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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 21310/2024

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
_____ DATE	_____ SIGNATURE

In the matter between:

S SAYED O.B.O O[...] M[...]

Applicant

and

THE HPCSA

First Respondent

THE ACTING REGISTRAR OF THE HPCSA

Second Respondent

THE RAF APPEAL TRIBUNAL

Third Respondent

THE RAF

Fourth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10: 00 am on 13 September 2024.

Summary:

A review of an administrative action by an administrative tribunal. The tribunal refused to uphold an appeal against the decision of the Road Accident Fund (RAF) to assess the injuries of the injured minor child to be serious injury. Applicant for review is confined to the grounds upon which the administrative action is impugned. A reviewing party is not entitled to add further grounds in the heads of argument. The statutory duty to confirm the rejection of the serious injury assessment report (SIAR) by the RAF lies with the appeal tribunal. Its findings in the exercise of its statutory power are final and binding. The applicable review test is that of whether the decision of the appeal tribunal is one that a reasonable decision maker may not reach. A Court of review is not entitled to usurp the statutory powers of the appeal tribunal.

In the absence of a Rule 53 record, it is difficult for a Court of review to assess whether the appeal tribunal has failed to apply its mind by taking into account irrelevant consideration and ignoring the relevant ones. The statutory role of the RAF in relation to the SIAR is to either accept or reject it. Once the SAIR is rejected by the RAF, the recourse available for the claimant is to dispute the rejection of the SAIR by lodging a dispute with the Registrar of HPCSA. In order to resolve the dispute, the appeal tribunal is empowered to (a) determine whether in its majority view the injury concerned is serious in terms of the method set out in the regulations and (b) confirm the rejection of the SAIR by the RAF.

Available to a party aggrieved by the decision of the appeal tribunal, is either a PAJA review or a legality review. Having chosen the PAJA review, the applicant is obliged to allege and prove the PAJA grounds. Absent the proof of the PAJA grounds, a party must fail. The applicant has failed to prove PAJA grounds and the decision of the appeal tribunal is one that falls within the bands of reasonableness. The findings of the appeal tribunal, that the injuries are not serious, are incapable of being faulted, thus, its confirmation of the rejection of the SAIR by the fund is also incapable of being faulted. Held: (1) The application for review is dismissed. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Where a review application is not opposed, it does not axiomatically follow that a Court of review shall exercise its review powers in the absence of grounds of review being proven, simply because the application stands unopposed. Taking into account the rule of law and separation of powers, a Court of law is not empowered, by demonstration of superior knowledge, to willy-nilly interfere with decisions of administrative tribunals. Aptly, the English case in *Chief Constable of the North Wales Police v Evans (Evans)*¹ per Lord Brightman, stated the following:

“Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping.”

[2] Before me is an unopposed review application, instituted in terms of section 6, read with section 7 of the Promotion of Administrative Justice Act (PAJA).² The applicant, Advocate S Sayed N.O., on behalf of O[...] M[...] (a minor child), has launched the present application, effectively seeking to review and set aside a decision made by the third respondent, the Road Accident Fund Appeal Tribunal (Tribunal), on 9 June 2024, in terms of which, the Tribunal confirmed the rejection of the serious injury assessment report (SIAR), by the fourth respondent, the Road Accident Fund (RAF). The rejected SIAR was prepared by Dr Gavin Fredericks on 03 May 2021, following an assessment he conducted on 15 September 2020.

¹ [1982] ALL ER 141 [HL].

² Act 3 of 2000 as amended.

Background facts appertaining the present application

[3] On 26 June 2017, the minor child was struck by a motor vehicle while crossing the street on his way home from school. At the time of the collision, the minor child, then seven years old, was rebuttably presumed to be *doli incapax*. The minor child was received by Segametsi Magaetsho Clinic on 29 June 2017. Later that evening, the minor child was ferried to NIC Bodenstein hospital. Upon admission to the hospital, his Glasgow Coma Scale (GCS) was recorded as 15/15. The hospital recorded the following injuries: (a) bruises and swelling on the head; and (b) lacerations on the right ankle. Four days later, on 17 July 2017, the minor child was discharged from the hospital. Following the collision, the mother of the minor child lodged a claim with the RAF on behalf of the minor child. Later, the mother was substituted by *the curator-ad-litem*. On 15 September 2020, as required by section 17(1A)(b) of the Road Accident Fund Act (RAFA),³ Dr Fredericks assessed the minor child in support of the non-pecuniary loss claim.

[4] On 13 February 2023, the RAF rejected the SIA R as contained in RAF4 form completed by Dr Fredericks. The reasons advanced by the RAF for rejection were recorded in the rejection letter as: (a) the whole person impairment (WPI) assessed in the RAF form is not of such a nature and severity to qualify as serious as the plaintiff will not reach 30% WPI; and (b) the injuries sustained currently form part of the list of non-serious injuries. On 15 February 2023, Ehlers Attorneys lodged a dispute, within the contemplation of the Regulations, with the Registrar of the Health Professions Council of South Africa (HPCSA). The nature of the dispute was set out in the RAF 5 form, and it only related to narrative test 5.1 (orthopaedic injuries, neurological and psychological problems other than in narrative test 5.3) and 5.3 (psychiatric disorder, emotional shock and learning disability).

[5] In due course, the Tribunal was constituted in order to consider the dispute so lodged in accordance with the Regulations. On 9 June 2023, the Tribunal met and considered the dispute. It reached a conclusion that the injuries sustained by the minor child may be classified as non-serious injuries in terms of the narrative test.

³ Act 56 of 1996 as amended.

This conclusion was communicated to the attorneys of the applicant on 14 June 2023. Chagrined thereby, reasons were requested. On 8 September those reasons were duly provided. Of significance in the present application, the following salient reasons were recorded:

“Reported injuries (acute injury diagnosis)

Soft tissue injuries to the knees and feet, and to one elbow. At the hospital, his GCS score was 15/15, there was at the time of arrival at the hospital. On the day of the accident, a history of a loss of consciousness, but now fully awake, with no localising neurological findings. There was significant bruise over the head.”

[6] After providing detailed reasons in a six-page letter signed by Ms Kraai, the case administrator, the Tribunal summarised its conclusions as follows:

- “In light of the above, it is the Tribunal’s viewpoint that the injuries sustained by the patient did not result in significant long-term life altering consequences. No functional impairment, no loss of body function.
- No objective evidence to support the qualification of long-term serious impairment or loss of a body function and not resulted in severe long term mental or severe long behavioural disturbance or disorder or constitutes permanent serious disfigurement.
- The claimant would be able to do most activities of daily living.
- There were no Narrative Test issues of significance to justify a classification of the injuries as Not-Serious.”

[7] Disenchanted by the reasons advanced by the Tribunal, on 6 March 2024, within the 180 days period contemplated in section 7(1)(b) of the PAJA, the applicant launched the present application. As indicated above, despite proper service to the significant respondents, the application stood unopposed.

Grounds of review

[8] This being motion proceedings, the applicant is bound by the case as made in the founding affidavit. For reasons that are not clear to this Court, ostensibly for expediency, the applicant waived his right to a record of the review and any further reasons within the contemplation of rule 53 of the Uniform Rules. The grounds put forward by the applicant in impugning the decision of the Tribunal, may be summarised as follows:

- (a) Failure to provide adequate reasons within the contemplation of section 5(3) read with section 5(4) of the PAJA;
- (b) Bias within the contemplation of section 6(2)(a)(ii) of the PAJA;
- (c) Procedural unfairness within the contemplation of section 6(2)(c) of the PAJA;
- (d) Error of law which materially influenced the action within the contemplation of section 6(2)(d) of the PAJA;
- (e) Considering irrelevant considerations and ignoring the relevant ones as contemplated in section 6(2)(e)iii) of the PAJA;
- (f) The action was taken arbitrarily or capriciously as contemplated in section 6(2)(e)(vi) of the PAJA;
- (g) The action is not rationally connected within the contemplation of section 6(2)(f)(ii) of the PAJA;
- (h) The decision is so unreasonable that no reasonable person could have so exercised the power or performed the function as contemplated in section 6(2)(h) of the PAJA;
- (i) Breach of the Regulations, by failure to inform the parties and afford them an opportunity to object to the constitution of the Tribunal and by failing to constitute a Tribunal consisted by independent practitioners with expertise in the appropriate areas of medicine;
- (j) Excess of power by considering issues of causation.

[9] The above are the grounds upon which this application shall be considered by this Court. At this juncture, it is appropriate for this Court to mention that, in his heads of argument, the applicant expanded his grounds to allege a legality review, despite the case being entirely predicated on a PAJA review. The founding affidavit in support of the present application alleges the following:

“10.2 The judicial review application is premised on the provisions of PAJA on the grounds that...”

Analysis

[10] Before considering each of the grounds raised in this review application, it is of significance to first extrapolate and examine the applicable legislative framework relevant to this matter.

The applicable legislative framework

[11] Of cardinal importance, the Tribunal, as the central respondent in an application of this nature, exercises statutory powers when considering a dispute regarding the SIAR. The departure point in this regard should be the RAFA.

Section 17 of RAFA

[12] Primarily, section 17 of RAFA addresses the liability of the RAF or its agents. In essence, if any of the provisions of section 17 are not met, the RAF may not be liable. Section 17(1)(b) provides that the obligation of the Fund to compensate a third party for non-pecuniary loss is limited to compensation for a serious injury, as contemplated in subsection(1A) and shall be paid as a lump sum. What emerges from the above section is that a non-pecuniary loss claim is limited to only serious injuries. Subsection (1A)(a) stipulates that assessment of a serious injury must follow a prescribed method, adopted after consultation with medical service providers, to ensure that injuries are assessed in relation to the circumstances of the third party. Hence, the assessment is not done in vacuum but it is based on a prescribed

method. Any assessment that deviates from this method would be *ultra vires* and unlawful.

[13] Impliedly, a Court of review, in an instance like the present, where the assessment is questioned, must also be guided by the prescribed method. If the assessment is based on a prescribed method, a Court of review cannot interfere with such an assessment. Importantly, this method is a product of consultation with medical service providers, it ensures that injuries are assessed in the context of the third party's circumstances. Sadly, the legislature omitted in the RAFA to afford the phrase "serious injury" any meaning. Therefore, it follows that not every injury qualifies for compensation of a loss of a non-pecuniary nature. Only serious ones are to receive compensation. Axiomatically, it must follow that the nature of injuries sustained by a claimant plays a pivotal role in the assessment exercise. Generally, serious injuries, often referred to as catastrophic, typically have a significant and long-term impact on the life of the injured person. Examples include brain and spinal cord injuries, amputations, severe burns, and fatal accidents.

[14] In *JH v Health Professions Council of South Africa and others (JH)*,⁴ Rogers J consulted a lexicon when considering the word 'serious'. The learned judge concluded that, in the context of this narrative, the word 'serious' implies having important, critical or dangerous consequences. The erudite judge reached a conclusion that, that which is serious must be more intense than moderate. Adopting a similar approach in this matter, this Court must ask whether bruising, swelling, and lacerations amount to serious injuries. The primary focus, in my view, should be on the nature and type of injury, rather than the sequelae of the injuries. A bruise, for example, involves the rupture of small blood vessels and discoloration without a break in the overlying skin; a laceration is a tear in soft body tissue; and a swelling is the enlargement of organs, skin, or other body parts. This Court shall return to the question whether, bruising, swelling and laceration constitute serious injuries when considering the reasons advanced by the Tribunal.

⁴ 2016 (2) SA 93 (WCC)

Regulations, 2008

[15] Section 26 of RAFA empowers the Minister of Transport to make regulations. On 21 July 2008, the Road Accident Fund Regulations, 2008 (Regulations) were published.⁵ Regulation 3 deals with the assessment of serious injury in terms of section 17(1A) of RAFA. Although the phrase 'serious injury' has not been defined in RAFA, regulation 3(1)(b) lists injuries that are considered non-serious and these include: a laceration,⁶ bruising,⁷ and swelling.⁸ The legal position is such that no bruising, laceration and swelling shall be assessed as serious. Once an injury falls under this exclusionary list, it is unnecessary to subject such an injury to the test contemplated in sub-regulations 3(1)(b)(ii) and (iii).

[16] Only injuries that are a *prima facie* serious, and not hit by the exclusionary list, outlined in sub-regulation 3(1)(b)(i), may be subjected to the two tests; namely the WPI and the Narrative tests. It seems incongruent, in my view, to suggest that the legislature intended for a laceration, bruise or swelling to be subjected to the WPI and Narrative test while such injuries are specifically excluded from being serious. On application of the common law principle of *expressio unius exclusio alteris* (the expression of one thing is the exclusion of the other), the express exclusion of lacerations, bruising and swelling from the list of serious injuries means the inclusion of other forms of injuries not specifically excluded. This point is buttressed by a contextual, purposive and literal interpretation of section 17(1A)(a) of RAFA, which specifically states that assessment based on a prescribed method is only for serious injuries. Therefore, non-serious injuries are excluded from this assessment.

[17] It is important to emphasise that what is required for a WPI test is not assessment by a medical practitioner, which tends to be subjective in some instances, but the result of an injury. In other words it is not a say-so of the medical

⁵ Published under GN R770 in GG 31249 of 21 July 2008, amended as at 4 July 2022, GN 2235 in GG 46661 of 4 July 2022.

⁶ Reg 3(1)(i)(dd) of the Regulations.

⁷ Reg 3(1)(i)(nn) of the Regulations.

⁸ Reg 3(1)(i)(mm) of the Regulations.

practitioner but the objective consequences of the injury itself. The AMA Guides assist in assessing the percentage of WPI. The legislated percent is that of over 30 %. Should the consequences of the injury be above 30 % of the WPI, the injury is serious enough for compensation purposes. The prescribed method is either the WPI method or the Narrative Test and not both. In terms of sequential order, the primary method is the WPI, once the 30 % threshold is not met then the only other available method is the Narrative Test. Regulation 3(1)(iii) specifies that an injury that does not result in 30 % or more impairment of the whole person, may only be assessed as serious if that injury meets any of the four stated requirements, namely: (a) serious long-term impairment or loss of body function; (b) constitutes permanent serious disfigurement; (c) severe long-term mental or severe long-term behavioural disturbance or disorder; or (d) resulted in loss of a foetus. In *JH*, Rogers J concluded that that which is 'severe' must be more intense than 'serious'.

[18] Upon any assessment, it is difficult, in my view, to emerge with long-term impairment or loss of body, let alone a serious one, in a laceration, bruise or swelling. These injuries are incapable of constituting a permanent, let alone a serious disfigurement or severe long-term mental or long-term behavioural disturbance or disorder. The applicant's appeal against the rejection by the RAF was solely based on the Narrative Test 5.1 and 5.3. Accordingly, in this review, no reliance is capable of being placed on the WPI test.

Grounds of review considered.

[19] Before each ground may be considered, it suffices to reflect on some important legal principles which find application in this matter. It is common cause that this Court is called upon to review a decision of a body statutorily authorised to do what it did. There can be no doubt that the Tribunal is a specialised body laden with certain expertise or speciality. Regulation 3(8) (b) specifically provides that the Tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine, appointed by the Registrar. Clearly, a Tribunal is a specialised body, which will require to apply its expertise in the areas of medicine. The proper approach to be adopted in a review of such bodies was considered in

Canadian Union of Public Employees Local 963 v Brunswick Liquor Corporation (CUPE),⁹ where the Supreme Court of Canada held that judges should not have the last word on all administrative interpretations of law, but should sometimes intervene only when the agency interpretation is irrational. The *CUPE* decision was followed by the Supreme Court of Canada in the matter of *Dunsmuir v New Brunswick (Dunsmuir)*¹⁰. The Supreme Court of Canada stated that in order to establish whether deference should be accorded and a reasonableness test to be applied, the following factors play a role; (a) putative clause – this is a statutory direction from Parliament or legislature indicating the need for deference; (b) a discrete and special administrative regime in which the decision maker has special expertise; and (c) the nature of the question of law.

[20] The learned Schutz JA in *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another (Phambili)*¹¹ stated the following:

“Judicial deference is particularly appropriate where *the subject matter of an administrative action* is very technical or of a kind in which a court has no particular proficiency.”

[21] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others (Bato Star)*,¹² it was emphasised that the Court should take care not to usurp the functions of administrative agencies. The task of the Court is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution. The Court, in *Bato Star*, emphasised that a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. At the same time, a Court must not function as a rubber stamp of administrative tribunals. When deference is accorded, it is not a sign of timidity but rather a recognition of the principle of separation of

⁹ [1979] 2 SCR 227

¹⁰ [2008] 1 S.C.R. 190

¹¹ 2003 (6) SA 407 (SCA) at para 53

¹² 2004 (4) SA 490 (CC).

powers. In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Ltd and another (Trencon)*,¹³ the approach in *Bato Star* was endorsed. Additionally, the Court stated that indeed the idea that Courts ought to recognise their own limitations still rings true. Such a stance is informed not only by the deference Courts have to afford an administrator but also by the appreciation that Courts are ordinarily not vested with the skills and expertise required of an administrator. With specific reference to the functions of the Tribunal, medical expertise are required for the Tribunal to either confirm or reject a SIAR. Undoubtedly, a Court is bereft of medical expertise required in the assessment process.

[22] This Court part ways with a submission made by the applicant's counsel, that the doctrine of deference only finds applicability when it comes to a Court exercising those powers afforded to it in terms of section 8 of the PAJA. On the contrary, section 8 applies after a Court had found legal basis to review and set aside an administrative action. However, the doctrine of deference applies when considering whether to interfere or not interfere with a decision of an administrator. Guided by the above legal principle, I continue to consider each of the grounds put forward by the applicant.

[23] I must state upfront that this Court takes a view that in reviewing decisions of the Tribunal, in matters of these nature, the reasonableness test is the only test to be applied since deference must be shown to the Tribunal given the special skills required. There is a very limited question of law, and that is, did the Tribunal follow the prescribed method during the assessment and or followed the legislated process.

Inadequate reasons-section 5(3) of the PAJA.

[24] The gripe of the applicant on this score is centred on the adequacy of the reasons provided. In order to deal with the gripe, it is important to consider the context of the reasons provided. When the RAF rejected the SIAR, it provided two

¹³ 2015 (5) SA 245 (CC).

reasons; namely (i) the WPI will not reach 30% and (ii) the injuries sustained currently form part of the list on Non-Serious injuries. What emerges from the reasons advanced by the RAF for the rejection of the SIAR is that the Narrative Test was not advanced as the basis for the rejection. Nevertheless, when the applicant lodged a dispute, he predicated the dispute on the Narrative Test as opposed to the WPI test. Significantly, the applicant did not contest the reason that the injuries sustained are classified as Non-Serious injuries.

[25] This Court has already adopted a view that once the injuries form part of the list, the assessment on either WPI or Narrative Test is unnecessary. In the Court's view, only serious injuries should be subjected to the prescribed assessment methods. Having stated the above, the applicant was only entitled to be given reasons as to why the injuries sustained were not assessed through the Narrative Test. In this case, there is no dispute that written reasons, as required by section 33(2)¹⁴ of the Constitution, have been provided. Thus, from a constitutional point of view, the applicant received the right guaranteed in section 33(2) of the Constitution.

[26] The issue of adequateness was introduced by section 5(2) of the PAJA. It does not owe its origin from the Constitution. Sadly, the PAJA does not provide any criteria for what constitutes adequate reasons. Therefore, adequacy is left to administrators and the Courts to determine a particular set of reasons on a case-by-case basis. Reasons will be adequate if they serve the purpose that the PAJA, supported by the Constitution, seeks to achieve by imposing a duty to provide reasons. The principal purpose of requiring an administrator to furnish reasons is to justify the administrative action that has been taken. Reasons provide someone aggrieved by a decision with an explanation and justification for the decision. Reasons are adequate when they are intelligible to the person seeking reasons and are of sufficient precision to give him or her a clear understanding of why the decision was made. Importantly, when a Court of review is faced with a challenge of

¹⁴ (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

inadequacy of the reasons provided, the question is not whether a Court would have provided the same or similar reasons for the impugned administrative action.

[27] The question is one of whether there is (a) justification; (b) intelligibility; (c) precision; and (d) provision of an understanding of the reasons provided. In assessing those questions, an objective approach is required. In other words, a Court should ask whether the reasons are justifying, intelligible, precise or provides an understanding to a reasonable person. It is indeed so that adequacy is to be assessed from the point of view of the recipient of the reasons, rather than the administrator or the reviewing Court. Justification refers to the action of showing something to be right or reasonable. Intelligibility simply means reasons are understood and comprehensible. Precision means the quality, condition, or fact of being exact and accurate.

[28] Provision of reasons benefits the receiver as opposed to the provider of reasons. Reasons also assist a person in deciding whether to exercise rights of appeal or review.¹⁵ Therefore, it is expected of a receiver of reasons to assess, within a reasonable time, whether the reasons provided him or her with (a) justification; (b) intelligibility; (c) precision; and (d) ability to understand. In *Goodman*, the learned Schutz JA felicitously pointed out that:

“[10] ...For instance, reasons given may tell the tenderer that his goods did not comply with the specification. He, knowing that they did comply, would then be able to take the matter further. *Without reasons he might be without a remedy.*”

[29] Clearly, since the reasons are to the benefit of the receiver, if the reasons provided do not justify the decision, are unintelligibility, imprecise, or incapable of being understood, there is nothing preventing the recipient from requesting proper and adequate reasons. A receiver of reasons is not justified, in my view, to keep his dissatisfaction about the reasons up his or her sleeve simply to lurk the provider of

¹⁵ See *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) (*Goodman*).

reasons in a review application. The right to written reasons is a fundamental right protected in the Bill of Rights. As such, an aggrieved person is entitled to approach a Court of law to enforce that right. In this case, the applicant received reasons on 8 September 2023. For almost six months, the applicant laid no complaint of inadequacy. Instead it laid supine until almost the last day of the 180 days to seek to protect his rights. Importantly, using those reasons, the applicant managed to precisely reckon the 180 days to launch the present review, and to formulate his barrage of grounds to review the decision.

[30] Surely, if the reasons furnished were inadequate, the applicant would not have been able to formulate his review grounds. In *City of Cape Town v Aurecon South Africa (Pty) Ltd (Aurecon)*,¹⁶ it was made clear that the 180 days is to be reckoned from the date of reasons being provided. In support of this point, the learned Mbha AJ, writing for the majority, had the following to say:

“[41] ... On the contrary, it provides that the clock starts to run with reference to the date *on which reasons for the administrative action became known ...to an applicant.*”

[31] This Court is of the view that the ground of inadequate reasons is opportunistic and arose as an afterthought. It is rather too little, too late. The train has left the station. The review was launched, which in itself suggests that adequate reasons have been furnished. In a six-page letter, the Tribunal provided reasons justifying its decision. In *Soldatow v Australian Council (Soldatow)*,¹⁷ it was correctly found that the reasons need not be lengthy unless the subject matter requires it. However, they should be sufficient to determine whether the decision was made for a proper purpose, whether the decision involved an error of law, whether the decision-

¹⁶ [2017] ZACC 5

¹⁷ (1991) 28 FCR 1.

maker acted only on relevant considerations, and whether any such considerations were left out of account.¹⁸

[32] The applicant placed heavy reliance on the decision of this Division, per Davis J, in *Qutyana v Health Professions Council of South Africa and others (Qutyana)*.¹⁹ This judgment is distinguishable from the present case. In *Qutyana*, there was a specific request for an assessment to be done by a clinical psychologist. For that reason, Davis AJ was correct in concluding that the HPCSA had to explain its reasoning in circumstances where it “felt” that it differed from the conclusions subsequently reached by the clinical psychologist. Another distinguishing factor is that the injuries in *Qutyana* were far more serious than the injuries involved in *casu*. Regard being had to the dispute lodged by the applicant, what required determination was whether the injuries sustained by the minor child amounted to serious injuries under the Narrative Test.

[33] Whether the Narrative test was met or not, guidance ought to be sourced from regulation 3(1)(b)(ii)&(iii)(aa)-(dd) of the Regulations. The Tribunal gave detailed reasons for finding that there were no significant Narrative Test issues to justify a classification of the injuries. It must be borne in mind that where reasons are provided, the end point is not an agreement with the view point of the administrator but an understanding of the decision. The applicant’s contention that the experts’ observations were taken out of context; that the contents of the reports and their findings were not addressed; and that the conclusions were speculative and unsupported, suggests an understanding of the reasons and a disagreement with them. In order to disagree, an understanding is required, unless the applicant is “shooting from the hip” so to speak.

[34] Accordingly, this ground of review falls to be rejected. As an indication that the applicant understood the reasons already provided, at the eleventh hour, it waived

¹⁸ This approach was favoured in *Moletsane v Premier of Free State* 1996 (2) SA 95 (O).

¹⁹ [2023] ZAGPPHC 629 (26 July 2023).

the rights in Rule 53 of the Uniform Rules. In my view, Rule 53(1)(b) aligns with section 5(3) of the PAJA, as it states that the decision maker must be called upon to dispatch reasons as required by law. It is incongruent, in my view, for a party to complain about not being provided with adequate reasons while rejecting the second opportunity provided in Rule 53. This stance gives credence to the conclusion reached by this Court earlier, that the ground is nothing but an afterthought and an opportunistic posture.

Breach of regulation 3(8)(b) and (c) as well as 3(9)(b)(i) of the Regulation

[35] This ground amounts to an alleged error of law or unlawfulness within the context of a legality review. Given that a legality review was not pleaded, it cannot be found that the Tribunal acted unlawfully. When it comes to an error of law in the context of a review of a decision of administrative agencies, the question is whether the error of law is material enough to affect the outcome reached. With regard to the error of law, as a ground of review, what was said in *Hira and Another v Booysen and another (Hira)*²⁰ remains good law even under the present constitutional dispensation. The erudite Corbett CJ, after an extensive review of the local and foreign authorities, summarised the legal position as follows:

“To sum up, the present-day position in our law in regard to common law review is, in my view, as follows:

- (1) Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common law review...;
- (2) Where the duty/power is essentially a decision making one and the person or body entrusted has taken a decision, *the grounds upon which the Court may, in the exercise of its common law review jurisdiction, interfere with the decision are limited;*

²⁰ [1992] (4) SA 69 (AD)

- (3) Where the complaint is that the tribunal has *committed a material error of law, then the reviewability of the decision will depend basically upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision;*
- (4) Where the tribunal exercises powers or functions of a purely judicial nature, ... then the Court will be slow to conclude that the tribunal is intended to have *exclusive jurisdiction to decide all questions including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common law review;*
- (5) Whether or not an erroneous interpretation of a statutory criterion ... *renders the decision invalid depends upon its materiality ...* Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. *In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal "asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or "failed to apply its mind to the relevant issues in accordance with the behests of the statute"; and that as a result its decision should be set aside on review;*
- (6) In cases where the decision of the tribunal is a discretionary rather than purely judicial in nature ...or *where opinion or estimation plays an important role, the general approach to ascertaining the legislative intent may be somewhat different. . . ."*

[34] Ordinarily, an error of law would arise if the repository of public power misconstrues the enabling provisions or misapplies it.²¹ As observed in *Hira*, only a material error of law matters in order to quash a tainted decision. The important question is what materiality means. It is suggested that, firstly, an error is material if it is serious enough to place the exercise of power at jeopardy. In order to determine the seriousness of the error, the enabling provisions ought to be interpreted by a

²¹ *Local Road Transportation Board v Durban City Council and Another* 1965 (1) SA 586 (A) (*Durban City Council*) and *Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg and Another* 1985 (2) SA 790 (A).

Court. This requires a Court to engage in a statutory interpretation. If, upon true construction of the statutory power or conditions to exercise that power, it emerges that there was non-observance of the letter of the law, such non-observance may be fatal to the decision reached.²² Secondly, the error must be causally related to the decision reached and impugned. The error has to be one which affected the actual making of the decision, and therefore, affected the decision itself.²³ In other words, this error must taint the conclusion and/ or the decision reached; otherwise, it is immaterial and incapable of tainting the decision.²⁴ Thirdly, it remains within the judicial discretion of a Court to still refuse a relief, even where an error is pointed out. Lord Neuberger MR in *R (FDA) v Work and Pensions Secretary*²⁵ had the following to say, with which this Court associate itself:

“Even where the irrelevant factor played a significant or substantial part in the decision-maker’s thinking, the decision may, exceptionally, still upheld, *provided that the court is satisfied that it is clear that, even without the irrelevant factor, the decision-maker would have reached the same conclusion.* . . . There is, in theory at least, a possibility that, even if the court concludes that it ought otherwise set aside a decision on the ground that a legally irrelevant factor was taken into account, it can nonetheless uphold the decision, *if it is satisfied that it would be pointless to require the decision-maker to reconsider the question afresh, because it would reach the same answer.*”

[35] Thus, the error must be material enough in order to taint or distort the ultimate decision²⁶. Section 6 (2) (d) of the PAJA provides that the power of judicial review lies on the action that was materially influenced by an error of law. Accordingly, materiality is key when an error of law is alleged. In the present matter, the applicant laments the constitution of the panel. Regulation 3(8)(b) empowers the Registrar to

²² See Forsyth C and Wade W *Administrative Law* (Oxford University Press, 11th Ed, 2014) 183-184.

²³ See *Peters v Davidson* [1999] 2 NZLR 164 at 202 per Thomas J.

²⁴ See *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34.

²⁵ [2013] 1 WLR 444 at para 68-69.

²⁶ See *Goldfields Investment Ltd and Another v City Council of Johannesburg and another* 1938 TPD 551.

appoint the Tribunal. For the panel to meet the provisions of the regulation, it must (a) consists of three independent medical practitioners, and (b) have expertise in the appropriate areas of medicine. Appropriateness means suitability or properness in the circumstances. The injuries sustained by the minor child should be differentiated from sequelae that may flow from the injuries. For the purposes of determining the seriousness of the injuries, the sequelae only matters when the Narrative Test is applied in order to determine the four factors. Regulation 3(1)(b)(i)(oo) is expressly specific that any sequelae in the form of pain or discomfort as a result of the listed Non-Serious injuries also fall within the list. The suggested neurologist and or psychiatrists would be useful only to the extent of determining the sequelae of the lacerations, bruises and swellings, which form part of the excluded list. Their role in assessing the injuries sustained by the minor child is limited in nature.

[36] An orthopaedic is the medical speciality that focuses on injuries and diseases of the body's musculoskeletal system. Musculoskeletal system is a complex system which includes bones, joints, ligaments, tendons, muscles and nerves. Regard being had to the injuries of the minor child, an orthopaedic is an expert with appropriate skills in the area of musculoskeletal. In the circumstances, the Registrar did not commit any error of law in appointing orthopaedics to the Tribunal. Accordingly, this ground must fail. The applicant failed, for flimsy reasons, to object to the appointment of the orthopaedics. The fact that the 10-days period was not complied with is of no consequence. The fact that the Registrar did not exercise his or her discretionary powers to appoint an additional independent health practitioner does not amount to any material error of law that vitiates the ultimate outcome reached.

Bias

[37] This ground is a non-starter. It does not begin to move out of the starting blocks. All the allegations upon which this ground is predicated are weak and insubstantial. It is unnecessary, for the purposes of this judgment, to evaluate each of them. The apprehension of bias perceived on all those allegations is not

reasonable at all. Howie JA, in *S v Roberts (Roberts)*,²⁷ usefully summarised the position on bias in the South African Law as follows:

- “There must be a suspicion that the judicial officer [administrator] might (not would) be biased;
- The suspicion must be that of a reasonable person in the position of the accused or litigant [claimant];
- The suspicion must be based on reasonable grounds;
- The suspicion is something that the reasonable person would (not might) have”.

[38] More recently, the Constitutional Court reverberated its view as expressed in *Turnbull-Jackson v Hibiscus Coast Municipality (Turnbull)*²⁸ in the matter of *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and others (Umkhonto)*²⁹. The erudite Theron J, writing for the majority, stated the law as follows:

“[97] The test for bias is objective. A reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person.

[102] The respondent bears the onus to establish the existence of bias and they have failed to do so.”

[39] The contention by the applicant that there was no open-mindedness on the part of the Tribunal lacks any persuasive force and ought to be rejected outright. Reliance on *Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and others (Hamata)*,³⁰ is, with respect, misplaced. The applicant at no stage objected to nor asked the Tribunal members to recuse themselves. The fact that they reached an unfavourable decision does not

²⁷ 1999 (4) SA 915 (SCA).

²⁸ 2014 (6) SA 592 (CC).

²⁹ [2024] ZACC 6.

³⁰ 2000 (4) SA 621 (C).

axiomatically suggest bias on their part. Their comments, unsavoury as they may seem for the applicant, do not suggest bias.

Excess of power

[40] It is contended that the Tribunal exceeded its powers in that it decided the issue of causation, something that falls within the province of this Court. For starters, it is factually incorrect that the Tribunal decided the issue of causation. Its findings were directed to the question of seriousness of the injury. Reasons for the decision do not constitute the decision. The issue of the seizures is apparent from the discussions and not the decision itself. To my mind, the issue of seizures is more related to a sequelae as opposed to an injury. There is no injury known as seizure. Therefore, the Tribunal was not called upon by the applicant to assess the seriousness of the seizures. The powers of the Tribunal are tabulated in regulation 3(11)(a)-(i). In terms of 3(11)(g), the Tribunal is empowered to determine whether, in its majority view, the injury concerned is serious in terms of the method set out in the Regulations. The Tribunal did exactly that. In terms of regulation 3(11)(i), the Tribunal is empowered to confirm the rejection of SIAR by the RAF, again using the majority principle. The Tribunal did exactly that. The issue of the seizures is irrelevant to the main issue to be determined when an exercise of statutory power occurred.

[41] Accordingly any allegation of excess of power lacks merit. There is no evidence that the Tribunal finally determined the issue of causation in this matter. The issue of the possible sequelae of the seizures is peripheral and has nothing to do with assessment of the injuries based on the Narrative Test. The authority of *RAF Appeal Tribunal and others v Gouws and others (Gouws)*³¹ relied upon is unhelpful to the applicant.

Relevant and irrelevant considerations.

³¹ 2018 (3) SA 413 (SCA).

[42] Where a reviewing party alleges that relevant considerations were ignored and irrelevant considerations were taken into account, that party must produce evidence in support of such an allegation. The applicant seems to take the wrong view that the Tribunal was obliged to consider the factors stated by his experts. This being an assessment of injuries exercise, the legislature has predetermined the factors to be taken into considerations. First and foremost, if an injury forms part of the list, *cadit quaesto*. Where a Narrative Test is alleged to be applicable, the relevant factors in order to reach that goal are legislated. As confirmed in *Dawood v Minister of Home Affairs (Dawood)*,³² it is unacceptable for the legislature to confer wide powers without giving some guidelines. Hefer JA, in *Minister of Law and Order v Dempsey (Dempsey)*,³³ helpfully stated the following:

“Unless a functionary is enjoined by the relevant statute itself to take certain matters into account, or to exclude them from consideration, *it is primarily his task to decide what is relevant and what is not... In order not to substitute its own view for that of the functionary, a Court is, accordingly, not entitled to interfere with the latter’s decision merely because a factor which the Court considers relevant was not taken into account, or because insufficient or undue weight was, according to the Court’s objective assessment, accorded a relevant factor.*”

[43] Clearly, the applicant wished the views of his experts to prevail, hence the allegation that relevant considerations were ignored. The views of the experts required consideration by other independent experts in the relevant medical area, which is aligned with the injuries sustained. The fact that the RAF did not present any expert reports to counter those of the applicant is a red herring given the task at hand, to be performed by the Tribunal experts. When it comes to the assessment of the seriousness of the injury, section 17(1A) (a) of the RAFA, in a peremptory language, states that *shall be based on a prescribed method adopted*. Regulation 3 prescribes that method. The prescribed method is thus the relevant factor to be considered during the assessment. This is underpinned by regulation 3(11)(g), which

³² 2000 (3) SA 936 (CC).

³³ 1988 (3) SA 19 (A).

states that the *injury concerned must be serious in terms of the method set out in these Regulations*. To then suggest another method that is not legislated would be to create irrelevant factors contrary to what *Dempsey* held. Given the dispute as formulated by the applicant himself, the factor of 38% WPI is an irrelevant factor. The applicant chose the Narrative Test; made his bed and must lie in it. A decision is irrational if the purpose of the legislation is not achieved.

[44] In *Albutt v Center for the Study of Violence and Reconciliation and others*,³⁴ the following was said:

'The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.'

[45] The means chosen by the Tribunal to exercise its statutory powers, are means available to it in terms of the applicable empowering source. The objective sought to be achieved is that compensation for non-pecuniary loss is limited to only serious injuries. The means selected by the Tribunal achieved that objective. Accordingly, this Court is unable to find any irrationality in the decision arrived at by the Tribunal. This ground too is bound to fail. The means selected was a simply one. The Tribunal placed the injuries sustained against the factors for a Narrative Test as prescribed in the Regulations. When this means is assessed, it is one that is rationally related to the objective sought to be achieved – only compensate for serious injuries.

³⁴ 2010 (3) SA 293 (CC).

Failure to exercise powers afforded in regulation 3(11)

[46] It is difficult to understand this ground as pleaded. The pleaded case seem to suggest that failure to adopt a specific procedure which would have seen some different but legislated procedure being adopted amount to procedural fairness. This amounts to, if upheld, a Court selecting a means for the Tribunal contrary to what *Albutt* held. The applicant suggests that it amounts to fair procedure if;

- (a) The Tribunal had called for further assessment by a medical practitioner designated by it;
- (b) The minor child to present himself for examination in order to assess the seriousness of the injury;
- (c) Call for further medical reports;
- (d) Further treatment records to be obtained;
- (e) Stipulate further time frames.

[47] There is a huge difference between discretionary exercise of a statutory power and procedural fairness. A legal remedy that exists to compel a statutory body to perform its statutory functions is known as *mandamus*. In *Moll v Civil Commissioner of Paarl (Moll)*,³⁵ De Villiers CJ confirmed that a Court has wide powers of compelling the performance of a specific duty on the part of a public officer. According to De Villiers CJ, this writ of *mandamus* is available to be granted where there is continued infringement of a right. Once a decision is taken, the remedy will be unavailable. In *Thusi v Minister of Home Affairs and others (Thusi)*,³⁶ the learned Wallis J had the following to say:

“[45] ... After a decision has been taken on an application for the issue of an identity document, whether the application is successful or unsuccessful, *it*

³⁵ (1897) 14 SC 463 at 468

³⁶ 2011 (2) SA 561 (KZP)

is no longer possible to review and have declared unlawful the failure to take that decision”.

[48] In this particular instance, the Tribunal, in exercising its powers, had already taken a different decision. At this stage, the water is under the bridge. The Tribunal cannot be forced to take another different decision falling still within its other statutory powers. However, section 33(1) of the Constitution guarantees everyone the right to an administrative action that is taken in a procedurally fair manner. As to what constitutes procedural fairness, section 3 of the PAJA unpacks the right to procedural fairness. Accordingly, in my view, failure to invoke a statutory power is remediable through a *mandamus* or by invoking the review contemplated in section 6(2)(g) of the PAJA. Having not sought a *mandamus* or a section 6(2)(g) review, the events of 9 June 2023 overtook the exercise of those available but not used rights. For the above reasons, this ground too is doomed to fail.

Conclusions

[49] Having considered all the grounds as pleaded, this Court finds no legal basis to interfere with the impugned decision. The decision of the Tribunal falls within the bounds of reasonableness. Outside the pleaded case, the applicant introduced a case based on the legality principle. The applicant is not permitted to do so. In an instance where a right to reasons and the record has been waived, it is difficult for a Court of review to perform its review functions, particularly when assessing the ground of ignoring relevant considerations and considering irrelevant ones – failure to apply mind. Overall, there is no legal basis to interfere with the findings reached by the Tribunal, particularly considering the nature of the injuries. The injuries sustained by the minor child form part of the list of Non-Serious injuries. These injuries are incapable of satisfying the Narrative Test. As a result, the application for review falls to be dismissed.

[50] As a parting shot. The legislature did not afford Courts any appeal powers. Instead the findings of the Tribunal are stated to be final and binding. This is a clear

indication that the correctness test is not contemplated in matters of this nature. In the words of Binnie J in *Dunsmuir*, he said, to which this Court fully concurs:

“When the applicant for judicial review challenges the substantive outcome of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge’s view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a “correctness” standard is intended.

Order

- 1 The application for review is dismissed.
- 2 There is no order as to costs.

GN MOSHOANA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:	Ms H J Basson
Instructed by:	Ehlers Attorneys, Pretoria
For Respondents:	No appearances
Date of the hearing:	22 August 2024

Date of judgment:

13 September 2024