REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 23432/18

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

12 April 2021
DATE

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SIGNATURE

In the matter between:

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| K L MOTHIBI | APPLICANT |
| and | |
| HEALTH PROFESSIONS COUNCIL OF S A | FIRST RESPONDENT |
| THE ACTING REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL OF S A | 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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MOGALE, AJ

## INTRODUCTION

[1] This is a review application whereby the applicant is applying for reviewing and setting aside of the decision of the third respondent dated 23 November 2016 stating that the injuries suffered by the applicant are non-serious in terms of section 17(1)(a) of the Road Accident Fund, Act 56 of 1996

[2] That the respondent be directed to re-appoint an appeal tribunal to determine the dispute reviewed and set aside in paragraph 1 and to further reconsider all medical reports in respect of the applicant's injuries.

[3] 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 tribunal hearing if she wishes to do so.

## APPEAL TRIBUNAL FINDINGS

[4] The application is brought after the appeal tribunal resolved at its meeting held on 23 November 2016 stating as follows:

i. The patient was involved in a motor vehicle accident in 2010 and was assessed by Dr. Schutte who gave him a WIP of 17% based on cervical disc lesion radiculopathy and L4-L5 radiculopathy

ii. Dr. Oelofse did an MRI scan of the neck and it shows extensive degenerative changes in the neck.

iii. Looking at the notes from the referring hospital, there is no evidence of acute disc injury at the time of the accident. They mention that the patient was on ARV's.

iv. The panel felt that the patient had a degenerative cervical spine and lumbar spine disease. The late document presented gives evidence from other experts who saw the patient 4 years after the injury. The clinical Psychologist mentioned that there are no psychometric answers because of the low level of education. The Occupational therapist felt that the dexterity of the finger was impaired.

v. The neurosurgeon said that there was a normal physical examination but based on history, the patient had post-traumatic epilepsy and has been on Vellum. The Psychologist writes on the scale of seizures also which shows on history.

vi. The issue of seizures has not been proven and the patient was on Vellum and they are not sure how long he has been treated and there is no proof of the patient being seen on an outpatient basis of any hospital over the last four years for the epilepsy treatment. In the absence of proof of epilepsy, the tribunal feels that this injury is not serious.

[5] The provisions of section 17(1) and 17(1)(A) of the Act and Regulation 3 provide that a claimant may only claim general damages against the Road Accident Fund where the claimant has suffered a serious injury. Regulation 3(1) (b) sets out the criteria which the medical practitioner must apply to assess whether a third party has suffered a serious injury. Should the Road Accident Fund not be satisfied that the injury has correctly been assessed as serious, it must reject the report or direct the third party to undergo a further assessment. Should the third party not be satisfied with the rejection of the third party's serious injury assessment report, the third party must declare a dispute and lodge such dispute with the Registrar of the HPCSA. The Registrar must then appoint a tribunal of at least three medical experts to determine whether the third party has indeed sustained a serious injury.

**ISSUES TO BE DETERMINED**

[6] The crux of the review is to consider whether the appeal tribunal was bound by the opinion of Dr. Oelofse and Dr. Earle or whether they could under the circumstances have formulated their own opinion.

**SPINAL INJURY**

[07] The applicant submits that the respondents in their founding affidavit attached a report dated 6 May 2014 whereby Doctor Oelofse did an MRI scan of the neck

and it shows extensive degenerative changes in his neck. A radiological examination report from NC Radiology noted slight scoliosis to the right in the mid-cervical spine. The Doctor continued to opine that there are signs of degeneration and disc pathology at the level of C5/6. With the injuries to the thoracic or lumbar spine in concern, the Doctor also refers to the report of NC Radiology.

[08] The appeal tribunal findings stated that "it felt that the patient had a degenerative cervical spine and lumbar spine disease'. The applicant argued that the aforesaid feeling by the HPCSA is made in contradiction of the report by Dr. Oelofse. The applicant argued further that the appeal tribunal seems to have rejected the report without having the radiology report of NS Radiology

[09] The applicant submitted that HPCSA failed to utilize the provisions in terms of Regulation 3(11) of the Road Accident Fund Act and failure to do so is unreasonable and arbitrary for the respondent to not have utilized the empowering regulations to obtain the radiology report, based thereupon, to make an informed decision. Advocate Jacobs for the applicant referred the court to the **Supreme Court of Appeal case RAF and Others v Gouws and Another** [1] where it was stated that the tribunal does not have the final say in relation to causation between the driving of a motor vehicle and the injuries, the power is not provided for.

[10] The respondent submitted that only one RAF4 was filled by Dr. J J Schutte, a general practitioner who found a 17% whole person impairment rating which is insufficient to qualify the applicant for having a serious injury. Dr. Schutte recorded his findings as follows: "will need spinal orthopaedic surgeon's opinion and treatment on injuries to the cervical and lumbar spine with sic lesions C4/C6, L4-S1 both with radiolopathy. At the time of the applicant's treatment at the hospital, radiology examinations were ordered in relation to the applicant's skull, chest, shoulder both arms, hip, pelvis, and spinal (cervical, thoracic, and

[1] 2017 (SCA) 188

lumbar). These reports were not provided and no explanation was provided by the applicant.

[11] The applicant consulted further with Dr. L F Oelofse (orthopaedic surgeon) who recorded his findings as per applicant submissions, accordingly, the respondent argued that there are inconsistencies and or contradictory to Oelofse report.

i. The appeal tribunal noted that MRA scan of the neck according to the report shows ‘extensive degenerative changes’ but from the hospital records, there is no evidence of an acute disc injury at the time of the accident.

ii. Similarly, Dr. Schutte on the RAF4 Form highlighted that the seriousness of the spine injury in relation to C4 C6, L4-S1, but Dr. Oelofse's opinion is that a serious injury is found on the head. Dr. Earl was appointed to examine the applicant and made no finding in relation to serious injury on the head.

iii. Dr. Oelofse’s opinion was that there were signs of degeneration and disc pathology. Even though Dr. Oelofse’s report deals with the applicant's thoracic or lumbar spine, that was not classified as being a serious injury. The appeal tribunal consisting of various doctors viewed this as being age-related having sight of the applicant's employment history.

iv. Concerning the injury on the right shoulder, Dr. Schutte considered the combined effect of these injuries that the injury might respond well to further conservative treatment. Dr. Oelofse's narrative report shows that the injuries are permanent and failed to show that conservative treatment will not alleviate this injury and also failed to show that their injury was serious.

v. Dr. Oelofse made a psychological trauma diagnosis for which he is not an expert on the field that the applicant suffered a post-traumatic stress disorder. The findings of Mrs. Havenga, a counselling psychologist pointed out that some of the applicant's symptoms of depression were present before the motor vehicle collision, as a result of childhood trauma and difficult relationships.

[12] The applicant argued that, considering the evidence presented by the applicant, according to their conclusion, no serious injury finding was established. As a result thereof, factually, there is a rational basis why the appeal tribunal would not accept and follow the opinion expressed or noted by Dr. Oelofse.

**EPILEPSY**

[13] The applicant submitted that the appeal tribunal failed to require additional information for them to conclude that "in the absence of proof of treatment for epilepsy, the tribunal feel that this history is not serious". That the appeal tribunal's failure to utilize the regulations which empower them to obtain information renders the decision and reasons proffered by the appeal tribunal unreasonable and arbitrary.

[14] The applicant submits that the respondent's reasons are clear that they require additional information to make an informed decision. That the appeal tribunal's failure to utilize the regulations which empower them to obtain the required information renders their decision or finding unreasonable and arbitrary.

[15] That Dr. Earle (Neurosurgeon) provided a report to the appeal tribunal and finds that "This woman suffered a mild to moderate traumatic brain injury. She does not present with any cognitive or intellectual dysfunction, but this injury has resulted in post-traumatic epilepsy. These attacks are not fully controlled yet". The applicant argued that it is evident that the respondent contradicts the finding of the Neurosurgeon who physically examined the applicant. If the appeal tribunal was not satisfied with the finding of the Neurologist, it was obliged to have utilized the empowering regulations to make an informed decision.

[16] The respondent admits that on 13 November 2015, Dr. Earle noted a finding of epilepsy which started somewhere in 2011 during his consultation with the applicant as a history provided to him. The respondent argued that this history provided to Dr. Earle contradicts the history provided to Dr. Schutte and Dr. Oelofse and further that Dr. Earle did not complete the RAF4 form. The applicant consulted with Mrs. Havenga on 04 November 2015 and noted some complaints of epilepsy, the last episode was reported in 2014 but to Dr. Earle, the last episode was reported specifically on 16 October 2015 and 28 October 2015. Mrs. Havenga made findings concerning depression, not epilepsy. The applicant further consulted with Mrs. S Potgieter, an occupational therapist on

20 June 2014 where it was reposted to her that the applicant suffers from epilepsy from being involved in the accident. This diagnosis cannot be accepted before the court as an occupational therapist can never be an expert to issue a diagnosis for epilepsy. Lastly, the applicant consulted with Mrs. Van Jaarsveld, an industrial psychologist on 20 June 2014 the same day the applicant consulted with Mrs. Potgieter, the episodes of epilepsy were not recorded

[17] The respondent argued that there are discrepancies relating to the reporting of epilepsy, except the reports by the abovementioned experts, the applicant failed to submit additional information to assist her in proving her case. That the appeal tribunal members consisting of an occupational therapist, specialist neurosurgeon, and two orthopaedic surgeons after considering the evidence presented by the applicant concluded that there is no evidence of epilepsy.

[18] The crux of the review is to consider whether the appeal tribunal was bound by the opinion of Dr. Oelofse and Dr. Earle or whether they could under the circumstances have formulated their own opinion.

[19] The applicant applies to this court to review and to set aside the decision taken by the appeal tribunal and that the HPCSA to re-appoint a newly constituted appeal tribunal to determine the dispute reviewed. The applicant relies on the provisions of section 6(2) (c) (d) Promotion of Administration of Justice Act.
Advocate Jacobs for the applicant abundant the application that the applicant be present at the tribunal hearing and that the applicant be permitted to provide further evidence pertaining to her injuries at the tribunal hearing if she wishes to do so.

[20] Advocate Martin for the respondent argued that the appeal tribunal was not bound by the opinion of Dr. Oelofse and Dr. Earle and further that they have powers to formulate their own opinion. The respondent argued that the applicant seeks a confusing relief. That the applicant seeks an order that this court substitute the tribunal's ruling with one of its own and according to provisions of section 8(c) (ii) of PAJA such occurs in exceptional circumstances.

In addition to the principle of separation of powers, matters ought to be remitted to an administrative authority

**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*". 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)[2] 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 terms of what is called the AMA Guides[3] 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:

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

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[2] Assessment of serious injury in terms of section 17(1A)

[3] Defined in Regulation 1 as the American Medical Association's Guides to the Evaluation of permanent impairment, Sixth Edition

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

22.3. 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*** [4] and the court held as follows:

> "*The words 'serious' and 'severe' in these items are not defined. They connote a degree of impairment or disturbance or disorder that cannot be fixed by quantitative measure. The assessment requires a value judgment, though one to be performed based on 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'….*
>
> *[23] 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 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'.*

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

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[4] 2016(2) SA 93 (WCC)

[25] The main question is therefore whether a reviewing 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.

[26] The courts are obliged to interpret legislation granting powers to the administrators as requiring the power to be exercised reasonably and rationall**y. Cora Hoexter** [5] 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] The applicant main contention is that the appeal tribunal failed to exercise its 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 and correctly referred to the case of **RAF and Others v Gouws and Another par 17** supra were the facts of the case were as follows:

*'Mr. Gouws complained that the Tribunal had disregarded the documentary expert evidence supplied by him, which accepted that his shoulder injury was related to the accident and that it resulted in serious long-term impairment. Furthermore, in his founding affidavit, he stated that if the Tribunal had been concerned about the nexus between his injuries and the collision referred to earlier, it had the power, in terms of Regulations 3(11)(a) to (e) to obtain further information. Mr. Gouws stated that he had no idea why the fact that he was a karate instructor had been taken into account. In a supplementary affidavit, he stated that from the record supplied in terms of Rule 53 of the Uniform Rules, there appears to have been no basis upon which the undisputed information*

[5] Administrative Law in South Africa 1st Edition, page 307

*supplied by experts on his behalf was rejected. In his replying affidavit, Mr. Gouws complained that he had not been apprised that causation was an issue and had therefore not been given an opportunity to deal with it. He also denied that the Tribunal has the power to consider questions regarding the nexus between the injuries and the collision*

"*The court held that the power given to the tribunal in terms of the legislature is narrowly circumscribed. It is not of a broad discretionary nature, which would allow for further powers to be implied. The tribunal does not have the final say in relation to causation between the driving of a motor vehicle and the injuries, the power is not provided for"*

[28] In ***Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others***[6] **(CC) and *Pharmaceutical Manufacturers Association of South Africa & another: In re ex parte President of the Republic of South Africa & others***[7] the Constitutional Court made it clear that it is a fundamental principle of our law that public power can only be exercised within the bounds of the law. Repositories of power can only exercise such power as has been conferred upon them by law. This is a description of the principle of legality.

[29] 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 disfigurement. It is the sequelae of the injuries and not the injuries per se that play a role in the determination thereof. The report by Dr. Oelofse and Dr. Earle discuss the issue of spinal injuries and epilepsy and the respondent argue that there are contradictions and consistency in the reports of other experts. The applicant argued that the respondent failed to examine the applicant to ascertain the extent of injuries sustained, 'the feeling' by the appeal tribunal is made in contradiction of the report by Dr. Oelofse

[6] 1998 (ZACC) 17, 1999 (1) SA 374 CC

[7] 2002 (ZACC] 1, 2002(2) SA 674 CC

[30] I find that the appeal tribunal failed to require additional information, including the power to direct the claimant to submit a further assessment by an expert for them to exclude the possibility of epilepsy. The respondent also failed to use their powers to examine or to physically assess the applicant alleged spinal injury before making a finding that that “it felt that the patient had a degenerative cervical spine and lumbar spine disease’ without having their own radiology report. As a result, I conclude that the appeal tribunal's failure to utilize the regulations which empower them to obtain information renders the decision and reasons proffered by the appeal tribunal unreasonable and arbitrary.

[31] Having regard to the authorities and the principles set out above, I agree with the submissions by the applicants that the power given to the tribunal in terms of the legislature is narrowly circumscribed. It is not of a broad discretionary nature, which would allow for further powers to be implied. The tribunal does not have the final say in relation to causation between the driving of a motor vehicle and the injuries, the power is not provided for.

[32] The applicant has established that the decision of the tribunal was affected by the fact that the tribunal's decision was taken for a reason not authorized by the legislature which empowers the tribunal to act in terms of the PAJA. The relief sought in prayer 3 of this application is abundant.
I, therefore, conclude that the tribunal misconceived its jurisdiction and that the review must succeed

[33] The following order is made:

[33.1] The reviewing and setting aside of the decision of the third respondent dated 23 November 2016 stating that the injuries suffered by the applicant are non-serious in terms of section 17(1)(a) of the Road Accident Fund, Act 56 of 1996 is hereby granted.

[33.2] That the respondent is directed to re-appoint an appeal tribunal to determine the dispute reviewed and set aside in paragraph 1 and to

further reconsider all medical reports in respect of the applicant's injuries.

[33.2] The respondent is to pay costs of the application

**K J MOGALE**

ACTING JUDGE OF THE
GAUTENG DIVISION,
PRETORIA

Electronically submitted.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 April 2021.

Date of hearing: The matter was heard by way of video conferencing or otherwise, the matter may be determined accordingly. The matter was set down for a court date of 15 March 2021.

Date of judgment: 12 April 2021

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| Heard on | : 15 March 2021 |
| For the Plaintiff | : Adv H Martin |
| Instructed by | : VZLR INC ATTORNEYS |
| For the Defendant | : Adv M Jacob |
| Instructed by | : MBOWANE ATTORNEY |
| Date of Judgment | : 12 April 2021 |