

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]



CASE NUMBER: 28637/17

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
18/12/19	
DATE	SIGNATURE

In the matter between :

**V MAHLANGU**  
(REF: RAFA/002057/2015)

**APPLICANT**

and

**THE 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**

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**JUDGMENT**

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**A.J. LOUW AJ**

[1] The Applicant is a young lady and was born on 14 June 1985. She is employed by the South African Police Service. From the available medico-legal reports it appears that the Applicant was a passenger in a minibus taxi when it was involved in an accident. The accident occurred on 22 June 2009.

[2] In the motor vehicle accident the Applicant suffered a left lower leg injury, a laceration to her left ear and a laceration to her upper back according to the medico-legal report of Dr Hoffman. These injuries led to disfigurement. According to Dr Hoffman the prognosis is as follows:

*"It is my opinion that some of the patient's scarring can be improved by up to 50% with Plastic Surgery treatment.*

***Please note that even after revision and treatment, the scarring will be visible and permanent. It will continue to limit her clothing options."***

[3] In the serious injury assessment report (RAF4 form) Dr Hoffman, a plastic surgeon, conclude in paragraph 4.3 of the RAF 4 form that the current symptoms and complaints of the Applicant are "Unsightly scars on left upper back and left lower leg". In paragraph 5 of the RAF 4 form Dr Hoffman then says that under the narrative test the Applicant suffers from permanent serious disfigurement.

- [4] The Fourth Respondent formally rejected the Applicant's RAF 4 form. The dispute was, as is required under the provisions of the Road Accident Fund Act 56 of 1996 ("the RAF Act") read with its Regulations, referred to the Third Respondent to finally assess whether the Applicant is entitled to general damages.
- [5] On 30 September 2016 the First Respondent required colour palette photographs of the Applicant's scarring. On 3 October 2016 the Applicant's attorneys of record dispatched the report of Dr Hoffman, which report contained the colour photographs, to the First Respondent. This evidence of the Applicant is not disputed by the Respondents in paragraph 77 of the answering affidavit where paragraph 6 (with all its sub paragraphs) of the Applicant's founding affidavit are noted. I refer to this fact because there appears to be a dispute whether colour photographs of the Applicant's scarring indeed reached the Third Respondent timeously for its hearing of the Applicant's matter on 17 January 2017. The apparent dispute created by a general denial without any particularity regarding the contents of paragraph 7.6 of the founding affidavit in paragraph 83 as read with paragraph 84 to 88 of the answering affidavit cannot be read as a clear denial of the fact that the colour photographs were timelessly dispatched. All the relevant annexures to the founding affidavit support the statement that the colour photographs were timeously provided. The non-denial of paragraph 6 of the founding affidavit supports this statement. I thus find that the Third Respondent had colour

photographs available for purposes of the assessment on 17 January 2017. (Whether the members of the panel timeously received the colour photographs is another issue but it is an issue of no concern to the Applicant).

- [6] The Applicant's attorneys of record requested that the Applicant be present at the Third Respondent's hearing to give evidence pertaining to her injuries.
- [7] The extract of the decision reached by the Third Respondent is part of the review record and is paraphrased in the letter dated 15 February 2017 from the First Respondent. The letter records that the Third Respondent met on 18 January 2017 and resolved as follows regarding the Applicant:
  - "i. *Previous Minutes of Tribunal: Injuries: Injuries: fracture left distal tibia, laceration left ear. Outcome: swelling left leg, cannot stand long, run or walk long distances. Scarring of the back and left lower leg plus left ear.*  
*Tribunal findings: colour photographs of all scars.*
  - ii. *New material: Only unclear black and white photos were submitted. No colour photos Colour photos of the left ear, torso, and the left leg submitted on 23/01/2017.*
  - iii. *Resolution: Not serious. scars are not disfiguring."*

- [8] The Applicant applies that these findings of the Third Respondent be reviewed and set aside. Secondly the Applicant applies that the Second Respondent be directed to reappoint a new appeal tribunal to determine the dispute and to further reconsider all medico-legal reports that served before the Third Respondent in respect of the Applicant's injuries. Thirdly it is prayed that the Applicant be permitted to be present at the appeal tribunal hearing and that the Applicant be permitted to provide further evidence pertaining to her injuries at the hearing if she wishes to do so. Lastly costs and alternative relief are sought.
- [9] In *Road Accident Fund v Duma And Three Similar Cases* 2013 (6) SA\_9 (SCA) it was found in paragraph 34 of that judgement that a serious injury assessment cannot be done without first doing what is commonly known as the AMA/WPI test or assessment provided for in regulation 3(1)(b)(ii).
- [10] In paragraph 26 of that judgement the Supreme Court of Appeal pointed out that the appeal created by the regulations is an appeal in the wide sense, that is a complete rehearing and fresh determination of the merits with additional evidence or information if needs be.
- [11] The Third Respondent exercises a wide investigator of fact finding power and can establish for itself whether or not to assess the injury as serious, whatever the reasons of the Fourth Respondent might have been.

- [12] It is furthermore also trite by now that the Third Respondent's decision constitutes administrative action which is reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). See: Duma supra at paragraph 19 at page 17G-J.
- [13] Both the facts upon which an applicant for review base his/her cause of action and the legal basis of the cause of action must clearly and precisely be disclosed. See: Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at paragraph 27 en 507C-E.
- [14] From paragraph 7 to 9 of the founding affidavit the attack on the findings of the Third Respondent is set forth without reference to the provisions of section 6(2) of PAJA. I take into consideration that it is not necessary to specify a particular statutory provision as long as it is clear from the facts alleged by the litigant that the section is relevant and operative. See Bato supra at paragraph 27 on p 507C-D.
- [15] The Applicant attacks the decision of the Third Respondent on the basis that it is an overall view of the Applicant's injuries without taking into account the negative impact that these injuries have on the Applicant as well as the impact of the scarring of the Applicant. In the answering affidavit the deponent on behalf of the Third Respondent says that although the AMA guides and the narrative test constitute two different tests of assessment, they are related to each other. He then says that the criteria under the AMA guides is always the starting point

in the performance of an assessment and would ordinarily give one a good indication as to the severity or seriousness of the injury, even where the injury does not qualify as a serious injury under that criteria. He then goes on to say that this makes an assessment under the narrative test easier and more objective as it is informed by information already gathered in an assessment under the AMA guides.

[16] The approach as set forth in the answering affidavit and discussed in the previous paragraph is clearly wrong. The AMA guides test relates to an objective assessment of the injury sustained by the Applicant whereas the narrative test is a subjective test, which specifically focuses on the subjective personal circumstances of each individual claimant. In using the objective assessment as a premise in adjudicating the dispute, the appeal tribunal misdirected itself. See: a similar finding in the case of **T.P. Buthelezi v Health Professions Council of South Africa and Three Others**, Case Number 3039/27 (unreported judgement in the High Court of South Africa, Gauteng division, Pretoria dated 17 April 2019) at paragraph 51 and 52.

[17] The Third Respondent's decision is not procedurally fair and ought to be set aside. The decision constitutes an error of law as envisaged by section 6 (2) (d) of PAJA.

[18] Mr Venter who appeared for the Applicant argued that the appeal panel of medical practitioners that constituted the Third Respondent was incorrectly constituted because it was not populated with a plastic

surgeon. This submission appears to be correct but I refrain from making a finding of reviewability on this submission as I cannot find any statement in the founding affidavit that would support this submission. On the approach that a proper case for the relief sought (albeit without referring to the particular sections of PAJA) must be made out, I am respectfully of the opinion that such a case has not been made out on the founding papers.

- [19] The deponent on behalf of the Third Respondent says the following in paragraph 15 and 16 of the answering affidavit:

*"15. At our meeting held on 18 January 2017, we were satisfied that we were provided with enough medical records to enable us to consider the Applicant's appeal, and that further submissions (oral or written) were not required.*

*16. We deliberated and resolved that based on medical evidence that was provided when the request for adjudication of the appeal was submitted by the Applicant's legal representative, that the Applicant's scarring did not amount to permanent serious disfigurement and do not qualify both under the narrative test and AMA rating."*

- [20] Then in paragraph 62 and 63 of the answering affidavit the following is said:



"62. According (sic) the RAF4 form the serious injury assessment that the Applicant was said to have suffered from was **permanent serious disfigurement** and this was the assessment that was rejected by RAF and as such this was what the Tribunal was mandated to determine in terms of the Appeal.

63. As such, the reports by Dr Oelofse and Rita van Biljon did not have any bearing when it came to the Tribunal reaching a decision as to whether the scarring suffered by the Applicant resulted in permanent serious disfigurement."

In addition, at paragraphs 80, 81, 85, 88, and 96 of the opposing affidavit it is reiterated that no case was made for serious disfigurement in terms of the narrative test. With reference to the Applicant's additional reports it is stated that:

"85. These reports and their findings are not related to the issue that served before the Tribunal to adjudicate that being the appeal of the decision that the applicant did not suffer permanent serious disfigurement.

86. Accordingly, the Tribunal reached a decision as to whether the Applicant suffered any permanent serious disfigurement and this case has been elaborated on already in this affidavit.

87. *I reiterate that the decision that was being appealed against did not pertain to the injuries and the effects of the injuries suffered by the applicant but only related to the scarring."*

The deponent then concludes in paragraph 88 that the Applicant introduces a new case for serious impairment that that was not brought up in the current application and the same conclusion is made in paragraph 96 on the basis that the issue about the Applicant's injuries was the focus before the appeal tribunal and not the scarring which was the basis of the serious injury assessment report submitted to the RAF.

[21] This evidence on behalf of the Third Respondent shows a misunderstanding of the nature of the appeal to the Third Respondent. I again refer to paragraph 26 of the *Duma judgement, supra*. This ground for review is clearly covered by the evidence in the founding affidavit in paragraphs 7, 8 and 9 of the founding affidavit. The evidence in the answering affidavit clearly conveys that all the medical evidence submitted through the medico-legal reports were not considered for purposes of determining whether the requirements for the narrative test were complied with. Misunderstanding the nature of the appeal is an error in law as envisaged by section 6 (2) (d) of PAJA.

[22] The ignoring of the expert reports constitutes an error of fact. I do not intend to repeat the discussions in the case law regarding material errors of fact and the dangers of blurring the distinction between appeal

and review. Suffice to say the evidence in this matter clearly shows a material error of fact. See: **Pepcor Retirement Fund and Another v Financial Services Board** 2003 (6) SA 38 (SCA) at paragraph 47 and 48.

- [23] From the reasons provided by the Third Respondent tribunal it is clear that the colour photographs were not considered. These photographs clearly were available as explained earlier in this judgement. They should have been considered and the absence thereof is an additional ground why the decision of the Third Respondent must be reviewed and set aside.

The Third Respondent committed an error of law in refusing to take consideration of all the information before it and in failing to examine the Applicant or to appoint an expert to do so, especially having regard to the fact that the Third Respondent appears to have dealt with the issue of the disfigurement without having reference to the colour photographs and by not giving proper weight to the assessment of the expert with the relevant experience, Dr Hoffman. The panel constituting the Third Respondent did not include an expert with expertise in the appropriate area of medicine as required by regulation 3(8)(b) . The Third Respondent's administrative action was procedurally unfair as set forth in section 6(2)(c) of PAJA.

- [24] I need not deal with the question whether the decision of the Third Respondent is rationally connected to the information set forth in the

medico-legal report that served before the panel as it is clear that those reports were not taken into consideration. The fact that the decision is to be reviewed and set aside is clear from the discussion above.

[25] It does not appear to me that legal argument before the tribunal is necessary.

[26] Mr Venter in his oral argument referred to a number of unreported decisions. I do not consider it necessary to extend this judgement by discussing that case law.

[27] I am invited by the Applicant to replace the decision of the Third Respondent with a finding that the injuries indeed are serious as contemplated by the RAF Act by virtue of the application of the narrative test. Such a substitution is only possible in exceptional cases. See: section 8 (1) (c) (i) of PAJA. This is not an exceptional case.

[28] The decision of the Third Respondent must be set aside and the matter must be referred back to the Third Respondent for reconsideration. The tribunal must be constituted of other experts and must include at least one plastic surgeon.

[29] There is no reason why the costs ought not to follow the result accordingly the First, Second and Third Respondents who opposed the application ought to pay the costs thereof. However, the notice of motion only prays for a costs order against the First Respondent and accordingly I will so order.

[30] I make the following order:

1. The decision of the Third Respondent dated 18 January 2017 to the effect that the injuries suffered by the Applicant are non-serious in terms of section 17 (1A) of the Road Accident Fund Act 56 of 1996 and its regulations is reviewed and set aside;
2. The Second Respondent is directed to reappoint a new appeal tribunal to determine the dispute reviewed and set aside in prayer 1 above and to further reconsider all medico-legal reports that served before the tribunal in respect of the Applicant's injuries;
3. The Applicant is permitted to be present at the appeal tribunal hearing and the Applicant is permitted to provide further evidence pertaining to her injuries at the tribunal hearing if she wishes to do so;
4. The First Respondent is ordered to pay the costs of this application on party and party scale.

  
  
AJ LOUW AJ