

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>23/06/2015</u>	
DATE	SIGNATURE

23/6/2015

Case No: 17403/2014

In the matter between:

MAFELANE PETRUS MODIBEDI

APPLICANT

and

HEALTH PROFESSIONS COUNCIL SOUTH AFRICA

1ST RESPONDENT

THE REGISTRAR OF THE HEALTH

PROFESSIONS COUNCIL

2ND RESPONDENT

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL

3RD RESPONDENT

THE ROAD ACCIDENT FUND

4TH RESPONDENT

DR D LEKALAKALA

5TH RESPONDENT

DR V CLOSE

6TH RESPONDENT

DR BLIGNAUT

7TH RESPONDENT

DR SHAHZAD

8TH RESPONDENT

JUDGMENT

A.M.L. PHATUDI J:

INTRODUCTION

[1] This is a review application in terms of section 6(1) read with section 6(2)(g) of Promotion of Administrative Justice Act 3 of 2000 (PAJA). The applicant seeks an order formulated as follows:

‘3.1. That the second Respondent’s express, alternatively tacit, further alternatively implied, confirmation of the appointment, made in terms of Regulation 3 (8) of the Road Accident Fund Regulations 2008, of the Fifth, Sixth, Seventh and/or Eighth respondents as members of the Third Respondent;

3.2. The Second Respondent’s failure to substitute any one or more of the initial appointments, made in terms of Regulation 3 (8) of the Road Accident Fund Regulations 2008, in respect of the Fifth, Sixth, Seventh and/or Eighth Respondents as members of the Third Respondent; and/or

3.3. The Third Respondent’s alternatively the Fifth to Eighth Respondents’, determination, in terms of Regulation 3 (11) of the Road Accident Fund Regulations 2008, that the Applicant’s injuries do not warrant a 30% whole person impairment

rating and/or that the Applicant's injuries do not qualify the Applicant under the narrative test.

3.4. The Third Respondent's, alternatively the Fifth to Eighth Respondents', failure to postpone the hearing of the appeal and to refer same back to the Second Respondent for a proper determination of the appointments, after receiving an objection from the Applicant pertaining to the appointment of the Fifth to Seventh Respondents as members of the Third Respondent.'

[2] The applicant further seeks an order as to costs against the First and Second respondents alternatively jointly and severally against the Third to Eighth respondents respectively, the one paying the other to be absolved and that the Third, alternatively the Fifth to Eighth respondent(s) and the Fourth respondent be ordered to pay costs of this application jointly and severally with any award as to costs granted against the First and Second respondents the one paying the other to be absolved, if they oppose this application.

[3] The First to Third and Fifth to Eighth respondent(s) raises in *limine* point that the review application was not instituted within 180 days from the date upon which the applicant became aware of the administrative action and the reasons thereof as enacted in PAJA. The applicant contends that the request for reasons interrupted the running of 180 days.

FACTS

[4] On 18 February 2009, the applicant was involved in a motor vehicle accident. He sustained injuries. He was then hospitalised at Boitumelo Hospital. It is apparent from the papers that the applicant lodged the claim with the Fourth respondent (RAF). On 20 November 2012, RAF rejected the applicant's serious assessment report. The RAF, through their legal representative advised the applicant, 'if [he] wishes to dispute the rejection of the serious injury assessment report, [he] can do so by following the procedure (dispute resolution tribunal process) as set out in paragraphs 3(4) to 3(13) of the Road Accident Fund Regulations 2008'

[5] The applicant, acting on the advice of RAF, lodged an appeal on 13 December 2012 against the RAF decision with the First Respondent. On 21 May 2013 the applicant was notified by letter that his appeal has been placed on the agenda for consideration by the Third respondent on the 14 June 2013. He was further appraised that the second respondent had appointed the Fifth to Eighth respondents to constitute the Third respondent. The First respondent further stated in their letter that '... [they] request that any objection of the appointment of a member [of the Third respondent] be lodged with [their] office... together with a motivation, within ten (10) working days of receipt of this letter.'

[6] On 28 May 2013, the applicant objected to the appointment of three (3) out of four (4) members of the Third respondent. He opined that the said three (3) members of the Third respondent are well known to the firm of attorney representing him and further that they (the three members) acted predominantly on behalf of the Fourth respondent in

RAF matters. He felt uncomfortable to be subjected to a panel of members of the Third respondent that is constituted primarily out of doctors acting for the RAF. He further opined that it is not unreasonable to believe that, in the circumstances, 'a reasonable apprehension exists that the three members [objected to] and or the entire panel, will not bring an impartial mind in adjudicating the matter'.

[7] In response thereto, the First respondent wrote a letter dated 4 June 2013 in which it is stated: 'Please be advised that we will recommend to the Appeal Tribunal that the consideration of the matter be deferred to the next meeting of Appeal Tribunal consisting of different experts. Please take note that further communication will be addressed to you in due course'

[8] There is no evidence that the First respondent advised the applicant of the next meeting of the Appeal Tribunal. On 21 June 2013, the applicant annexed to his letter the medico-legal report prepared by one expert. He further enquired: 'Kindly further also advise when the next Appeal Tribunal meeting will take place'

[9] The applicant received no response to the said letter. The applicant learned from the First respondent letter dated 15 July 2013 where it is stated: 'We refer to the above matter and hereby inform you that Road Accident Fund Appeal Tribunal resolved at its recent meeting held on 14 June 2013 as follows:

- (i) ...
- (ii) ...

- (iii) The panel considered the results and agreed that this patient does not reach the 30% whole person impairment nor does he qualify under the narrative test.'

[10] In response thereto, the applicant wrote two (2) letters, both dated 17 July 2013 to the First respondent protesting against the decision to proceed with the matter on the 14th June 2013 in their absence. The applicant opined in one of the two letters that 'the conduct of the Appeal Tribunal was irregular'. In the other letter, the applicant requested reasons in terms of section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for:

'(aa) the panel's failure to postpone the matter after receiving an objection from the [applicant's] legal representative... and

(bb) For [the Third respondent's] decision to find that the [applicant's] injuries [do] not qualify as serious'

[11] The applicant further requested the Third respondent to provide him with the requested reasons within "**SIXTY (60) DAYS**" from 17 July 2013. The applicant stated in his Founding Affidavit 'Notwithstanding the expiry of the 60 (sixty) day period in terms of the request, ... the First to Third respondents, failed and/or refused to provide reasons for the administrative actions...'

THE LAW

[12] Promotion of Administrative Justice Act 3 of 2000 (PAJA) has been enacted '[to] give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the constitution of the Republic of South Africa, 1996...'

[13] Section 5 provides:

1. 'Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
2. The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reason in writing for the administrative action.
3. If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.
4. (a) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.
(b)

[14] Section 6 (1) provides that 'Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.'

[15] Section 7 provides that

- (1) 'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-
 - (a) Subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
 - (b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
- (2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.'

SUBMISSIONS

[16] Mr Scheepers for the applicant submits that the Third respondent's decisions only came to the knowledge of the applicant on 16 July 2013. The applicant requested reasons which were never provided. He concedes that 180 days from 16 July 2013 expired on 16 January 2014 that renders the applicant's application out of time. He submits that the 180 days if calculated from the 13 September 2013, being the 60th day on which the First and/or Third respondent ought to have provided reasons as requested by applicant on 17 July 2013, would fall on 13 February 2014, which would mean that the application was brought within 180 days as prescribed in PAJA.

[17] Mr Motau for the respondents submits that the applicant failed to comply with the time frame prescribed in PAJA and further that the

applicant failed to apply for an extension of the 180 days as envisaged into section 9 of PAJA.

EVALUATION

[18] It is common cause between parties that the applicant only became aware of the Third respondent action on the 15 July 2015. It is further common cause that the applicant launched the review application on 4 February 2014.

[19] The issue to be determined is whether the applicant's application for review was, firstly brought within the prescribed 180 days period and secondly, whether request for reasons interrupts the running of the prescribed 180 days period.

[20] It is clear from the reading of section 7(1) of PAJA that proceedings for judicial review brought in terms of section 6(1) must be instituted without reasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reason for it.

[21] The applicant conceded to have been informed of the administrative action through the First respondent's letter dated 15 July 2013. He, on his version, became aware of the action as at the 16 July 2013. On the applicant's concession, the application for review that was

instituted on the 4 February 2014 is out of the 180 days prescribed in terms of section 7(1) (b).

[22] Variation of the period of 90 or 180 days referred to in section 5 and 7 respectively, may be extended for a fixed period by agreement between the parties or, failing such agreement, by the a court or tribunal on application by the person or administrator concerned. (Section 9(1) (b)).

[23] Any person, such as the applicant, whose rights have been adversely affected by administrative action and has not been provided with reasons for the action, may within 90 days after the date on which that person, (as the applicant), became aware of the action, request the administrator concerned to furnish written reasons for the action.

[24] The applicant complied with the provisions of section 5(1). He requested reasons within 90 days after the date (17 July 2013) on which he became aware of the action (16 July 2013). Reasons were never furnished.

[25] It is trite that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed. The request for reasons envisaged in terms of section 5(1) must be made within 90 days. The 90 days referred to in section 5(1) must, in my view, be construed to be

within 180 days prescribed in terms of section 7(1). This brings me to the conclusion that the 90 days prescribed in terms of term of section 5(1) within which the applicant may request reasons does not interrupt or suspend or extend the running of 180 days prescribed in terms of section 7(1). Interruption, suspension or extension of such a time frame can be effected either by agreement between parties or failing such agreement, by a court or tribunal on application by either party.

[26] There is no evidence of any agreement between the parties to extend either 90 days or 180 days referred to in section 5 and/or 7 for a fixed period. There is further no evidence that either a court or tribunal ordered an extension of such time limits in favour of either party. In the absence of such extension this court has no authority to entertain the review application at all. (*Opposition to Urban to Tolling Alliance and Others v South African National Roads Agency Ltd and others (90/2013) [2013] ZASCA 148* (9 October 2013) paragraph [26].

[27] Brandt JA further penned that 'that does not mean that after the 180 day period, an enquiry into the unreasonableness of the applicant's conduct becomes entirely irrelevant'. The question of whether the delay was reasonable or unreasonable, is still a 'factor to be taken into account in determining whether an extension should be granted or not.' (footnotes omitted). In the absence of the application for condonation and or application for variation of time as provided in terms of section 9(1) (b), this court has no authority to entertain the review application at all.

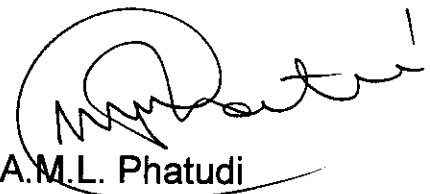
[28] The applicant's counsel conceded that the review application launched on 4 February 2013 is out of the prescribed 180 day period calculated from either 15 or 16 July 2013. This court is thus prevented by the provisions of section 7(1) of PAJA from considering the merits of the review application.

[29] It is trite that costs follow the event. The respondents succeed with their *in limine* point and are thus entitled to costs. The respondents did not seek for costs of two counsel.

In the result, I make the following order:

Order:

- 1. The point in limine is upheld.**
- 2. The applicant's application is dismissed with costs.**



A.M.L. Phatudi
Judge of the High Court

On behalf of the Applicant:

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On behalf of the 1st to 3rd
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