



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **A187/2023**

In the matter between:

JAKOBUS JOHANNES LOMBARD

Applicant

and

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

1st Respondent

**THE REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

2nd Respondent

ROAD ACCIDENT FUND

3rd Respondent

CORAM: DAFFUE *et* VAN RHYN JJ

HEARD ON: 20 MAY 2024

DELIVERED ON: 20 MAY 2024

This judgment was handed down electronically by circulation to the applicant's representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 May 2024.

JUDGMENT

[1] On 11 October 2013 the applicant in this review application was injured in a motor vehicle collision. At the time he was a pedestrian who was struck by a car which was performing an illegal u-turn. He filed a claim with the Road Accident Fund (the RAF), the third respondent herein.

[2] Dr JF Ziervogel, an orthopaedic surgeon, examined the applicant on 6 September 2016 whereupon he completed a Serious Injury Assessment Report, the required RAF4 form. The expert concluded that the applicant was suffering from a serious injury based on the narrative test. His opinion was formed based on his finding of a 'serious long-term impairment or loss of a body function.' Dr Ziervogel's detailed report was annexed to the RAF4 form.

[3] More than 5 years later, ie on 1 November 2021, the RAF rejected the serious injury assessment. The applicant timeously lodged a dispute in accordance with regulation 3 of the Road Accident Fund Regulations, 2008 published under GN R770 in Government Gazette 31249 of 21 July 2008. On 8 March 2023 the appeal tribunal of the Health Professions Council of South Africa (HPCSA), the second respondent in this review application, agreed with the RAF that the applicant had not sustained a serious injury and did not qualify under the narrative test. Reasons for its decision were provided on 19 June 2023.

[4] We quote the following from the reasons provided by the appeal tribunal:

'Therefore, while an injury of the right knee was reported in this accident, it is questionable if all the arthroscopy procedures of both knees were necessitated by the accident. The bilateral knee arthroscopies he had that were predating the accident as well as his pre-injury hospital visits for myofascial pain syndromes may in all likelihood be the major factor of his complaints. The mismatch between the early degenerative changes in the right knee centered on the lateral compartment and the diagnosed pathology of medial compartment is not supportive of his case. The same changes may also be present in the left knee too. This may be supported by the MRI of left knee that was ordered on 18/02/2016. Mr Lombard resumed his job 3 months after the accident as a mechanical fitter, and continued working for almost 3 years in his pre-injury capacity until the company closes down in Oct 2016. Fortunately, in Feb 2017, he managed to establish his own business providing various handyman services, and he is to-date running his business. Any proven medical and/or psychological/psychiatric problems should be covered by RAF undertaking.' (my emphasis)

[5] In his review application the applicant seeks the following relief:

1. Reviewing and setting aside the decision of Appeal Tribunal of the First Respondent of **8 March 2023**, namely that the injuries sustained by Jakobus Johannes Lombard is classified as "non-serious in terms of the narrative test", which decision was communicated to the Applicant on **10 March 2023** and the reasons therefore were provided on **19 June 2023**.

2. Referring the dispute lodged by the Applicant as set out in RAF 5 back to the First and Second Respondent for reconsideration by a newly constituted Appeal Tribunal in accordance with the provisions as set out in Regulation 3 of the Road Traffic Regulations, 2008.

3. Costs of suit.'

[6] Notwithstanding proper service on all three respondents, *ie* the HPCSA, its registrar and the RAF, cited as first, second and third respondents respectively, they failed to oppose the application which was accordingly heard on an unopposed basis.

[7] We quote the following relevant regulations of the Road Accident Fund Regulations, 2008:¹

'3(8)(a) The Registrar shall within 60 days after receiving notification from the other party, or after the expiry of the 60 day period, referred to in subregulation (7), refer the dispute for consideration by an appeal tribunal paid for by the Fund.

(b) The appeal tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine, appointed by the Registrar, who shall designate one of them as the presiding officer of the appeal tribunal.

(c) The registrar may appoint an additional independent health practitioner with expertise in any appropriate health profession to assist the appeal tribunal in an advisory capacity.

(9)(a) The Registrar shall in writing inform the parties who the persons are that he or she has appointed in terms of subregulation (8).

(b)(i) if a party is aggrieved by any one or more of the appointments made by the Registrar in terms of subregulation (8), such party shall within 10 days deliver a written motivation to the Registrar and the other party, setting forth grounds upon which the party objects to the appointment made.

(ii) The other party may respond in writing within 10 days by delivering a response to the Registrar and the aggrieved party.

(iii) The Registrar may, upon receipt of a written motivation, and a response thereto, if any, either confirm the appointment made in terms of subregulation (8) or substitute any one or more of the initial appointments made, and such decision by the Registrar shall be final.'

[8] We are of the view that the appeal tribunal's decision should be reviewed and set aside for several reasons, but specifically, one or more of the following:

- a. the RAF failed to file any submissions, medical reports and/or opinions to dispute the version of the applicant's expert, Dr Ziervogel contrary to regulation 3(7);
- b. the HPCSA's registrar failed to inform the applicant in writing, as he/she was obliged to do in accordance with regulation 3(8), read with regulation 3(9)(a) – clearly peremptory provisions - which three independent medical practitioners had been appointed in terms of regulation 3(8) to enable the applicant to consider whether to object to their appointment or not;

¹ GN R770 in GG 31249 of 21 July 2008 paras 3(8)(a) to 3(9)(b)(iii).

- c. in failing to act as required in the previous sub-paragraph, the registrar failed to comply with a mandatory and material procedure as set out in section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000; consequently, the decision of the appeal tribunal should be reviewed and set aside on this basis alone;
- d. insofar as the appeal tribunal intended to come to a different conclusion than Dr Ziervogel, it should have given the applicant and Dr Ziervogel a reasonable opportunity to make representations before coming to a final conclusion; consequently, in failing to act accordingly, the procedure adopted by the appeal tribunal was procedurally unfair;
- e. although we are not required to deal with the merits of medical opinions in this review application, it appears from the reasons, as quoted, that the appeal tribunal relied on speculation and in this specific instance Dr Ziervogel and/or the applicant should have been allowed an opportunity to make representations and/or further medical reports should have been obtained, bearing in mind the appeal tribunal's powers set out in regulation 3(11)(c), (d) and (e).

[9] Regulation 3(14) stipulates that the RAF shall bear the reasonable costs of the HPCSA arising from regulation 3. The applicant sought costs of the application against all three respondents. We considered regulation 3(14), but insofar as Adv De Kock submitted that costs should be granted against all three respondents, we are satisfied that it is the appropriate order to be made.

[10] Consequently, we make the following order:

1. The decision of the appeal tribunal of the first respondent of 8 March 2023, namely that the injuries sustained by Jakobus Johannes Lombard is classified as 'non-serious in terms of the narrative test' is reviewed and set aside.
2. The dispute lodged by the applicant as set out in the RAF 5 is referred back to first and second respondent for reconsideration by a newly constituted appeal tribunal in accordance with the provisions as set out in Regulation 3 of the Road Accident Fund Regulations, 2008.
3. The respondents shall pay the costs of suit.

4. This judgment and order shall be served forthwith by the applicant's attorney per electronic mail on all three respondents.



JP DAFFUE et I VAN RHYN JJ

On behalf of the applicant:
Instructed by:

Adv D De Kock
Webbers Attorneys
BLOEMFONTEIN