

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION – MTHATHA]

CASE NO. 3823/2018

Heard on: 24 October 2019

Delivered on: 12 November 2019

In the matter between:

LULEKA BOQWANA

Applicant

and

ROAD ACCIDENT FUND APPEAL TRIBUNAL AND OTHERS

Respondents

JUDGMENT

ZONO AJ

[1] The applicant approached this court in terms of Rule 53 of the Uniform Rules of this court. The applicant seeks the following relief to be granted:

- (1) Review and setting aside first respondent's decision dated 23 April 2018 rejecting applicant's appeal on the basis that applicant's injuries sustained in a motor vehicle accident occurred on 15 March 2014 were not serious.

- (2) Ordering the first and second respondents to pay costs in this application jointly and severally one paying the other to be absolved.
- (3) Ordering the third, fourth, fifth respondents to pay costs of this application jointly and severally one paying the other to be absolved only in the event of them opposing same.
- (4) That the above Honourable Court grants such further and / or alternative relief.

[2] The matter is opposed by the first and second respondents. In opposition of the matter the first respondent duly delivered its notice to oppose and answering affidavit. The second respondent only filed Notice to Oppose. During the date of hearing both respondents were represented by their counsels and heads of argument were filed by all the parties. The participants in the matter were the applicant, first and second respondent. They participated on an equal footing.

[3] Before dealing with the merits of the application I find it prudent to deal with the concessions made by or on behalf of the first and second respondents. Both respondents conceded that the impugned decision be reviewed and set aside. On behalf of the first respondent it was submitted that it is inexcusable that the first respondent has not dispatched record of proceedings relating to applicant's appeal to this court in terms of Rule 53(1) of the Uniform Rules. It was requested on behalf of the first respondent that an order be made remitting the matter back to the first respondent for proper application of mind and decision. Lastly the first respondent conceded that the first respondent took the impugned decision without recourse to the relevant and necessary information first respondent sought to apply that it be not

mulcted in costs. The sole basis for that application is that, so it was argued, the first respondent was never furnished with the necessary papers relating to the appeal. It was firmly submitted that the relevant papers were sent only to the registrar of the Health Profession Council of South Africa. On behalf of the second respondent a similar application was made that the second respondent be not mulcted in costs. Second respondent's reason for such an application was somewhat different. The second respondent submitted that because the actual litigation and engagement was between the applicant and the first respondent and that it was not an actual participant in the proceeding, it should be saved from paying costs.

[4] The applicant on the other hand sought costs order against the first and second respondents jointly and severally. It appeared to be an insurmountable obstacle to escape the general Rule that costs should follow the result. It was not disputed that the applicant is, by reason of the concessions made, a successful party in the proceedings. I will deal with this principle later in this judgment. With a view to dispel first respondent's suggestion that the necessary documents were sent not to the first respondent, applicant's counsel made two submissions: firstly he referred the court to the provisions of regulation 4 and 8 of the Road Accident Act commonly known as **Road Accident Fund Regulations, 2008** promulgated in terms of or under **Section 26 of the Road Accident Fund Act 56 of 1996, (the Regulations)**. The meaty and beneficial part of the Regulations is Sub Regulation 4(a) which reads as follows: *"if a third party wishes to dispute the rejection of the serious injury assessment report, or in the event of either the third party or the Fund or the agent disputing the assessment performed by a medical practitioner in terms of these regulations, the disputant shall:*

(a) *within 90 days of being informed of the rejection or the assessment, notify the registrar that the rejection or the assessment is disputed by lodging a dispute resolution form with the registrar.”* The argument went on to say that it is not a mistake that the Registrar received the documents, because the Registrar is a or serves as a reception office or point of the first respondent. The Registrar is a functionary statutorily empowered to receive documents relating to the rejection of the serious injury assessment report on behalf of the first respondent. I was further referred to paragraph 15 of the founding affidavit where the following is said “*on 10 July 2017 I wrote a letter to the first respondent requesting the said dispute resolution and the said letter was accompanied by assessment reports mentioned above which were compiled by Dr Kumbirai. Dr Lekgwara and Dr Mtati together with duly completed RAF5 form which is a request form for dispute resolution.*” In the answering affidavit the first respondent does not meaningfully deal with the fact that these documents we sent to him but only limits itself to the denial of receipt of comprehensive report by Dr Lekgwara.

[5] With regard to the second respondent’s attempt to escape costs, I have already found that it was an equal participant as the first respondent. The fact that it did not file answering affidavit is neither here nor there. Of importance is the relief sought in paragraph 2 of the Notice of Motion, which is a prayer for costs against the first and second respondents jointly and severally one paying the other to be absolved. I am mindful of the fact that the second respondent is cited, inter alia, on the basis that it rejected applicant’s medical reports without any basis. First respondent did the same. First respondent’s

decision was a continuation of a harm started by the second respondent. I find no basis why the first and second respondents cannot be mulcted in costs jointly and severally. Having found that the impugned decision is liable to be reviewed and set aside, it follows that costs have to follow that event. In what follows I deal with important aspects of the case which support the aforesaid finding over and above that there were concessions correctly made so by first and second respondents' counsels.

- [6] The applicant brought this application with the sole purpose of reviewing the first respondent's decision of the 23 April 2018. The basic attack launched by the applicant on the impugned decision is that the first respondent took the decision without having had regard to the crucial information that would enable it to arrive at a proper decision. **Annexure LB5** to the applicant's founding affidavit is a request for dispute resolution sent for the attention of the first respondent and decision. It listed and enclosed various documents that would be necessary for proper taking of decision. Those documents, which are inter alia, expert reports, demonstrate that the applicant has pass the necessary threshold level for serious injuries assessment. The threshold level for serious injuries is 30% whole person impairment. The aforesaid reports demonstrated 44% whole person impairment which is way beyond the minimum threshold. Of importance, that is not denied by the respondents. The first respondent only pleads that those documents were not in its possession.

[7] Regretably, the first respondent failed to make means to obtain the documents listed in Annexure LB5. Those documents were reports of the following Doctors: Dr T Kumbirai, Dr N. Mtati, Dr Lekgwara, completed RAF4 Form and completed RAF5 Form. The first respondent deals with the allegations about submission of those documents as follows: *“the documents were never in possession of such reports hence the appeal was dismissed. Alternatively, the scanty information that we had was not sufficient to make out a case for the applicant.”* While it does not tell the nature of scanty information it had, the first respondent continued to allege as follows: *“when the file from the applicant reached the tribunal we were told to peruse the papers and thereafter reach a finding. We did that and on the papers before us and there was no sufficient evidence to prove serious head injuries hence we dismissed the appeal.”* In the light of what I had found and what I will say herein below, I find that these allegations are untenable, farfetched and palpably impossible and they warrant rejection merely on these papers.¹ The whole tenor of the answering affidavit is bereft of a sound basis for failure to obtain those listed documents. The applicant told the court what was sent for the attention of the first respondent and the nature of those documents was demonstrated. The first respondent on the other hand does not disclose the nature of the scanty information it had before and during the taking of the decision. The first respondent was aware of the nature of documents that were meant to be sent to it even before the taking decision. That information was easily identifiable from the letter that is annexed as Annexure LB5 to applicant’s founding papers.

¹ Wightman t/a JW Construction v Head four (Pty) Ltd 2008(3) SA 371 SCA AT 375F – 376B , South Africa Veterinary Council and Another v Szymanski 2003(4) SA 42 (SCA) Para 24.

[8] Even if I am wrong in the above finding, the first respondent would still not succeed. Even a benevolent approach of upholding first respondent's version and arrive at a conclusion that the respondent was indeed not in possession of the documents alleged to have been sent under cover of Annexure "LB5" **Road Accident Fund Regulations 2008** would still be against the first respondent. It would still not be saved by the "**Plascon – Evans Rule**."² First respondent's powers are set out in **Regulation 11 of Road Accident Fund Regulation, 2008**. The Regulation reads as follows:

(11) **The appeal tribunal shall have 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.

² Plascon - Evans Ltd v Van Reibeek Paints (Pty) Ltd 1984(3) SA 623(A).

- (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.

[9] Regulation 12 provides that *“unless there has not been compliance with directions issued in terms of the Regulation 11(a) to (e) above, the appeal tribunal shall notify the Registrar of its findings within 90 days after the referral of the dispute in terms of Sub-regulation 8, or such additional period as the Registrar may on application from the appeal tribunal authorise in writing.”* This regulation gives effect to Regulation 11. Regulation 11 was promulgated solely to empower and give directions to the first respondent in the event that it is faced with paucity of information. The first respondent enjoys a vast power to obtain information so as to enable it to arrive at a fair decision. The second purpose for promulgating this regulation was to combat and avoid arbitrary taking of decisions. A decision taken without the invocation of the provisions of Regulation 11, where exigencies and merits of the case demand that is ordinarily arbitrary. There was not even an attempt by the first respondent to obtain the required information in terms of the means outlined in the regulation. There is not an inkling of a suggestion that there were reasons that impeded the invocation of the Regulation.

[10] Even prior to the advent of the Constitutional dispensation, powers conferred on administrators were inevitably accompanied by an implied duty to exercise the power.³ The first respondent clearly failed to exercise power statutorily

³ Chatabai v Union Government (Minister of Justice) 1929 AD 281 at 785; Mpayipheli v Minister of Social Development and Another (3956/16) [2017] ZAECHMC 15 (13 June 2017) Para 15.

conferred upon it for public benefit. There is no justification for that failure instead it became a source of arbitrariness. This court has the power to judicially review an administrative action if the action was taken arbitrarily or capriciously.⁴

[11] As it has been demonstrated in paragraph 7 above, the deponent in the first respondent's answering affidavit stated that *"when the file from the applicant reached the tribunal we were told to peruse the papers and thereafter reach a finding."* The deponent describes himself as the then chairperson of the Tribunal that heard the appeal of the applicant when it served before the first respondent. The paragraph continues to state that *"we did that and on the papers before us and there was no sufficient evidence to prove serious head injuries hence we dismissed the appeal."* It appears that the first respondent in taking the impugned decision in the manner it did was responding to instruction given to it. Provisions of Regulation 11 were never invoked because the first respondent was instructed to just peruse the file and reach a decision. It is not stated who told the first respondent to peruse the file and reach a finding without the necessary or sufficient evidence. What is certain is that the first respondent took the decision because of unauthorised or unwarranted dictates of another person. Decisions of that kind are liable to be set aside on judicial review in terms of **Section 6(2)(F)(IV) of PAJA**.

[12] The decision was taken not in terms of the law but because of the dictates of another person. Regulation 11 is a vehicle towards decision taking. It provides means in terms of which decisions can be taken. Failure to employ the means aforesaid renders the decision taken without them unlawful. Kampempe J had an

⁴ Section 6(2)(e)(iv) of PAJA.

occasion of saying that “1.State functionaries, no matter how well – intentioned may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law. 86. The Rule of law does not permit an organ of state to reach what way turn out to be a correct outcome by any mean.. On the contrary the Rule of law obliges an organ of state to use the correct legal process.” ⁵ The legal process is what is provided for in Regulation 11. There is therefore no rational connection between the means and the ends.⁶

[13] Finally on this point, there is authority for preposition that a decision must be supported by the evidence and information before the administrator as well as the reasons 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.⁷ It is now clear that first respondent’s decision was irrational for it was without evidence and information for taking thereof. The decision is not supported by evidence or information which allegedly served before or sent for the attention of the first respondent.

[14] On 7 May 2018, pursuant to the receipt of the first respondent’s decision and upon realization that it contained no reason for it, the applicant caused a letter to be penned and forwarded to the first respondent requesting reasons for the decision. No reasons were furnished notwithstanding that request. It is now clear that the decision was indeed taken without reasons. Rationality entails that the decision is

⁵ Head of Department, Department of Education, Free State Province v Welkom High School and Another 2014(2) SA 228 (CC) Para 1 and 86.

⁶ Minister of Home Affairs and Others v Scalabrini Centre and Others 2013(b) SA 421 SCA.

⁷ Cora Hoexer: Administration Law in South Africa, 1st edition, Page 307.

founded upon reason – in contra – distinction to one that is arbitrary – which is different to whether it was reasonably made.⁸ Jafta JP, as he then was, had this to say “*an administrative decision can only be justified by the reasons underpinning it. It is those reasons which would show whether the decision is rational or not. If it is not, it cannot be allowed to attend and must be set aside.*”⁹ The decision in question was clearly irrational in the circumstances.

[15] Judicial review is concerned with determining whether the impugned acts were made within the ambit of the empowering legislation, and in accordance with the precepts of such law, in particular, and the constitution, in general. I therefore find that the impugned decision was not made in accordance with the empowering provisions and it therefore offends the principle of legality. It is accordingly found liable to be set aside.

[16] This court is the repository of a remedial power to remit the matter for reconsideration by the first respondent with or without directions.¹⁰ It is within my discretion to exercise this power especially in the light of the relief the applicant is seeking in Paragraph 1 of her Notice of Motion. She is not seeking a relief reviewing and setting aside the proceedings that served before the first respondent, but only seeking an order reviewing and setting aside a decision. The practical effect of setting aside a decision is that the proceedings are still extant before the tribunal.¹¹

⁸ Minister of Home Affairs and Others v Scalabrini Centre and Others (supra).

⁹ Mafongosi and Others v VDM and Others 2002(3) ALL SA 271 (TK) Para 15, Sikutshwa v MEC for Social Development, Eastern Cape and Another 2009(3) SA 47 Para 69.

¹⁰ Section 8(1)(c)(i) of PAJA.

¹¹ Matiwane v President of the Republic of South Africa and Others 2019(3) ALL SA 2019 (ECM) Para 27.

The adverse effect of not giving directions to the first respondent will be that it will stymie not only the proceedings before it but also the main proceedings in this court under which this application was brought. The main action has to be finalised expeditiously. The approach I intend to follow is not unusual in the courts of this country in matters of this nature.¹²

[17] On a conspectus of all evidence and papers before me it has been established that the applicant has made out a proper case, accordingly this application should succeed with costs.

[18] **In the result the following order shall issue:**

- 1. The first respondent's decision dated 23 April 2018, rejecting applicant's appeal on the basis that applicant's injuries sustained in a motor vehicle accident on 15 March 2014 are not serious, is hereby reviewed and set aside.**
- 2. The matter is hereby remitted back to the first respondent for reconsideration.**
- 3. The first respondent is hereby directed to determine the dispute within 60 days of this order and when determining the dispute, consider the following documents:**

¹² RAF v Duma and Others 2013(6) SA 9 SCA; May v Health Professions Council of South Africa and Others (1996/2016) [2017] ZAGPHC 739(28 November 2017).

Applicant's RAF4, RAF5, Medico legal reports by Dr Mtati and Dr Lekgwara.

- 3. The first respondent is directed to obtain any additional information that may be necessary for determination of the seriousness of applicant's injuries.**
- 4. The first and second respondents are ordered to pay costs of this application, jointly and severally, the one paying the other to be absolved.**

A.S. ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

Attorney for the Applicant : Mr Pangwa

CAPS PANGWA AND ASSOCIATES

MTHATHA

Counsel for the 1st Respondent : Adv Ngumle

Instructed by : MESSRS MZILENI AND ASSOCIATES

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