IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED NO

DATE: 21 August 2023

SIGNATURE:.....

Case No. 58064/17

In the matter between:

BENFIELD, J	**APPLICANT**
And	
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	**FIRST RESPONDENT**
DR L N BOMELA	**SECOND RESPONDENT**
DR K S BILA	**THIRD RESPONDENT**
DR P MPANZA	**FOURTH RESPONDENT**
THE ROAD ACCIDENT FUND	**FIFTH RESPONDENT**

Coram: Millar J

Heard on: 27 July 2023

Delivered: 21 August 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 21 August 2023.

Summary: Application for review of HPCSA Tribunal finding that applicant's injuries do not qualify for non-patrimonial damages – decision reviewable under PAJA – absence of full record making it impossible to ascertain fairness of procedure followed - relevant medical opinion mis-recorded and disregarded – decision reviewed and set aside and matter remitted back to newly constituted Tribunal to consider afresh.

JUDGMENT

MILLAR J

[1] This is an application for the review of a decision by the Tribunal of the Health Professions Council (HPCSA Tribunal) in terms of which it found that the injuries sustained by the applicant in a motor vehicle collision on 4 June 2014 were not "serious".

[2] The consequence of this finding is that the applicant does not qualify for non-patrimonial damages – general damages for pain and suffering, disfigurement, disablement and loss of amenities of life.

[3] The application for review is brought in terms of the Promotion of Administrative Justice Act (PAJA).[1] The application was not brought timeously and so I am also required to adjudicate an application for condonation. There was also an application brought by the respondents for the late filing of their answering affidavit. This latter application was not opposed and since the matter was ripe for hearing before me the condonation was granted, and the hearing proceeded.

BACKGROUND

[4] The applicant submitted a claim to the 5th respondent, the Road Accident Fund (RAF). The submission of such a claim entails compliance with the Road Accident Fund Act[2]. This required the applicant to *inter alia* submit a RAF1 claim form to which is attached a medical report as well as various other peremptory documents. The applicant complied sufficiently with his obligations in terms of the Act and on 5 September 2019, some 5 years after the injuries were suffered, the RAF accepted liability.

[5] The damages claimed fell under two categories – special damages for actual patrimonial loss and general damages for non-patrimonial loss. The claim for special damages is not in issue here.

[6] In order to prosecute a claim for non-patrimonial damages against the RAF, it was necessary for the applicant to comply with Regulation 3 of the Regulations[3] promulgated in terms of the Act.

[7] In particular, Regulation 3(3)(a) provides that:

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[1] 3 of 2000.
[2] 56 of 1996 (as amended).
[3] GN R770 of 2008 which came into effect on 1 August 2008.

"A third party whose injury has been assessed in terms of these Regulations shall obtain from the medical practitioner concerned a serious injury assessment report."

[8] The applicant submitted a RAF4 report form completed by Dr. Birrell an Orthopaedic Surgeon on 30 August 2017. In that RAF4, Dr. Birrell, after having reviewed all the medical records relating to all the injuries sustained by the applicant, came to the conclusion that the injuries suffered by the applicant were indeed "*serious*" in terms of paragraph 5.1 of the narrative test. Besides referring in his assessment to his detailed medico legal report he also noted his finding *"due to neck surgery."* This conclusion was also reached by Dr. J Du Plessis, a Neurosurgeon, who also reviewed all the medical records, including the report of Dr. Birrell and also examined the applicant. In this regard Dr Du Plessis recorded in his medico legal report that "*I concur with Dr Birrell's narrative test.*"

[9] Notwithstanding that the RAF4 report form of Dr. Birrell had been furnished to the RAF in 2017 it only conveyed its decision to reject the applicant's claim for non-patrimonial damages on 9 September 2019 being the day of the trial and on which, it had conceded liability.

[10] Unfortunately, besides notifying the applicant that it was rejecting his claim for non-patrimonial damages, no formal notice was ever given and no reasons proferred for the rejection.[4] It was in its terms by all accounts a "blanket" rejection.

[11] An appeal was lodged by the applicant to the HPCSA Tribunal in terms of Regulation 3(4) on 19 September 2019. Somewhat inexplicably, it took until 20 January 2021, 16 months, before the applicant was notified that the 2nd to 4th respondents (the actual HPSCA Tribunal for the applicant's matter) had been appointed to determine the appeal.

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[4] See Regulation 3(3)(d)(i) which provides that *"If the Fund or an agent is not satisfied that the injury has been correctly assessed, the Fund or agent must: (i) reject the serious injury assessment report and furnish the third party with reasons for the rejection;"*

[12] The record shows that on 24 December 2020, the agenda together with all the "meeting files" were sent to the members of the tribunal. A link was also sent for the virtual meeting to be held on 30 January 2021.

[13] On 30 January 2021, the HPCSA Tribunal considered the present matter and 20 others and came to the conclusion, in respect of the applicant, in finding that the injuries suffered by the applicant in the collision were "*non-serious*". The consequence of this finding and of this decision, was to non-suit the applicant in his claim for non-patrimonial damages. The decision was communicated to the applicant on 2 February 2021 together with notification that if reasons were requested these should be requested within 90 days. These were requested and were furnished on 5 May 2021.

REVIEW UNDER PAJA

[14] It is accepted that a decision on whether or not an injury is "serious" is an administrative act falling under the PAJA. In *Road Accident Fund v Duma and Three Similar Cases*[5] it was held:

> *"In accordance with the model that the Legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the Court. That much appears from the stipulation in regulation 3(3)(C) that the Fund shall only be obliged to pay general damages if the Fund and not the Court is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious."*

[15] It bears mentioning that at the time of the decision in *Road Accident Fund v Duma and Three Similar Cases* that the Regulations did not prescribe a time period within which a decision had to be made in regard to whether or not liability for non-patrimonial damages would be accepted or not. It was only on 15 May 2013

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[5] 2013 (6) SA 9 (SCA) at para [19].

that Regulation 3(3)(dA) came into effect and provided that a decision should be made within 90 days of the submission of the RAF4 serious injury report.

[16] In the present matter, the decision to reject the applicant's claim for non-patrimonial damages was taken some 600 days after it should have been taken. There is no explanation before the court for this and similarly, no explanation for the 16-month delay between the submission of the appeal and its hearing.

CONDONATION FOR LATE FILING UNDER PAJA

[17] What is clear in this matter is that there have been a number of periods of inordinate delay on the part of the RAF and the HPCSA Tribunal for which there is no explanation. It is against this background that the HPCSA Tribunal, in the present proceedings, has taken issue with the fact that the applicant's application for review was delivered outside the period provided for in PAJA.

[18] Section 7 of PAJA provides that review proceedings must be instituted *"without unreasonable delay and not later than 180 days"* after the reasons for the decision are made known.[6]

[19] It was held in *Opposition to Urban Tolling Alliance v South African Roads Agency*[7] that:

> *"[26] At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see e.g. Associated Institutions Pension Fund and Others v Van Zyl and others 2005 (2) SA 302 (SCA) at paragraph 47 [also reported at [2004] 4 ALL SA 133 (SCA) – Ed]). Up to a point, I think, section 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as per se*

[6] Section 7(1)(b).
[7] 2013 JDR 2297 (SCA) at para [26].

unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But the 180-day period the issue of unreasonableness is pre-determined by the Legislature, it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay (see e.g. Associated Institutions Pension Fund (supra) at paragraph 46). That of course does not mean that, after the 180-day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 ALL SA 519 (SCA) at paragraph 54)."

[20] In the present matter, since the delay in bringing the application was outside the 180-day period, whether the period is to be extended (condoned) in terms of Section 9(1)(b) or 9(2) of PAJA will depend on the facts of the specific case.[8]

[21] In *Van Wyk v Unitas Hospital and Another*[9] it was held:

> *"This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation*

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[8] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para [57].

[9] 2008 (2) SA 472 (CC) at para [20]; *Pricewaterhouse Coopers Inc v Van Vollenhoven N.O* 2009 JDR 1307 (SCA) at para [6]; see also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC)

for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[22] Insofar as the reason for the 18-day[10] delay is concerned, this was accepted by the applicant's attorney of record as having been an error on her part. She did not try to justify the error and accepted, forthrightly, and as a professional person should, her responsibility for the cause of the delay.

[23] I am not persuaded that an 18-day delay is of any moment – it is in my view, having regard to the extended period of disregard by, firstly the RAF in failing to take a decision within 120 days and secondly, the HPSCA Tribunal taking some 16 months to convene a hearing for the appeal, inconsequential.

[24] I was not directed to any prejudicial consequence either to the respondents or in respect of the administration of justice in consequence of the 18-day delay. While there are instances where a litigant should stand or fall by the neglectful conduct of their representative, this is certainly not one of those instances.[11]

[25] While I find that the explanation for the 18-day delay is reasonable and acceptable and that there is no prejudice in consequence thereof, these are not the only aspects to be considered.

[26] Insofar as the importance of the matter is concerned, it certainly is insofar as the applicant[12] is concerned, as it affects the exercise of his right to compensation for non-patrimonial damages. Insofar as the RAF is concerned, it is equally, in my view, important to it in view of its statutory object to ensure, *"the payment of compensation"* in accordance with the Act.[13]

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[10] The applicant contended the delay was 11 days and the respondents 18 days. The difference is not material and so for purposes of this judgment I accept that the delay was 18 days.

[11] See for instance *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) – distinguishable from the present matter because of the period of the delay in the present matter.

[12] In *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA) at para [18] it was held that *:"...It has long been recognised in judgments of this and other courts that the Act and its predecessors represent 'social legislation' aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle."*

[13] Section 3 of the RAF Act.

[27] The final consideration insofar as the application for condonation is concerned, is the prospects of success and I now turn to this.

THE GROUNDS OF REVIEW

[28] The applicant sought to review the decision on 2 grounds:

[24.1] Firstly, that relevant considerations were not taken into account and irrelevant considerations were taken into account;[14] and

[24.2] Secondly, that the decision was irrational.[15]

[29] Insofar as the first ground is concerned, it was argued for the applicant that besides the medical reports that were submitted to the HPCSA Tribunal, they were also informed that the RAF had had the applicant examined by a number of medical experts whose reports had not been made available.

[30] In this regard, they pointed specifically to the examination of the applicant by Dr. Mkhonza (a Neurosurgeon), Dr. Matsape (an Occupational Therapist) and Ms. M Du Plessis (an Industrial Psychologist).

[31] It was argued that notwithstanding that the Tribunal had been made aware of the fact that the applicant had been examined by these experts and the reports had not been placed before it, it had proceeded to decide the matter ostensibly on the basis that the record before it was incomplete and that no regard had been had to the medical opinions of those experts.

[32] Unfortunately, it was never asserted that the reports concerned existed or for that matter were ever placed in possession of the HPCSA Tribunal. While there may

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[14] Section 6(2)(e)(iii) of PAJA.
[15] Section 6(2)(f)(ii)(cc) and (dd) of PAJA.

well have been examinations, it is unknown whether the professionals concerned ever prepared reports or furnished them to the RAF.

[33] For "relevant considerations" being medical reports which should have been taken into account in the present matter, it was for the applicant to demonstrate that the reports existed and were available to the HPCSA Tribunal. The applicant has failed to do this, and for this reason I am not persuaded that this ground of review is meritorious.

[34] The second ground of review is that the decision taken was irrational – in that the decision taken was not rationally connected to the information before the HPCSA Tribunal or the reasons given for the decision by it.

[35] Since the decision of Dr. Birrell in finding that the applicant qualified for non-patrimonial damages on the basis of the narrative test, was a value judgment, the HPCSA Tribunal, consisting also of specialist medical practitioners, is empowered in terms of the Regulations[16] to substitute its finding for his.

[36] In this regard, in *Brown v Health Professions Council of South Africa and Others*[17] it was held:

> *"It bears repeating that the impugned decision was taken by a panel of medical experts who considered all the medical reports before them, at least half of which supported the decision they ultimately took. The decision was, in so (sic) small part, a value judgment and it is quite conceivable that even had there been no countervailing medical opinions the Tribunal could justifiably have arrived at a different conclusion to that of the experts . . . "*
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> *"These comments must not, however, be understood as suggesting that decisions of the Tribunal in similar matters are sacrosanct or immune to review. Whether such decisions are sound, however, will depend in each case on the particular*

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[16] In terms of Regulation 3(11)(h) which empowers the Tribunal to *"Confirm the assessment of the medical practitioner or substitute its own assessment for the disputed assessment performed by the medical practitioner, if the majority of the members of the appeal tribunal consider it is appropriate to substitute."*

[17] 2015 JDR 2562 (WCC) at para [48].

circumstances. There will, no doubt, be cases where the conclusion whether to intervene is much more difficult to make particularly given the inherent imprecision of the concept of a 'serious injury'".

[37] Having found the injuries suffered by the applicant to be "non-serious", the HPCSA Tribunal record was the following:

"Mr Benfield who is 56 years old was an MVA victim as a driver. He sustained a cervical spine soft tissue injury. Just a month after the injury, was done a cervical fusion. He ha managed to return to his pre injury job and resigned for non-accident related issues. Was seen by Drs Matekane and Tony Birrel, the latter qualified him under 5.1 Radiologically, has spondylosis plus fusion MY IMPRESSION; NOT SERIOUS
Dr Mpanza *56 years old male involved in a PVA in 2014* *Sustained: Neck injury, right shoulder injury* *Consulted a month after the accident and was done an operatio- ACDF,* *Complains: Neck pain, Right hip pain, mood changes* *He returned to work after the accident and he resigned after that.* *Dr Birell (ortho) – X rays – showed degenerative changes. WPI of 9% and qualifies client under 5.1.* *Dr Du Plessis (neuro) – denies having neck pain, probably had degenerative disc disease before the accident. No neurological deficits noted.* *Dr Matekane (ortho) – prognosis is fair, injuries were STI, WPI is 3% does not qualify client.* *CP – no neurocognitive deficits* *Opinion: NON-SERIOUS injury*
*In **JANUARY 2021,** the Appeal Tribunal **RESOLVED** that: 56 year old in MVA in 2014* *Injuries:* • *Cervical spine soft tissue injury* • *Chest wall contusion* *Initially admitted and discharged same day. Readmitted 1 month later and ACDF C5-C7 done.* *Outcome:* • *Complaining of neck pain and stiffness*

- *Decreased ROM cervical spine.*
- *X-rays: Prosthesis C5-7. Spondylosis C5-7 with degenerative changes*
- *Ortho- Dr Birrell qualifies claimant (2 level neck fusion). Dr Matekane notes no future surgery foreseen.*
- *Neurosurgeon – Cervical spine soft tissue injury, osteoarthritis right C5-6 paravertebral joint with stenosis (Dr du Plessis, who does not qualify claimant).*
- *Clinical psychologists: depression and anxiety.*

Opinion: NON SERIOUS INJURY – No neurological deficits

Tribunal Finding:

- *NON SERIOUS INJURY*
  - *No neurological deficits.*
  - *No decreased function and returned to his pre-accident function*

Spondylosis is age related"

[38] A number of features stand out when consideration is given to the reasons of the HPCSA Tribunal. Firstly, the Tribunal incorrectly recorded that Dr. Du Plessis (the Neurosurgeon) who had examined the applicant, did not agree with and did not support the finding by Dr. Birrell, that the applicant's injuries qualified as "serious". This to my mind arises in consequence of a failure on the part of the HPCSA Tribunal to properly consider the report of Dr. Du Plessis. Additionally, the opinion of Dr Birrell is inexplicably disregarded in favour of that of Dr Matekane but there is no apparent basis for doing so.

[39] The waters are muddied further by the notation on the record of the decision "*my impression – not serious*". This notation is in the singular and appears at the beginning of the record the decision of the Tribunal.

[40] Another aspect arose during the course of the hearing of this matter, in regard to whether or not the Tribunal members had properly considered the entirety of the records before them. In the present matter, the medical records submitted with the appeal numbered some 390 pages.

[41] From the record of events on 30 January 2021, it appears that the same Tribunal considered the appeals of 21 persons. On consideration of what was before the court, I requested counsel for the HPCSA Tribunal, to ascertain to whether there was a verbatim transcript of proceedings during the Tribunal's sitting. I was informed from the bar that the meeting had been conducted virtually and that the recording was no longer available. I then also requested that the court be furnished with an indication of the page count in respect of the records considered in each of the other 20 matters. I was informed from the bar that this information would be furnished within a week. It has never been furnished.

[42] On consideration of the matter as a whole, I am not persuaded that the HPCSA Tribunal gave proper attention to the records before it in respect of the applicant. The reasons for this are twofold – firstly that having regard to non-availability of the transcript, the volume of the material to be considered and the record of the decision, there is no means to determine what procedure was followed in arriving at the decision.

[43] While PAJA recognizes that "*a fair administrative procedure depends upon the circumstances of each case*"[18], in order to find that the procedure was fair it is necessary to know what it was. The unavailability of the record of the hearing at which the discussion of the matter took place and the failure to provide the further information sought makes it all but impossible to know if the procedure was fair or not. The summary of what was considered, and the findings are certainly not indicative of a proper consideration or discussion of the matter before arriving at a decision.

[44] Secondly, in the absence of the full record, the reasons given do not bear any rational connection between, in particular, the reports of Dr. Birrell and Dr. Du Plessis and the decision made by the Tribunal. The failure to record Dr. Du Plessis opinion of the seriousness of the applicant's injury is inexplicable. The notation on the record, to which I have referred to above, is particularly

[18] Section 2(a) of PAJA.

problematic and in its terms, indicative, in my view of the decision having been made by a single member of the Tribunal. The likelihood of all three members making precisely the same error in respect of the same report can be safely discounted.

[45] In regard to the second ground of review, I find that that there is no rational connection between what was before it and the decision of the Tribunal and I find this ground of review meritorious.

[46] Having found that one of the grounds of review are meritorious, it follows that condonation ought also to be granted.

[47] When the application for review was initially brought, it was brought on the basis that this court should substitute the finding of the HPCSA Tribunal with a finding that the applicant's injuries are "serious". During the course of the argument, counsel for the applicant conceded, quite correctly in my view, that the appropriate remedy (were the review to succeed) was for the matter to be remitted back to the HPCSA for the constitution of a new Tribunal to consider the matter afresh. I intend to make an order in these terms.

COSTS

[48] In terms of Regulation 3(14), the RAF is liable to bear the costs of the HPCSA Tribunal. The RAF, however, took no part in the proceedings and for that reason I intend to order that the HPCSA and RAF are jointly and severally liable for the costs. The applicant argued that the engagement of two counsel in the matter was warranted given its importance to the applicant. On consideration of the matter as a whole, I am persuaded that the engagement by the applicant of two counsel was a wise and reasonable precaution and hence the order that I make.

ORDER

[49] In the circumstances I make the following order:

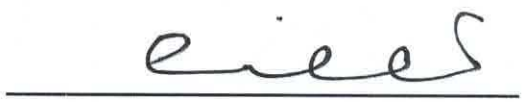
[44.1] The first to fourth respondents' application for condonation for the late filing of their answering affidavit in the main application, is hereby granted.

[44.2] The 180-day period referred to in section 7 of the Promotion of Administrative Justice Act, 3 of 2000, is in terms of section 9 extended for a period of 11 days to 20 December 2021.

[44.3] The decision of the Road Accident Fund Appeal Tribunal (as constituted by the second to fourth respondents) on 20 January 2021, that the applicants' injuries do not qualify as "serious" is hereby reviewed and set aside.

[44.4] The matter is remitted back for reconsideration in terms of the Regulations before a newly constituted Tribunal.

[44.5] The first and fifth respondents, jointly and severally, the one paying the other to be absolved, pay the costs of the application for review, including the costs of the application for condonation. Such costs are also to include the costs of two counsel, where so engaged.



A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON: 27 JULY 2023

JUDGMENT DELIVERED ON:	21 AUGUST 2023
COUNSEL FOR THE APPLICANT:	ADV. J WILLIAMS SC ADV. Z MARX DU PLESSIS
INSTRUCTED BY: REFERENCE:	MARAIS BASSON INC MS S VAN STADEN
COUNSEL FOR THE 1st, 2nd, 3rd and 4th RESPONDENTS:	ADV. D THUMBATHI
INSTRUCTED BY: REFERENCE:	VAN GREUNEN & ASSOCIATES INC MR. S VAN DEN HEEVER

NO APPEARANCE FOR 5th RESPONDENT