

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**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:

23 August 2023
DATE


.....
SIGNATURE

14

Case No: 83708/2019

In the matter between:

ELIZABETH LOMBARD obo R-L L

Applicant

and

THE HEALTH PROFESSIONS COUNCIL OF

SOUTH AFRICA

First Respondent

THE ROAD ACCIDENT FUND

Second Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be 23 August 2023.

JUDGMENT

BOKAKO AJ

Introduction

1. The applicant seeks to review a decision of the first respondent, The Health Professions Council of South Africa [Hereinafter HPCSA] determining whether injuries suffered by the applicant resulting from a motor vehicle accident qualify as a serious injury in terms of Act 56 of 1996.
2. The applicant is ELIZABETH LOMBARD, who brings this application on behalf of her minor biological child, R-L L. The child was involved in a motor vehicle accident on 29 October 2018. On 21 June 2019, the applicant lodged a claim with the second respondent, and she issued a summons for payment of damages, including a claim for compensation of non-pecuniary loss or general damages as it is often referred to.
3. On 24 October 2022, the issue of merits and quantum became settled, save for the claim for payment of general damages, which the first and second respondents rejected. The RAF 4 form serious injury by Dr Ntimbane was served on RAF on 3 May 2022. On 20 July 2022, RAF rejected the RAF 4 form stating that the applicant does not have a WPI of 30% or more and that such injuries are not regarded as severe in terms of Regulation 3(1)(b) of the Act. On 5 August 2022, RAF 5 form was transmitted to the Registrar of the

HPCSA, appealing the decision of the RAF to the HPCSA Appeal Tribunal. On 16 November 2022, the applicant was advised that an Appeal Tribunal had finally constituted the following members to the panel: Dr Williams Ramokgopa (Orthopaedic Surgeons) and Dr Miller (Neurosurgeon) who were appointed.

4. On 30 November 2022, the HPCSA addressed a letter with the appeal outcome, and The Appeal Tribunal resolved that *'After considering all available evidence presented to the committee, it was found that the injuries sustained by the patient may be classified as non-serious in terms of the narrative test'*. After this decision, the applicant decided to institute these review proceedings.
5. The first respondent and the second respondent does not oppose the application.

LEGISLATIVE FRAMEWORK

6. The RAF Act was amended with effect from 1 August 2008 to introduce provisions that brought about a whole new dispensation in the history of third-party claims in this country. The provisions relating to the Fund's obligation to compensate third parties for non-pecuniary loss (general damages) are relevant to this application. The Fund's responsibility is now limited to a severe injury contemplated in sections 17(1) and (1A) of the RAF Act.
7. Section 17(1A) provides as follows:
 - “(a) *Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that damages are assessed about the circumstances of the third party.*

(b) The assessment shall be carried out by a medical practitioner (b)registered as such under the Health Professions Act, 1974 (Act 56 of 1974). “

8. Section 26(1A) empowers the Minister to make regulations regarding:

- a) The method of assessment to determine whether, for purposes of section 17, a serious injury has been incurred;*
- b. Injuries that are, for section 17, not regarded as serious injuries. The resolution of disputes arising from any matter provided for in this Act."*

9. Under the above powers, the Minister promulgated the Road Accident Fund Regulations, 2008, which came into operation on 1 August 2008. Of relevance to this application are the provisions of Regulation 3. It prescribes the method of assessment for determining serious injury. The relevant part of Regulation 3(1)(b) reads as follows:

“(b) The medical practitioner shall assess whether the third party's injury is serious by the following method:

- (i) ...*
- (ii) the injury resulted in 30% or more impairment of the Whole Person as provided in the AMA Guides; the injury shall be assessed as serious.*
- (iii) An injury that 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 severe long-term Impairment or loss of a body function;*

- (bb) constitutes permanent serious disfigurement;*
- (cc) resulted in extreme long-term mental or severe long term behavioural disturbance or disorder;*
or
- (dd) resulted in the loss of a fetus."*

10. Regulation 3(3) provides, among other things, that a third party whose injury has been assessed in terms of these Regulations shall obtain a serious injury assessment report from the medical practitioner concerned and submit it to the Fund by the Act and Regulations. It provides further that the Fund shall only be obliged to compensate a third party for non-pecuniary loss if a serious injury assessment report supports a claim and the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided in the Regulations.

11. How an assessment may be disputed is set out in Regulation 3(4). These regulations involve a referral of the dispute to the Appeal Tribunal. Regulation 3(11) provides for the powers of the Appeal Tribunal. Includes a determination whether or also, in its majority view, the injury concerned is serious in terms of the method set out in the Regulations.

CASE FOR THE APPLICANT

12. The applicant sustained the following injuries:

- 12.1 Severe head injury and a laceration to the scalp.
- 12.2 Laceration on the right knee.
- 12.3 Emotional shock and trauma due to the death of a co passenger and scarring and disfigurement.

13. Dr Mennen (Orthopaedic Surgeon) examined the child on 9 October 2020 and observed that the child had the following complaints: Neck pain in the left lateral area and, at times, on the right and neck muscle spasms. She develops headaches three times a month; she experiences nightmares

regarding children who died in the accident. The expert noted an occipital skull scar of 4cm on further examination. The applicant presented with a diminished range of neck motion; she also suffered acutely. She has chronic headaches and neck pain. She suffered a whiplash-type injury to the neck and a sprain-type injury to the neck. She now suffers from a stiff and painful neck as a result. Orthopaedically, she suffers some degree of potential loss of work capacity owing to the accident.

14. Dr Ntimbane (Neurosurgeon) examined the child on or about 2 February 2022 and found that the child suffered a loss of consciousness. She also sustained a head injury, specifically an occipital laceration. She struggles to pay attention and focus which results in poor concentration. She can have headaches twice a week and it worsens during hot conditions. She complains about blurred vision. She uses over-the-counter medication. She gets anxious when traveling in a car. On examination, the expert noted a scar on the occipital. The expert diagnosed a mild brain injury. She suffers from long-term residual poor concentration and posttraumatic stress disorder. A developing brain is vulnerable to long-term cognitive deficits following a concussion. The expert deferred the fallouts to a clinical psychologist. The child suffers from posttraumatic headaches; she has a 23% WPI. She qualifies for general damages due to her severe mental or strict long-term behavioural disturbance or disorder.

15. Ms Steyn (Occupational Therapist) examined the child on 30 October 2020. The child has the following complaints: Physical: Headaches a few times per month. The headaches are worse in hot weather and when concentrating. Occasionally, unprovoked neck pain. Cognitive: She struggles to concentrate, her memory is poor, she experiences headaches, and she gets anxious when traveling in a vehicle. On the day of the occupational therapy assessment, the child presented with difficulties relating to occasional neck pain and headaches. She reported pain in her neck with prolonged neck flexion. Subsequently, from a physical perspective, she is ideally suited for sedentary, light, and medium work. From a cognitive perspective, she presented with scholastic challenges, including below-average visual perceptual and mathematic skills and below-average writing speed. Given cognitive limitations may impede her ability to cope with her studies with an increasing workload and mental demands as she progresses to higher grades. Handling heavy loads, working in the sun, or noisy environments will likely exacerbate the headaches. She takes pain medication as and when needed, relieving the headaches. It should be noted that chronic exposure to analgesics potentially

places her at risk of developing dangerous side effects like the erosion of the gastrointestinal lining and ulcers. It could also lead to rebound headaches, drug dependency, sleepiness, and anxiety. These factors can lead to work-related difficulties, and thus she should take pain medication under the management of a medical practitioner. The note is furthermore taken of her psychological challenges, in the form of anxiety and posttraumatic stress disorder, as indicated by the clinical psychologist, as well as symptoms of posttraumatic stress disorder and accident-related depression, as noted by the psychiatrist.

16. Mr Ferreira Texeira (Clinical Psychologist) examined the child on 3 November 2020. The child had the following complaints: Physical: Pain in her neck, headaches located in her temporal region, about three to four times a month. She does not take any medication as treatment. She reported that her eyes become painful when reading for long periods, which causes headaches. She stated that her arms sometimes become numb, and she struggles to lift heavy objects off the floor and overhead.

17. Cognitive: She battles to concentrate when she has a headache, is forgetful. Loses things such as her cell phone and money, forgets people's names, uses a diary to remember things, Diminished attention and concentration, and her mind tends to wander and easily distracted. The child reported that she becomes sad when she thinks about the accident. She suffers from increased nightmares about two to three times a week. She sometimes dreams about the accident or that her dolls are trying to hurt her. She then wakes up crying and afraid.

18. According to the neurosurgeon, the child sustained a mild brain injury and a whiplash injury. Her reported cognitive shortfalls likely reflect overall emotive dysfunction, chronic pain, and discomfort. Her psychological profile revealed psychological distress in the form of anxiety and posttraumatic stress disorder. It can be concluded that the child has been rendered psychologically more vulnerable due to her involvement in the accident under discussion. It should

be noted that any psychological dysfunction could likely be compounded by her mother's sudden disappearance post-accident.

19. Further to this, the psychological profile is likely to be affected negatively by the presence of an ongoing pain and discomfort. The child's general enjoyment and quality of life has been affected, due to her chronic pains caused by the accident under discussion. The expert noted that it is fair to assume that the child was possibly of low average to average cognitive potential pre-accident with no history of serious medical, psychological, or psychiatric illnesses before the accident. Further factors are also considered to impact the child's educational functioning negatively: Her anxiety symptoms may result in her being less motivated and driven overall. An increase in anxiety and PTSD symptoms are likely to tax her emotional resources more, thus rendering her less stress-tolerant and less able to cope with the psychological demands of school. The expert deferred the child's problems and sequelae to an educational psychologist.

20. Dr Berkowitz (Plastic surgeon) examined the child on 4 November 2020. The child suffered a head injury with a laceration to the posterior scalp. She has a non-hear-bearing scar of 40mm x 8mm, lying horizontally across the occipital scalp; This scar can be improved with plastic surgery.

21. Dr Fine (Psychiatrist) examined the child on 6 November 2020. The child reached typical developmental milestones before the accident. Post-accident, she complains about headaches, with stiff and painful neck. The child has bad dreams about the accident, especially the two brothers passing away. The dreams wake the child, and she cannot go back to sleep again. She developed a fear that her father may pass away. She has severe separation anxiety. She is severely upset by the death of the two boys in the same accident. The expert diagnosed the child with PTSD and Accident-Related Depression due to the accident's physical and emotional effects. The accident, with the death of two boys, was a watershed event. The child's

mother left soon after the accident, which exacerbated the impact of the anxiety and depression. Her ability to perform and enjoy her normal activities has been reduced. The child suffered a mild brain injury with a brief period of loss of consciousness. She will require psychiatric treatment, and her prognosis is good with optimal treatment. RAF 4: She qualifies for general damages due to her severe long-term mental or long-term behavioural disturbance or disorder. She has a 10% WPI.

22. Ms. Van den Heever (Educational Psychologist) In terms of her post-morbid complaints, she experiences headaches and neck pain, is forgetful and misplaces things, is moody and temperamental, and still has travel-related anxiety. She has nightmares and upsetting reminders of the accident and the dead children. Results of the cognitive assessment indicated that her non-verbal reasoning abilities (in particular, her ability to understand and analyse visual information and problem-solving skill using visual reasoning) were more advanced than her verbal reasoning skills. She would thus prefer to engage in tasks of a more practical nature during this evaluation. Her verbal reasoning and verbal problem-solving abilities are presented as weak. Results of the academic assessment confirmed backlogs in terms of language expressive abilities. The above weakness may result from a lack of sustained attention, emotional distress, and anxiety that affects concentration and a lack of motivation to apply herself when engaging in verbal tasks. The emotional assessment showed the child is anxious and presents with trauma-related symptomology.

23. The RAF 4 serious injury by Dr Ntimbane was served on the RAF on 3 May 2022. On 20 July 2022, the RAF rejected the RAF 4 form stating only the following:

"your client does not have a WPI of 30% or more, and your client's injuries are not to be regarded as serious injuries in terms of Regulation 3(1)(b) of the Act".

24. The applicant contends that the Appeal Tribunal should have considered all the relevant facts. It disregarded the experts' conclusion that the applicant had

suffered severe injuries, which entitled her to general damages. It could have satisfactorily explained why it rejected the experts' findings and recommendations.

25. The applicant relies on the provisions of section 6(2) of the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA"). In this regard, it is contended that the Appeal Tribunal failed to consider the Serious Injury Assessment form completed by Dr Ntimbane's (neurosurgeon) and Dr Fine's (psychiatrist) report, which was attached. Further submitted that the first respondent did not furnish adequate reasons for their decision to reject the claim for payment of general damages.

26. On 5 August 2022, well within the permissible 90 days, a RAF 5 form (dispute Resolution Form) was transmitted to the Registrar of the HPCSA, thereby appealing the decision of the RAF to the HPCSA Appeal Tribunal. The appeal clearly states that the RAF has not filed any reports to contradict the applicant's experts.

27. On 30 November 2022, the HPCSA, represented by Nomathemba Kraai, in compliance with Regulation 3(13), addressed a letter with the appeal outcome, inviting the applicant to request reasons within 90 days of the receipt of the letter, advising simply that: *'After considering all available evidence presented to the committee, it was found that the injuries sustained by the patient may be classified as non-serious in terms of the narrative test.'*

28. The applicant contends that the administrative action taken by the first respondent was not procedurally fair as the applicant's case was not considered fully, and the action was, therefore procedurally unfair. It was pointed out that the first respondent failed to act reasonably because they could not consider all the information submitted by the applicant's attorneys when determining the seriousness of her injury.

DISCUSSION

29. The main thrust of the argument presented on behalf of the applicant is that the Appeal Tribunal failed to take into account the severe injury assessment form completed by Dr Ntimbane's and Dr Fine's (psychiatrist) report, which was attached. Further submitted that the first respondent did not furnish adequate reasons for their decision to reject the claim for payment of general damages. Proposing that the decision taken by the Appeal Tribunal should be reviewed and set aside as relevant considerations were not considered and the action itself is not rationally connected to the reasons given for it by the Appeal Tribunal.
30. The first question to be considered is whether or not the serious injury assessment form ("RAF 4 form") completed by the applicant's experts, a psychiatrist, and her neuropsychological report, were indeed part of the documents that served before the Appeal Tribunal. The same documents have now been put before this Court for consideration. Section 6(1) of PAJA provides that any person may institute proceedings in a Court for the judicial review of an administrative action, i.e., the first respondent's decision. The applicant contends that the Appeal Tribunal considered only the medico-legal reports by Dr Ntimbane and Dr Fine, despite additional reports being available and both RAF 4 forms of both doctors directing the attention of the reader to further experts to be consulted, including a clinical psychologist, occupational therapist, and educational psychologist.
31. The main contention of the applicant is that it is unimaginable that an Appeal Tribunal decided on a child without acquainting itself with all of the crucial facts and expert opinions. Further submitting that no attempts were made to obtain additional expert opinions, which is within the powers of the Appeal Tribunal, therefore, concluding that no competent decision can be reached and that the Appeal Tribunal failed to implore the necessary facts and opinions resulted in dereliction of the duty of the Appeal Tribunal. Applicant avers that the HPCSA is bound to consider reports at hand and can use the rules to solicit further information, but they chose not to. It is undisputed that

the Appeal Tribunal did not ask for the child's school reports and did not bother to liaise with the teachers or principal regarding her previous schooling, whereas the report by Dr Ntimbane makes it clear that the child was home-schooling. The Appeal Tribunal relied on outdated and old reports and failed to solicit the necessary facts which would have allowed it to make an informed decision.

32. The Appeal Tribunal nit-picked from the available records, which suited the narrative of the Appeal Tribunal and focused only on the report of Dr Fine (psychiatrist) and disregarded the opinion of Dr Ntimbane (neurosurgeon). The Appeal Tribunal relied on the hearsay evidence and *ipse dixit* of the child's father, who is not well educated and indigent from a poor socio-economic background, without as much as verifying a single shred of information and information which was provided to the expert in November 2020, and which is outdated.

33. In regulation 3(13), the determination by the appeal Tribunal is final and binding.¹ A procedure by which the Appeal Tribunal enquires into the dispute

¹ In *JH v Health Professions Council of South Africa and Others* (22407/14) [2015] ZAWCHC 178; 2016 (2) SA 93 (WCC) (25 November 2015) at para 23, the Court held:

Where the RAF's rejection of a claimant's serious injury assessment report is disputed, the lawmaker has entrusted to the Appeal Tribunal the function of determining whether or not to uphold that rejection. There is no appeal from the Appeal Tribunal to this Court. The distinction between appeal and review must be clear (Bato Star Fishing Pty Ltd v Minister of Environmental Affairs & Others [2004] ZACC 15; 2004 (4) SA 490 (CC) para 45). Bearing in mind the incidence of onus in this case, I cannot set aside the Appeal Tribunal's decision if the Appeal Tribunal has shown that it did not act arbitrarily, capriciously, or irrationally. The mere fact that I might, on the merits, have reached a different conclusion would not justify a finding that the Appeal Tribunal acted arbitrarily, capriciously, or

is laid down in substantial detail by regulations 3(4) to 3(13). It includes the following features: Both sides may file submissions, medical reports, and opinions. The Appeal Tribunal may hold a hearing to receive legal arguments by both sides and seek the recommendation of a legal practitioner about the legal issues arising at the hearing. The Appeal Tribunal has broad powers to gather information, including the ability to direct the third party to submit to a further assessment by a medical practitioner designated by the Appeal Tribunal; to do its examination of the third party's injury; and to direct that additional medical reports be obtained and placed before it. Counsel for the applicant referred the Court to relevant case law in so far as the RAF's and the HPCSA decision, relating to general damages and the seriousness of the injuries, the SCA in *Duma* held, at para 19 that:

(a) Since the Fund is an organ of the State as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of regulations 3(3)(c) and 3(3)(d), whether or not the RAF 4 form correctly assessed the claimant's injury as "serious" constitutes "administrative actions contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A "decision is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of PAJA.

(e) Neither the decision of the Fund nor the decision of the Appeal Tribunal is subject to an appeal to the Court. The Court's control over these decisions is by means of the review proceedings under PAJA.

irrationally (Road Accident Fund v Duma and Three Similar Cases 2013 (6) SA 9 (SCA) para 19; Brown v Health Professions Council of South Africa & Others Case 6449/2015 WCHC paras 13-18 and 40 (as yet unreported judgment of Bozalek J dated 23 November 2015); cf MEC For Environmental Affairs & Development Planning v CClairison'sCC 2013 (6) SA 235 (SCA) para 18). Appropriate respect for the administrative agency in the present case is particularly apposite, bearing in mind that one is concerned with a question of medical judgment regarding which the members of the Appeal Tribunal, unlike the Court, have qualifications and expertise.

33. In terms of section 6(2)(d) of PAJA² administrative action may be reviewed if *"the action was materially influenced by an error of law"* Amongst other references, Counsel referred to *Democratic Alliance v President of the Republic of South Africa and Others*³ the Constitutional Court held that the principle of legality requires rational decision-making - the process by which the decision is made, and the decision itself must be reasonable.
34. The next question to be considered is whether or not the Appeal Tribunal had taken into account the contents of the severe injury assessment form completed by Dr Ntimbane (neurosurgeon) as well as Dr Fine (psychiatrist), which was attached to it in preparation of the Appeal Tribunal. At a glance, it appears that there is evidence indicating that the severe injury assessment form completed by Dr Fine, together with her neurosurgeon report attached to it, was considered by the Appeal Tribunal as part of *"all the reports"* If the Appeal Tribunal was of the view that Dr Fine's conclusions are not correct and should be rejected, what are the reasons for having taken such a decision. Thus far, no grounds for the rejection have been provided.
35. On 17 January 2023, the HPCSA provided reasons. These reasons came from Ms. Kraai and not from the constituted panel; allegedly, the reasons consisted of cryptic and telegraphic assertions, which did not clearly explain why the Appeal Tribunal concluded that the applicant did not suffer serious injuries. There is also no clear indication whatsoever that the Appeal Tribunal considered or applied the narrative test envisaged in regulation 3(1)(b)(iii) to the Act. Ms Kraai notes that the child suffered a minor brain injury with no complications, and there had been no complaints from the child's teachers, school marks are good, and she enjoys visiting friends.
36. It is also evident that the Appeal Tribunal overlooked the psychiatric fallouts of the child. The Appeal Tribunal disregarded the effect of the death of the two boys on the minor child, leaving the child with residual nightmares and anxiety. Given the diagnosis by the neurosurgeon of a brain injury, the Appeal Tribunal needed to investigate and establish the child's neurocognitive and psychological profile

² Act 3 of 2000.

³ 2013(1) SA 248 CC at para 33 - 34

and the impact on her education and productivity, which they omitted to do. It is also imperative to note that the decision by the first respondent to the effect that the child's injuries are not-serious is an administrative decision as contemplated by the definition of an "administrative decision contemplated by Section 1 of the Promotion of Administrative Justice Act 3 of 2000 [Hereinafter PAJA]. Therefore, in terms of section 6(2)(d) of PAJA, administrative action may be reviewed if "an error of law materially influenced the action" Dr Fine and Ntimbane directed the attention of the reader to further experts to be consulted, including a clinical psychologist, occupational therapist, and educational psychologist. The applicant contends that without obtaining the said additional expert opinions, no competent decision can be reached. According to the Appeal Tribunal's reasons, it appears as if they were unaware of Dr Ntimbane's suggestions in directing further experts to be consulted.

37. It was necessary, in my view, that the Appeal Tribunal should have taken into account the suggested directive by an expert, as opined by Dr Ntimbane. The severe injury assessment form completed by Dr Ntimbane diagnosed a mild brain injury in that the applicant suffers long-term residual poor concentration and posttraumatic stress disorders. A developing brain is vulnerable to long-term cognitive deficits following a concussion. The expert deferred the fallouts to a clinical psychologist. The child suffers from posttraumatic headaches. The expert qualified the applicant's psychological injuries as serious. In her opinion, the applicant suffers from symptoms associated with major depression, severe anxiety, and posttraumatic stress resulting from the accident. She then concluded that these injuries resulted in "severe Long-term mental or severe long-term behavioural disturbance or disorder" and that the applicant "needs urgent and adequate psychological intervention for her severe symptoms".

38. In *Mnqomezulu, Za Mnqomezulu, Zamokwakhe Comfort v Road Accident Fund* (04643/2010 [2011] [2011] ZAGP JHC (8 September 2011), Kgomo J said the following about this narrative test (par33):

"The narrative test calls for an inquiry into various components of the persona, including an injured Plaintiff's physical, bodily, mental, psychological, and even aesthetic features. It is

inappropriate for a single medical expert to express themselves with any authority on the point of a finding in terms of the narrative test on all such facets of diminished capacity. On the contrary, it is appropriate and desirable, if not proper, that a RAF4 form be produced about every particular and applicable medical discipline that is called for by Regulation 3(1)(b)(iii) in respect of each claimant individually detailing his specific and individual injuries and complaints.

39. I entirely associate myself with this dictum. It would be irrational to exclude other expert reports in different fields of discipline (e.g., that of a Psychiatrist, Occupational Therapist, Clinical Psychologist, Educational Psychologist, etc), under circumstances where a RAF 4 form duly completed by a medical practitioner and filed in terms of the regulations, are also presented for consideration where necessary. This approach is contemplated by the formulation of the narrative test (Regulation 3(1)(b)(iii)), also read with, for instance, Regulation 3(2)(b) where reference is made not only to a "medical practitioner" but also to a "health care provider" for purposes of collecting and collating information to facilitate an assessment. Another example is Regulation 3(8)(c) which provides that the Registrar (third respondent) may appoint an additional independent health practitioner" with expertise in any" health profession" to assist the Appeal Tribunal in an advisory capacity. The reason for this approach is quite simple.

40. In the present matter, an RAF 4 form was completed by Dr Ntimbane and Dr Fine, who recommended that the applicant be examined by a clinical psychologist, occupational therapist, and educational psychologist for purposes of the narrative test.

41. The conclusion reached by Mr. Ferreira Texeira (Clinical Psychologist) falls within the ambit of Regulation 3(1)(b)(iii)(cc) or the narrative test as it is also referred to. His opinion and conclusion of him appear to be, at least prima facie and without deciding whether he is correct or not, to be essential and

therefore relevant for purposes of determining whether or not the applicant qualifies under the narrative test for the payment of general damages, more particularly in respect of the alleged psychological injuries suffered by her. In my view, it was necessary for the Appeal Tribunal also to have considered an applicant's alleged psychological injuries as stipulated in the severe injury assessment form completed by Mr Texeria.

42. Finally, after considering all the evidence, can it be said that the severe injury assessment form completed by Dr Fine and Dr Ntimbane was taken into account by the Appeal Tribunal? According to the evidence presented by the applicant, this question should be answered in the negative.

43. In summary, the reasons for this conclusion are the following: First, there is no reference to the alleged psychological injuries suffered by the applicant in the Appeal Tribunal's reasons for their decision. Second, the suggestion that these injuries were taken into account is a vague bald statement without any factual support. There needs to be an indication in their reasons or elsewhere that it was considered. The Appeal Tribunal laboured under the incorrect impression that the applicant did not refer the psychological injuries to the first respondent (Appeal Tribunal) and that the dispute referral was never about the psychological wounds. This creates the impression that the Appeal Tribunal was unaware of these injuries or never took the time to consider the documents completed and filed Dr Ntambane.

44. In conclusion, I am of the view that the applicant has made out a proper case for the review and setting aside of the first respondent's decision in terms of the provisions of section 6(2)(e)(iii) of PAJA, as relevant considerations, such as the serious injury assessment report by Dr Ntimbane and Dr Fine were not considered by the Appeal Tribunal. The Appeal Tribunal did not present any version to this Court explaining on what basis they arrived at the impugned decision, which leaves me with no alternative but to find that the impugned judgment of the Appeal Tribunal should be reviewed and set aside as irrelevant considerations were taken into account, or relevant considerations

were not considered in arriving at the decision.

45. Should the matter be referred back to the same Appeal Tribunal consisting of the same members, taking into account the possibility that these members might already have compromised themselves without deciding? Hence, it is preferable that the third respondent appoint a new Appeal Tribunal consisting of other members. The power to establish whether or not an injury is serious lies ultimately with the Appeal Tribunal which comprised of functionaries with appropriate expertise and not with the Courts.

ORDER

As a result, I make the following order:

1. In respect of the second respondent, the following order is made:
 - 1.1. It is declared that the second respondent failed to give intelligible, informative and comprehensible reasons for the rejection of the RAF 4 serious injury assessment by Dr Ntimbani (Neurosurgeon), dated 20 July 2022, which refusal does not comply with the prescripts of Regulation 3(3)(d) of the Road Accident Fund Act 56 of 1996 Regulations, published in GG 31249 of 21 July 2008, and the rejection is thus reviewed and set aside.
 - 1.2. Suppose the second respondent persists with the rejection of the RAF 4 serious injury assessment by Dr Ntimbani (Neurosurgeon). In that case, the second respondent must, within 15 calendar days from the date of this order, comply with Regulation 3(3)(d), and must provide comprehensible, informative intelligible, and comprehensive reasons to the applicant for the rejection of the RAF 4 serious injury assessment.
 - 1.3. It is declared that by the wording used in the RAF regulations, specifically section 3(3)(d), the second respondent must make a separate decision regarding the seriousness of injuries of the injured victim for every individual RAF 4 serious-injury-assessment and a third party may

refer numerous appeals to the HPCSA, one for each serious-injury-assessment rejected by the second respondent, who can adjudicate the appeal only once rejected by the Road Accident Fund.

1.4. The failure of the second respondent to decide on the RAF 4 serious injury assessment of Dr Fine (Psychiatrist) dated 26 June 2022, in terms of Section 6(3)(b) of PAJA, is reviewed and set aside.

1.5. The second respondent is ordered to decide regarding the severe injury assessment of Dr Fine (Psychiatrist), dated 26 June 2022, within 15 calendar days from the date of this order.

2. In respect of the first respondent, the following order is made:

2.1. It is declared that the decision of the first respondent's decision dated 17 January 2023, to the effect that the injuries suffered by R-L L in an accident dated 29 October 2018, is not serious, is reviewed and set aside.

2.2. The first respondent is directed to appoint a new Appeal Tribunal, within 30 calendar days from the date of this order, consisting of different members (with appropriate areas of expertise), to adjudicate the appeal afresh after calling upon the parties to submit such further evidence.

2.3. The new Appeal Tribunal must consist of at least three members with expertise in the appropriate areas of medicine, as contemplated by Regulation 3(8).

2.4. The new Appeal Tribunal is directed and ordered to consider all of the injuries of R-L L collectively, and not only the injuries regarded by medical practitioners who completed RAF 4 profound injury assessments, to be serious.

2.5. The new Appeal Tribunal is directed to employ powers set out in Regulation 3(11) to investigate, concerning R-L L, the injuries, diagnosis,

prognosis, external and individual circumstances, pain, suffering, loss of enjoyment of life and level and degree of educational, employment and other changes, owing to the accident, and other relevant factors, to the extent that the Appeal Tribunal may deem this fit.

- 2.6. It is declared that where the injuries assessed by a duly constituted HPCSA Appeal Tribunal involve a child, the Appeal Tribunal must heed the Children's Act and pay specific attention to the best interest of the child principles set out in section 7 of the Children's Act 38 of 2005 and ensure child participation as contemplated by Section 10 of the Children's Act.
- 2.7. The new Appeal Tribunal shall comply with Regulation 3(13) and provide the parties with the outcome of the appeal, together with reasons, within 60 calendar days from the date of this order.
3. It is declared that a medical practitioner qualified to complete an RAF 4 serious injury assessment MUST complete the form by considering any accident-related injuries and sequelae and should not complete the form only from the vantage point of particular expertise or discipline.
4. The first and second respondents are jointly and severally, the one to pay the other to be absolved, ordered to pay the applicant's attorney and client costs on a High Court scale, including the costs of Counsel, which shall include fees for the heads of argument.



T BOKAKO

*Acting Judge of the High Court
Gauteng Local Division, Pretoria*

HEARD: 22 MAY 2023

JUDGEMENT DATE: 23 AUGUST 2023

COUNSEL FOR THE APPLICANT: ADV FHH KEHRHAHN