4. Four colour copies depicting the injuries of Fray; and
5. A report by Prof. J.F. Jooste.

[7] On the RAF4 Dr. Schutte set out that in terms of the narrative test Fray did suffer a serious injury as follows:

"The extent of his serious injuries may lead to future medical/surgical treatment/procedures.

Acute symptoms still exist.

*All of this will affect his possible employment, social life and general enjoyment of life."*¹

Under the heading "*Discussion*" Prof J.F. Jooste reached the conclusion that Fray had reached maximum medical improvement. Fray had been left with severe, serious, permanent disfigurement as a result of the accident. On the RAF4 form under the heading "*Serious injury: the narrative test*" Dr. Schutte marked 5.1 reading "*Serious long-term impairment or loss of a body function*".

[8] The Appeal Tribunal concluded that there was assessment by only a plastic surgeon with the outcome and diagnosis being scars. The reported problems related to cosmetic disfigurement. These scars are from an injury of the laceration of the left knee and sacral region that according to the WPI he suffered a 5 % and the question in fact was whether in terms of the narrative test he qualified for cosmesis. The Appeal Tribunal's decision was a "*Non-serious musculoskeletal injury*".

[9] In this application Fray attached a letter to Honey Attorneys from Prof. Jooste which was not before the Appeal Tribunal, in which he concludes that it is very difficult to

¹ Page 11 of the Rule 53 record

quantify the seriousness of a scar as people's circumstances differ widely. However in utilising the method prescribed in the AMA Guidelines of Table 13-8 he would classify the physical extent of the scars as mild abnormalities/1 to 10 %. In determining the interference with Fray's ability to assume normal roles or activities of daily living he found Fray to have moderate abnormalities/11-20 %.

Reasons for the review application

- [10] In the founding affidavit the main reason for the bringing of the review is that the predominant injuries of Fray relates to the severe scarring of his left knee and sacral area. It is in fact stated that what "*fathoms Fray*"² is why he was not requested to appear in front of the Tribunal. The panel members of the Tribunal did not have the benefit of examining Fray before coming to an opinion. For the first time in this affidavit Fray sets out that his self-esteem and bodily injuries has severely been affected and has left him self-conscious with a lack of confidence and with a negative self. He does not wear long trousers anymore as people constantly stare at his scare which in turn "*reignites all the bad memories that I have of the accident.*"³ Fray is struggling to cope with the reality that his scars are a permanent burden to his physical appearance. Yet the Appeal Tribunal found him not to be deserving of receiving compensation for pain and suffering. The fact that the Appeal Tribunal did not talk to Fray to establish the impact of his injuries severely prejudiced Fray and also denied him his right to a fair administrative action.

² Paragraph 7

³ Paragraph 13.5

[11] Annexure “F”, setting out that Fray suffers from serious permanent disfigurement as a result of the accident is to be ignored. This was not in front of the Appeal Tribunal and cannot now *ex post facto* influence this court. Although the Tribunal has the power to call Fray to assess him, there is no duty on the Appeal Tribunal to do so. On the documents before the Appeal Tribunal there was also no reason as to why they should have called Fray, i.e. insufficient information or glaring contradictions alerting the panel to invoke their power to call Fray. It is further apposite to state that Fray appears to be relying on the psychological effects of the accident however failed to provide any proof of such psychological deficits to the Appeal Tribunal or RAF. The facts before this court cannot render a decision of the Appeal Tribunal to be set aside and is accordingly to be ignored. Furthermore, Fray submitting that the panel needed to consist of a plastic surgeon flies in the face of Fray’s own documentation which does not rely on the evidence of a plastic surgeon who completed the prescribed RAF4 form, but a general practitioner. Where reliance is heavily placed on the scarring as the sequelae of the accident it would be logical for such plastic surgeon to complete the required forms.

[12] On this ground of review the court can accordingly not find that the actions and decision of the Appeal Tribunal constituted arbitrary action or was procedurally unfair or that they took irrelevant considerations into account or disregarded relevant considerations.

[13] A party cannot introduce new evidence, annexure “F”, the letter from Prof. Jooste, as evidence in support of a review. It is an abuse of process to introduce evidence which was not before the Appeal Tribunal and it requires no further discussion.

[14] For the first time in the heads of argument the point is made that the reasons provided by the Appeal Tribunal was not adequate. This also requires no further address as it is not set out in the founding affidavit as a ground for review.

[15] Fray relied on a ground of review as that the Appeal Tribunal was influenced by an error in law. Fray has failed to identify the provision of the law that erroneously influenced the decision of the Appeal Tribunal. If reliance is placed thereon that the Appeal Tribunal incorrectly applied the narrative test, this argument has to be dismissed. The fact that the Appeal Tribunal did not get the subjective views of Fray is most certainly not a mistake in law.

[16] I am accordingly satisfied that the application for review should be dismissed with costs. I accordingly order same.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 16102/17

HEARD ON: 20 June 2019

FOR THE APPLICANT: ADV. M. JACOBS

INSTRUCTED BY: Honey Attorneys

FOR THE 1ST AND 2ND RESPONDENTS: ADV. L.M. MAITE

INSTRUCTED BY: Moduka Attorneys

DATE OF JUDGMENT: 29 July 2019