

CASE NO: 1212/16

Heard on: 18/08/16

Delivered on: 30/08/16

In the matter between:

MAWANDE GOGOBA

Applicant

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT

NHLANGULELA DJP:

[1] Pursuant to the road accident that the applicant was involved in on 11 May 2009 he, as obliged in terms of the Regulations to the Road Accident Fund Amendment Act 56 of 1996 aa (the Act), submitted to medical examination by his own doctor and clinical psychologist, Dr R.A. Olivier and Ms N. Mtati respectively. He obtained reports from these specialists. He also obtained a radiologist's report on the fracture of his tibia. These reports were duly lodged by him with the Road Accident Fund. Form RAF4 was also prepared and filed on his

behalf with the Fund. The purpose of the filing was to claim compensation for non-pecuniary loss sustained due to the accident.

[2] The Fund conceded the *merits* of the applicant's claim but rejected the claim on *quantum*, acting in terms of Regulation 3 (3)(d)(i) to the Act, on the basis that the applicant did not sustain serious injuries that would entitle him to be paid compensation. I quote hereinunder the respondent's reasons for the rejection of the applicant's claim as set out in annexure "SD 1":

- "The injuries managed well conservatively with no impairment nor complication documented.
- The narrative test indicate mild head injury with chronic headache but there is no clinical evidence of such symptoms.
- Pains is not considered serious injury in RAF Act. RAF4 Form indicate mal-union with no radiology report and chronic pain of the knee and leg".

[3] Aggrieved by the rejection of his claim, the applicant, acting in terms of Regulation 3 (4) to the Act, lodged a dispute with the Registrar of the Health Professions Council of South Africa. This procedure warrants that the Appeal Tribunal of the Council must adjudicate the dispute by considering the full

circumstances that led to the dispute including the reasons for rejection of the injury assessment.

[4] Whilst the adjudication of the appeal was pending the applicant saw it fit to bring the present proceedings before this Court seeking a relief that the Fund be directed to furnish adequate written reasons for the rejection of the serious injury assessment report of Dr Olivier within 20 days from the date of the order of the Court. I was informed that such proceedings are predicated on the provision of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); s 5 thereof which is entitled: “Reasons for administrative action”. In formulating a case under PAJA the applicant stated in the founding affidavit that the reasons given by the Fund are not good enough or are not adequate reasons as to why they said that the injuries are not serious. He alleges that they are inadequate in that the Fund did not respond pertinently to the expert reports of Dr Olivier and Ms Mtati, it did not have recourse to a radiologist’s report and that it ignored certain clinical notes. It appears that the materials alluded to had been submitted to the Registrar in support of the applicant’s case that is still due to be adjudicated by the Appeal Tribunal. It was contended on behalf of the applicant that without good and/or adequate reasons the applicant will be unable to present his case on appeal before the Tribunal.

[5] For the purpose of completeness I must also highlight the objection of the applicant that the reasons given by the Fund fall to be invalidated by reason that the person who drafted them, Mr Lutendo of the Fund, is “just a claims handler” who was not medically qualified to make an injury assessment report as he did.

[6] Whilst the Fund, on the one hand, denies that, firstly, the appellant was not given reasons and, secondly, the reasons given are inadequate, it, on the other hand, raised a special point that the present application is *lis pendens* in that the Appeal Tribunal is as yet to adjudicate the dispute.

[7] At the outset of the proceedings I raised the question with the legal representatives as to whether entertainment of the dispute in this Court will not amount to a usurpation of the appeal powers presently vested in Appeal Tribunal in terms of legislation. I did not quite get a satisfactory answer but a strong reaction that the principles of *lis pendens* do not apply because the cause of action pleaded on affidavit is different from the one that is going to be adjudicated before the Tribunal. On the report about the s 5 claim, I was urged to find that the case of, *inter alia*, *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA), at para. [5] and *Minister of Environmental Affairs and Tourism and Others v*

Phambili Fisheries and Another [2003] 2 All SA 616 (SCA) at para. [40] provides a good reason for the matter to be adjudicated in this court.

[8] It was submitted on behalf of the Fund that the provisions of s 7 (2) of PAJA intertwines with the defences of *lis pendens* in such a way that the applicant cannot bring the present application without first exhausting the internal remedy of an appeal as prescribed by the Legislature. I was not persuaded by the argument that s 7 (2) of PAJA has no bearing to the present matter as the application brought is not a review proceedings. To the extent that the impugned decision of the Fund, the administrator, cannot be set aside without reviewing by a court of law the argument cannot be sustained. Even a consideration based on s 5 of PAJA as relied upon by the applicant calls for invocation of judicial review power of this Court.

[9] The question as to why the applicant saw it fit to by-pass the internal appeal remedy without seeking an exemption as he was enjoined to do so in terms of s 7 (2) of PAJA was not answered by the applicant. Therefore, the power vested in this Court in terms of s 7 (2)(b) kicks in. I will deal with this power later on in this judgment.

[10] In my opinion the decision on the issue of *lis pendens* puts paid to the competency of a relief based on s 5 of PAJA. In so far as the cases referred to the Court, *Transnet and Phambili*, are relevant to s 5 there is no need to deal with them. But I find that the case of *Wycliffe Simuyu Koyabe and 2 Others v Minister of Home Affairs and 2 Others*: Constitutional Court Case CCT 53/08, [2009] SACC 23 is relevant. It deals with the principle that a litigant armed with an internal remedy provided to him/her by statute is obliged to first exhaust that remedy before proceeding to a court to seek judicial review under PAJA. Since it is common cause that the applicant in this case is afforded an internal remedy in terms of the regulations to the Act, it will suffice, for present purposes, to refer to the statement of the Constitutional Court in the *Koyabe* judgment at 16 para. [34]. It was said:

“Thus ... PAJA... requires that available internal remedies be exhausted prior to judicial review of an administrative action.”

[11] See also the case of *Nichol and Another v The Registrar of Pension Fund and Others* 2008 (1) SA 383 (SCA) at para. [15] and Plasket: “The Exhaustion of Internal Remedies and Section 7 (2) of the Promotion of Administrative Justice Act 2 of 2000” (2002) 119 SALJ 50. The statement in *Koyabe* is anchored on these reference materials.

[12] Most unfortunately for the applicant the conclusion I am able to reach, with respect, is that he must first exhaust the appeal internal remedy as provided to him in the regulations to the Act.

[13] It now remains to deal with the issue of *lis pendens*. For the respondent to succeed on this issue, it must prove the requirements that are set out in the case of *Nestlé (South Africa)(Pty) Ltd v Mars Inc.* 2001 (4) SA 542 (SCA) at 549B namely:

- (a) there must be a litigation pending,
- (b) the other proceedings must be pending between the same parties or their privies,
- (c) the pending proceedings must be based on the same cause of action, and
- (d) the pending proceedings must be in respect of the same subject matter.

[14] These requirements are proved in this case. Much was said in argument on behalf of the applicant that in this matter the cause of action is compelling the furnishing of adequate reasons whereas the cause of action before Appeal Tribunal is the determination of the validity of those reasons. I do not agree. The argument overlooks the fact that reasons underpinning the decision were supplied by the

Fund. And they are intelligible in my view. The contention that the reasons furnished do not justify the decision that was made seems to me to be the issue lying at the heart of the appeal adjudication process. It is a contention that calls for this Court to assess the quality of the reasons given including whether Mr Lutendo was qualified to make the assessment underpinning the reasons given by the respondent. To do so would be tantamount to usurping the power of the Appeal Tribunal. That I cannot do. And the evidence that the Fund has supplied adequate reasons and that it has not more reasons to supply means to me that the battle lines have been drawn for the appeal process to roll. It seems to me that that the Appeal Tribunal will have to deal with the adequacy, validity or otherwise of the reasons that inform the decision of the Respondent. That being the case it cannot be said that the dispute between the parties is not *lis pendens*.

[15] The respondent has achieved success on the issue of *lis pendens*. The appropriate order to be made with regard to the objection based on s 7 (2) of PAJA is that the applicant must be sent back to the Appeal Tribunal and continue to exercise his remedies there. Costs will have to be paid by the applicant for his wasteful pursuit of this application. But certainly not on a punitive scale as contended for on behalf of the respondent because I have not detected malice on the part of the applicant.

[16] I must say something about the special points raised, *albeit* in a muted fashion, concerning the alleged deponent's lack of authority to act on behalf of the respondent and, as a consequence, the striking off of the answering affidavit made by the deponent. The deponent's affidavit contains allegations by an attorney on points of legal procedure rather than pure facts with regard to the decision made by the Fund. In so far as the objections were not centred around the absence of a power of attorney *per se* I have no doubt in my mind that it was in the interest of applicant himself to be heard on the special points on PAJA and *lis pendens* without delay and unnecessary attended costs. There was no demur on the part of those legally representing the applicant with regard thereto. Therefore the deponent who was armed with a power of attorney did not have to obtain authority to depose to an affidavit, and moreso in that the affidavit deals with procedural irregularities adopted by the appellant.

[17] In the result the following order shall issue:

“The application is dismissed with costs.”

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Attorney for the applicant : Mr M. Pangwa
: c/o Caps Pangwa & Associates
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Counsel for the respondent : Adv. S. Y. Malunga
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