REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 97059/16

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

10 July 2020

....
DATE SIGNATURE

In the matter between:

SIMON MADONSELA	Applicant
and	
THE ROAD ACCIDENT FUND APPEAL TRIBUNAL	First Respondent
THE ROAD ACCIDENT FUND	Second Respondent
THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	Third Respondent
DR J SAGOR	Fourth Respondent
DR R MELVILLE	Fifth Respondent
DR M HANNA	Sixth Respondent
DR J P DRIVER JOWITT	Seventh Respondent

J U D G M E N T

TEFFO, J:

Introduction

[1] The applicant seeks, among others, an order reviewing and setting aside the decision taken by the first respondent on 18 May 2016 and communicated to his attorneys of record on 5 July 2016 to the effect that the injuries he had suffered as a result of a motor vehicle accident are non-serious in terms of section 17(1A) of the Road Accident Fund Act, 56 of 1996 and its Regulations.

[2] All the respondents except the second, are opposing the application.

[3] The applicant is an adult male born on 5 September 1963. He was involved in a motor vehicle accident on 9 February 2013.

[4] The first respondent is the Road Accident Fund Appeal Tribunal ("*the tribunal*"), a statutory body created in terms of section 17 read with section 26 of the Road Accident Fund Amendment Act,19 of 2005 ("the Amended Act") and the RAF Regulations to determine whether a person's injuries warrant a 30% whole person impairment rating and/or if such injuries qualify a person under the narrative test.

[5] The second respondent is the Road Accident Fund ("*the Fund*"), a legal entity created in terms of the RAF Amendment Act.

[6] The third respondent is the Health Professions Council of South Africa ("*the HPCSA*"), an entity created in terms of the Health Professions Act[1].

[7] The fourth respondent is Dr J Sagor. The fifth respondent is Dr R Melville. The sixth respondent is Dr Hanna. The seventh respondent is Dr J P Driver Jowitt. All these respondents are orthopaedic surgeons, save for the fifth, who is a neurosurgeon. They are cited in their capacities as members of the Appeal Tribunal that was tasked with determining the dispute. They will be referred to collectively as such and where appropriate they will be referred to separately.

Background facts

[8] The applicant sued the second respondent for damages arising from bodily injuries he sustained in a motor vehicle accident. The action is still pending and the issue of liability and all other heads of damages, save for the general damages, have been resolved. He was assessed by Dr Kaplan on 15 March 2014 who completed a statutory RAF 4 form and concluded that the applicant's injuries were "*serious*" in terms of the Narrative Test.

[9] The applicant was also assessed by different experts whose reports were also submitted to the second respondent: Dr Townsend (Neurologist); Dr Ormond-Brown (Neuropsychologist); Dr Fayman

[1] Act 56 of 1974

(Plastic and Reconstruction Surgeon); Ms Cloete (Occupational Therapist); and BMS Consulting (Industrial Psychologist).

[10] The second respondent rejected the applicant's claim for general damages based on Dr Kaplan's assessment of his injuries.

[11] On 12 November 2014, the applicant's dispute with the second respondent's decision was referred to the third respondent in terms of Regulation 3(4).

[12] On 22 April 2016 the third respondent notified the applicant that the dispute had been set down for determination by the first respondent on 18 May 2016 and that the panelists would comprise three Orthopaedic Surgeons and a Neurosurgeon (the fourth to seventh respondents).

[13] On 18 May 2016, the first respondent upheld the rejection of the applicant's RAF 4 serious injury assessment and concluded that on available record and information, the applicant's injuries were not serious.

[14] The letter further indicated the following assessment by the first respondent:

"*Injuries:*

- *Soft tissue injuries left arm;*
- *Head injury.*

Outcome:

- *Leloid scars left arm.*
- *Undocumented cognitive changes.*

- *No neuropsychological evaluation made.*"

[15] The above decision constitutes an administrative action and is susceptible to review in terms of the provisions of the Promotion of Administrative Justice Act[2] ("*PAJA*"). Having been aggrieved by the decision, the applicant approached this Court for relief.

The issue

[16] Has a proper case been made for the relief sought?

The legislative framework and legal principles

[17] In terms of section 17(1) and 17(1A) read with Regulation 3, a claimant may only claim general damages against the Fund where he/she has suffered a "*serious injury*". In order to qualify for this head of damages, a claimant is required to submit to an assessment by a medical practitioner in accordance with Regulation 3.

[18] Regulation 3(1)(b)[3] prescribes the criteria that such a medical practitioner has to apply to assess whether a claimant had suffered "*serious injury*". The consideration of a "*serious injury*" in terms of the Regulations, involves a two tier process. The injury is first assessed in

[2] Act 3 of 2000

[3] "*3 Assessment of serious injury in terms of section 17(1A).*
(1)(b) The medical practitioner shall assess whether the third party's injury is serious in accordance with the following method …
(iii) an injury which does not result in 30% or more impairment of the whole person may only be assessed as serious if that injury:
(aa) resulted in a serious long-term impairment of all loss of body function;
(bb) constitutes permanent serious disfigurement."

terms of what is called the AMA Guides[4] which determines whether the injury is of such a nature that it constitutes a Whole Person Impairment of at least 30%. If the injury does not qualify as serious under the AMA Guides, it may nonetheless be assessed as serious in terms of what is called the "*narrative test*" which assesses whether the injury resulted in a serious long-term impairment or loss of a body function or constitutes permanent serious disfigurement.

[19] Should the Fund not be satisfied that the injury has been correctly assessed as serious, it must reject the report or direct the claimant to undergo a further assessment.

[20] Should the claimant not be satisfied with the Fund's rejection of the serious injury assessment report, he or she must declare a dispute and lodge such a dispute with the Registrar of the HPCSA. The Registrar of the HPCSA then has to appoint a Tribunal of at least three medical experts to determine whether the claimant has sustained a serious injury.

[21] A procedure by which the Tribunal enquires into the dispute is outlined in detail in the Regulations and includes the following features:

24.1 Both sides may file submissions, medical reports and opinions.

[4] AMA Guides are defined in Regulation 1 as the "*American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition*

24.2 The Tribunal may hold a hearing for the purpose of receiving legal argument by both sides and seek the recommendation of a legal practitioner in relation to the legal issues arising at the hearing.

24.3 The Tribunal has wide powers to gather information, including the power to direct the claimant to submit to a further assessment by a medical practitioner designated by the Tribunal; to do its own examination of the claimant's injury; and to direct that further medical reports be obtained and placed before it.

[22] The meaning of the words "*serious*" and "*severe*" was considered in *JH v Health Professions Council of South Africa and Others*[5] and the court held as follows:

"*[18] The words 'serious' and 'severe' in these items are not defined. They connote a degree of impairment or disturbance or disorder which cannot be fixed by quantitative measure. The assessment requires a value judgment, though one to be performed on the basis of a correct interpretation of the words used in the narrative test. Dictionary definitions of 'serious' in the context appropriate to the narrative test includes 'having important or dangerous consequences; critical'; 'approaching the critical or dangerous' while definitions of 'severe' include 'inflicting' great pain or distress; of a serious or considerable degree or extent; grave'; 'unsparing pressing hard; hard to endure'….*

[19] The purpose of limiting non-pecuniary damages of cases of 'serious injury' must have been to introduce a significant limitation on the RAF's liability for general damages. In context, 'serious' and 'severe' should not be regarded merely as 'not trivial', since trivial cases are unlikely in the past to have placed a significant burden on

[5] 2016 (2) SA 93 (WCC)

the public purse. On a continuum from trivial at one extreme to catastrophic at the other, descriptors which come to mind are mild, moderate, serious and severe. That which is 'serious' must be more intense than 'moderate'. And that which is 'severe' must be more intense than 'serious'.

[23] In *RAF v Duma* and three similar cases[6] the SCA said the following:

"*[24] Recognition that the Fund's decision to reject the Plaintiff's RAF 4 form constituted administrative action, dictates that until that decision was set aside by a court on review or overturned in an internal appeal, it remained valid and binding.*[7] *The fact that the Fund gave no reasons for the rejection; or that the reasons given are found to be unpersuasive or not based on proper medical or legal grounds, cannot detract from this principles. The same holds true for the respondent's arguments that it appeared from the medical evidence presented by them at the trial that the Fund was wrong in deciding that their injuries were not serious. Whether the Fund's decisions were right or wrong is of no consequence. They exist as facts until set aside or reviewed or overturned in an internal appeal.*"

[24] This Court can entertain any review process if it is satisfied that the internal remedies provided for in terms of PAJA have been exhausted[8].

[25] The main question is therefore whether a review court can be satisfied that a reasonable person in the position of the appeal tribunal on the evidence disclosed in the record and applying the correct test in law, could have reached a conclusion that the appeal tribunal in fact reached[9].

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[6] 2013 (6) SA 9 (SCA)
[7] See *Onderstekraal Estate (Pty) Ltd v City of Cape Town* 2004 (6) 222 (SCA) para [26]
[8] Section 7(2)(a) of PAJA
[9] *Dumani supra*

[26] The courts are obliged to interpret legislation granting powers to the administrators as requiring the power to be exercised in a reasonable and rational manner[10]. C Hoexter states that rationality is the first element of "*reasonable*" administrative action as expressed in section 33(1) of the Constitution. She explains the meaning of "*rationality*" as follows:

> "*This means in essence that a decision must be supported by the evidence and the information before the administrator as well as the reason given for it. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken.*"

[27] In *Bel Porto School Governing Body and Others v Premier Western Cape and Another*[11] the Constitutional Court held that an administrative decision taken by the functionary must be justifiable and be a rational decision taken "*lawfully and directed at a proper purpose*". According to the provisions of section 6(2)(f)(i) of PAJA, rationality is a ground for review.

[28] The Constitutional Court in *Democratic Alliance v The President of the Republic of South Africa and Others*[12], held that the principle of legality requires rational decision making – both the process by which the decision is made and the decision itself must be rational.

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[10] Cora Hoexter: *Administrative Law in South Africa* 1st Edition, p 307
[11] 2002 (3) SA 265 (CC) para [89]
[12] 2013 (1) SA 248 (CC) at paras [33]-[34]

[29] The court in *Minister of Home Affairs and Others v Scalabrini Centre and Others*[13], set out the following in paragraph 65 of the judgment:

> "*… rationality entails that the decision is founded upon reason – in contradistinction to one that is arbitrary – which is different to whether it was reasonably made*."

[30] In the exercise of their powers, the functionaries of the administrative decision must act within the scope of empowering statutory provision and for the purpose envisaged by legislation[14]. The power exercised must not be misconstrued[15].

[31] Cloete JA held in *Pepcor Retirement Fund and Another v Financial Services Board and Another*[16] that administrative action must be taken on an accurate factual basis. A mistake of fact renders an administrative action subject to review.

[32] The above principle has been elaborated in *Dumani*[17] as follows:

> "*[29] I turn to consider the law. Material error of fact was first recognised as a ground of review by this Court in Pepcor where the following was said in para 47:*
>
> > *'In my view, a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision in the public interest, the decision should be made on the material*

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[13] 2013 (6) SA 421 (SCA)
[14] *Hoexter supra,* p 71; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras [58]-[59]
[15] *President of the Republic of South Africa and Others v South African Rugby Football Union* 2000 (1) SA 1 (CC) para [148]
[16] 2003 (6) SA 38 (SCA) at para [47]
[17] *Supra*

> *basis which should have been available for the decision properly to be made. If a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should be … reviewable at the suit of, inter alios, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of the decision in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly; i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires.*"

But the court went on in the immediate succeeding paragraph, paragraph [48], to say:

> "*Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review.*"

[33] The factual mistake is required to be uncontentious and objectively verifiable. The material error of fact will render a decision subject to review if the relevant decision had been made in ignorance of the true facts material to that decision such as for example not considering relevant material and/or all the material provided and/or personal circumstances[18].

[34] In terms of section 6(2)(d) of PAJA[19], an administrative action may be reviewed if "*the action was materially influenced by an error of law*".

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[18] *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA)
[19] *Supra*

[35] In terms of the provisions of section 6(2)(f)(ii) of PAJA this will happen where:

> "*(f) the action itself –*
>
> *(ii) is not rationally connected to –*
>
> *(aa) the purpose for which it was taken;*
>
> *(bb) the purpose of the empowering provision;*
>
> *(cc) the information before the administrator;*
>
> *(dd) or the reasons given for it by the administrator.*"

[36] Section 6(2)(h) of PAJA[20] reads:

> "*(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.*"

The grounds for review

[37] The applicant contends the tribunal did not consider the medico-legal report of Dr Fayman which was submitted to it before the decision was taken.

[20] *Supra*

[38] He claims that the tribunal failed and/or refused to provide reasons or adequate reasons for its decision.

[39] He asserts that the members of the tribunal did not consider legal arguments and elected not to utilize the provisions of Regulation 3(10)(c) to (h).

[40] It was submitted that the first respondent failed in terms of section 6(2)(e)(iii) of PAJA to give relevant consideration to expert opinion that it was aware of.

[41] The action was procedurally unfair.

Error of fact

[42] The allegations made have been denied by the first, third to seventh respondents in their answering affidavit. It has been specifically pleaded that the medico-legal reports of Drs Townsend and Fayman were filed with the third respondent and therefore considered by the first respondent. This aspect was conceded by the applicant in the replying affidavit.

Failure to provide reasons/adequate reasons

[43] The applicant contends that in the letter from the first respondent notifying him of its decision, there is no indication that the narrative test was considered. It was only concluded that the injuries he sustained were not serious. No future *sequelae* of the injuries were discussed at all. Subsequent to receipt of the first respondent's decision, he

requested reasons. There was no reply to the letter. He claims that on that basis alone, the decision has to be reviewed. He contends that the first time the narrative test is mentioned, is in the respondents' answering affidavit. Further that having regard to what has been stated in the respondents' answering affidavit, the two tests have been conflated.

[44] The above allegations have been denied by the respondents. The respondents contend that there was no application in terms of section 8 of PAJA for reasons by the applicant after receipt of the decision. The request was for reconsideration of the decision and not the reasons.

[45] The following is noted in the letter from the applicant's attorneys to the third respondent dated 5 July 2016:

> "2. *We acknowledge receipt of your letter of even date, for which we thank you.*
>
> 3. *We note with concern that the tribunal's resolution does not make any reference to the extent of the assessment by Dr M S Fayman (Plastic & Reconstructive Surgeon), dated 8th May 2015, a copy of which was delivered by hand to your offices on 22nd May 2015.*
>
> 4. *We once again, enclose a copy of Dr Fayman's report, along with our May 2015 covering letter and, respectively, draw the following aspects to your attention, namely:*
>
> 4.1. *the injured sustained a permanent disfigurement to his left arm, as described comprehensively by Dr Fayman;*
>
> 4.2. *the injured, further, also, sustained a loss of full function to the left arm and hand, due to the nerve damage sustained in the collision, which impairment is noted and documented by Dr M S Fayman, Dr D Ormond-Brown (Neuropsychologist) and Ms Cloete (Occupational Therapist); and*

4.3. the impairments and disfigurement, above, contradict the findings of the Tribunal and are, accordingly, a cause for concern for the injured.

5. We appreciate the convention that, in terms of the Regulations of the RAF Amendment Act, the resolution in your May 2016 letter is 'final and binding', however, in view of the fact that the resolution states that this finding was made 'on available records and information', we cannot accept that the Tribunal had proper consideration of Dr Fayman's expert report, despite same having been available to the Tribunal since May 2015.

6. In the circumstances, we respectfully request that the Tribunal revisit the injured's claim of serious impairment …"

[46] In support of his argument, counsel for the applicant referred to various decisions of this Court that dealt with the issue, where what was stated in *Minister of Environmental Affairs & Tourism v Phambili Fisheries*[21] was referred to. This is what was stated in the above matter:

> "*[40] What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of Ansett Transport Industries (Operations) (Pty) Ltd and Another v Wrath and Others (1983) 48 ALR 500 at 507 (lines 23-41), as follows:*
>
> > *'The passages from judgments which are conveniently brought together in Re Palmer and Minister for the Capital Territory (1978) 23 AR 196 at 206-7; 1 ALD 183 at 193-4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect:*
> >
> > > *"Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."*
>
> *This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which*

[21] 2003 (6) SA 407 (SCA) para [40]

> *his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.*'"

To the same effect, but more brief, in Hoexter the New Constitutional and Administrative Law Vol 2 at 244:

> "*(I)t is apparent that reasons are not really reasons unless they are properly informative. They must explain <u>why</u> action was taken or not taken; otherwise they are better described as findings or other information.*"

[47] Counsel for the respondents submitted that the applicant in his founding affidavit, does not specifically say he has problems with the reasons. She argued that it cannot be said that there are no reasons in the letter notifying the applicant of the decision taken. The decision made is that the injuries are not serious and the basis thereof is contained in the injuries. In support thereof, she relied on the decision of *J H v Health Professions Council of South Africa and Others*[22], where the court held that:

> "*I think the Tribunal was justified in saying the doctors who had assessed the injuries as serious under the narrative did so without providing adequate reasons or explanation to be fair, it may sometimes be difficult to explain or provide reasons why one considers a stated set of symptoms and sequelae to be serious and severe for purposes of the narrative test but this simply highlights the point that, once factual findings are established, the ultimate conclusion is a value judgment. The Tribunal's value judgment that the applicant's injuries are not*

[22] *Supra*

> *serious for purposes of the narrative test is no more than an unreasonable conclusion than that of the four doctors who expressed the opposite view.*"

[48] The applicant averred that the reasons provided by the respondents indicate that the injury is considered "*not serious"* but does not specifically indicate its findings with regard to both components of the serious injury assessment, namely the whole body impairment ("*WPI*") test as well as under the "*Narrative Test*". I therefore do not agree that the applicant does not specifically say he had problems with the reasons for the decision. The letter dated 18 May 2016 is in my view not clear. The reasons given are not properly informative. It does not explain why the action was taken. The applicant challenges the decision taken on the basis that all the reports which were considered before the decision was taken, were from the applicant's experts and they all assessed the applicant's injuries as serious in terms of the narrative test. There were no reports from the second respondent to counter the reports which served before the first respondent.

[49] It was therefore necessary, in my view, for the decision-maker to set out his understanding of the law, any findings of fact on which his conclusions depend, and the reasoning process which led him to those conclusions. That was not done.

[50] Although I agree with the respondents' counsel that the letter dated 5 July 2016 from the applicant's attorneys in response to the respondents' attorneys' letter of 18 May 2016, did not request reasons as alluded to in the applicant's papers but a request for a reconsideration of the matter,

the contents thereof suggested that the decision was lacking and/or not clear. The least that the first respondent could have done was to respond to the letter and clarify the decision by furnishing brief, proper and informative reasons for it.

[51] The appeal tribunal had to consider whether the applicant's injuries resulted in a serious long-term impairment or loss of body function or constitutes permanent serious disfigurements. It is the *sequelae* of the injuries and not the injuries *per se*, that play a role in the determination thereof. The reports filed by the applicant's experts, in particular, Dr Fayman, which served before the first respondent, discuss the relevant aspects. The decision of the Tribunal is silent on whether the assessment of the injury was done in terms of either the WPI or the Narrative Test. It is only in the answering affidavit that it is contended that the applicant's injuries did not qualify for general damages under both tests. I am therefore not persuaded that there are reasons in the letter of 18 May 2016 explaining why the decision was taken.

[52] Rationality entails that the decision is founded upon reason[23]. Without reasons the decision cannot be rational.

[53] Having regard to the above, I conclude that the decision of *J H v Health Professions Council of South Africa and Others* is distinguishable and not of assistance to the respondents. It therefore follows that the decision of the first respondent stands to be reviewed and set aside on

[23] *Minister of Home Affairs v Scalabini supra*

this ground. Under the circumstances, I find it unnecessary to deal with the other grounds of review.

[54] The applicant also sought an order declaring that the High Court has jurisdiction to determine the quantum of general damages suffered by the applicant as a result of injuries he sustained in a motor vehicle accident. Having regard to the decisions arrived at in *Duma*[24] and *RAF v Faria*[25] I am precluded from doing so.

[55] I accordingly make the following order:

1. The decision of the first respondent made on 18 May 2016 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 hereby reviewed and set aside.

2. The third respondent is directed to constitute a new appeal tribunal to reconsider and determine the dispute between the applicant and the second respondent as to whether or not the applicant's injuries are serious or not.

3. The third respondent is ordered to pay the costs of the application.

[24] *Supra* at par [19] p17
[25] 2014 (6) SA 19 (SCA) at par [34] 28D-E where Willis JA writing for the court stated:
"*The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts.*"

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M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the applicant	R R du Preez
Instructed by	Faber & Allin Inc c/o Adams & Adams
For the first and third to seventh respondents	L M Maite
Instructed by	Moduka Attorneys
Date of judgment	10 July 2020