IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

Case number: 2015/63370

Date: 14/5/2018

In the matter between:

SEKAILE LEBOGANG KGAREBE	**Applicant**
and	
HEALTH PROFESSIONS COUNCIL OF SA	**1st Respondent**
A.J.P BOTHA N.O.	**2nd Respondent**
A.A ADEN N.O.	**3rd Respondent**
DR. IRSIGLER N.O.	**4th Respondent**
D.M. MANYANE N.O.	**5th Respondent**
ROAD ACCIDENT FUND	**6th Respondent**

JUDGMENT

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1. Applicant has launched an application for the review and setting aside of an administrative decision made on 12 November 2014 by the Road Accident Appeal Tribunal, a tribunal established in terms of section 26 of the Road Accident Fund Act, Act 56 of 1996 ("the Act"), read with section 3 (8) of the Road Accident Fund Regulations ("the regulations") as

published in Government Gazette no. 31249 dated 21 July 2008. Applicant seeks either an order that the action be continued on the basis that the South Gauteng High Court shall determine the quantum of her general damages, alternatively that the matter be referred back to a new appeal tribunal for re-consideration.

2. Initially, all six respondents opposed the application. Sixth Respondent has subsequently by notice withdrawn its opposition.

3. 1st Respo,ndent is the statutory body tasked with appointing the tribunal. 2nd to 5th Respondents were the members of the tribunal, and they are cited in their capacity as such.

4. On 11 December 2011 applicant was injured in a motor collision when, whilst walking in the Boksburg area, she was struck by a car. She was hospitalized for a period of approximately eight days. On behalf of applicant, her attorneys filed a claim for compensation for damages with the 5th Respondent, and on 29 April 2013 summons was issued on her behalf. Applicant's claim included general damages for non- pecuniary loss on the grounds that she had been seriously injured.

5. On behalf of 5th Respondent, a plea was filed taking issue, *inter alia,* with the fact that applicant was claiming for non-pecuniary damages even though the procedure for determining the existence of serious injury, as required by the Act and the regulations had not been completed.

6. On 12 December 2012 applicant submitted a "Serious Injury Assessment Report" by Dr. M Jivan, to 5t h Respondent. The report revealed that applicant had injuries to her lower extremities, which Dr. Jivan assessed as having caused a 45% Whole Person Impairment ("WPI"). The report was accompanied by a radiologist's report that showed that applicant had a "well healed mid-shaft tibial fracture".

7. The assessment was rejected by 5th Respondent , whereafter applicant filed a dispute accompanied by a bundle of medical-legal documents relating to the applicant's injury. As a result of the dispute, the tribunal was tasked with considering and determining the dispute in accordance with

the regulations.

8. The tribunal heard the matter on 12 November 2014, and its finding, that the injuries were not serious, was conveyed to applicant's attorneys by letter on 24 November 2014. It is against this finding that the application is aimed.

CONDONATION

9. The Promotion of Administrative Justice Act, Act 3 of 2000 ("the PAJA Act") deals with the right of a person to administrative justice that is lawful, reasonable and procedurally fair. In the PAJA Act administrative action is defined as:

"... *any decision taken, or any failure to take a decision, by-*

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;....."

10. 1st Respondent is an organ of state as defined by section 239 of the Constitution, and the tribunal is a "tribunal" as defined by the PAJA Act.

11. Section 7 (1) (b) of the PAJA Act provides that any proceedings for judicial review of a decision of the tribunal must be instituted without unreasonable delay, and not later than 180 days after the date upon which applicant became aware of the action and the reasons therefor.

12. It is common cause that the decision of the tribunal was communicated by letter to applicant's attorney on 24 November 2014. Accordingly, applicant had until 23 May 2015 to institute these proceedings. The application was launched on 7 August 2015, some 76 days late.

13. In its answering affidavit, respondents took issue with the late filing of the application. At the hearing of the matter on 24 October 2017 respondents raised the late filing as an *in limine* point as a result of which an order was

granted that applicant should file a substantive application for extension of the time periods. Applicant duly filed its application seeking condonation for the late filing of the main application. Both the application for condonation for the late filing of the review application, and the review application itself are before me.

14. The reasons for the late filing of the application are the following:

14.1 Applicant alleges that as a lay-person she was so traumatized when she heard of the decision of the tribunal, that she could only see her attorney on 15 December 2014.

14.2 Applicant was then advised on the further continuation of the matter, and that she had to raise funds for legal fees. She did so by 22 January 2015. Applicant's attorney was therefore in a position to brief counsel on 22 January 2015.

14.3 In February 2015 Applicant's attorney instructed counsel to draft papers. Applicant's attorney alleges that over the next few months he waited for counsel to draft the papers. Emails reveal months he waited for counsel to draft the papers. Emails reveal that he enquired about the papers on a number of occasions. On 29 April 2015 counsel advised that the application was "pretty much done", and that he would deliver it to the attorney by the end of the week.

14.4 On or about 11 May 2015 counsel again apologized for not completing the papers, apparently because he had been ill, and he undertook to leave the documents at chambers for collection. Applicant's attorney asked whether they were late with the application, and on 13 May 2015 counsel replied that it was hard to predict what a court would do given the fact that they believed that the application was late. Both seemed to be of the view that the *dies* had expired, which was not the case.

14.5 The papers were not completed in May as promised and the 180 days ran out on 23 May 2015. There is no proper explanation for the further delay of some 10 weeks in issuing the application.

15. Even if applicant's explanation is accepted for the delay of the application for some two months, between 24 November 2014 and 22 January 2015, because of her emotional and financial distress, there is no proper explanation for the delay in drafting papers and filing the application. Had applicant's attorney given any thought to the matter, he would have realized that the date for filing was no later than 23 May 2015, and he would have taken steps to brief another counsel. A prudent attorney would not have allowed the matter to drag on for months without taking alternative steps to expedite the matter.

16. I cannot find an acceptable explanation for the delay in launching the application.

17. However, the consideration of whether to grant an extension of time depends on a number of factors, and should be considered in the context of the particular facts and circumstances of each case. In **Aurecon (Pty) Ltd v City of Cape Town**[1] it was held:

"The relevant factors in that enquiry generally include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation for the delay which must cover the whole period of delay, the importance of the issue to be raised and the prospects of success."

18. Applicant has given an unsatisfactory explanation for the delay in launching this application. The entire period of delay as not been dealt with, and there is no explanation whatsoever regarding the delay between May and August 2015. None of the other factors referred to above are of particular relevance to this matter. I turn now to the prospects of success.

THE MERITS OF THE APPLICATION

19. Section 3 (4) of the regulations provides that if a party wishes to dispute the rejection of the serious injury assessment report, it shall within 90 days of being informed of the rejection, notify the Registrar that the rejection is

[1] [2016] 1 ALL SA 313 (SCA)

disputed. In such notification it shall set out the grounds upon which the assessment is disputed and include in such submissions medical reports and opinions as the disputant wishes to rely upon.

20. The appeal tribunal may:

20.1 Direct that the third party submit himself or herself at the expense of the Fund or an agent, to a further assessment;

20.2 Direct that the third party present himself or herself to the appeal tribunal to examine the third party's injury and assess whether the injury is serious in terms of the regulations;

20.3 Direct that further medical reports be obtained and be placed before the appeal tribunal;

20.4 Direct that relevant pre-and post-accident medical, health and treatment records be made available to the tribunal;

20.5 Direct that further submissions be made by one or more of the parties;

20.6 Determine whether in its majority view the injury is serious in terms of the method set out in the regulations.

21. The following reports were placed before the tribunal:

21.1 The RAF 5 claim form notifying about the dispute;

21.2 The RAF 4 serious assessment report by Dr. M Jivan;

21.3 The medico-legal report of the orthopaedic surgeon, Dr. E Schnaid;

21.4 The radiologist's report by Dr. Mistry;

21.5 The medico-legal report by the clinical psychologist, L Grootboom;

21.6 Netcare Hospital records;

21.7 The RAF 1 claim form.

22. An injury is considered to be serious if it is assessed as such according to one of two methods of assessment:

22.1 If the injury resulted in more than 30% impairment of the whole person as provided in the AMA guides ("WPI" or whole person

impairment): or, if it does not result in a WPI in excess of 30%, then;

22.2 If the injury:

22.2.1 Results in a long term impairment or loss of a body function;

22.2.2 Constitutes permanent serious disfigurement;

22.2.3 Resulted in severe long-term mental or severe long- term behavioural disturbance or disorder;

22.2.4 Resulted in the loss of a foetus.

23. The test referred to in paragraph 22.2 above is the so-called narrative test.

24. Applicant bases its allegations, that the tribunal did not consider the narrative test, on the fact that Dr. Jivan had found that there was serious long-term impairment or loss of body function. According to applicant, Dr. Jivan's findings are supported by those of Dr. Schnaid, and that of Dr. Scheepers, an orthopaedic surgeon. These two practitioners drafted a joint minute, which indicates that applicant suffered a serious long-term impairment. That joint minute was not placed before the tribunal.

25. Applicant also referred to reports by occupational therapists, Ms Magoele and Ms Kekana, and a report by one Dr. Chait, a plastic surgeon, in support of its submissions. These were not also placed before the tribunal.

26. Applicant alleges that the decision of the appeal tribunal was so unreasonable that no reasonable authority could come to such a conclusion. Applicant contends that the tribunal did not consider the narrative test. During argument, it transpired that applicant based this contention solely on a -reading of the letter of 1st Respondent dated 24 November 2014, and specifically paragraph iii thereof which reads:

"Tribunal Findings

The tribunal finds the injuries are not serious. The fracture has united. The thrombotic disorder was incorrectly rated and should be 5% *for one prior incident. The scarring was also incorrectly rated and no photographs were*

submitted."

27. Counsel for applicant conceded that a proper reading of the above passage did not result in a conclusion that the tribunal had ignored the narrative test.

28. In respect of the tribunal's functioning, Respondents state that the appeal tribunal consists of three independent medical practitioners with expertise in the. appropriate areas of medicine. Those persons are provided in advance with a pack of documents relating to each case under appeal, which pack includes all the documents provided by applicant in accordance with section 3 (4) (b) of the regulations.

29. The tribunal met on 12 November 2014 to consider the case. Dr Jivan's assessment was considered, and specifically the following findings by him:

    29.1 Applicant was reported to have suffered a compound fracture of the right tibia, and fibula, a laceration on the heel, and a post- accident embolism;

    29.2 Applicant walked with crutches with an analgic gait on the right and she had multiple scarring on her right tibia, knee, and heel;

    29.3 Dr. Jivan awarded a total WPI of 45% and was of the view that applicant had suffered long-term impairment or loss of body function.

    29.4 Dr. Jivan's report was accompanied by an x-ray report that revealed a well-healed mid-shaft tibial and proximate third fibula fracture. The patella was intact and no arthritic or joint pathology of the right knee was evident.

30. Upon considering Dr. Jivan's WPI rating, the entire tribunal was unanimous in the finding that the WPI rating was excessive. The tribunal also considered the narrative test, more especially whether, in accordance with the narrative test, applicant had suffered a serious injury as defined by the regulations. The tribunal unanimously found that also according to the narrative test, applicant had not suffered a serious injury.

31. Dr. Schnaid's report was also considered by the tribunal. He found that:

31.1 There were multiple scars on the right leg;

31.2 Applicant suffered from pain in the right tibia, fibula, lumbar spine, right knee and foot;

31.3 There was a loss of right ankle and knee movement, the former being irreversible, and the latter causing a severely restriction in the movement of the knee;

31.4 A total knee replacement would be required in later years.

32. The tribunal noted that the knee and back injuries reported by Dr. Schnaid were not recorded in the hospital notes, nor in the rejection letter of Dr. Scheepers who had come to a different conclusion. The x- ray evidence indicated that the fractures had united and the tribunal was consequently not convinced by Dr. Schnaid's findings. Supporting this view was the fact that the x-ray report in fact showed that the right knee was normal, whilst Schnaid found serious injury to the knee.

33. Respondent therefore submits that it did in fact consider whether a serious injury had occurred, and found that both on the WPI inquiry, and on the narrative test, no serious injury had been suffered.

34. The tribunal could only consider the appeal on the reports before it. No reasons are given why the further reports were not before the tribunal, and there is also no allegation that the tribunal should have called for further reports.

35. Applicant' counsel initially argued that there were subsequent reports that showed that the injuries were serious, that were not before the tribunal. He contended that it would be just and equitable that the tribunal reconsider its decision. Over and above the fact that it is not permissible to review a decision based on evidence that was not before the tribunal, when it was pointed out to counsel that in fact, with the exception of one report, the others were drafted well in advance of the tribunal sitting, but had not been put before the tribunal, counsel conceded that there was no basis to his argument. It was also conceded that, had applicant been aware of the facts set out in the answering affidavit before this application was

launched, a different approach to the matter might have been taken. It is a pity that the attorney for applicant had not sought reasons for the decision before he took the decision to launch this application.

36. On the merits of the matter applicant also has no prospect of success. In light of the view that I have taken on the application for condonation, and on the prospects of success in the main application, I am not inclined to grant condonation in terms of section 9 ((1) (b) of the PAJA Act.

37. **In the result I make the following order:**

37.1 The application for condonation, and the application for the review and setting aside of the finding of the appeals tribunal dated 12 November 2014 are dismissed with costs.

Swanepoel J
Acting Judge of the High Court,
Gauteng Division

DATE OF HEARING:	**24 APRIL 2018**
DATE OF JUDGMENT. - -	**14 MAY 2018**
ATTORNEY FOR APPLICANT:	**DIALE MOGASHOA ATTORNEYS**
ADVOCATE FOR APPLICANT:	**ADV K T BAKABA**
ATTORNEY FOR RESPONDENT:	**GILDENHUYS MALATJI INC**
ADVOCATE FOR RESPONDENT:	**ADV M E MANALA**