IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO.: 29722/12

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ /NO
(3) REVISED

15/1/2014
DATE

SIGNATURE

16/1/2014

In the matter between:

MALAN, JOSIAS ALEXANDER	Applicant
and	
ROAD ACCIDENT FUND APPEAL TRIBUNAL	First Respondent
THE ROAD ACCIDENT FUND	Second Respondent
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	Third Respondent
MADUPE N.P.	Fourth Respondent
THE MINISTER OF TRANSPORT	Fifth Respondent
DR.P. ENGELBRECHT N.O.	Sixth Respondent
DR. K. BLOEM N.O.	Seventh Respondent
DR. F.P. DU PLESSIS N.O.	Eighth Respondent
DR. C. DE BEER N.O.	Ninth Respondent
DR. K.D. ROSSMAN N.O.	Tenth Respondent
DR. R. RAMDASS N.O.	Eleventh Respondent

CORAM: P Z EBERSOHN AJ
DATE HEARD: 6th June 2013.
DATE JUDGMENT HANDED DOWN: 16th January 2014

JUDGMENT APPLICATION

EBERSOHN AJ:

[1] The applicant is a claimant against the second respondent the Road Accident Fund for damages sustained in a motor accident.

[2] The first respondent is the Appeal Tribunal who must sit in judgment regarding appeals against certain decisions of the Fund..

[3] The third, fourth and fifth respondents were cited as nominal respondents.

[4] The sixth to the eleventh respondents were the members of the first respondent who allegedly dealt with the appeal of the applicant.

[5] The applicant launched a review of the decision of the first respondent who dismissed the appeal to it. A record, purporting to be the Appeal Record was subsequently delivered to the Applicant, in terms of the provisions of Rule 53. The applicant did not supplement its founding papers as envisaged in terms of the provisions of Rule 53, and the respondents subsequently delivered their opposing affidavit.

[6] The Applicant contends that it became apparent, from the opposing affidavit, that reference was made to certain documents, which did not form part of the Appeal Record, and that certain further documentation must exist, which should

have formed part of the Appeal Record, but which were not delivered to the applicant in terms of the review notice. The Applicant seeks, by virtue of this application, relief entitling him to production and inspection of the documents referred to in the Notice of Motion, either in terms of the provisions of Rule 35(12) or in terms of Rule 53(3) of the Uniform Rules of Court so that these documents can also be before the Court who hears the main review application..

[7] Rule 35(12) reads as follows:

> "35(12). Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording, to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding, provided that any other party may use such document of such tape recording."

[8] In paragraph 1 of the notice of motion, relying on Rule 35(12), the applicant sought documents under ten different subparagraphs. The court had the advantage of reading the particulars which were indeed supplied in the past.

[9] In paragraph 2 of the notice of motion,, relying on Rule 53(3), the applicant sought documents under ten different subparagraphs.

[10] Rule 53(3) reads as follows:

> "53(3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks

appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, in any, shall be borne by the applicant and shall be costs in the cause."

[11] The first respondent sat as a tribunal, it received inputs from its members having studied the reports, the inputs were discussed, minutes were to be kept for possible reviews or a referral back, and a considered decision was then arrived at and recorded in January 2012 nearly two months later. All that was recorded by the first respondent regarding the applicant is to be found on pages 144/145 of the record of the main application as part of the answering papers. The copying is of poor quality and under the heading Resolved reference is made in I) to an unnamed source regarding alleged injuries to the applicant and in II) Dr. Enslin is referred to but the back injuries he found to be present are not mentioned. It is mentioned that according to the unnamed Occupational Therapist's report the applicant's work has not been affected

[12] It is noted on page 134 of the main application that the hearing of the Tribunal commenced at 9:00. Normally there is a tea break at 11;00 for 15 minutes and a lunch break between 13:00 and 14:00 and the usual adjournment is at 16:00 or earlier. That left 5 and ¾ hours (345 minutes) for the tribunal to sit. According to the agenda of the tribunal to be found on page 135 of the record of the main application 31 matters were to be handled by the tribunal on that day – an average of one in just about every eleven minutes. The applicant's was no. 19 on the agenda (pages 144/145 of the record of the main application) and his matter was dealt within 11 lines of text. There are quite a number of matters which took obviously a lot longer than 11 minutes which lessens the average of about 11 minutes per case. As mentioned no reference is made of the injuries and findings of Dr. Enslin, the orthopaedic surgeon of the applicant's cervival spine, on page 73 of that record and which were apparently overlooked by the occupational

therapist. Yet, the tribunal relying on her report found "that the patient's work had not been affected.". The tribunal clearly spent less than 11 minutes on the applicant's matter despite the bundle of documents the respondents did make available numbering about 189 pages. How such a voluminous report could have been properly discussed by six doctors and decided in less than 11 minutes is not clear.

[13] The respondents claim that the notes and other documentation relating to the hearing was destroyed. The source for this information is paragraph 12 (p 48 of this application) of the affidavit deposed to by dr. P.R. Engelbrecht, the sixth respondent, which paragraph reads as follows:

> "12. In regard to the notes of the other tribunal members, these are handed back to the Third Respondent together with the meeting packs. I am advised that these are then destroyed. In this regard I refer to the confirmatory affidavit of Mr. Matome Seisa. A copy of the confirmatory affidavit is attached hereto marked "PE2".

[14] The text of the confirmatory affidavit of Matome Theorda Seisa (record p 58/59) reads as follows:

> "1, I am an adult male person employed by the third respondent as a case administrator for the RAF Appeal Tribunal.
>
> 2. I am duly authorised to depose to this affidavit.
>
> 3. The facts herein contained are, save where otherwise stated or the context indicates to the contrary, within my personal knowledge and are both true and correct.
>
> 4. I have read the answering affidavit deposed to by Tshepo Paul Boikanyo on behalf of the second and third respondents and I confirm the contents thereof as true and correct in so far as they relate to me."

[15] The hearsay evidence of dr. Engelbrecht regarding the notes being destroyed were therefore not confirmed under oath by Matome Theorda Seisa whose affidavit is to be found on pages 58/59 of the record of this application, or by anyone else. Matome in fact confirmed an affidavit of one Tshepo Paul Boikanyo which affidavit was, however not attached to the papers and was nowhere else referred to in the papers.

[16] It has now been placed on record by dr. Engelbrecht that notes were in fact made by the other members of the Tribunal and used at the hearing although it does not appear from the typed roll regarding the decisions of the Tribunal (record p. 136-154). Minutes were obviously also kept of the proceedings and the results typed. These typed results were signed by dr. Engelbrecht on page 154 of the record only on the 13th January 2012, about two months later. There is thus no valid reason on record why copies of the notes regarding the minutes and the discussion notes of the tribunal members cannot be made available to the applicant.

[17] There is therefore no reason why an order cannot be granted calling upon the respondents to make available within a stated period of the following items referred to in prayer 2 namely 2.2, 2.3, 2.4, 2.5, 2.6, 2.7 and 2.9.

[18] Seeing that the matter is very urgent in view of the approaching pre-trial and trial these documents must be supplied within a very short period.

[19] Costs will follow the event and will include the costs of two counsel.

[20] The following order is made:

1. The application succeeds and the First, Second, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh respondents are ordered to provide the applicant's attorneys on/or before the 27th January 2014 with the particulars/documents referred to in the followings subparagraphs of the notice of motion: 2.2, 2.3, 2.4, 2.5, 2.6, 2.7 and 2.9.

2. The second respondents is ordered to pay the costs of the application which costs will include the fees of two counsel.

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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