IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION,)

23/2/18

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

23/2/2018 .....

DATE **SIGNATURE**

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 29967/2016
30323/2016

In the matter between:

K T MOTAU (Case No-29967/2016)	APPLICANT
M M MASILELA (Case No-30323/2016)	APPLICANT
and	
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	1st RESPONDENT
THE REGISTRAR OF THE HEALTH	2nd RESPONDENT

PROFESSIONS COUNCIL OF SOUTH AFRICA

ROAD ACCIDENT FUND APPEAL TRIBUNAL 3rd RESPONDENT

ROAD ACCIDENT FUND 4th RESPONDENT

JUDGMENT

Before: HOLLAND-MUTER A/J:

[1] The applicants each instituted a separate claim against the 5th respondent (the "Fund") for damages they suffered as a result of the respective motor vehicle accidents. The dispute between the applicants and the Fund is whether the Fund is liable under the provisions of section 17(1) of the Road Accident Fund Act 56 0f 1996 to compensate them for general damages-or non-pecuniary loss, as it is called in the section- to instances where the applicants suffered 'serious injuries' within the meaning of section 17(1A) of the Act.

[2] In terms of the provisions of section 17(1) the Fund was liable to compensate the applicants but the all important limitation to this proviso in section 17(1A) introduced during 2005 limits the Fund's liability in these instances to so-called serious injuries as assessed in the prescribed way as

determined by Regulation 3 published in the Government Gazette of 21 July 2009, the regulations.

[3] This assessment is done by a medical practitioner under the Health Professions Act 56 of 1974 and on the basis of the "prescribed method", to mean prescribed under section 26. In terms of regulation 3(3)(a) a third party who has been assessed, shall obtain from the medical practitioner concerned a serious injury assessment report, this report also referred to as the completed RAF 4 report.

[4] Both applicants lodged their respective claims with a completed RAF 4 form respectively annexed to their claims. Both applicants' assessments in the respective RAF 4 forms were rejected by the Fund, the matters taken on the prescribed appeal to the 3rd respondent (the RAF Appeal Board) where both appeals were unsuccessful, hence these review applications. The Motau appeal heard on 9 September 2015 and the Masilela appeal heard on 14 October 2015.

[5] Regulation 3 provides for the assessment of a serious injury in terms of section 17(1A). Three different scenarios are possible:

5.1 The Minister may publish a list of injuries which do not qualify as

serious. If a third party's injury fall within this description, the injury shall qualify as serious. This is not applicable in these two matters. See regulation 3(1)(b)(i).

5.2 If the medical assessment results in a 30 % or more impairment of the Whole Person (WPI) as provided in the AMA Guides, the injury **must** be assessed as serious. See regulation 3(1)(b)(ii).

5.3 If the injury does not qualify as serious under 5.2 above, regulation 3(1)(b)(iii) provides that such injury may be assessed under the so-called '***narrative test***' to determine whether the injury is serious or not. See regulation 3(1)(b)(iii) where an injury which does not result in 30% or more WPI, may be assessed as serious if that injury results in a serious long term impairment or loss of a body function or constitutes permanent serious disfigurement or long term mental disturbance etc. Both matters resort under this provision.

[6] The Fund is only liable to compensate a third party's claim for general damages if the claim is supported by a serious injury assessment and the Fund is satisfied that the injury has been correctly assessed. If not, the Fund must either reject the third party's RAF 4 form and give reasons therefore or direct the third party to submit him/herself to a further assess-

ment by the Fund's designated medical practitioner. See regulation 3(3)(d). The Fund rejected both applicants' RAF 4 forms.

[7] An aggrieved third party may declare a dispute in terms of regulation 3(4) and the matter will then be referred to an appeal tribunal of three independent medical practitioners with the necessary expertise in the appropriate area of medicine, appointed by the registrar of the Health Professions Council (HPCSA), the 2nd respondent in both matters.

[8] Regulation 3(4) to 3(13) lays down the procedure to be followed by the tribunal to enquire into the dispute. This includes that both parties may file submissions, medical reports and opinions. The tribunal may hold a hearing for the purpose of receiving legal arguments by both sides and may seek the recommendation of a legal practitioner in relation to the legal issues arising at the hearing. The tribunal has wide powers to gather information and may direct that further medical reports be obtained.

[9] The action performed by the Fund to consider the RAF 4 form and to reject the assessment of the injury, and the tribunal to consider the dispute amounts to the performing of an administrative action. See ***Road Accident Fund v Duma and three related cases (Health Professions Council of***

South Africa) [2012] ZASCA 169 (27 November 2012) par [19]. Neither the Fund's rejection of the RAF 4 assessment nor the Tribunal's decision is subject to an appeal to the court. The court's control over these administrative actions is by means of the review proceedings under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (known as '**PAJA**').

LEGAL NATURE OF THE GENERAL GROUNDS OF REVIEW:

[10] When deciding the dispute before it, the Tribunal should keep in mind the following to ensure that its decision will be in accordance with the requirements for a valid administrative action:

10.1 The decision should be taken on an accurate factual basis to ensure that no material *mistake/error of fact* renders the decision subject to review. See **Dumani v Nair and Another 2013 (2) SA 274 SCA par [29]. De Ville,** in **Judicial Review of Administrative Action in South Africa Butterworths ,** on p 171 states that the validity of an administrative action will only be affected where the decision was materially influenced by an error of fact, ie it would have made a difference in the outcome of the decision had the error of fact not been made. See **S A Veterinary Council of South**

Africa v Veterinary Defence Association 2003 (4) SA 546 SCA p 40-44. Section 6(2)(f)(ii)(cc) of **PAJA** provides for review if the action itself is not rationally connected to the information before the tribunal.

10.2 Section 6(2)(d) of **PAJA** provides that the administrative action may be reviewed if the action was materially influenced by an error of law. See **De Ville supra on p 152-154.**

10.3 When reviewing an administrative action of an organ, the court should interpret the relevant legislation, ie regulation 3 in this instance, granting powers to administrators with reference to the power to be executed in a reasonable way. See O'Regan J in **New National Party of South Africa v Government of the RSA 1999 (3) SA191 CC par126: "*determining what procedural fairness and reasonableness require in a given case, will depend amongst other things, on the nature of the power*".** See **De Ville supra 212-214.**

10,4 **PAJA** recognizes rationality as a ground for review in section 6(2)(f)(ii) meaning that in essence a decision must be supported by

the evidence and information before the administrator as well as the reasons given for it.

10.5 Section 33(1) of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter referred to as the "Constitution"), gives everyone the right to administrative action that is procedurally fair. A fair administrative procedure is dependent on the circumstances of each individual case. See section 3 of **PAJA.**

10.6 Although an effected person must be given a reasonable opportunity to make representations, this does not automatically mean the person has a right to be heard in person. This will be depend on the specific circumstances of the case. See **De Ville supra 254.** The administrator has a discretion to exercise in deciding whether to hear the person to present and dispute information and arguments. The ***audi alteram partem*** maxim means the other party must be heard before the decision is made. Procedural fairness does not mean that all the technical rules of evidence which apply in a court of law need to be followed. See **De Ville supra 255.**

10.7 The tribunal must be impartial. It is nowhere alleged that the tribunal in these two matters where bias and it is not necessary to dis-

cuss this aspect further.

10.8 The tribunal must give reasons for its decision. It is not possible to state what constitutes sufficient or adequate reasons. It will depend on each individual case. The gravity of the administrative act will determine the degree of particularity of the reasons. See **Moletsane v Premier of the Free State 1996(2)SA 95 O on 98G-H.** See **De Ville supra 292** on the adequacy of reasons.

10.9 If the administrator (the tribunal in these applications) already has given its reasons for the decision as required by section 5 of **PAJA** before the decision is challenged, it will be undesirable to elaborate thereon once it is served with an application. It may however provide a background to the decision in its opposing affidavit. See **De Ville supra 313.**

[11] The question to be answered in both cases is whether the reasonable administrator, with the evidence disclosed, would have reached the same decision that the tribunal reached? If not, the matter referred back to a newly appointed tribunal to re-consider the issues on all the evidence presented.

CASE NO 29967 / 2016: M T MOTAU:

[12] From the record received from the tribunal in terms of Rule 53 the following is clear:

12.1 The tribunal considered the matter on 9 September 2015.

12.2 The applicant presented the following relevant medico-legal reports;

12.2.1 RAF 5 form;

12.2.2 RAF 4 as completed by Dr Schutte;

12.2.3 RAF 4 and narrative test completed by Dr Erlank;

12.2.4 Medico-legal report by Dr Oelofse;

12.2.5 RAF 1 form.

12.3 The tribunal considered the matter on 9 September 2015 and found that the injuries are not serious as contemplated in the Act.

12.4 The applicant's matter was number 4.21 on the schedule of the tribunal on the said date and a short summary is found on p 118 of the record bundle. From the notes it is clear that no reference is made to the report of Dr Oelofse. The tribunal also held that it was not convinced that the reports on the hip pathology was accident related.

12.5 The Fund made no submissions and filed no medico-legal reports on its behalf. It can be accepted that the decision was made on the evidence submitted on behalf of the applicant. The fact that the tribunal had reservations on the information in some of the reports which led to the decision, in my view called for an explanation to the tribunal by the applicant on these aspects to reach clarity on the hip pathology and Dr Oelofse's report. In my view this leads to the finding that the tribunal did not consider all evidence presented and that the applicant should have been present to clarify the uncertainty of the tribunal's concerns with regard to the hip pathology. This was a case where the ***audi alteram partem*** maxim should have been applied in having the applicant in person or represented before the tribunal.

[13] The attempts by the chair of the tribunal to "correct" the incomplete reasons by way of the averments in the opposing affidavit, if taken into account what was stated above by **De Ville** (par 10.9 above), is undesirable and amounts to the proverbial second bite of the cherry.

[14] I am therefore of the view that the decision of the 2nd respondent should be set aside and that the 1st respondent should re-appoint a new tribunal

to determine the dispute. See order below.

CASE NUMBER 30323 / 2016: M M MASILELA:

[15] From the record received from the tribunal in terms of Rule 53 the following is clear:

15.1 The tribunal considered the matter on 14 October 2015.

15.2 The applicant presented the following relevant medico-legal reports:

15.2.1 RAF 5 form;

15.2.2 Report by Dr L Berkowitz;

15.2.3 RAF 4 and narrative test completed by Dr JD Erlank;

15.2.4 RAF 4 and narrative test completed by Dr TJ Enslin;

15.2.5 Medico-legal report by Dr K Truter.

15.2.6 RAF 1 form.

15.3 The tribunal considered the matter on 14 October 2015 and found that the injuries were not serious as contemplated in the Act.

15.4 The applicant's matter was number 3.7 on the schedule of the tribunal on the said date and a short summary of the proceedings is found on p 43 of the record. It is clear from these notes that only Dr

T Enslin's report was considered. Nothing is recorded about the other medico-legal reports submitted to the tribunal.

15.5 The Fund made no submissions and filed no medico-legal reports on its behalf. It can therefore be accepted that the decision was made on the evidence submitted on behalf of the applicant. The applicant's attorneys further also requested the tribunal to address the tribunal to hear evidence with regard to the alleged injury. It was submitted that it would be in the best interest of all the parties if evidence be heard and oral arguments be submitted. See letter dated 15 September 2015 on p 32-33. This request to be present and to address the tribunal was ignored in toto and no response was coming from the tribunal. In my view this amounts to an unfair procedure and the ignorance of the well known maxim of ***audi alteram partem.*** The tribunal in all probabilities never considered such request and never gave any reasons why such request was not considered at all.

[16] As indicated in par [13] above, the attempt by the chair of the tribunal to "correct" the record in the opposing affidavit is undesirable.

[17] As in the instance of Mudau above, I am of the view that the decision of

the 2nd respondent should be set aside and the 1st respondent should re-appoint a new tribunal to re-consider all the medico-legal reports and/or consider hearing the applicant in person or hear legal arguments on behalf of the applicant.

ORDER:

A: CASE NUMBER 29967 / 2016: K T MUDAU:

[1] The decision of the 2nd Respondent as decided on 9 September 2015 and communicated on 15 October 2015 to the effect that the injuries suffered by the Applicant (KT Mudau) are non-serious in terms of Section 17(1A) of the Road Accident Fund Act, Act 56 of 1996 and its regulations is set aside;

[2] The 1st Respondent is directed to re-appoint a new Appeal Tribunal to determine the dispute reviewed and set aside in prayer 1 above and to further reconsider all medical-legal reports that served before the Tribunal 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 per-

taining to his injuries at the Tribunal hearing if requested by the Tribunal;

[4] That the 2nd Respondent be ordered to pay the costs of this application.

B: CASE NUMBER 30323 / 2016: M M MASILELA:

[5] The decision of the 2nd Respondent as decided on 14 October 2015 and communicated on 2 December 2015 to the effect that the injuries suffered by the applicant (MM Masilela) are non-serious in terms of Section 17(1A) of the Road Accident Fund Act, Act 56 of 1996 and its regulations is set aside;

[6] The 1st Respondent is directed to re-appoint a new Appeal Tribunal to determine the dispute reviewed and set aside in prayer [5] above and to further reconsider all medical-legal reports that served before the Tribunal in respect of the Applicant's injuries;

[7] 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 his injuries at the Tribunal hearing if requested the Tribunal;

[8] That the2nd Respondent be ordered to pay the costs of this application.

[9] Both applications were heard on the same day and both applicants and the respondents were represented by the same counsel at the hearing. Both counsel's fees are restricted to one day fee for the hearing.

J HOLLAND-MUTER AJ
23 FEBRUARY 2018

Date of hearing of both matters: 25 October 2017.
Judgment delivered: 23 February 2018

FOR APPLICANTS:

Adv HHA KRIEGE
Attorneys: VZLR
Ref: JB GRIMBEEK/sp/MAT414187
Tel: 012-435 9444

FOR RESPONDENTS:

Adv L NYONGIWA
Attorneys: GILDENHUYS MALATJI
Ref: T MALATJI/T MAODI/HMA/01777262
Tel: 012-428 8600