IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 7104/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

E.M. KUBUSHI DATE

In the matter between

E M J KRUGER — APPLICANT

and

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA — FIRST RESPONDENT

THE ACTING REGISTRAR OF THE HEALTH PROFESIONS COUNCIL OF SOUTH AFRICA — SECOND RESPONDENT

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL — THIRD RESPONDENT

THE ROAD ACCIDENT FUND — FOURTH RESPONDENT

JUDGMENT

KUBUSHI J

[1] The applicant in this matter was involved in a motor vehicle accident that occurred on 8 December 2012. She has instituted action against the fourth respondent, the Road Accident Fund ("the Fund") in terms of The Road Accident Fund Act[1] ("the Act"). The applicant's claim is for general damages or non-pecuniary loss, which in terms of section 17 of the Act is limited to compensation for 'serious injury' as contemplated in section 17 (1A) of the Act.

[2] The method of assessing 'serious injury' is prescribed in regulation 3 of the Road Accident Fund Regulations of 2008 ("the Regulations").[2]

[3] Regulation 3 of the Regulations requires a claim for compensation for general damages to be submitted with the Fund by submitting the RAF4 form. The RAF4 form submitted by the applicant in this instance, was completed by Dr JJ Schutte ("Dr Schutte"). Dr Schutte, using the 'narrative test', assessed the applicant's injury as 'serious injury' for purposes of the Act.

[4] It is not in dispute that the applicant duly complied with the provisions of the Act and regulation 3 when submitting the RAF4 form as required. The Fund did not take issue with the applicant's substantive compliance in this regard. The Fund was, however, not satisfied that the injury sustained by the applicant was correctly assessed as a 'serious injury' and, as a result, rejected the applicant's RAF4 form.

[5] The applicant subsequently raised a dispute with the first respondent, the Health Professions Council of South Africa ("the HPCSA") and the second respondent, the Acting Registrar of Health Professions Council of South Africa ("the Acting Registrar").

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[1] Act 56 of 1996.

[2] Promulgated by the Minister in terms of the RAF Act through publication in the Government Gazette of 21 July 2009.

[6] A dispute resolution, in terms of the Act, is an appeal, which ordinarily lies with the Tribunal, and is instituted by the filing of an RAF5 form. Attached to the applicant's RAF5 form filed with the Tribunal was, amongst others, the RAF4 form completed by Dr Schutte, the medico-legal reports by Dr Oelofse, an Orthopaedic Surgeon, and Mr Meyer, an Occupational Therapist, which the applicant relied on in support of her appeal. In both the RAF4 and the medico-legal report of Dr Oelofse the applicant's injury was assessed as 'serious injury'. Inclusive of other injuries noted by the two doctors, they, also, noted the injury to the left shoulder together with a rotator cuff tear.

[7] Consequent upon the applicant's lodgement of the RAF5 form, the Acting Registrar appointed four specialist doctors to constitute the Tribunal. The Tribunal sat and deliberated the dispute on 13 January 2017 and took a decision that the injury sustained by the applicant in the collision of 8 December 2012 was a non-serious musculoskeletal injury and, as such, did not qualify as 'serious injury' in accordance with the 'narrative test'. The applicant is aggrieved by the decision of the Tribunal and has, as a result, approached this court for relief.

[8] The applicant is applying for an order reviewing and setting aside the decision taken by the Tribunal on 13 January 2017 that the injuries suffered by the applicant are not serious and a referral of the decision back to a freshly constituted Tribunal and further relief entitling the applicant to be present and be permitted to provide further evidence pertaining to her injuries at that rehearing.

[9] The HPCSA, the Acting Registrar and the Tribunal are opposing the application. I shall, for convenience, in this judgment, refer to them collectively as the respondents.

[10] The gravamen of the applicant's complaint is that from the decision (of the Tribunal) itself it is clear that, based on the available information, the Tribunal considered itself unable to make a proper decision on the existence of a rotator cuff tear as the Tribunal appears to have believed the left shoulder was not properly evaluated. According to the applicant, the Tribunal having concluded that the left shoulder was not properly evaluated ought to have examined the applicant and/or exercised its powers in terms of regulation 3 (11) *(a)*, *(c)* and *(d)*. The contention is that having failed to do so amounts to an error of fact *alternatively* procedural unfairness *alternatively* that the decision of the Tribunal is unreasonable and irrational. On those grounds, the decision should, as such, be reviewed and set aside.

[11] According to the respondents the decision of the Tribunal in essence rejected Dr Schutte's diagnosis of a rotator cuff tear because Dr Schutte examined the applicant almost three years after the accident as against Dr Viljoen whose diagnosis was accepted because he examined the applicant five months after the accident and did not mention a rotator cuff tear in his report. Dr Viljoen's findings were confirmed by X-rays taken five months after the accident which found only a normal, type 1 acromion and existing changes of AC-joint.

[12] The applicant's query, firstly, is the basis on which the Tribunal accepted the diagnosis of Dr Viljoen who is a neurologist and who deferred to an orthopaedic surgeon, as against the diagnosis of Dr Oelofse who is an orthopaedic surgeon; secondly, the reason why the Tribunal when it could not make a decision on the rotator cuff tear, did not examine the applicant or exercise its powers in terms of regulation 3 (11).

[13] Following on the judgment of the court in *L J Venter v RAF*,[3] which I am in agreement with, the decision of the Tribunal may not be set aside if it cannot be shown that the Tribunal acted arbitrarily, capriciously or irrationally.

[14] The court in that judgment stated that the mere fact that on the merits a court might reach a different conclusion would not justify a finding that the Tribunal acted arbitrarily, capriciously or irrationally. According to that judgment, the finding of a Tribunal is a medical value judgment in regard to which the members have special qualifications and expertise.[4]

[15] It appears from the papers that in the present instance, the Acting Registrar constituted the Tribunal consisting of four doctors, namely Dr J Reid (Neurologist), Dr A Szabo (Orthopaedic Surgeon), Dr AJ Lambrechts (Orthopaedic Surgeon) and Dr J Crosier (Orthopaedic Surgeon). All of them experts in their own field with the necessary experience.

[16] A whole process of how the applicant's dispute was considered by this body of experienced specialists is set out in the respondents' papers. All the documents that served before the Tribunal were provided to each member of the Tribunal and each member independently evaluated the reports and findings therein and considered the documents. When the Tribunal convened, each member had an opportunity to state his or her opinion on the injuries sustained by the applicant and the *sequelae* thereof. The opinions were debated between them and a decision was reached.

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[3] Case No. 96671/2016 dated 20 November 2018.
[4] See Venter paras 3 and 4.

[17] The experts unanimously decided to reject the applicant's appeal and found that the injuries were not serious. It is also evident that in coming to such a decision the experts considered the medico-legal reports of Dr Schutte (General Practitioner), Dr Oelofse (Orthopaedic Surgeon), Mr Meyer (Occupational Therapist), Dr Viljoen (Neurologist), Dr van der Merwe (Radiologist) and Dr Mike (Diagnostic Radiologist) which yielded the following information on the applicant's injuries:

17.1 The Tribunal found that the applicant was examined and assessed by various doctors at different stages before filing her RAF4 form.

17.2 Dr Viljoen, a neurosurgeon, first examined the applicant on 16 May 2013. Dr Viljoen diagnosed the applicant to have sustained whiplash injury of the neck, left shoulder injury and mid-lower back and lumbar injury. Due to the pain the applicant complained about in the left shoulder, Dr Viljoen recommended that she see an orthopaedic surgeon as it was not his field of expertise. The following is stated in his report:

> "5. ***LINKER SKOUER BESERING***
>
> *Ek bevel aan dat sy deur n ortopediese chirug evalueer word vir haar linker skouer besering aangesien dit vir haar n problem is in haar alle daagse aktiwiteite sowel as by haar werk. Die toestand behoort definitief aangespreek te word. Dit is nie egter nie my veld van ekspertiese nie en vandaar dus die ortopediese verwysing."*

17.3 Dr Viljoen found the left shoulder not serious – nie egter nie – and recommended conservative treatment which may later require surgery.

17.4 On the same day, 16 May 2013, the applicant was assessed by a radiologist, Dr van der Merwe who found no abnormalities in regard to the cervical, thoracic and lumbar-sacral spine. As regards the left shoulder his findings were that:

"*LEFT SHOULDER*

The glenohumeral joint appear normal.

The AC joint shows slight cortial irregularity with sclerotic change of the distal end of the clavicle in keeping with focal degenerative arthritis.

The bone density is normal.

The soft tissue spaces appear normal."

17.5 On 19 October 2015, almost three years after the collision, the applicant consulted with the following doctors:

17.5.1 Dr Schutte, who completed the RAF4 form, and during the examination diagnosed a cervical spine injury with reduced symptoms of chronic pain syndrome, injury to the left shoulder, tenditis, rotator cuff injury and lumbar spine injury with residual symptoms of chronic pain syndrome. In terms of the narrative test he made a finding that the said injuries amount to 'serious injury' for purposes of the Act

17.5.2 A diagnostic radiologist, Dr Mike, on examination found no soft tissue abnormality or pathological calcifications. Everything else was normal except the presence of A type acromion.

17.5.3 Dr Oelofse an orthopaedic surgeon on examination diagnosed a cervical spine injury with chronic pain syndrome, left shoulder injury with biceps tendonitis, rotator cuff tendinitis, muscle spasms and muscle pain syndrome, lumbar spine injury with chronic pain syndrome. In respect of all these injuries Dr Oelofse recommended conservative treatment.

17.6 On 8 June 2016, almost four years after the accident, the applicant was seen by Mr Meyer an occupational therapist. Mr Meyer reported that the applicant went for a few sessions of physiotherapy for her neck, back and left shoulder, which relieved some of the symptoms. The applicant also reported that she had been involved in a second accident, which caused her pain in her hands, right shoulder and knees. She also reported having been diagnosed with lymphoma cancer two years before the examination. Mr Meyer recommended treatment by a physiotherapist for conservative management of the injuries sustained to the left shoulder, cervical spine, lumbar spine and thoracic spine, and post-surgery. Mr Meyer's medico-legal report shows that the applicant underwent a few of those sessions (conservative management) which provided some relief.

[18] Having considered all these reports the experts were satisfied that they were provided with enough medical reports and findings to enable them to consider the applicant's appeal. Further submission, whether oral or written, or a physical examination of the applicant was according to them not required or necessary.

[19] Having read the medico-legal reports together with the papers filed of record, it is clear to me that the Tribunal came to its own conclusion on the basis of their own

expertise and experience. It is therefore, not for this court to second-guess their opinions and finding [5]

[20] I am in agreement with the remark made by the court in *Venter* at para 6 of its judgement, that –

> *[6] . . . It is clear that a Court should give due weight to such decisions as the Tribunal makes. It should not easily substitute its own opinions as to what would have been more appropriate. In any event, I am not concerned with the correctness of the decision, but whether or not the Tribunal performed its functions in good faith, reasonably and rationally. See MEC for Environmental Affairs and Development Planning v Clainsons CC (408/2012) [2013] ZASCA 82 at paras 18 and 22."*

[21] The finding that the applicant's left shoulder was not properly evaluated and that the Tribunal could not make a proper decision on the rotator cuff tear was explained in the respondents' answering affidavit as a rejection of those findings by Dr Schutte. The explanation is set out in the respondents papers as follows.

> *"The finding that the Applicant's left shoulder was not properly evaluated and that the tribunal could not make a proper decision on the rotator cuff tear was a rejection of those findings by Dr Schutte. Dr Viljoen's report made no mention of a rotator cuff tear and Dr Viljoen's evaluation of a whiplash and soft tissue injuries was accepted. It was further clear from the left shoulder X-rays done five months after the accident that it indicated that it was normal type 1 acromion and that there were existing changes to the AC-joint. The*

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[5] See N Vilane v Health Professions Council and Others Case No. 54182/2016 dated 14 February 2018 para 21.

tribunal considered all the above information and found that the injuries on the acceptable evidence before the tribunal were not serious. "

[22] The Regulations, particularly regulations 3 (11) *(a)*, *(c)*, and *(d)* give the Tribunal certain powers which it may exercise, depending on the facts.[5] It is my view that where, as in the current matter, the Tribunal is able, given its expertise and experience, to assess the seriousness of an injury on the basis of the reports furnished, it can do so without exercising the powers conferred on it by regulation 3 (11). The exercise of these powers is in the discretion of the Tribunal and exercised on a case-by-case basis. This was conceded by the applicant's counsel on a question from the bench that the Tribunal has been vested with the discretion to run its own proceedings and does not have to always require referral to examination.

[23] There is nothing unreasonable or irrational about the Tribunal's decision. Nor can it be compelled to follow a particular procedure. The Regulations do not allow for such approach. To the contrary, the Tribunal itself must decide which option in terms of Regulation 3 (11), it wishes to exercise.[7] If it was satisfied about the reports that were before it and opted not to follow any options under regulation 3 (11), it cannot be faulted.

[24] The applicant's submission that failure by the Tribunal to invoke the powers afforded it by regulation 3 (11) in order to clarify the existence (or non-existence) of a rotator cuff tear in the applicant's left shoulder, amounts to an error of fact alternatively a procedural unfairness, is unsustainable. Her reliance on the judgment in *Pepcor*[8] does not take her case any further. That judgment must be read in

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[5] See Venter at para 6 thereof.
[7] See Venter at para 7 thereof.
[8] Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA) para 47.

context. The court in that judgment held that if an administrative act has been performed irregularly – be it as a result of administrative error, fraud or other circumstances – then, depending upon the legislation involved and the nature and functions of the public body, it may not only be entitled but also bound to raise the matter in a court of law, if prejudiced. In this instance, the Tribunal has an unfettered discretion to use the powers conferred on it in terms of regulation 3 (11). It is, thus, upon the Tribunal to decide whether or not to use those powers and having opted not to do so, it cannot be faulted.

[25] The reliance by the applicant on the letter of Dr Oelofse of 6 November 2017, explaining how the rotator cuff tear developed, does not assist her case. The letter did not serve before the Tribunal and the findings contained therein would have been made five years after the first accident. In any event, the applicant's argument is that the letter serves only as an indication of what the Tribunal would have achieved had it opted to exercise its powers in terms of regulation 3 (11).

[26] The Tribunal also considered the fact that the rotator cuff tear might have developed due to the applicant's failure to attend the recommended conservative treatment. It, as a result, came to the conclusion that if the rotator cuff tear developed as opined by Dr Oelofse in the letter of 6 November 2017, it did not develop as a result of the accident related injuries *per se*.

[27] Of further importance is that the applicant's argument fails to address the impact of the injuries sustained by the applicant in a subsequent accident together with the serious illnesses of cancer and ear infection she suffered after the first accident, which are not considered in the letter of 6 November 2017, nor in the medico-legal reports of Dr Schutte and Dr Oelofse. The impact of the injuries

sustained in the second accident on the applicant's left shoulder is unknown hence the rejection of Dr Schutte and Dr Oelofse's diagnosis of a rotator cuff tear.

[28] I have to conclude, therefore, that from the evidence furnished by the respondents the manner in which the Tribunal dealt with the applicant's appeal was not procedurally unfair as contended for by the applicant. It is my view that the Tribunal was entitled and acted correctly in applying its own expertise and experience to adjudicate the appeal without exercising its powers in terms of regulation 3 (11).

[29] It also cannot be said that the decision was unreasonable or irrational. The test for rationality requires a rational connection between the reasons and the decision. The test is not whether the decision is correct in relation to the reasons. It is also not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts.[9] The reasons provided by the respondents in their papers in relation to the decision made by the Tribunal, appear to me rational. The members of the Tribunal properly applied their minds to the expert reports furnished before coming to the unanimous decision they came to.

[30] Consequently, the application is dismissed with costs.

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

[9] See Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)

Appearance:

Applicant's Counsel	Adv. G R Egan
Applicant's Attorneys	VZLR Incorporated
Respondent' Counsel	Adv. R Schoeman
Respondent' Attorneys	Ramulifho Incorporated
Date of hearing	15 October 2019
Date of judgment	03 December 2019