


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER : 90639/2018

| | |
|------------------------------------|---|
| DELETE WHICHEVER IS NOT APPLICABLE | |
| (1) REPORTABLE | YES / NO |
| (2) OF INTEREST TO OTHER JUDGES | YES / NO |
| (3) REVISED | |
| 15 December 2022 |  |
| _____ DATE | _____ SIGNATURE |

In the matter between:

MOEGAMAT YASIN KHAN

Applicant

and

**HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

1st Respondent

**REGISTRAR OF THE HEALTH PROFESSIONS
COUNCIL OF SOUTH AFRICA**

2nd Respondent

ROAD ACCIDENT FUND APPEAL TRIBUNAL

3rd Respondent

ROAD ACCIDENT FUND

4th Respondent

Summary: Practice - Judicial review
Administrative law – Promotion of Administrative Justice Act 3 of
2000 (PAJA)

ORDER

1. The decision of the third respondent dated 3 October 2018 is reviewed and set aside;
 2. The second respondent is directed to appoint a new appeal tribunal to determine the dispute reviewed and set aside as set out in paragraph [1] above, and for this purpose to include in the panel so appointed an occupational therapist and to allow the applicant a reasonable opportunity to lodge with the second respondent such further medico-legal reports and other information as the applicant may wish to rely on for purposes of a new appeal hearing;
 3. The first and second respondents are ordered to pay the cost of the application, the one paying the other to be absolved.
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JUDGMENT

VAN HEERDEN AJ

BACKGROUND

- [1] On 23 November 2014, the applicant was involved in a motor vehicle collision in which he sustained injuries. During 2016, the applicant instituted action proceedings against the fourth respondent in the Western Cape division of the High Court under case number 9497/2016 wherein the applicant claimed general damages as a result of the accident.
- [2] Following the completion and submission of the applicant's RAF4 Form and the medico-legal report, in which an orthopaedic surgeon concluded that the applicant's injuries will leave the applicant with long-term impairment, the fourth respondent rejected the applicants claim for general damages.¹
- [3] The applicant disputed the fourth respondents rejection and a dispute resolution was lodged with the second respondent in accordance with the regulations.
- [4] The first respondent informed the applicant's attorney that the second respondent had appointed an appeal tribunal and that the applicant's matter will accordingly be considered.
- [5] The applicant however objected to the fact that the members of the appeal tribunal appointed by the second respondent did not include an occupational therapist, and requested that the panel be amended.

¹ pp 005-43 - 005-44

[6] The first respondent in response answered the objection by merely referring the applicant to the third respondents letter dated 27 September 2018 wherein the conclusion (decision) was already reached by the appeal tribunal on 20 to September 2018.

THE REVIEW

[7] This application for judicial review accordingly concerns the third respondent's (the appeal tribunal) decision wherein it found that the applicant did not sustain a serious injury in the relevant accident.

[8] Such decision was contained in an email addressed by the first respondent to the applicants' attorneys of record dated 3 October 2018² ("the appeal tribunal's decision").

[9] The effect of the appeal tribunal's decision is, as already stated, that the applicant can no longer claim general damages in the action which was instituted against the fourth respondent *supra*. Such proceedings are currently still pending.

[10] The Appeal Tribunal's decision was encapsulated in reference to a letter dated 27 September 2018 from the first respondent to the applicant's attorneys of record which stated as follows:

"Re: RAF Appeal Tribunal // Khan Moegamat Yasin

We refer to the above matter and hereby inform you that Road Accident

² Annexure "AB2" to the founding affidavit pp 005-17 - 005-18

Fund Appeal Tribunal resolved at its recent meeting held on 22 September 2018 as follows:

- (i) 45 years old male with history of MVA as in 2014.*
- (ii) injuries sustained:*
 - rotator cuff.*
 - an ulna and radius fractures.*
 - grade II collateral ligament injury.*
- (iii) complaints: pain on knee and shoulder.*
- (iv) clinical outcome: acceptable range of movement of the left shoulder. [my emphasis]*
- (v) conclusion: does not qualify.”³*

[11] My emphasis to: "(iv) left shoulder" *supra* will become significant hereinafter.

GROUNDS FOR REVIEW

[12] The applicant contends that the appeal tribunal's decision being vitiated by a failure of procedural fairness in that the second respondent (the registrar) failed to apply his mind to the objection⁴ lodged by the applicant, which requested that it be considered to appoint an additional independent health practitioner (the objection), namely a registered occupational therapist to

³ pp 005-18

⁴ Annexure AB12 to the FA pp 005-73

assist the appeal tribunal as envisaged in Regulation 8(c) of the Road Accident Fund Regulations, 2008 (the Regulations), which provides as follows:

“The Registrar may appoint an additional independent health practitioner with expertise in any appropriate health profession to assist the Appeal Tribunal in an advisory capacity.”

- [13] The issue which the appeal tribunal had to resolve was whether the applicant’s injuries resulted in a serious long term impairment or loss of the body function within the meaning of section 17(1A) of the Road Accident Fund Act, 56 of 1996 (the Act) read with Regulation 3(1)(iii)(aa).
- [14] The assessment procedure in this regard allows for comprehensive assessments to be done. The applicant was assessed by an orthopaedic surgeon⁵ as well as by an occupational therapist⁶ who both provided medico-legal reports on the outcome of their assessment.
- [15] For purposes of the appeal the applicant relied upon both these reports whereby the assessment done by the occupational therapist also became relevant for purposes of the appeal.
- [16] The applicant contends that the Registrar unjustly ignored the applicant’s request that an occupational therapist should additionally be appointed to the designated appeal tribunal.

⁵ Annexure AB4 to the FA pp 005-27 - 005-42

⁶ Annexure AB11 to the FA pp 005-58 - 005-72

[17] Also, that this failure constitutes procedural unfairness within the meaning of section 6(2)(b) and section 7(2)(c) of PAJA.

[18] The applicant furthermore contends that the decision by the appeal tribunal was taken without due regard to the relevant considerations relating to the nature of the applicant's injuries and the sequelae thereof.

[19] Section 6(2) of PAJA describes on which grounds a court has the power to judicially review an administrative action and determines as follows:

6(2) A court or tribunal has the power to judicially review an administrative action if –

(b) a mandatory and material procedural or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

...

(e) the action was taken –

...

(iii) because irrelevant considerations were considered or relevant considerations were not considered.

(h) the exercise of the power of the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable

person could have so exercised the power or performed the function.”

[20] Regulation 8(b) of the Regulations provides as follows:

“The Appeal Tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine, appointed by the Registrar, who shall designate one of them as the presiding officer of the Appeal Tribunal.”

[21] As a result, it should show that the second respondent has a discretion and if and when this discretion is exercised, a health practitioner with expertise in the appropriate areas of medicine and expertise in any appropriate health profession must be appointed.

[22] In failing to consider the objection raised by the applicant any subsequent steps and/or decisions taken by the second and/or third respondents were procedurally unfair and should be set aside.

[23] In failing to appoint an occupational therapist to the appeal tribunal, whilst the applicant relied only on medico-legal reports from both an orthopaedic surgeon and also from an occupational therapist, should be procedurally unfair and should accordingly be set aside.

[24] The applicant’s objection was not considered by the second respondent prior to the decision being taken at the meeting of the appeal tribunal.

[25] The Appeal Tribunal had taken irrelevant considerations into account as provided for in section 6(2)(e)(iii) of PAJA.

[26] By considering the irrelevant information and subsequently reaching a conclusion, the applicant contends, is not only unjust and unfair but also unreasonable to such an extent, that justifies the applicant's reliance, in addition to the aforementioned reliance, on the ground as set out in section 6(2)(h).

NATURE OF THE REVIEW APPLICATION

[27] The applicant seeks relief premised upon section 6 of PAJA which determines as follows:

“6(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action ...”

[28] Section 8(1)(c) of PAJA provides for the following remedy:

“8(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation ...”

[29] The applicant is accordingly relying on section 6(1) of PAJA in order to obtain the relief as provided for in terms of section 8(1)(c) of PAJA, namely the reviewing of the decision taken by the third respondent and setting the decision aside.

[30] The decision by the appeal tribunal constitutes an administrative action as provided for in PAJA.

[31] This application was opposed by the first second and third respondents (the respondents).

[32] The respondents contended that Regulation 11 provides the following:

“(11) The Appeal Tribunal shall have the following powers:

(f) [to] confirm the rejection of the serious injury assessment report by the fund or an agent or accept the report, if the majority of the members of the Appeal Tribunal consider it is appropriate to accept the serious injury assessment.”

[33] In this regard the third respondent confirmed the rejection of the serious injury assessment report by the fourth respondent's agent in terms of Regulation 11(f) of the Act.

[34] Furthermore, the respondents contend that the third respondent answered to the objection wherein the third respondent confirmed that the applicant's

injuries does not qualify as serious injuries.⁷ It is the respondents case that the objection was duly considered.

[35] The respondents contend that the second respondent had a discretion to appoint an additional independent health practitioner with expertise in any appropriate health profession to assist the appeal tribunal in accordance with Regulation 8(c) of the Act.

[36] Also, that the Act's regulations do not prescribe that the registrar must appoint an occupational therapist.

[37] The applicants' objection, in addition is contained in the letter dated 27 August 2018,⁸ referred to *supra* wherein the applicant's attorneys informed the third respondent that:

"We object to your panel as you have not included an occupational therapist which is essential with regard to deciding whether our client's injury is serious in terms of the narrative test."

[38] The third respondent's decision and response to the objection, as stated is contained in the email dated 3 October 2018⁹ *supra* wherein the following was stated:

"We refer to the abovementioned matter. Kindly find herewith the attached document for your attention."

[39] The document attached for attention is however the letter dated 27

⁷ Annexure "AB2" to founding affidavit *supra*

⁸

⁹ pp 005-17

September 2018 i.e. the decision of the third respondent which concluded that the applicant “*does not qualify*”.¹⁰

[40] The first/second respondent could not have considered the objection in circumstances where its response to the objection related to the decision already taken by the third respondent.

[41] Consequently, the objection was not considered.

[42] The reasons proffered for the appeal tribunal's decision, unjustly ignored the clinical outcome of the assessments done by the orthopaedic surgeon and occupational therapist engaged on behalf of the applicant.

[43] Alternatively, irrelevant considerations were taken into account to justify the conclusion reached, namely that the applicant's injury does not qualify as a serious injury as envisaged by section 17(1A) of the Act, by relying on the clinical outcome of the third respondent indicating an “*acceptable range of movement of the left shoulder*”.

[44] The appeal tribunal's decision was based on a finding that relied on the clinical outcome of an acceptable range of movement of the left shoulder.

[45] The medico-legal reports which served as evidential material before the appeal tribunal (the orthopaedic surgeon as well as an occupational therapist) as well as the medical records of the applicant's injuries relate, *inter alia*, to a rotator cuff tear on the right shoulder with a complete tear of the

¹⁰ pp 005-18

supraspinatus tendon of the right shoulder.

[46] Consequently, the applicant's impairment reported on, is totally unrelated to the conclusion reached by the appeal tribunal, namely that of "an acceptable range of movement of the left shoulder."

[47] The first/second respondent's response *supra*,¹¹ evidence the fact that the first/second respondents failed to truly consider the objection which resulted in the subsequent decision taken by the third respondent in the absence of an occupational therapist constituting part of the appeal tribunal.

[48] In failing to appoint an occupational therapist, under these circumstances, to the appeal tribunal, whilst the applicant relied on medico-legal reports from both an orthopaedic surgeon and an occupational therapist, is accordingly found to be unreasonable, unfair and should as a result be set aside.

[49] Evidently, the third respondent had taken irrelevant considerations into account when reference was made to the left shoulder of the applicant rendering the decision reviewable under section 6(2)(e)(iii) of PAJA.

[50] Also, by considering such incorrect information and reaching the subsequent decision, it was unjust, unfair and unreasonable to the extent that it justifies relief on the grounds set out in section 6(2)(h) of PAJA.

[51] In respect of cost, I find no cogent reason why cost should not follow the event.

¹¹ pp 005-17

ORDER

[52] Accordingly the following order is made:

- a. The decision of the third respondent dated 3 October 2018 is reviewed and set aside;
- b. The second respondent is directed to appoint a new appeal tribunal to determine the dispute reviewed and set aside as set out in paragraph [a] above, and for this purpose to include in the panel so appointed an occupational therapist and to allow the applicant the reasonable opportunity to lodge with the Registrar such further medico-legal reports and other information as the applicant may wish to rely on for purposes of a new appeal hearing;
- c. The first and second respondents are ordered to pay the cost of the application, the one to pay the other to be absolved.

DJ VAN HEERDEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 23 November 2022

Date of judgment: 15 December 2022

APPEARANCES

For the applicant:

Adv LA Visser
Instructed by:

A Bachelor & Associates
c/o Friedland Hart Solomon Nicholson Attorneys

For the respondents:

Adv DF Makhubele
Instructed by:
Rambevha Morobane Attorneys