

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 2024-023448

Date of hearing: 30 April 2025

Date delivered: 29 May 2025

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
29/5/25	
DATE	SIGNATURE

In the application between:

SENKWE SIMON MMAMOTHAMA

Applicant

and

**THE HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

First Respondent

**THE CHAIRPERSON OF THE ROAD
ACCIDENT FUND APPEAL TRIBUNAL**

Second Respondent

**THE ROAD ACCIDENT FUND
APPEAL TRIBUNAL**

Third Respondent

JUDGMENT

SWANEPOEL J:

[1] This is an application to review and set aside the third respondent's ("the Tribunal") dismissal of an appeal against the decision of the fourth respondent to reject the applicant's claim for non-pecuniary damages on the basis that his injuries are not serious.

[2] The applicant was involved in a motor vehicle accident on 12 August 2014, as a result of which he was injured, allegedly suffering a head, shoulder and back injury. The applicant issued summons against the fourth respondent ("the fund") during 2016. In terms of s 17 (1) of the Road Accident Fund Act, 56 of 1996 ("the Act"), the Fund is liable to –

“...compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury. . . caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury . . . is due to the negligence or other wrongful act of the driver or of the owner of the of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.” (my emphasis)

[3] The applicant duly issued summons for loss of income and for general (non-pecuniary) damages. S 17 (1A) provides that a serious injury shall be assessed in the following manner –

“(a) . . . [by a] prescribed method adopted after consultation with medical services and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974).”

[4] S 26 of the Act provides that the Minister may make Regulations to prescribe any matter which in terms of the Act may be prescribed, and, consequently, on 21 July 2008 the Minister caused the Road Accident Fund Regulations to be published.¹ Regulation 3 prescribes the manner in which an allegedly serious injury is to be assessed –

[4.1] The Minister may publish a list of injuries that are not to be regarded as serious;

[4.2] If the injury results in 30% impairment of the Whole Person as provided in the AMA guides, the injury shall be assessed as serious;

[4.3] An injury that does not result in a 30% or more impairment may only be assessed as serious if that injury:

[4.3.1] resulted in a serious long-term impairment or loss of body function;

[4.3.2] constitutes permanent serious disfigurement;

[4.3.3] resulted in severe long-term mental or severe long-term behavioural disturbances or disorder; or

[4.3.4] resulted in the loss of a foetus.

[5] In conducting the assessment the medical practitioner must apply the American Medical Association guides ("AMA" guides). This method of assessment is called the 'narrative test'. Therefore, if a third party does not qualify by reason of a WPI of 30% or more, it may qualify on the narrative test.

[6] The applicant was assessed by Dr. PR Engelbrecht, an orthopaedic surgeon, who completed the prescribed RAF-4 form. Dr Engelbrecht assessed the applicant's Whole Person Impairment at 60%. Dr Engelbrecht reported that the applicant suffered a soft tissue injury to the right hip, an injury to his shoulder, thoracic-lumbar spine, and compression fractures. In addition, his vision was impaired after the accident, and he had an injury to his neck at C6 level.

[7] As a result of the injuries, the applicant suffers constant pain. He cannot lift his right arm, nor can he pick up heavy objects, and he has a loss of sensation in that arm. His right hip pains constantly and is stiff. His memory has also been affected, and has a sensory deficit in his left arm.

[8] A psychiatrist, Dr D Shevel, conducted an assessment, and similarly, he completed an RAF-4 form. He opined that the applicant had

sustained ongoing psychiatric sequelae as a result of the accident. The applicant is markedly depressed. Dr. Shevel diagnosed the applicant with severe pervasive depression secondary to a general medical condition. He considered that the applicant had sustained a 20% WPI as a result of the accident.

[9] The applicant lodged the RAF-4 forms with the Fund on 26 March 2020 and 16 November 2020 respectively. Having considered the reports, the Fund rejected the RAF-4 on 5 August 2022 on the basis that no clinical records from the first treating hospital had been submitted.

[10] Regulation 3 (4) provides a dispute resolution mechanism when the Fund rejects an injury as non-serious –

“(4) If a third party wishes to dispute the rejection of the serious injury assessment report, or in the event that either of the third party or the Fund or the agent disputing the assessment performed by a medical practitioner in terms of these regulations, the disputant shall:

- (a) within 90 days of being informed of the rejection of the assessment notify the Registrar that the rejection or the assessment is disputed by lodging a dispute resolution form with the Registrar;
- (b) in such notification set out the grounds upon which the rejection or the assessment is disputed and include such submissions, medical reports and opinions as the disputant wishes to rely upon; and

- (c) if the disputant is the Fund or agent, provide all available contact details pertaining to the third party.

[11] The applicant duly lodged a dispute with the Registrar that culminated in the eventual appointment of four medical practitioners as the Appeal Tribunal, of which the second respondent was the chairperson. The Tribunal consisted of an orthopaedic surgeon, a neurosurgeon, a psychiatrist and a clinical psychologist. The third respondent was also presented with the report of Dr. A Smuts, a neurologist, and of Dr. M Mazabow, a neuropsychologist. Both of these reports supported the conclusion to which Drs. Engelbrecht and Shevel had come.

[12] An appeal tribunal has the following powers²:

[12.1] To direct the third party to submit himself to a further assessment;

[12.2] To direct that the third party shall present himself or herself to the Appeal Tribunal;

[12.3] To direct that further medical reports shall be obtained by either party;

[12.4] To direct that the third party's pre-and post-accident medical, health and treatment reports be obtained;

[12.5] To direct that further submissions must be made by either party;

[12.6] To refuse to decide a dispute until a party has complied with any direction;

[12.7] To determine whether, in the majority view, an injury is serious;

[12.8] to confirm the medical practitioner's assessment or to substitute it with its own assessment;

[12.9] to confirm the rejection of the serious injury assessment or to accept the report.

[13] On 7 July 2023 the first respondent advised the applicant's attorney that the Appeal Tribunal had considered the matter, and had determined that the injury "*may be classified as **non-serious** on the narrative test.*" The first respondent was requested to provide reasons for its decision, and on 6 September 2023 the first respondent replied that it stood by the decision. It said –

"In light of the above, the Tribunal is satisfied that the patient's injuries **do not qualify** as serious in respect of 5.1, 5.2, 5.3 and 5.4 of the narrative test."

[14] Noticeably absent from the two letters mentioned above is any reference to the WPI assessment, and that Dr Engelbrecht had assessed

the applicant on a substantially higher WPI than the statutory minimum of 30% which is required to qualify the injuries as serious.

[15] The applicant then launched this application, seeking to review and set aside the decision of the second and third respondents under the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). There was no dispute that the decision is reviewable under PAJA. The first respondent and its appeal tribunal are organs of state, and the decision taken by the tribunal is administrative action.

[16] The material grounds for review are the following (I do not mention all):

[16.1] That the tribunal was not authorized to do so by the empowering provision;

[16.2] The action was materially influenced by an error of law and/or fact;

[16.3] The action was taken because irrelevant considerations were taken into account or relevant considerations were not considered;

[16.4] The tribunal exceeded their powers by usurping the function of a court to rule on causation.

[17] In the founding affidavit the applicant pointed out that the tribunal had not mentioned the WPI assessment, and had only based its decision

on the narrative test. The applicant also speculated that if the tribunal had come to its decision because it considered that the injuries did not result from the accident, then it exceeded its powers as the causation question may only be determined by a Court.

[18] In its answering affidavit the respondents were at pains to explain the workings of the tribunal. Having done so, the respondents explained the basis of the decision. They say that immediately after the accident the applicant did not seek immediate medical treatment, only doing so the following day. The suggestion seems to be that the injuries suffered in the accident were not serious. They discounted the head injury on the basis that the hospital notes did not record a history of head injury, nor of loss of consciousness. The hip and shoulder injury were ascribed to causes other than the accident. As for the spinal injuries, the tribunal was of the view that had they been the result of the accident, they would most likely not have been overlooked, and would have been recorded by the hospital. In short, the tribunal expressed the view that, although the applicant suffered from these injuries, they were not the result of the accident.

[19] Significantly, the tribunal did not dispute the WPI assessments of Drs. Engelbrecht and Shevel. However, the deponent to the answering affidavit alleges that –

“The members of the tribunal are, unanimously, of the opinion that the experts arrived at the WPI ratings of 22% and 60% by including ratings for impairments that are not attributable to injuries the patient had sustained in the accident on 12 August 2014.”

[20] The respondents strongly argue that it is within the tribunal's powers for it to consider the nexus between the injury and the accident, and to opine on whether the injury is related to the accident or not.

[21] It is uncertain why the respondents take this approach as the issue has been dealt with categorically by the Supreme Court of Appeal. In *Road Accident Appeal Tribunal v Gouws and Another*³ the matter concerned a claim by a pedestrian who was struck down by a motor vehicle. He was assessed by a medical practitioner who assessed his injuries as serious on the narrative test. The Fund rejected the injury assessment on the incorrect basis that the injuries had been found not to be serious.

[22] An appeal to the tribunal was unsuccessful as the tribunal took the view that the reported injuries were not causally connected to the accident. The High Court (per Tuchten J) held that the tribunal was not empowered to make a determination on causation. The learned judge said -

"The courts have for decades determined causation. Difficult questions arise in this regard from time to time. In my view the courts, duly informed by expert evidence and argument, are better suited to make this adjudication than the administrative decision makers in question."

[23] The Supreme Court of Appeal approved of this view.⁴ In respect of the tribunal's assertion that it is entitled to consider causation, the Court said the following:

“This demonstrates confused thinking on the part of the Tribunal. When the tribunal ‘pronounces’ on causation, it must be considered to arrive at a finding which would then, in terms of reg 3 (13) be final and binding. As set out above, the Fund appears to have considered itself bound by the tribunal’s finding in regard to causation.”

[24] If the Tribunal’s approach were to be adopted, consider the following hypothetical scenario: The Tribunal concludes that a third party’s injuries are not causally linked to the accident. The Fund adopts that finding and refuses to accept the injuries as serious, and the court is then precluded from considering general damages. The third party forges ahead, though, on a claim for loss of earnings and proves that the injuries were indeed caused by the accident. The absurd result is that the third party is not entitled to general damages based on an incorrect finding by the Tribunal, but succeeds in proving damages due to loss of earnings. Such an absurdity cannot be allowed.

[25] On whether the Tribunal acted within the boundaries of the empowering provision, the Court said the following:

“[36] Having regard to the authorities and principles set out in [25] above, it is necessary to bear in mind that the power given to the Tribunal in terms of the legislation is narrowly circumscribed. It is not of broad, discretionary nature, which would allow for further powers to be implied. The Tribunal cannot have the final say in relation to causation. That is not provided for.”

[26] It is therefore clear that the tribunal was not empowered by the Regulations to decide on causation, and it has acted outside of the empowering provision. In making the decision the Tribunal took irrelevant considerations (the possibility of other causes for the injuries) into consideration. I have other concerns with the decision. The Tribunal initially rejected the RAF-4 assessment as it did not, in its view, satisfy the narrative test. When the Tribunal was requested for reasons, it said that the applicant had not qualified on paragraphs 5.1, 5.2, 5.3 and 5.4 of the narrative test.

[27] At no stage did the Tribunal make any reference to the WPI test, nor did it mention causation as a factor in its decision making. Only in its answering affidavit did the Tribunal say that it had been of the view that the injuries were not related to the accident. The WPI assessment by Drs. Engelbrecht and Shevel was not challenged in itself.

[28] I accept that simply because a decision maker does not refer to a specific consideration in its finding, that does not mean that the decisionmaker did not consider that aspect. However, in this case, it seems to me, the Tribunal was fixed on considering the narrative test, and likely did not even consider the WPI assessment. In doing so it ignored relevant considerations.

[29] Even if I am wrong on the latter aspect, there is no argument to be made that the Tribunal acted within its powers. The decision must be set aside.

[30] I make the following order:

[30.1] The decision of the second and third respondent dated 7 July 2023, to reject the RAF-4 serious injury assessment by Drs. Engelbrecht and Shevel, is reviewed and set aside.

[30.2] The matter is referred back to the first respondent for the appointment of a different Appeal Tribunal in terms of Regulation 3 of the Road Accident Fund Regulations, 2008.

[30.3] The second and third respondents shall pay the costs of the application jointly and severally on Scale C.

[30.4] This judgment shall be disclosed by the first respondent to the Appeal Tribunal appointed in terms of paragraph 2 above.


SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

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Heard on:

30 April 2025

Judgment on:

29 May 2025

¹ R 770 dated 21 July 2008, published in Government Gazette no. 31249

² R 3 (11)

³ 2018 (3) SA 413 (SCA)

⁴ Road Accident Appeal Tribunal v Gouws and Another 2018 (3) SA 413 (SCA) at [32]