IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 28001/2016

2825/2016

In the matter between:

M **APPLICANT**

and

M J **APPLICANT**

AND

HEALTH PROFESSIONS COUNCIL OF SOUTH **FIRST**

RESPONDENT

AFRICA

THE REGISTRAR OF THE HEALTH PROFESSIONS **SECOND**

RESPONDENT

COUNCIL OF SOUTH AFRICA

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL **THIRD**

RESPONDENT

THE ROAD ACCIDENT FUND **FOURTH**

RESPONDENT

JUDGMENT

TLHAPI J

Introduction

[1] These are opposed applications in which the applicants seek the following orders:

1. The review and setting aside of the decisions of the second respondent which determined that the injuries sustained by the applicants were not serious within the meaning of section 17(1A) of the Road Accident Fund Act 56 of 1996 and its regulations
2. 'That the first respondent be directed to appoint a new Appeal Tribunal to determine the disputes reviewed and set aside in paragraph 1 and to further reconsider on all medico-legal reports that served before the Tribunal in respect of the applicants' injuries and in addition and in respect of the second applicant that the reports of Dr Hoffman and Rital van Biljon be considered;

The review applications are in terms of the Promotion of Administrative Justice Act, 3 of 2000, sections 6(2)(d); section 6(2)(e)(iii) and section 6(2)(e)(vi). The decision in respect of the first applicant was taken on 30 September 2015 and in respect of the second applicant on 28 August 2015.

Since both applications were heard on the same day this judgment deals with the applications in respect of both applicants.

FACTUAL BACKGROUND (M)

[2] The applicant instituted a claim for compensation for non-pecuniary loss and presented an RAF4 form to the fourth respondent, completed by Dr J.H.S Van Zyl (Orthopaedic Surgeon) who had to assess whether the applicant had suffered serious injury, basing such assessment on the AMA Impairment Rating and on the Narrative test.

[3] After the fourth respondent rejected the RAF4 as not representing a serious injury an Appeal Tribunal was appointed to evaluate and assess all the medico-legal records from Doctor AC Strydom (Industrial Psychologist); Ms Rita van Biljon (Occupational Therapist); Dr H.B Enslin (Orthopaedic Surgeon)

[4] The Tribunal consisted of a panel of experts, Doctors, N Mabuya (Occupational Medicine); JR Ouma (Specialist Neurosurgeon); Prof Ngcwelane (Orthopaedic Surgeon) Prof JH Flemming (Occupational Surgeon). Their decision that the applicant's injuries did not qualify as serious was communicated to the applicant's attorneys on 30 September 2015. The applicant contended that the decision of the tribunal was procedurally unfair because it failed to mention the reports which served before it and no reasons were given for their decision. The Tribunal failed to address the long term impairment as opined in the expert reports in that they failed to apply the Narrative Test to the facts presented in such reports

[5] In the record of proceedings availed in terms of rule 53 the resolution of the tribunal was recorded as follows:

"The tribunal members looked as the clinical facts presented before them

by the various reports of the medical experts, including that of the treating occupational therapist, the psychologist's report and came to a conclusion that this case is not serious and that it does not qualify both under the AMA rating system as well as the narrative test"

[6] Criticisms levelled against the tribunal were that:

- It did not receive submissions for the fourth respondent;
- Failed to consider medical reports presented and the applicants long term serious disfigurement; and it failed to call for a separate assessment;
- No reasons were given for the findings; thereby making it difficult to assess the reasoning behind the conclusion arrived at based on the expert medico-legal reports before it;
- Despite the absence of contradictory evidence, the tribunal arrived at a conclusion that the injuries were not serious;

[7] The RAF 4 completed by Dr van Zyl recorded the following :

- That applicant a grade 11 pupil was involved in a motorbike accident, admitted to hospital treated with analgesics, x-rayed, traction applied to right leg and wrist -plate and screws, POP, hip-bruising, laceration to the right eye. On examination it was recorded that the radius and femur fractures had healed; he recorded the applicant's other symptoms and complaints and his diagnosis;
- He had concluded that the applicants Whole Person Impairment was 10%, and that on the narrative test that the applicant suffered from a serious long term impairment;
- Multiple injuries- he has plate & screws in-situ in the right wrist R.O.M

deficit & weakened right hand grip;

- He cannot carry heavy medium to heavy objects; in general it interferes with his ADL's
- He was a serious contender on the sports field regarding Gold, Cricket & other recreational sports and was unable to compete anymore;
- Due to his injuries … he failed Gr 11 at school…..

[8] It was contended that neither the opinion or the reasons for the opinion of Dr Enslin were gainsaid by the tribunal. Having identified the injuries sustained and the sequalae of the applicant relating to the right knee, right wrist, right shoulder, right femur as recorded in his medico legal report concluded, by engaging the narrative test, that the applicant suffered serious long term injury and loss of function and qualified to be awarded general damages and his findings were:

- The applicant has reached Maximum Medical Improvement but the injuries will be felt for years to come;
- The long term effects of the injuries sustained by the Applicant have left the Applicant with serious and long-term consequences;
- The applicant's prospects as an excellent sportsman have been negatively impacted upon;
- The applicant has limitations in respect of his earning capacity. He will not be able to make a living from sport and will have to perform administrative work tasks and his work speed could slow down as he ages;
- The applicant's long term prognosis is limited

- There is 60% possibility that he could develop arthritis in his right wrist joint;
- The probabilities are that the applicant would have to undergo further surgical treatment and long term treatment relating to the injuries sustained and effects of the sequalae reported,

[9] It was contended further that the tribunal's decision was unreasonable in that the opinions of Elna Kingsley (occupational therapist), who relying on the same information as Dr Enslin did, concluded that the applicant would be restricted to 'medium categories of work; the injuries to his right wrist, right hip and knew restricted his capacity to work. Therefore, his choices of work were limited and that his work capacity would improve with proper treatment. Dr Strydom (Industrial Psychologist) also relying on the same medical reports and the applicant's sequalae opined that the he could not function at the capacity he did pre-morbid, the accident had delayed progression in the work's environment. The applicant had as a result become less competitive in the work market.

[10] It was common cause that the appeal tribunal had not received any input from the fourth Respondent ('the Fund') despite an invitation to do so, therefore the only reports available were those presented by the applicant. The second respondent was therefore obliged to appoint a panel of experts who participated in an advisory capacity. The answering affidavit was deposed to by the chairperson of the appeal tribunal, Dr Nomonde Buyisiwe Mabuya. It was averred that there was no need to call for additional reports. They concluded that the applicant's Whole Person Impairment did not reach the 30% mark and were therefore, not serious

injuries under the Narrative Test.

[11] Before the sitting each member of the tribunal is said to be availed with a pack in respect of all individual files to be considered at the meeting. This will consist of the RAF4, all the medico-legal expert reports, including hospital, photographs, actuarial reports, relied upon by them of evaluate each case. They are expected to independently analyse, evaluate and formulate their individual views on all the facts before them relating to the serious injury before the scheduled meeting. It was explained that each member would have worked on the different files for at least 16-20 hours and each file is allocated 30 minutes for consideration. In as far as the record is concerned what is recorded is what was communicated to the applicant. There are no minutes of the deliberations or recordings and no transcript of such deliberations was available.

[12] It was contended that the content of the medico-legal reports, the Regulations and AMA Guides played a role in the determination of the seriousness of the injuries. The applicable rules were dealt with in the answering affidavit and these shall be dealt with below. The medico legal reports were revisited, analysed and reference was had to key findings and inconsistencies in the reports dealing with the applicant's condition. It was denied that the applicant had failed to apply the Narrative test or any of its powers or obligations when considering the reports. It was contended that the applicant had elected not to institute PAJA proceedings and decided to launch the application without seeking reasons for the decision of the tribunal. The main findings of the tribunal are to be found from paragraph 63-69 of the answering affidavit. They unanimously found that the

applicant's injuries have not resulted in significant change to his personal circumstances. It was contended that the applicant could not second guess the tribunal's unanimous conclusions as mentioned in the affidavit.

[13] It was contended in reply that the tribunal paid scant attention to the reports and that it was not entitled to advance additional reasons as it did for its decisions.

M J

[14] The applicant was walking on the side of the road when he was hit by a motor vehicle. He was seen by Dr Oelofse who after examination recorded the following in the RAF4 form:

- In terms the AMA results he recorded that the applicant suffered a WPI of 20%; and
- On the Narrative Test that he suffered :
- A serious long term impairment
- The patient is candidate for long term medical and surgical intervention;
- He will need long term rehabilitation by means of physiotherapy and Biokinetics;

Further medico-legal expert reports by Dr Hoffman (Plastic Surgeon) and Rita van Biljon (Occupation Therapist) both recording the negative impact the injury had on his future working ability.

[15] The tribunal consisting of Dr Szabo (Orthopaedic Surgeon); Dr J Reid (Neurologist); Dr J Crosier (Orthopaedic Surgeon) recorded the following:

"The medico legal report states that there is mal-union of the fracture with 25 degree angulation and early medical compartment osteoarthritis therefore the Tribunal is unanimous that the claimant has non-serious musculoskeletal injuries"

Also in this instance it is contented that the decision of the tribunal was irrational and unreasonable, and that is amounted to an error of law or fact and was procedurally unfair.

[16] The supplementary affidavit highlighted further observations in the medico-legal reports which did not serve before the tribunal, that of Dr Hoffman as articulated in paragraphs 15 and 16 and that of Rita van Biljon paragraph 17. The applicant presented these reports on the basis that the tribunal was empowered to call for additional medical reports and had failed to do so. Some of their findings were:

DR HOFFMAN

- Scarring over the knee which will not benefit from surgery;
- The scarring of the left lower leg will not benefit the scar prevention;
- Ant attempt at revision might cause complications as the applicant had already contracted sepsis once;
- He defers to the opinion of a clinical psychologists with regards to the applicants acceptance of the fact that the scars will permanent;

RITA VAN BILJON

- When the applicant returned to work his employer accommodated him to perform light jobs until his early retirement due in May 2011;

- The applicant has been experiencing intermitting left lower leg pain since the accident which impacts on his ability to lift and carry weight while maintaining an acceptable biochemical alignment;
- The osteoarthritis in the applicant's knee affects his ability to assume dynamic positions such as squatting and crouching frequently as any frequent adoption of his positions will contribute to further degeneration;

[17] The analysis by the tribunal of the reports are dealt with paragraphs 63-38 and this was the basis of their finding that the applicant did not suffer serious injuries as contemplated in the Regulations.

[18] The answering affidavit at paragraph 42-44 also deals with the process engaged by the panel in arriving at its decision as explained in paragraph 11 above.

THE LAW

[19] Compensation by the fourth respondent ('the Fund') for non-pecuniary loss suffered by a third party in collisions is provided for in section 17 (1) and 17 (1A) od the Road Accident Fund Act 56 of 1996 (the Act') and its Regulations. According to the Act and its regulations compensation is allowed only in the event of a serious injury being identified. The third party is required to submit to be assessed by a medical practitioner recognized by the first respondent and the method of assessment is one prescribed in the Act and regulations. The assessment takes the form of a physical examination. The gathering of information is objective and in that it is sourced from medical expert reports and the RAF4 and from personal circumstances obtained from the third party. It is common cause that the

initial assessment was disputed and the appeal tribunal was constituted in terms of the of the regulations and there was no objection to its composition.

[20] Compensation is awarded to those having suffered serious injury as prescribed by the Act and a serious injury results where there is a Whole Person Impairment ('WPI') of 30% or more as determined according to the method in the Ama Guides ('the Ama Guides (American Medical Association's Guide to the Evaluation of Permanent Impairment). The rating can only be done once the third party has reached the maximum medical improvement status, ('MMI'), which is recovery at a stage where further "medical or surgical intervention cannot be expected to improve the underlying impairment'. The third party must have reached permanent impairment.

[21] The alternative assessment in the Narrative test is used in order to evaluate the injuries of the third party and where the injury does not reach the 30% or more mark. Here the 'Impairment of the Whole Person' is assessed as a serious injury where (a) it is a serious long term impairment or loss of body function; (b) constitutes permanent serious disfigurement; (c) resulted in a severe long-term mental or long term behavioural disturbance or disorder; or (d) resulted in loss of foetus.

[22] The appeal tribunal has various powers, which include and subject to the terms and method set out in the regulations, to call the third party for further assessment; to direct that the third party present him/herself for further examination by the tribunal; to direct that further medical reports be placed before the tribunal and further submissions be made; determine that

in its majority view the injury was serious; confirm and accept or reject the initial assessment or substitute its assessment. The findings of the tribunal are final and binding, Regulation 3(13).

RATIONALITY AMND REASONABLENESS

[23] An administrative decision is reviewable under PAJA where the decision taken by the decision-maker was irrational and unreasonable. Where the court is faced with this determination it is not its function to substitute the decision of the decision-maker with its own, but its function is to determine whether the process and the decision flowing from the facts/evidence before it, were related , i.e that the decision served the purpose for which the authority to make such decision was given and, that the procedure was a fair one. These trite principles have been stated in various matters before our courts: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 45; *Pharmaceutical Manufactures Association of South Africa and Another in re: Ex Parte President of the Republic of South Africaand Others 2000 (2) SA 647 (CC) at para 85.* In *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 51 the following was stated:

> "..But, where the decision is challenged on grounds of rationality. Courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And

if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution"

[24] It was submitted that the decision was arbitrary, not reasonable or justified on the evidence disclosed. The discretion exercised by the decision maker should be discerned from the record and from an evaluation of the facts on record. With regard to applicant Maraz it was argued for the respondents that the applicant proceeded to launch the application without first seeking reasons and that these were provided in the answering affidavit and that it was those reasons to which this court should look in order to determine whether there was a rational connection between the conclusion or decision on the material made available. It was further submitted, that the decision must be viewed in light of the reasons provided in the answering affidavit. In *Brown v The Health Professions Council of South Africa and Others* case 6449/2015 (WCC) [2016] JOL 34788(WC) it was stated that the brief reasons given in a letter communicating the decision 'must not be critically read so as to exclude any other explanation to its findings. This seems to suggest that the respondent in this matter would be justified in giving extensive reasons in the answering affidavit. In Brown supra the court took into consideration that the applicant did not give the respondent an opportunity to give reasons, having asked for such reasons to be provided within 90 days and had launched the application in less than a month of such letter and without waiting for the reasons within the time frames provided.

[25] In National Lotteries Board v South African Education and Environment Project 2012 (4) SA 504 (SCA) at paragraph 4, Cachalia JA stated:

" The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly and the failure to give reasons, which include proper or adequate reasons, should ordinary render the disputed decision reviewable. In England, the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given after wards -even if they show the original decision may have been justified.

For in truth the latter reasons are not true reasons for the decision but rather an ex post facto realization of a bad decision" (my underlining)

[26] In my view there is no merit in the suggestion that the applicant launched an application before seeking reasons as it was procedurally required to do and should therefore be satisfied with the reason sin the answering affidavit. What is important is for this court to determine the connectivity between the means chosen to achieve the decision. The key is to determine whether the reasons given in the answering affidavit tally with those in the record as given in terms of Rule 53 of the Uniform Rules of Court. What the court is required to do, is not to test the correctness or not of the decision, or to substitute the decision, but to see from the record if the tribunal applied its mind to what it was empowered to do in light of the information before it. Otherwise not engaging in this exercise would open flood gates to having reasons being supplemented in an answering affidavit where they were not given in the record.

[27] It is my view, that if the record is silent on the reasons then the contention of the applicant that the findings in the medico-legal reports remain

uncontested should stand. However, if in the record there are reasons as explained in the answering affidavit or related to the explanation in the answering affidavit then the criticism by the applicants has no merit.

M: Although the record mentions Dr Van Zyl, it recorded that there were no submissions. It does however acknowledge in its finding that there were various expert reports by the occupational therapist and t6he psychologist without mentioning their names and it excluded mentioning that the applicant was again seen by an orthopaedic surgeon. Having regard to paragraph 11 above, I come to the conclusion that it is important for the record to correctly reflect in column 3 that the applicant provided additional reports and to mention the experts by name and to give reasons in column four why the tribunal was of the view that regardless of such reports, on the Narrative Test the injury remained non-serious that is, which aspects of those reports were rejected. The applicant was seen and examined by two Orthopaedic surgeons Drs Van Zyl and Dr Enslin and the panel had two orthopaedics Drs Ngcelwane and Flemming. There is no indication in the record were availed to the panel a mere 7 days before the scheduled hearing, this probably was at short notice.

MJ: There was only one report, that of Dr Oelofse which served before the tribunal. The subsequent reports were filed after the tribunal had taken a decision and it was not appropriate to request that the applicant's case be considered by the panel in light of fresh medico-legal reports

being present. The tribunal was *functus officio.*

I shall therefore concentrate on Dr Oelofse's report. Where the WPI is below 30% and in terms of the regulations the applicant is afforded a second opportunity for assessment according to the narrative test. In the RAF4 and according to the Narrative Test there was long term impairment and it was recommended that there be further assessment for the applicant. No reasons were given by the tribunal why this aspect of Dr Oelofse's recommendation was not accepted as warranting a further assessment. In the notice of motion the applicant calls for further and alternative relief. I am of the view that in light of Dr Oelofse's recommendation and in the interests of justice it is appropriate to order that the reports of Dr Hoffmann and Rita van Biljon be considered for purposes of assessing the injuries of the applicant.

In view of the above reasons the decisions of the third respondent are reviewed and set aside.

[28] In the result the following order is given;

It is ordered:

1. That the decisions of the second respondent dated the 28 August 2015 and 30 September 2015 are reviewed and set aside.
2. In respect of the first applicant M and for determining the injuries, the first respondent is directed to reappoint a new Appeal Tribunal to determine the dispute reviewed and set aside under paragraph 1 above to reconsider all the medico-legal reports that served before the Tribunal, in respect of the injuries of M.

3. In respect of the second applicant M J and for determining the injuries, the First respondent is directed to reappoint a new Appeal Tribunal to determine the dispute reviewed and set aside under paragraph 1 above and to reconsider all the medico-legal reports that served before the Tribunal together with those of Dr Hoffmann and Rita van Biljon.
4. The second respondent is ordered to pay the costs of both applications.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 28 APRIL 2017

JUDGMENT RESERVED ON : 28 APRIL 2017

ATTORNEYS FOR THE APPLICANT : VAN ZYL LE ROUX INC

ATTORNEYS FOR THE RESPONDENT : GELDENHUYS MALATJI INC