IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 97001/16

1. Reportable: NO
2. Of interest to other Judges: NO
3. Revised: NO
4. Date: 01/11/19

Signature:

In the matter between:

MC SOKO

(REF: RAFA/001292/2016/BRI) Applicant

and

HEALTH PROFESSIONS COUNCIL

OF SOUTH AFRICA First Respondent

THE ACTING REGISTRAR OF THE HEALTH

PROFESSIONS COUNCIL OF SOUTH AFRICA Second Respondent

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL Third Respondent

THE ROAD ACCIDENT FUND Fourth Respondent

JUDGMENT

MAKHUBELE J

Introduction

[1] The Fourth respondent (RAF) rejected the applicant's claim for compensation for non-pecuniary loss on the basis that the injuries were not serious. He lodged a dispute and the Road Accident Appeal Tribunal ('the Appeal Tribunal") subsequently considered the matter on 28 October 2016. On 09 November 2016, the Health Professions Council addressed a letter to the applicant's attorneys of record and informed them that the Appeal Tribunal had decided that his injuries were '*Non-serious musculosketal injuries*'.

[2] In this application, the applicant seeks an order to review and set aside the decision of the Appeal Tribunal. He also seeks an order to direct the second respondent to re-appoint a new Appeal Tribunal to determine the dispute and to further reconsider all his medico-legal reports that were served before the Appeal Tribunal and that he be permitted to be present at the hearing and to provide further evidence pertaining to his injuries should he wish to do so.

[3] The review is launched in terms of various subsections of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") on the basis that the decision was materially influenced by errors of law or facts, irrelevant considerations were taken into account, relevant considerations were not considered and that the action of the Tribunal was arbitrary and/or procedurally unfair.

Relevant legislative framework

[4] The Road Accident Fund Amendment Act No. 19 of 2005 has imposed restrictions or limitations on amongst others, compensation for non-pecuniary loss. In this regard, the assessment of claims is regulated by Regulations promulgated in terms of Section 26 of the Road Accident Fund Act No. 56 of 1996, as amended (the Act).

[5] Regulation 3 prescribes the procedure for assessment of a serious injury in terms of section 17 (1A) of the Act.

[6] The assessment by a medical practitioner is based on one of the following methods:

[6.1] considering whether the injury is included in the list of injuries published by the Minister in the Gazette from time to time; (Regulation 3(b)(I), and if not,

[6.2] if the injury has resulted in 30% or more of the Whole Body Impairment in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 6th Edition ("AMA Guides"); (Regulation 3(b)(ii)), and if not;

[6.3] if the injury falls in one of the categories listed in Regulation 3(b)(iii) which includes a consideration as to whether the injury has resulted in a serious long-term impairment or loss of a body function. The enquiry under Regulation 3(b) (iii) is referred to as *'the narrative test'*.

[7] The RAF is entitled to challenge an assessment of an injury as a 'serious injury' and to this extent, it has an option to reject the assessment report or direct that the claimant undergo further assessment.

[8] Regulation 3(4) prescribes the procedure that a claimant who is not satisfied with a rejection of his serious injury assessment report should follow to declare a dispute and lodgement of documents in that regard.

[9] Referral of a dispute to the Appeal Tribunal is in terms of Regulation 8, which also prescribes appointment of a panel of three independent medical practitioners with expertise in the appropriate areas of medicine. One of them is designated as Chairperson.

[10] In terms of Regulation 3(8)(c), the Registrar "*may appoint an additional independent practitioner with expertise in any appropriate health profession to assist the appeal tribunal in an advisory capacity*".

[11] The parties (RAF and the claimant) are entitled to be notified in writing "who the persons are that have been appointed as appeal tribunal". (Regulation 3).

[12] Any one of the parties are entitled to object to the composition of the Appeal Tribunal in writing. The Registrar is enjoined to allow the other party to respond to the objection, and then make a final decision on the appointment, which may be to substitute the member complained about or to stick with the appointment. The decision is final and binding. (Regulation 3(10)).

[13] The Appeal Tribunal is entitled to decide whether a hearing to consider legal arguments is necessary and to this extent, it must communicate with the Registrar and give reasons. The Registrar then appoints an Advocate or Attorney recommended by the Bar Council or Law Society to give advice on the need for a hearing. If there is a need, and the Appeal Tribunal accepts the recommendation, the hearing to consider legal argument is then presided over by the appointed Advocate or Attorney. The parties are duly informed and are entitled to legal representation at such a hearing.

[14] If on consideration of a recommendation a hearing is not warranted, or if the legal issues have been determined, the Appeal Tribunal's powers are prescribed by Regulation 3(11) and they include directing further assessment and submission of reports, confirmation or substitution of the assessment report of the medical practitioner or confirmation of rejection of the serious injury assessment report by the RAF or an agent.

[15] The decision of the Appeal Tribunal is final and binding. (Regulation 3(13))

The relevant facts relating to submission of the assessment for serious injury

[16] The applicant's injury does not fall within the list gazetted by the Minister. At 6.1% WPI, he is also far below the 30% threshold.

[17] Therefore, the only applicable criteria in terms of what I have elaborated above is if he satisfies one of the four categories in terms of the 'Narrative Test'. In this regard, the applicant's RAF 4 report, signed by Dr. Anton H. Van den Bout indicates that the applicant's injuries falls within the category of "Serious long-term impairment or loss of a body function" because it has *'serious long-term impairment or loss of a body function'*.

[18] The RAF rejected the RAF 4 assessment report on 18 January 2016 by email directed to his attorneys of record. The reason indicated was that *"The claimant sustained soft tissue injuries which were well managed and not classified as serious injury in RAF Act. The claimant is at advanced age of developing generative changes of the bones and not associated with accident"*.

[19] The applicant duly lodged a dispute in terms of Regulation 3(4) and filed RAF 5 and RAF 4 forms as well as medico-legal reports for assessment by the Appeal Tribunal. The latter were reports of Dr AH Van den Bout (Orthopaedic Surgeon), Rita van Biljon (Occupational Therapist) and Claire Hearne (Clinical Psychologist).

[20] The appeal was set down for consideration by the Appeal Tribunal on 28 October 2016. The applicant was duly notified by letter from the HPCSA directed to his attorneys of record dated 15 September 2016. It was also mentioned in the letter that four (4) medical experts, namely, Dr J Croiser, Dr Szabo, Dr AJ Lamprechts and Dr J Reid, constituted the Appeal Tribunal. The first three are Orthopaedic Surgeons and the latter is a Neurologist.

[21] The applicant's attorneys wrote to the HPCSA on 04 October 2016 and attached a medico-legal report of Kotze & De Bruin (Industrial Psychologists) and requested that it *"be included in our documentation for the Tribunal hearing on 28 October 2016"*.

[22] The decision of the Appeal Tribunal was communicated to the applicant's attorneys of record on 09 November 2016 as I have indicated above. It is necessary to reproduce the entire contents of the letter because it constitutes the record of the decision and factors that were taken into account.

The letter reads as follows:

> *"We refer to the above matter and hereby inform you that the Road Accident Fund Appeal Tribunal resolved at its recent meeting held on 28 October 2016 as follows:*
>
> ***Pre-accident age and circumstances***
>
> *Male, 56. Self-employed welder.*
>
> ***Post-accident circumstances***
>
> *Same occupation*
>
> ***Injuries***
>
> *Facial bruising and lacerations. Bruising left knee.*
>
> ***Reported problems***
>
> *Intermittent neck and right arm pain. Intermittent left knee pain. Left ear hearing loss.*
>
> ***Examination / assessment findings***

Decreased sensation left forehead. Painful restriction neck movements. Stable knee with tenderness. Neck x-rays no post-traumatic pathology, age related degeneration. Knee x-ray normal.

Outcome diagnosis

Non-specific soft tissue injuries.

WPI

6% (van den Bout)

Narrative test /disability

Does not pass the narrative test.

Appeal Tribunal decision

Non-serious musculoskeletal injuries"

Grounds of review

[23] In the founding affidavit, the decision of the Appeal Tribunal is attacked or criticised on the following grounds:

[23.1] The Tribunal failed to consider the narrative test or the applicant's long-term impairment, being that the injuries have a negative impact on the applicant's daily life and poetential employment. Reference was made to the opinions of the applicant's experts. Dr van den Bout had indicated that the applicant would never be abie to perform heavy-duty work. The Clinical Psychologist's report, which indicated, amongst other things, that he experiences residual symptoms of post-traumatic stress and suffers from chronic pain and physical impairment. The Industrial Psychologist had opined

that the applicant's career prospects have been negatively impacted due to the sequelae of the injuries.

[23.2] The Appeal Tribunal only took into account the injuries suffered, and not the negative impact of those injuries.

[24] It appears from the record of proceedings filed by the respondents (and a reading of their answering papers) that the only documents that served before the Appeal Tribunal were the documents submitted by the applicant when he lodged the dispute as indicated above.

[25] In the supplementary affidavit, the applicant argues that:

[25.1] The Appeal Tribunal did not clinically examine the applicant, but made findings that are against medical specialists that examined him.

[25.2] The narrative test requires legal argument, assessment of evidence and a value judgment, not just a medical examination. The Appeal Tribunal failed to apply the narrative test properly and that it relied on submitted papers whereas it should have called for oral evidence and legal argument.

[25.3] The Appeal Panel should have called for further or alternative medical reports.

[25.4] No Psychologist served on the Appeal Tribunal. As such, there is no basis for overuling the evidence of Claire Hearne because none of the specialists in the panel are qualified Psychologists.

[25.5] The Tribunal should have called for further submissions in terms of Regulation 3(11).

[25.6] The Tribunal should have called for her to be examined and called for additional evidence or even summoned her to attend the hearing.

[25.7] The Appeal Tribunal failed to apply the narrative test correctly. The contention put forward is that the Appeal Tribunal should have considered the subjective circumstances of the applicant as indicated in the various medico-legal reports.

[25.8] The Appeal Tribunal misconstrued its powers when it failed to assess the applicant's injuries in the context of his circumstances. This renders the decision arbitrary in the sense that it is not rationally related to the purpose for which the powers were conferred. The Appeal Tribunal failed to use its investigative powers to properly assess the applicant's injuries in terms of the narrative test.

[26] The applicant also devoted a sizeable part of the supplementary affidavit in discussing the application of the narrative test and its distinction from the American Medical Association Guides to the Evaluation of Permanat Impairment (AMA Guides).

Issues arising from the Answering affidavit

[27] The Tribunal met on 28 October 2016 to consider the applicant's appeal, and *"after deliberations, resolved that the applicant's injuries are not serious injuries under the narrative test, and that there was no nexus between certain injuries and the accident"*.

[28] In general, the answering affidavit contains standard and generalized issues such as the common cause 2008 legislative changes to the RAF Act and Regulations, composition and powers of the Tribunal, the manner in which the Tribunal conducts its work, the application of AMA Guides and meetings of the Tribunal.

[29] The Appeal Tribunal deliberated on the contents of the applicant's reports and resolved that her injuries were not serious and do not qualify under the narrative test and AMA rating.

[30] The Appeal Tribunal defended the procedure adopted when considering the applicant's matter. Each member spends hours reading the reports. If further improvement on the injury has been noted, it cannot be regarded as permanent.

[31] Although the AMA Guides and the Narrative Test are different, according to the Appeal Tribunal they are related, with the former as a starting point because it gives an indication of the severity of the injury.

[32] The Tribunal has a discretion to have the applicant assessed; however, it was not necessary because the presented facts were sufficient to *'render a proper and well thought out decision'*.

[33] There was no reason to request further reports because what they had was sufficient, and furthermore, nothing prevented the applicant from providing additional evidence.

[34] The applicant did not object to the constitution of the Tribunal in terms of Regulation 3(9). Furthermore, there is no legal requirement that a Psychologist must be in the Tribunal.

The replying affidavit

[35] The issues arising from the replying affidavit are of an argumentative nature with regard to each party's understanding of the procedures, and particularly the role of the Tribunal in sourcing relevant information or further investigations. To illustrate that the respondents' views on the narrative tests are contradictory to the official

version of the Department of Transport and the RAF, the applicant attached an affidavit deposed in a 2009 in application between the Law Society of South Africa and Others against the Minister and the RAF. There is no need to say anything further with regard to this aspect.

[36] The applicant contends that AMA Guide test is an objective assessment of the injuries, whereas the narrative test is objective and focuses on the personal circumstances of each individual.

Submissions

[37] Counsel for the both parties submitted heads of argument and bundles of authorities.

[38] On behalf of the applicant, Mr Du Preez's argument in court centred around two issues, namely,

(a) the Appeal Tribunal's stance that there is no nexus between the accident and the injuries and;

(b) error of law with regard to the application of the narrative test.

[39] With regard to (a), in the letter communicating the decision of the Appeal Tribunal, this issue is not stated in so many words, except the reference to "age related degeneration".

[39.1] The email from the RAF in terms of which the RAF 4 was rejected is however clear because it stated as follows:

"The claimant sustained soft tissue injuries which were well managed and not classified as serious injury in RAF Act. The claimant is at advanced age of

developing generative changes of the bones and not associated with accident".

[39.2] In the answering affidavit the following statement was made:

"after deliberations, resolved that the applicant's injuries are not serious injuries under the narrative test, and that there was no nexus between certain injuries and the accident".

[40] Mr Du Preez referred to the Supreme Court of Appeal judgment in the matter of *RAF & others v Gouws & another*[1] where it was held that the primary purpose of Appeal Tribunal is to determine a dispute concerning seriousness of injury. It does not have final say on question of link between the driving of a motor vehicle and the injuries allegedly sustained. Issues relating to causation are to be determined by the court.

The relevant paragraphs read as follows:

[32] In heads of argument filed in this court on behalf of the Tribunal, it latterly appears to be suggested that the Tribunal is entitled to 'express an opinion' on the nexus between the driving of a motor vehicle and the alleged injuries. This attempt to dilute its earlier position is negated by the provisions of Regulation 3(13) on which, inter alia, it had relied and by the passive attitude of the Fund. That Regulation makes 'findings' of the Tribunal final and binding. In para 49 of its heads of argument the Tribunal stated:

'The facts of this matter, considered against the authorities referred to above, indicate that the Tribunal was authorised and enjoined to consider and pronounce upon the link between the injury and the accident relied upon.'

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

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[1] (056/2017) [2017] ZASCA 188 (13 December 2017), referred to in the judgment of Kubushi J in the matter of TP Buthelezi v Health Professions Council and Others, Gauteng Division, Pretoria, Case No. 3039/17.

which would then, in terms of Regulation 3(13) be final and binding. As set out in para 30 above, the Fund appears to have considered itself bound by the Tribunal's finding in relation to causation.

[33] The medical practitioner who conducts the initial assessment of the seriousness of the injury is not, in making that assessment, precluded from expressing a view on whether the injury was caused by or arose from the driving of a motor vehicle. In the event of the medical practitioner casting doubt on whether there was a link between the alleged injury and the driving of a motor vehicle, the Fund can decide whether to contest causation or to concede it. In adopting a position on whether to contest causation, the Fund is not limited to the views expressed by the medical practitioner, but may have or acquire other information to inform its decision. In the ordinary course, causation is an issue that is ultimately decided by the courts. A dispute between the Fund and a claimant in relation to causation has to be referred to a court for adjudication. When that issue is decided by a court, it does not follow that medical practitioners are necessarily the only experts upon whom reliance may be placed. Courts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion.

[34] If, after the initial assessment by the medical practitioner, the Fund exercises the option of a rejection of the report, a dispute arises in relation to the correctness of the assessment of the seriousness of the injury by the medical practitioner and where, as far as the Fund is concerned, causation is not in issue, that dispute is left to be dealt with by the Tribunal, which will have the last say on the matter, subject of course to whether that decision is susceptible to judicial review. In the present case, as described in para 7 above, the Fund disputed the assessment of the injury on fallacious grounds. The Fund did not inform Mr. Gouws that causation was in issue nor did it independently adopt a position in relation thereto. It wrongly abdicated that position to the Tribunal. As pointed out above, the contestation before the Tribunal could only be in relation to the assessment by the medical practitioner of the seriousness of the injury and the finality of its decision is in relation to that aspect.

[35] The effect of what is suggested on behalf of the Tribunal is that the jurisdiction of the court is ousted. The only challenge to a decision by the

Tribunal in relation to causation on the suggested basis will therefore be in the form of a review, which, contrary to the suggestion on behalf of the Tribunal, will not be time or cost efficient. One might rightly ask where the funding for such an exercise will come from and how it might impact on indigent persons.

[36] Having regard to the authorities and principles set out in para 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 a broad discretionary nature, which would allow for further powers to be implied. The Tribunal cannot have the final say in relation to causation. That power is not provided for.

[37] Moreover, the power contended for is not a necessary or reasonable consequence of the express powers of the Tribunal or of the Fund. On the contrary, if the contentions on behalf of the Tribunal are upheld, it will be oppressive in relation to claimants and, as stated above, will deny them access to courts on an issue traditionally reserved for adjudication by them. A finding against the suggested power does not enervate the provisions of the Act. The Fund maintains the right to challenge or concede causation. The Fund's view could be informed by information it has acquired or has at its disposal at any time before or during litigation and in this regard is not restricted to only the medical evidence at its disposal. As hinted at in para 12 of the judgment of the court below, if the submissions on behalf of the Tribunal were to be upheld the result might well be that the Fund itself will be stripped of its power to decide the issue of causation in the event of an appeal tribunal deciding causation against it.

[38] The article by Slabbert and Edeling referred to in para 23 above, on which reliance was placed by counsel on behalf of the Tribunal, takes the matter no further. The authors' criticism of para 4.1 of the injury assessment report form (RAF 4) detracts from the submission that the Tribunal has the final say on causation. The authors state that the medical practitioner is required to describe the nature of the motor vehicle accident 'despite the fact that he or she often has no knowledge or limited knowledge of what happened and he or she must therefore speculate'. One might rightly ask how, in the absence of complete knowledge or information, the medical practitioners and, indeed, the Tribunal, can have the final say on causation.

[39] As stated above, Mr. Gouws was given no notice that causation was an issue that was going to be addressed by the Tribunal and was not afforded an opportunity to make representations, either on whether a conclusion of the kind finally arrived at was justified or on whether a final decision on that issue was within the Tribunal's statutory remit.

[41] On behalf of the first, second and third respondents, Mr. Felgate argued that save for the allegations in the answering affidavit, the Tribunal did not make a finding that there was no nexus between the injuries and the accident. This argument is not correct, because, as I have stated above, this was the reason for the rejection of the RAF 4, which culminated in the lodging of the dispute. The Appeal Tribunal did indicate, as a fact, that the applicant had some age deterioration. He argued further that the Appeal Tribunal did not ignore the narrative test. The contention is that the criterion under AMA Guides is the starting point because it gives an indication as to the severity of an injury.

Analysis and findings

[42] The number of judgments attached to the both counsel's heads of argument is indicative of the prevailing uncertainty with regard to the application of the procedural requirements for setting up an appeal tribunal, its composition, how it should discharge its functions and exercise its discretion. Except for the SCA judgment in the Gouws matter that I have referred to above, there is an equal number of judgments going both ways with regard to these issues.

[43] Counsel for the applicant appeared before me in the matter of *E Maluleke v Health Professions Council of South Africa and Others*[2]. The grounds of appeal in

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[2] (96672/16) [2019] ZAGPPHC 66 (14 February 2019)

that matter were limited to the procedures leading to the hearing of the appeal as well as the failures, as alleged in this matter, relating to calling of further evidence and assessment of the applicant and composition of the Appeal Tribunal. I dismissed the application. I am not persuaded that I was wrong. The Regulations are clear; once an applicant has been given notice, it is up to him or her to participate meaningfully in the hearing by for example, objecting to the composition of the panel. The applicant knew that the issues on appeal relate to long-term impairment, which could be better explained by a particular expert but failed to object. The decision in the *Maluleke* matter was based on the facts of that particular matter. Though mentioned in the affidavits, procedural deficiencies were not argued in this matter before me now.

[44] On the issues that were argued by Mr Du Preez in the matter before me now, I am of the view that the ground of appeal relating to the finding that there is no link (nexus) between the injuries and the accident does warrant consideration, particularly in view of the SCA decision in the matter of *RAF v Gouws.*

[45] The basis for the rejection of the RAF 4 assessment report as I have already indicated was that "*The claimant sustained soft tissue injuries which were well managed and not classified as serious injury in RAF Act. The claimant is at advanced age of developing generative changes of the bones and not associated with accident*".

[46] Therefore, it was clear from this stage that the dispute was about the causal link between the injuries and the accident. As discussed in the *Gouws* matter, the question is whether the Appeal Tribunal was a correct forum to address this dispute or not.

[47] The commedy of errors was compounded by the fact that that at the hearing, the Appeal Tribunal did not specifically address this reason for rejection of the RAF 4 assessment report, but just did a checklist and then concluded that the injury was a *"Non-serious musculoskeletal injuries"*. Somewhere in the checklist, there was a mention of *'age degeneration'*, but there is no substantiation of what this is all about. In the answering affidavit, the Tribunal reverted to the stance that was adopted when the RAF 4 assessment was rejected.

[48] Whether or not the narrative test is independent of the AMA Guides, it is clear from a reading of the 4 requirements indicated under the narrative test that paragraph 5.1 (long term impairment) entails an assessment based on subjective factors. No two people react the same way to similar injuries. Therefore, failure to take into account individual difficulties and experiences when considering the narrative test is a misdirection and failure to apply the correct criteria.

[49] In the matter of *MEC for Environmental Affairs and Development Planning y Clairison's CC*[3] , Nugent JA and Swain AJ reiterated the distinction between a review and an appeal.

> *"It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted."*

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[3] (408/2012) **[2013] ZASCA 82** (31 May 2013)

[50] Even though the applicant did not object to the composition of the panel, he had a legitimate expectation that having regard to the nature of the dispute, that the Appeal Tribunal would do what is necessary to interrogate issues pertaing to his impairment. These are sequelae of the injuries. Simply noting the nature of the physical injuries that he had suffered is far from discharging the duty conferred on the Appeal Tribunal.

[51] Accordingly, the review application succeeds and I make the following order:

[50.1] The decision of the third respondent of 28 October 2016, communicated to the applicant on 09 November 2016, to the effect that the injuries that he suffered are non-serious injuries in terms of Section 17(1A) of the Road Accident Fund Act 56 and its Regulations is reviewed and set aside;

[50.2] The second respondent is directed to re-appoint a new Appeal Tribunal to determine the dispute reviewed and set aside above and to further reconsider all medico-legal reports that served before the Tribunal in respect of applicant's injuries;

[50.3] The applicant be permitted to be present at the Appeal Tribunal Hearing; and that he be permitted to provide further evidence pertaining to his injuries at the Tribunal hearing if he wishes to do so.

[50.4] The first respondent is ordered to pay the costs of this application.

TAN MAKHUBELE J

Judge of the High Court, Gauteng Division

APPEARANCES:

APPLICANT:	**ADVOCATE WR DU PREEZ**
Instructed by:	VZLR INC
	Monument Park,
	PRETORIA
FIRST, SECOND AND	
THIRD RESPONDENTS:	**ADVOCATE N FELGATE**
Instructed by:	KM MMUOE ATTORNEYS
	C/O SAVAGE JOOSTE AND ADAMS
	Nieuw Muckleneuk
	PRETORIA
Heard on:	10 October 2019
Judgment delivered on:	01 November 2019