REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 3039/2017

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

17/4/2019

E.M KUBUSHI **DATE**

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG PRETORIA
2019 -04- 17
JUDGE'S SECRETARY
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

In the matter between:

T. P. BUTHELEZI **Applicant**
(REF: RAFA/ 00187/2016/DIP)

and

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **First Respondent**

THE ACTING REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **Second Respondent**

THE ROAD ACCIDENT FUND APPEAL TRIBUNAL **Third Respondent**

THE ROAD ACCIDENT FUND **Fourth Respondent**

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] This opposed application for judicial review concerns the decision of the third respondent, the Road Accident Fund Appeal Tribunal ("the Tribunal"), in finding that the injuries suffered in a motor vehicle collision by the applicant are non-serious injuries for the purposes of the Road Accident Fund Act 56 of 1996 ("the Act") and the Road Accident Fund Regulations of 2008 ("the Regulations"). The Tribunal is an independent panel constituted by the second respondent, the Registrar of the Health Professions Council of South Africa ("the Registrar"), in terms of the provisions of regulation 3 (8) of the Regulations. The Tribunal's purpose is, amongst others, to determine whether a person's injuries have been properly assessed.

[2] At issue in these proceedings is whether the applicant is entitled to review the Tribunal's decision on the grounds raised in her judicial review application.

[3] All the respondents except the fourth respondent, the Road Accident Fund ("the Fund"), are opposing the application.

THE RELIEF SOUGHT BY THE APPLICANT

[4] In her judicial review application, the applicant seeks an order in the following terms:

4.1 reviewing and setting aside the decision of the Tribunal dated 4 August 2016, to the effect that the injuries suffered by the applicant are non-serious in terms of s 17 (1A) of the Act and its Regulations;

4.2 that the Registrar is directed to re-appoint a new Tribunal to determine the dispute reviewed and set aside in paragraph 1 and to further reconsider all medico-legal reports that served before the Tribunal in respect of the applicant's injuries, including the report of Lindiwe Grootboom (Neuro-psychologist), that was received by the first respondent, the Health Professions Council of South Africa ("the HPCSA") subsequent to the hearing on 4 August 2016;

4.3 that the applicant be permitted to 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;

4.4 that the HPCSA be ordered to pay the costs of this application, only in the event of opposition.

[5] In essence, the applicant seeks that the Tribunal's decision be reviewed and set aside and that the matter be referred back to the HPCSA for consideration afresh before a newly appointed Tribunal which does not consist of any of the members who took the initial decision.

[6] Before I deal with the individual grounds of review, I pause to briefly set out the relevant factual matrix leading to the institution of this application and refer to the salient provisions of the Act and the Regulations pertaining to the issues raised respectively by the parties.

FACTUAL BACKGROUND

[7] The applicant's claim for compensation for non-pecuniary loss was formally lodged in terms of s 17 of the Act read with the Regulations with the Fund. Dr JJ Schutte completed the RAF4 form and found the applicant to have a whole person impairment ("WPI") of 10%. He, however, found the applicant to have serious long term impairment in terms of the narrative test. The Fund formally rejected the applicant's claim. The applicant declared a dispute and the matter was referred to the HPCSA for further adjudication.

[8] In notifying the HPCSA and the Registrar of the dispute pertaining to the rejection, the applicant also provided the Registrar with the RAF5 form and all medico-legal reports, necessary to assess the applicant's injuries. A further report of a neuro-psychologist, Lindiwe Grootboom ("Ms Grootboom") was provided to the Registrar after the other expert reports had been filed.

[9] The matter served before the Tribunal on 4 August 2016 and the applicant's injuries were found not to qualify as serious injuries. The decision and outcome reached by the Tribunal was communicated to the applicant's attorneys of record on 28 September 2016. In rejecting the claim the Tribunal concluded as follows:

"i. 24 years old female who was involved in a Motor vehicle accident on the 27th of June 2009.

ii. The patient was a passenger in a bakkie, had a head on collision and was transferred with an ambulance to Witbank hospital.

iii. At the time she was a Grade 10 learner and she was treated for head injuries and GCS at the time was 15/15.

iv. She had a C4-C5, C5-C6 disc lesion with headache and right ankle, degeneration neck injury, fracture of the right tibia. She is now scared to get into a car again.

v. X-rays were normal and was discharged on the same day.

vi. She was also referred to Neuropsychological further assessments.

vii. The experts that saw Dr Schutte completed the RAF4 form then seen by the Orthopaedic surgeon.

vii. Also seen by the Occupational and two Industrial Psychologists.

ix. The WPI came to 10% and having been evaluated, the medical facts; this rated as not serious injury under the Narrative test."

[10] It is not in dispute that the decision of the Tribunal constitutes administrative action and is thus susceptible to review in terms of the provisions of the Promotion of Administrative Justice Act[1] ("PAJA"). Being not satisfied about the outcome of the Tribunal, the applicant has approached this court for relief to review and set aside that decision.

THE LEGISLATIVE FRAMEWORK

[11] In terms of ss 17 (1) and 17 (1A) of the Act, read with regulation 3 of the Regulations, a claimant may only claim general damages against the Fund where she/he has suffered "serious injury". In order to qualify for this head of damages, a claimant is required to submit an assessment by a medical practitioner in terms of regulation 3 certifying that she/he has been seriously injured.

[12] The criteria of assessment applied by the medical practitioner in determining whether the claimant suffered serious injury or not is set out in regulation 3 (1) *(b)*[2].

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[1] Act 3 of 2000.

[2] "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;

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.

[13] The Fund must be satisfied that the injury has been correctly assessed as serious in terms of the method provided in the Regulations. Should the Fund not be satisfied, it must reject the report or direct the claimant to undergo further assessment by an independent medical practitioner.

[14] Should the claimant not be satisfied with the Fund's rejection of the serious injury assessment report, the claimant must declare a dispute by lodging a prescribed dispute resolution form with the Registrar within ninety (90) days of the rejection. The dispute is adjudicated by the Tribunal which the Registrar constitutes by the appointment of three independent medical practitioners with expertise in the appropriate area of medicine.

[15] A procedure by which the Tribunal enquires into the dispute is laid down in substantial detail in the Regulations and includes the following features:

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

15.2 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.

15.3 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

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(bb) Constitute permanent serious disfigurement."

[3] AMA Guides is defined in regulation 1 as the 'American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Sixth Edition.

examination of the claimant's injury; and to direct that further medical reports be obtained and placed before it.

[16] It is common cause, in this instance, that the applicant's injury did not qualify as serious under the AMA Guides, that is, her injury did not constitute an WPI of more than 30%. As such, she had to be assessed in terms of the narrative test in order to qualify for compensation for non-pecuniary loss.

THE GROUNDS OF REVIEW

[17] The judicial review application is premised on the provisions of PAJA on the grounds that the action was materially influenced by an error of law (s 6 (2) *(d)* of PAJA) and/or because irrelevant considerations were taken into account or relevant considerations were not considered (s 6 (2) *(e)* (iii) of PAJA) and/or that it amounts to arbitrary action (s 6 (2) *(e)* (vi) of PAJA) and being procedurally unfair.

[18] The said grounds have been further developed in the applicant's founding and replying affidavits and summarised in her heads of argument as follows:

18.1 That the Tribunal did not utilise the provisions available to it in terms of the Regulations and in particular the members of the Tribunal did not perform an examination of the applicant or called the applicant to be present at the hearing nor did it refer the applicant for a further investigation and/or physical examination by another expert in order to assess the applicant's injuries in terms of the narrative test.

18.2 That the Tribunal did not properly consider all expert reports that served before it and that the decision reached is merely an overall view which did not take into account the negative impact that the injuries have on the applicant and that the Tribunal failed to address the applicant's serious long term impairment as contained in the reports.

18.3 That the composition of the Tribunal did not include a neuro-psychologist, an occupational therapist or industrial psychologist and was as such unable to properly consider all the relevant information provided to it.

18.4 That the Tribunal materially misdirected itself by not taking proper heed to the opinions expressed in the expert's reports, which led to materially unreasonable decision, *alternatively*, that there was a failure to properly apply the narrative test.

18.5 That the decision of the Tribunal is arbitrary as it failed to assess the applicant's injuries in relation to her individual subjective circumstances.

[19] When the parties appeared before me the grounds of review were condensed into two points, namely, error of fact and error of law. I shall now deal with these grounds of review in turn.

Error of Fact

[20] The applicant's submission in this regard is that the Tribunal's failure to consider the report of Ms Gootboom, the neuro-psychologist, is an error of fact which constitutes an unfair procedure and irrational decision. The report, according to the applicant, was served timeously on the HPCSA, that is, two months before the hearing and should as such have been considered by the Tribunal.

[21] In support of this submission counsel for the applicant referred me to an unreported judgment of the Gauteng Division, Pretoria in *May v Health Professions Council of South Africa & Others*,[4] where the following is said:

> "[34] In this instance the Appeal Tribunal clearly made an error of fact when not taking the claimant's shoulder injury into consideration when deciding whether general damages should be awarded and thereby ignored relevant facts."

[22] The Tribunal's argument is that the report of Ms Grootboom did not serve before the Tribunal, a fact not denied by the applicant. What, however, the Tribunal is contending for is that firstly, the report was submitted outside of the regulated timeframe of ninety (90) days and did not form part of the applicant's submissions to the Tribunal; secondly, the report having not served before the Fund when it rejected the applicant's claim it could not have been considered by the Tribunal; thirdly,

[4] (1996/2016) [2017] ZAGPPHC 739 (28 November 2017) at para 34.

having had sight of the report, subsequent to the decision it made, the Tribunal is of the opinion that the report would not have, in any event, affected the decision it made.

[23] The question is whether Ms Grootboom's report should have been considered by the Tribunal and whether such failure to consider that report renders the Tribunal's decision reviewable as an error of fact.

[24] It is common cause that when the Tribunal sat to decide the applicant's dispute they were in possession of only the following documents: the RAF5 dispute referral form; the RAF4 serious injury assessment report completed by Dr Schutte; the medico-legal reports by Dr Oelofse dated 18 October 2013, Dr Rita van Biljon an occupational therapist, Dr AC Strydom an industrial psychologist and consultation notes, casualty patient evaluation form prescription and hospital notes. Ms Grootboom's report did not form part of those documents.

[25] Material error of fact has been found to be an independent ground of review in the judgment in *Pepcor Retirement Fund & Another v Financial Services Board & Another*[5], a judgment to which I have been referred to by the applicant's counsel. In that judgment, the Registrar of the Pensions Funds when approving the transfer of business of one pension fund to another pension fund was found to have been ignorant of the correct funding levels which had resulted from misstatement by the actuary.

[26] The court in that judgment was aware that in classical administrative law in South Africa, material error of fact was not an independent ground of review. The court, however, took cognisance of the doctrine of legality, a principle that has been introduced into our law by the Constitution as a founding value, and came to the conclusion that due to that principle material error of fact had to be an independent ground of review.

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[5] [2003] 3 All SA 21 (SCA).

[27] In accepting that material error of fact had to be an independent ground of review the court stated the following:

> '[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 facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of the fact material to the decision and which therefore should have been before the functionary, the decision should . . . be reviewable . . . The doctrine of legality which was the basis of the decision in *Fedsure*,[6] *SARFU*[7] and *Pharmaceutical Manufacturers*[8] 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 recognise the decision as *ultra vires*.'

[28] The approach in *Pepcor*, recognising error of fact as a ground of review, was endorsed as the correct approach in two other judgments of the Supreme Court of Appeal, namely, *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Snell Digital (Pty) Ltd & Others*[9]. In that judgment the court, relying on *Pepcor*, found that the decision by the tender board to blacklist a company on the ground that it had submitted inaccurate information in its application form pertaining to the date when its directors were appointed, was based on an error of fact. In that judgment, when the tender board made its decision it laboured under the mistaken information that the directors were appointed after the closing date of the tender whilst in fact the directors were appointed prior to the closing date of the tender. As such, it was found that the tender board made its decision on the basis of incorrect facts. The decision was as a result set aside.

[29] Even though the decision in *Chairman, State Tender Board* was eventually set aside on the basis of irrationality and unlawfulness it is, however, important to note that the court in arriving at its decision recognised material error of fact as an

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[6] Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others 1999 (1) SA 374 (CC).
[7] The President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC).
[8] Pharmaceutical Manufacturers Association of South Africa & Another: In re ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC).
[9] 2012 (2) SA 16 (SCA).

independent basis for setting aside an administrative decision. In that regard, that court held as follows:

> '[36] The STB erred factually when it concluded that the second to sixth respondents had been appointed on 11 February 2000, after the tender had been submitted. If the STB had taken its decision based on the proper facts it could not have concluded that the respondents had made fraudulent misrepresentations to it. Its factual error was material as it was the direct cause of the decision to blacklist the respondents.'

[30] On the facts in *Pepcor*, the court noted that the Registrar was misled on a fact material to his decision. The converse to this statement is that had the Registrar been aware of the correct facts regarding the funding levels he would have perhaps come to a different decision. Does it mean, therefore, that failure by the Tribunal, in this instance, to consider the report of Ms Grootboom led to a material error of fact, in the sense that the Tribunal was misled in its decision by the non-disclosure of the information in Ms Grootboom's report and that should the report have been available to the Tribunal, the Tribunal might have, perhaps, reached a different decision?

[31] Pertinent to the above question is whether the report of Ms Grootboom contained material facts. It is said that a fact is material if firstly, it is determinative of the outcome of a decision, as such, a judicial review based on error of fact can only be taken when an excluded fact or included fact is determinative of the outcome, which means that, the fact excluded or included must be shown to have the effect of changing the outcome; secondly, if the relevant decision has been made in ignorance of the true facts material to the decision.[10]

[32] Would the information in Ms Grootboom's report have changed the outcome of the Tribunal?

[33] The genesis to this question should be the initial report of the medical practitioner who did the narrative test and as contained in the RAF4 form. It is common cause that the RAF4 form was completed by Dr JJ Schutte. Dr Schutte, when doing the narrative test, concluded that acute symptoms still exist which will

[10] Minister of Home Affairs & Others v Somale Association of South Africa & Another 2015 (3) SA 545 (SCA).

affect the applicant's employment, social skills and enjoyment of life. He in that regard deferred to the following experts: the orthopaedic surgeon's opinion and treatment on injuries to the cervical spine and the right leg; psychological treatment on severe post- traumatic stress and the neurologist's opinion on head injuries.

[34] As already stated, the reports of Dr Oelofse, an orthopaedic surgeon, Dr Rita van Biljon, an occupational therapist and Dr AC Strydom, an industrial psychologist, were made available to the Tribunal. The three experts, who physically examined the applicant, were agreed that she qualifies for compensation under the narrative test.

[35] The applicant was also referred to a neuro-psychologist, Ms Grootboom, for a neuro-psychological and clinical assessment to establish the nature and extent, if any, of functional, cognitive and emotional impairment resulting from the motor vehicle collision as well as how this may impact on the applicant's future cognitive, social, emotional and occupational functioning. In compiling her report, Ms Grootboom took cognizance of the opinion of Dr Schutte in regard to the serious injury assessment report.

[36] It is worthy to note that although the assessment by Ms Grootboom was done after the assessment of Dr Oelofse and Dr Strydom, it does not appear as if she was provided with their reports, as such, she, in her report defers to: a neuro-surgeon or neurologist to assess the severity and *sequelae* of the head injury; an occupational therapist for final comment on employability and to assess and address deficits which are impacting on her vocational abilities; and, to an orthopaedic surgeon to assess and comment on the impact of the applicant's orthopaedic injuries on her future employability and on the future management of the applicant's orthopaedic injuries.

[37] Ms Grootboom finally concludes as follows in her report:

> "In conclusion significant neuropsychological test results may be most consistent with the pre-morbid conditions, although mild to moderate concussive symptoms (PCS) such as headaches, nausea, dizziness and forgetfulness may be exacerbating her neurocognitive functions."

[38] It does not appear as if the applicant was referred to a neurologist or a neuro-surgeon as there is no report in that respect. As such, it is my finding that Ms Grootboom's findings in regard to –

38.1 firstly, the applicant's neurocognitive difficulties which may have contributed to her failure to obtain Matric, as well as to her ability to perform her duties as a cashier with accuracy and efficiency, and subsequently in unemployment and loss of financial independence and self-reliance;

38.2 secondly, the neuropsychological *sequelae* (attention and memory deficits) which may compromise her functioning when performing sedentary tasks; and

38.3 lastly, the *sequelae* of the applicant's chronic pain and discomfort, emanating from her reported injuries which, may have resulted in her inability to continue her occupation as a cashier and with significant impact on her earning capacity and general functioning;

are, in my opinion, inconclusive and have no bearing on the applicant's entitlement to claim for non-pecuniary damages in terms of the narrative test. These findings are dependent on the findings of the other experts whose reports served before the Tribunal. Of concern is that there is no report by a neurology expert to confirm Ms Grootboom's findings. The findings are, therefore, in my view, immaterial and could not have had any effect on the decision of the Tribunal. Put differently, Ms Grootboom's findings do not have the effect of influencing the Tribunal's outcome.

[39] For instance, in her report, Ms Grootboom opines that: unless a head injury of significance (moderate to severe head injury) is diagnosed by a neurology expert, it is unlikely that the applicant's deficits are entirely attributable to the accident under discussion; and that should a mild head injury be diagnosed (which is the opinion of the report writer), it is highly possible that the neuropsychological test results would mostly reflect the applicant's premorbid functioning with reduced attention and memory span, perhaps, exacerbated further by the effects of the head injury.

[40] It is, therefore, my finding that failure by the Tribunal, in this instance, to consider the report of Ms Grootboom did not lead to a material error of fact. Although the Tribunal was misled in its decision by the non-disclosure of the information in Ms Grootboom's report, but, even if the report was available to the Tribunal, the Tribunal would not have reached a different decision.

Error of Law

[41] The applicant raised two grounds on which the Tribunal's decision is susceptible to review on this point. The first is that the Tribunal misdirected itself when it pronounced itself on the casual link between the injuries sustained by the applicant and the accident. The second ground is that the Tribunal misdirected itself in incorrectly interpreting the tests applicable to the assessment of serious injuries. I shall deal with the two grounds in turn.

[42] Relying on the judgment in *The Road Accident Appeal Tribunal & Others v Gouws & Another*[11], the applicant contends that it was wrong of the Tribunal to pronounce itself on the casual link between the injuries sustained by the applicant and the accident, as such pronouncement can only be made by a court. This reason for the rejection of the RAF4 form by the Tribunal was also not one of the reasons proffered by the Fund when it rejected the RAF4 form.

[43] The issue in *Gouws* was whether the shoulder injury assessed as serious by the medical practitioner was caused by or arose from the driving of a motor vehicle.

[44] When dealing with the issue of causation where the Tribunal had rejected the RAF4 form on the basis that the injury sustained was not serious, the court in *Gouws* expressed itself as follows:

> '[33] . . . In the event of the medical practitioner casting doubt on whether there was a link between the alleged injury and the driving of a motor vehicle, the Fund can decide whether to contest causation or concede it. In adopting a position on whether to contest causation, the Fund is not limited to the views expressed by the medical practitioner, but may have or acquire other information to in inform its decision. In the

[11] (056/2017) [2017] ZASCA 188 (13 December 2017).

ordinary course, causation is an issue that is ultimately decided by the courts. A dispute between the Fund and a claimant in relation to causation has to be referred to a court for adjudication. . .

[34] . . . In the present case, as described in para 7 above, the Fund disputed the assessment of the injury on fallacious grounds. The Fund did not inform Gouws that causation was in issue nor did it independently adopt a position in relation thereto. It wrongly abdicated that position to the Tribunal. As pointed out above, the contestation before the Tribunal could only be in relation to the assessment by the medical practitioner of the seriousness of the injury and the finality of its decision is in relation to that aspect.

[35] The effect of what is suggested on behalf of the Tribunal is that the jurisdiction of the court is ousted. The only challenge to a decision by the Tribunal is relation to causation on the suggested basis will therefore be in the form of a review which, contrary to the suggestion on behalf of the Tribunal, will not be time and cost efficient.

. . .

[36] Having regard to the authorities and principles set out in para 25 above, it is necessary to bear in mind that the power given to the Tribunal in terms of the legislation is narrowly circumscribed. It is not of a broad discretionary nature, which would allow for further powers to be implied. The Tribunal cannot have the final say in relation to causation. That power is not provided for.

[37] Moreover, the power contended for is not a necessary or reasonable consequence of the express powers of the Tribunal or of the Fund. On the contrary, if the contentions on behalf of the Tribunal are upheld, it will be oppressive in relation to claimants and, as stated above, will deny them access to courts on an issue traditionally reserved for adjudication by them. A finding against the suggested power does not enervate the provisions of the Act. The Fund maintains the right to challenge or concede causation. . . As hinted at in para 12 of the judgment of the court below, if the submissions on behalf of the Tribunal were to be upheld the result might well be that the Fund itself will be stripped of its power to decide the issue of causation in the event of an appeal tribunal deciding causation against it.'

[45] In paragraph 15 of the Tribunal's answering affidavit the following is stated:

'15. At our meeting held on 4 August 2016, we considered the applicant's appeal, and after deliberations, resolved that the applicant's injuries are not serious injuries under the narrative test, and that there was no *nexus* between certain injuries and the accident'

[46] It is on the basis of this paragraph that the applicant argues that the Tribunal misdirected itself, rendering its decision susceptible to review. I can say no more than what is referred to in the passages quoted from *Gouws*. The Tribunal having pronounced itself on the question of causation indeed misdirected itself and on this point its decision is reviewable and should be set aside.

[47] The decision of the Tribunal is affected by the fact that the Tribunal's decision was taken for a reason not authorised by the legislation which empowered the Tribunal to act and that the Tribunal took irrelevant considerations into account in conflict with ss 6 (2) *(e)* (i) and (iii) of PAJA[12]. The Tribunal as such misconceived its jurisdiction and the review stands to succeed.

[48] Even if I am wrong on the first point, I do think that even on the second ground the Tribunal has misdirected itself in that it relied on the objective test instead of the subjective test when it considered the seriousness or otherwise of the applicant's injury.

[49] What is at issue here is whether the two tests, namely the AMA Guides test and the narrative test can be conflated and used in conjunction with each other. I do not think so.

[50] The applicant in support of her argument on this point referred to paragraph 54 of the unreported judgment of the Gauteng Local Division in *Mngomezulu v Road Accident Fund*[13], wherein the following is stated –

> '[54] . . . The narrative test calls for an enquiry into various components of the *persona* including the physical, bodily, mental, psychological and aesthetic features of an injured Plaintiff which may also take into consideration the likelihood of further surgery, lengthy rehabilitation treatment, future deterioration and complications as well as the risk of relapse.'

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[12] See Gouws v Road Accident Fund Appeal Tribunal and Others (26553/2015) [2016] ZAGPPHC 954 (2 November 2016) at para 15.
[13] (04643/2010) [2011] ZAGPJHC 107 (8 September 2011).

[51] In this instance, it is my view that the premise for adjudicating the dispute was incorrect. In paragraph 51 of the answering affidavit the Tribunal clearly states that:

> '51. It is significant to note that although the AMA Guides and the narrative test constitute two different tests of assessment, they are however related to each other. The criteria under the AMA Guides is always the starting point in the performance of the assessment and would ordinarily give one a good indication as to the severity or seriousness of the injury even where the injury does not qualify as serious under that criteria. This makes an assessment under the narrative test easier and more objective, as it is informed by information already gathered in an assessment under the AMA Guides.'

This is clearly wrong.

[52] The AMA Guides test relates to an objective assessment of the injuries sustained by the applicant whereas the narrative test is a subjective test, which specifically focuses on the subjective personal circumstances of each individual claimant. In using the objective assessment as a premise in adjudicating the dispute, I think the appeal Tribunal misdirected itself. It is on that basis that I am of the view that the appeal Tribunal's decision is not procedurally fair and ought to be set aside.

ANCILLARY RELIEF

[53] In prayer 2 of the notice of motion the applicant seeks an order that the Registrar be directed to re-appoint a new Tribunal to determine the dispute reviewed and set aside and to further reconsider all medico-legal reports served before the Tribunal in respect of the applicant's injuries, including the report of Ms Grootboom.

[54] The second ancillary relief is contained in prayer 3 of the notice of motion in which the applicant seeks an order that she be permitted to be present at the newly established Tribunal; and that she be permitted to provide further evidence pertaining to her injuries at the Tribunal hearing if she wishes to do so.

[55] I do agree that the matter should be remitted back for reconsideration before a newly appointed Tribunal. But, I do not think that I should be prescriptive as to how the new Tribunal should conduct the dispute resolution. The powers of the Tribunal

are succinctly set out in regulation 3 of the Regulations and it is for that Tribunal to decide on how it should carry out those powers and not for this court to direct it.

[56] Brand JA in *Duma*[14] was very explicit when he described the nature of the appeal in the Tribunal; and this is what he said –

> 'The appeal created by the Regulations appears to be 'an appeal in the wide sense', that is, a complete re-hearing of and fresh determination on the merits with additional evidence or information if needs be.'

[57] The Tribunal, in the words of Brand JA in *Duma*, is entitled:

> 'In the exercise of its wide investigative and fact finding powers, the appeal tribunal can establish for itself whether or not to assess the injury as serious, whatever the reasons of the Fund might have been.'[15]

CONCLUSION

[58] I have, therefore, to conclude that the decision of the Tribunal is susceptible to review and ought to be reviewed and set aside. The matter should be remitted back for a reconsideration of the applicant's injuries on the basis of the narrative test.

THE ORDER

[59] In the circumstances, I make the following order –

1. The decision of the third respondent of 4 August 2016, under reference number RAFA/00187/2016/DIP, is reviewed and set aside.
2. The matter is remitted to the first respondent for reconsideration by a different Road Accident Fund Appeal Tribunal (panel) to be constituted by the Registrar of the Health Professions Council of South Africa.
3. The first respondent is ordered to pay the costs of this application.

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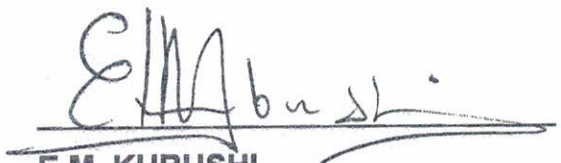
[14] Road Accident Fund v Duma and Three Similar Cases 2013 (6) SA 9 (SCA) at para 26.
[15] Road Accident Fund v Duma above.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel	: Adv W. R. Du Preez
Applicant's Attorneys	: VZLR INCORPORATED
Third Respondent's Counsel	: Adv N. Felgate
Third Respondent's Attorneys	: KM MMUOE ATTORNEYS.
Date of hearing	: 5 December 2018
Date of judgment	: 17 April 2019