IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

19/6/2015

CASE NO: 60851/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES/NO~~

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

(3) REVISED

DATE ..... SIGNATURE

IN THE MATTER BETWEEN

OLEBILE HAMILTON MOILWA ~~Applicant~~

and

ROAD ACCIDENT FUND	First Respondent
HEALTH PROFESSIONS COUNCIL OF SA	Second Respondent
THE MINISTER OF TRANSPORT	Third Respondent
DR F J D STEYN	Fourth Respondent
DR Z DOMINGO	Fifth Respondent
DR R K MARKS	Sixth Respondent
PROF. G J VLOK	Seventh Respondent

JUDGMENT

LEGODI J

[1] A victim of road accident, one Mr Olebile Hamilton Moilwa has approached this court seeking for relief as follows:

" BE PLEASED TO TAKE NOTICE that the Applicant intends to make application to this court for review of the following administrative action:

1. *The decision and finding by the RAF Appeal Tribunal (the Fourth, Fifth, Sixth and Seventh Respondents) on 14 February 2014 that "the injuries will not affect the applicant's employability as a taxi driver and that there are no serious consequences according to the narrative test" and thereby the rejection of the claimant's serious injury assessment lodged in terms of the Road Accident Fund Act 56 of 1996 and its Regulations;*

2. *And claims an order in the following terms:*

    2.1 *That the decision of the RAF Appeal Tribunal (Fourth to Seventh Respondents) dated 14 February 2014 and communicated to the Applicant's Attorneys on 28 February 2014 be reviewed and set aside;*

    2.2 *That the matter be remitted to the RAF Appeal Tribunal for consideration,* ***alternatively,*** *that the above Honourable Court substitutes or varies the decision of the RAF Appeal Tribunal;*

    2.3 *That the First Respondent be ordered to pay the costs on a scale as between attorney and client, alternatively that such Respondents which oppose this application be ordered to pay the costs thereof;*

    2.4 *Further and/or alternative relief."*

[2] The application is opposed by the Road Accident Fund and the Health Professions Council of South Africa (First and Second respondents respectively). The

Registrar of the second respondent appointed members of the Appeal Tribunal to consider an appeal against the decision taken in terms of Regulation 3.

[3] The Fund found that the applicant did not suffer serious injuries making the Fund liable to compensate the applicant for general damages. In terms of Regulation 3(3)(c), the Fund is only liable for general damages if the claim is supported by a serious injury assessment (RAF4 form), submitted in terms of the Act and the Regulations. The Fund ought to be satisfied that the injuries have been correctly assessed as serious in terms of the method provided for in the Regulations.

[4] The RAF 4 form must be completed in terms of Regulation 3(1)(b) which requires the medical practitioner to assess whether the third party's injury is serious in accordance with three sets of criteria. In terms of Regulation 3(1)(b)(ii), the third party's injury must be assessed as serious, if it resulted in 30% or more impairment of the whole person as provided for in the AMA Guide. The AMA Guide is defined in Regulation 1 as the American Medical Association Guides to the Evaluation of Permanent Injury, Sixth Edition. If an injury does not qualify as serious in terms of Regulation 3(1)(b)(ii), it may none the less 'be assessed as serious' under the so called "narrative test" in terms of Regulation 3(1)(b)(iii). It will be so none the less be assessed as serious if that injury resulted in a serious long term impairment or loss of a bodily function, constitutes a permanent serious disfigurement, resulting in severe long term mental or severe long term behavioral disturbance or disorder, or resulting in a loss of a foetus.

[5] The applicant in his appeal to the Appeal Tribunal submitted the following information; RAF1 form, RAF4 form, and affidavit in support of narrative test, the medico legal reports by Drs Oelofetse and Gantz, the photographs depicting the applicant's injuries and his hospital records.

[6] The decision of the Tribunal is contained in a letter dated the 28 February 2014 and the reasons for the decision, are summed up as follows:

> *"(i) The patient is 34 year of age. He sustained the following injuries which included the right femur fracture, metatarsal fracture as well as facial injuries.*

(ii) According to information, the fracture healed. The scaring will always be with him but not affecting him.

(iii) The injuries will not affect his employability as a taxi driver and the committee is unanimous that there are no serious consequences according to the narrative test".

[7] Two doctors completed the RAF4 forms. That is, Drs Gantz and Van Zyl. The applicant's injuries were found to have less than 30% impairment on the whole of his person. Dr Van Zyl rated the injuries at 10% and Dr Gantz at 9%.

[8] According to the applicant, Dr Van Zyl found that his injuries resulted in a serious long term impairment of loss of a bodily function and that they constitute permanent serious disfigurement. Dr Gantz on the other side differed with this view. In paragraph 37.3.4 of of the founding affidavit, the applicant contends as follows:

"The decision, in my humble opinion, which the Appeal Tribunal was faced with was therefore who was right and who was wrong, Dr Van Zyl or Dr Gantz?"

[9] The applicant has brought its review application in terms of PAJA. The grounds of review are articulated as follows:

"40.

RELEVANT CONSIDERATIONS NOT CONSIDERED – SECTION 6(2)(e)(iii) PAJA

40.1 The RAF Appeal Tribunal's rejection of my appeal is based upon a finding by them that my injuries cannot be typified as serious long-term impairments under the narrative test.

40.2 It is apparent from the medico-legal reports and RAF 4 form attached to this application (which were available to the RAF Appeal Tribunal) that this conclusion reached by them is incorrect, in particular, as certain relevant opinions of this expert were not considered.

40.3 I refer the above Honourable Court to what was already stated above and my legal representatives will also present the necessary oral argument in this regard at the hearing of the matter.

THE DECISION NOT RATIONALLY CONNECTED TO THE EMPOERING PROVISIONS OR THE PURPOSE FOR WHICH IT WAS TAKEN – SECTION 6(2)(f)(ii)(aa) and (bb) of PAJA

41.

41.1 The empowering provision is Section 17(1)(A)(a) of the Act which states:

> *"Assessment of a serious injury shall be based on a prescribed method adopted of the consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances to the third party". [My underlining]*

41.2 The narrative test as introduced by the Regulations is directly aimed at ensuring that the individual circumstances of the third party, being me, are considered. This is the purpose of the hearing and the purpose for which the decision is made.

41.2 It is evident from the ruling itself and the reasons as already set out hereinafter, that the narrative test and/or my personal circumstances were not considered properly or at all. The decision therefore cannot be said to be rationally connected to the purpose set out in section 17(1A)(a).

THE DECISION NOT RATIONALLY CONNECTED TO THE INFORMATION BEFORE THE RAF TO APPEAL TRIBUNAL – SECTION 6(2)(f)(ii)(cc) OF PAJA

42.

As already stated the Appeal Tribunal failed to take into consideration all the information before them and specifically the RAF4 form completed by Dr. Van Zyl and the report by Dr. Oelofse.

THE DECISION NOT RATIONALLY CONNECTED TO THE REASONS FORWARDED BY THE RAF APPEAL TRIBUNAL –SECTION 6(2)(f)(ii)(dd) of PAJA

43.

43.1 Again the above contentions are relevant. In particular the fact that no reasons were given or consideration as to how Dr. Gantz constantly contradicted himself. No reasons are given why the Appeal Tribunal failed to take into consideration the RAF4 form completed by Dr Van Zyl . No reference is made thereto at all.

43.2 No reasons are given why the Appeal Tribunal failed to take into consideration the report by Dr. Oelofse in its entirety. No reference is made thereto at all".

[10] In paragraph 59 of the answering affidavit, Dr Gert Jacobus Vlok who chaired the Appeal Tribunal alluded to the fact that it is significant to note that although the AMA Guides and the narrative test constitute two different tests of assessment, the criteria under the AMA Guides is always the starting point in the performance of an assessment and would ordinarily give one a good indication as to the severity or seriousness of the injury, even where the injury does not qualify as serious injury under that criteria. According to him, this makes an assessment under the narrative test easier and more objective, as it is informed by information already gathered in an assessment under the AMA Guides. He indicated that this is the process followed when considering appeals.

[11] In doing so, the Tribunal discusses case and evaluates all clinical reports and other related reports contained in each aspect. Included in the discussion are matters relating to key findings and any inconsistencies between the provided clinical reports. The tribunal evaluates the data provided on the RAF4 form and corrolates it with objectives clinical guides and reports provided by various specialists who examined the third party.

[12] The Tribunal also considers how specific findings relate to the conclusion of the diagnosis and the MM1 status. It refers to the current abilities of Activities of Daily Living (ADL) and any validated deficiencies or supplementary reports obtained from other health care professional, if any, who also examined the third party. The Tribunal considers and deliberates on how individual ratings were combined or adduced to create a final number of rating to explain why certain ratings were disregarded in the final analysis due to involve measurements and test results.

[13] Before the Tribunal, the information was that the applicant had sustained a laceration of the face, right foot injury and right femur fracture. He consulted with Dr Van Zyl on 16 February 2012, virtually two years after conclusion for the purposes of compiling a serious injury assessment report (RAF4 form). The applicant apparently complained about a blocked nose, difficulty in breathing through the nose, social problems regarding the scar on the nose, right foot and leg pains, inability to run like before. The injury on the face was described as 5cm highly visible facial scar, healed right femur fracture and right foot *pes cavas* deformity. Dr van Zyl assessed the applicant's WP1 at 7% in respect of the facial scar, and 3% in respect of the *pes cavas* deformity, which resulted in total WP1 of 10%. He assessed the healed right femur at

0%. In terms of the narrative test, he concluded that the applicant sustained serious disfigurement and serious long term impairment.

[14] The X-Ray report dated 16 February 2012 and compiled by Dr De Beer of Burger Radiologist Incorporated, shows a deformity of the right orbit due to old fractures. The report also recorded the presence of depression with old blow out fracture of the floor of the orbit, deformity of the right maxillary and widening of the right maxillary synchondrosis. Insofar as the right femur is concerned, the X-Ray report recorded the deformity of the femur shaft due to an old commuted fracture of the proximal and mid shaft of the femur. A good bony consolidation is reported. Regarding the right foot, it is recorded that there is *pes cavus* deformity with severe metatarsal prumus varas hallux valgus deformity. The 2nd metatarsal bone is recorded as relatively shorter than 1 in 3rd metatarsal-bone possibly due to previous trauma and no deformity of the foot bones noted.

[15] On the other hand, Dr LA Oelofse (Orthopaedic Surgeon) who examined the applicant on the 6 December 2012 states in his report that the applicant sustained an injury to the face, which resulted in secondary problems concerning his eyesight, nose and asymmetry of the face. Dr Oelofse deferred to the opinion of Ear, Nose and Throat Specialist, Ophthalmologist and Maxilla Facial Surgeon. In his report, he also recorded that the applicant has a scar over the upper leg and thigh where the internal fixation was placed and that the movements of the knee and hip joint are within normal limits but with tenderness on palpation. The right leg longer than the left leg. He then concluded by stating that the fracture of the femur neck is healed with the pin protruding into the soft tissue. He recommended removal of the internal fixation. As for the right foot injury, Dr Oelofse mentions in his report that the applicant is tender over the mid tarsal joints, has loss of sensation over the mid foot, and the movements of an ankle joint are mildly restricted. He diagnosed fractures of the 1st metatarsal joint with injury to the mid tarsal joints. He recommends local seroid injections, physiotherapy and removal of internal fixation and arthrodesis of the mid tarsal joint. In his report Dr Oelofse provides a list of the applicant's current discomforts and work duties and then concludes by stating that the applicant's current loss of productivity as a taxi driver was at 30%.

[16] The applicant was further examined by Dr Gants (Orthopaedic Surgeon) on 20 May 2013. In his report he records that there are 2 scars on the nose. There is one on

the centre of the nose and other on the right side, measuring about 2cm the scar on the right side of the nose causes a step in the skin. Although it is unsightly, it is well healed. He also noted a lump on the right leg, mid atrophy of the right muscles, healed but noticeable scars caused by the surgical performed on the right femur. He mentions the presence of a mild dorsal elevation of the taras, which gave the impression of a pes cavas. There was however, no cavas mainifestations of pes cavas, such as clawed toes and high medical longitudinal orch. Dr Ganzt then concluded that the applicant sustained facial lacerations, committed fracture of the right femur and fractures at the neck of the 3rd and 4th metatarsals of the right foot. In his opinion, the facial scars do not constitute disfigurement. The right femur fracture is reported to be solidly united in good position. He too recommends removal of the fixations on the femur due to the fact that some are protruding slightly and most likely restricted range of movement. He states that apparently mild cavas of the foot is more a dorsal prominence of the tarsus, rather than a real elevation of the medical longitudinal. Regarding the complaint by the applicant of the pain on the dorsal aspect of the tarsus, probably related to the dorsal enlargement at this level, Dr Gantz states that it does not appear as serious, long term impairment or loss of body function. He then concludes by assessing the applicant's WP1 at 9% and states that his injuries do not constitute serious long-term impairment or loss of body function or disfigurement.

[17] The Tribunal was also provided with photographs depicting the scars on the bridge of the nose as well as the foot. All the scars are well healed. The photographs of the foot were found not to be indicative of a cavas foot.

[18] Based on all of the above, the Tribunal came to the conclusion that the right femur fracture was well healed with normal alignment. The metatarsal fractures were found to be healed. I am unable to find evidence justifying contrary conclusion by the Tribunal in this regard.

[19] The Tribunal noted that there are conflicting reports regarding the pes cavas, which would be part of a pre-existing condition and as Dr Ganzt puts it, 'the prominence of the metatarsals dorsally'. Dealing with the applicant's scars, the Tribunal had regard to the AMA Guides 6th Edition at page 166. Table 82 deals with scars and lesions. According to those ratings, the scars and skin lesions are only significant if they interfere with some ADL's and require topical or system medication. Having considered all of

these, the Tribunal came to the conclusion that the applicant's scars to not require any such treatment and do not interfere with ADL's. As a result it was concluded that the applicant's injuries did not qualify as a serious injury either under the AMA Guides or the narrative test. I am satisfied that no evidence to suggest that in taking the decision, the Tribunal committed any of misgivings quoted in paragraph 9 of this judgment, bearing in mind that the proper approach is whether or not the decision by the Tribunal is correct or whether the court would have arrived at a different conclusion to that of the Appeal Tribunal.

[20] Consequently the application is dismissed with costs.

M F LEGODI
JUDGE OF THE HIGH COURT

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