



IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED NO	
<u>18/01/2024</u>	
DATE	SIGNATURE

Case No: 061644/2023

In the matter between:-

Rethabile Matshogo

Applicant

And

The Health Professions Council of South Africa

1st Respondent

Road Accident Fund

2nd Respondent

JUDGMENT

KHWINANA AJ

INTRODUCTION

[1] This is an unopposed application in terms of Rule 53 of the uniform rules of court.

[2] The applicant seeks the following orders:

1. Condonation for the late delivery of this application (if applicable)
2. An order directing the First Respondent -the Road Accident Fund Appeal Tribunal (HOCSA) to deliver records and reasons in respect of the finding and ruling on the 24th February 2023 regarding the applicant's injuries in that they are classified as Non-serious in terms of the narrative test.
3. In the event the first respondent not being in possession of the required records in respect of the applicant's injuries, in that they are not serious in terms of the narrative test must provide an affidavit indicating the whereabouts of the records of the applicant's injuries;
4. That the appointment and composition of the independent medical health practitioners, Dr E Williams, the Chairperson, Dr T. Ramokgopa and Dr Miller members in terms of regulation 8 (a) and (b) of the Road Accident fund be declared null and void and be set aside;
5. That the appointment and composition of the independent medical or health practitioners, Dr E Williams, Dr T. Ramokgopa and Dr Miller in terms of regulation 8 (a) and (b) of RAF regulation did not form a quorum as Dr P. Miller is not a practising Orthopaedic Surgeon and therefore must be excluded from the panel and therefore be declared null and void and be set aside.
6. That the finding and ruling made by the first respondent on the 24 February 2023 regarding the applicant's injuries, in that they are classified as non-serious in terms of the narrative test be declared null and void and be set aside.

7. That the above Honourable Court substitutes or varies the decision of the first respondent to confirm the decision of the plaintiff's experts being Dr JA Ntimbani Neurosurgeon and Dr J, Sibanyoni Orthopaedic surgeon that the applicant's injuries are regarded as serious in terms of the narrative test since the plaintiff's reports are not contested.

8. That the above honourable court to declare that in the absence of the fund's appointed medical practitioners' reports, the plaintiff's medical reports should be accepted as correct and uncontested.

9. That the First Respondent the Road Accident Fund Appeal Tribunal be ordered to pay the costs of this application on party and party scale.

[3] On the 3rd of July 2023, the notice of motion was served on the second Respondent by the messenger of the court whereas the first Respondent was served on the 25th of July 2023. The dies expired and no opposition has been filed. The applicant served the respondents with a notice of set-down on 20th October 2023. This matter was heard and counsel was requested to prepare heads of argument considering the draft order which did not tally with the notice of motion.

[4] Counsel submitted supplementary heads of argument regurgitating Rule 53 of the uniform rules. The applicant has filed a draft order that does not have the first prayer as per the notice of motion being condonation. I am ceased to decide on the notice of motion.

BACKGROUND

- [5] The applicant submitted medico-legal reports and the RAF 4 form which depicted that the applicant qualifies to be compensated for general damages. The second respondent the HPCSA assessed the applicant's injuries on the 24th of February 2023 in terms of Regulation 3 and decided that he did not qualify as her whole-person impairment was less than 30%.
- [6] The information was communicated on the 3rd of March 2023 to the applicant's attorney. They were informed to act within a period of 90 days in the event they required reasons herein. The RAF communicated on the 22 March 2023 that in terms of Regulation 3 (3) (d) the injuries sustained by the applicant did not qualify as serious injuries. **if the Fund or an agent is not satisfied that the injury has been correctly assessed**, the Fund or an agent must: "3(3)(d)(ii) direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in
- [7] The applicant says that the application if it requires condonation, must be granted. It is prudent for the applicant to know whether condonation is required or not. Further, the applicant says he has acted within 180 days in bringing this review application and therefore does not need condonation.

THE LEGAL MATRIX

- [8] In terms of section 7. (1)¹ Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
- (a) subject to subsection (2)(c), on which any proceedings instituted in

¹ Promotion Administrative of Justice Act 3/2000

terms of 15 internal remedies as contemplated in subsection (2)(a)

have been concluded;

(b) ~here no such remedies exist, on which the person concerned was

informed of the administrative action, became aware of the action and

the reasons for it or might reasonably have been expected to have

become aware of the action and 20 the reasons.

[9] The section starts by setting out a general rule that any proceedings for judicial review must be started "without unreasonable delay" and no later than 180 days. This establishes a six-month time limit for initiating judicial review from a certain starting point, emphasizing the need for prompt action while also providing a clear deadline.

[10] **In terms of Subsection (a):** It deals with situations where internal remedies or appeals within the administrative system must be pursued before going to court. The 180-day time limit starts from the date when these internal processes are concluded. However, there's a reference to "subsection (2)(c)," suggesting there might be exceptions or additional rules in that

subsection.

[11] **In terms of Subsection (b) caters for** when there are no internal remedies available. The 180-day period begins from the later of the following:
When the person was informed of the administrative action when the person became aware of the action and the reasons for it and when the person could reasonably have been expected to become aware of the action and the reasons.

[12] In casu, the applicant brought the application to the second respondent's attention on the 03rd of July 2023 and the First Respondent on the 25th July 2023 both within the time frame alluded to despite their challenge of not having the record.

[13] In terms of section 8 of PAJA

(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—

(a) directing the administrator— (i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and— (i) remitting the matter for

reconsideration by the administrator, with or without directions;

[14] This section emphasizes that in judicial review proceedings under section 6(1) of PAJA, the court or tribunal has broad discretion to issue orders that are "just and equitable." This means the court can make decisions it deems fair and appropriate based on the specific circumstances of each case. □

[15] In terms of Subsection (a) Orders Directing the Administrator

(i) To give reasons: The court can order the administrative body or official (administrator) to provide explanations for their actions or decisions. This is crucial for ensuring transparency and accountability in administrative decision-making.

(ii) To act as required by the court: The court may direct the administrator to take specific actions as determined by the court. This could involve correcting procedural errors, re-evaluating decisions, or taking specific steps in line with legal and procedural standards.

[16] In terms of **Subsection (b)**: Prohibition Orders

The court can issue orders prohibiting the administrator from acting in a particular manner. This typically involves preventing actions that are unlawful, unreasonable, or procedurally unfair.

[17] In terms of **Subsection (c)**: Setting Aside Administrative Actions

(i) Remitting the matter for reconsideration: The court can set aside the administrative action and send the matter back to the administrator for reconsideration. This can be done with or without specific directions from the court. This allows for the administrative process to be re-evaluated and corrected, ensuring that decisions are made fairly and in accordance with the law.

[18] The court in *Bridon*² emphasizes that without knowing the basis for the administrative decision, the applicant (in this case, Casar) is at a significant disadvantage. This is akin to "mounting a challenge in the dark." The analogy used here vividly illustrates the difficulty of contesting a decision without fully understanding the reasons behind it.

[19] Without access to the record and reasons, the applicant's ability to argue that the decision was irrational, arbitrary, or influenced by irrelevant considerations is significantly hampered. Essentially, challenging the decision becomes almost speculative without concrete information to base arguments upon.

[21] In casu if the applicant does not have the record, their challenge might appear irrational or unfounded. However, this perceived irrationality stems not from the applicant's arguments being inherently flawed but from the lack of crucial information that would substantiate their claims.

[22] The record helps elucidate what happened and why, offering transparency to

² Supreme Court of Appeal held in *Bridon International GMBH v International Trade Administration Commission* [2012] ZASCA 82; 2013 (3) SA 197 (SCA) (*Bridon*) at para 31

the otherwise opaque administrative process. It can expose after-the-fact justifications for a decision, ensuring that the reasons given are those that actually motivated the decision at the time it was made, not reasons concocted in defence of the decision after it's challenged.

[23] The record can also work in favour of the decision-maker by providing evidence that supports the legitimacy and reasonableness of their decision. The record is essential for the reviewing court to perform its function effectively. It allows the court to conduct a thorough and informed review of the administrative action.³

[24] Justice Madlanga⁴ held "Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker.

[26] Requesting the full record in a bona fide attempt to determine what factors were probably operative in the decision-maker's mind does not amount to a "fishing excursion". See *Johannesburg City Council* above n 20 at 93C-D.⁵

[27] *Telcordia Technologies Inc v Telkom SA Ltd*⁶ "The grounds for any review

³ In *Turnbull-Jackson* this Court held: "Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function."

⁴ *City of Cape Town v South African National Roads Agency Ltd* [2013] ZAWCHC 74 (HC SANRAL) at para 48. Though the Supreme Court of Appeal overturned much of the Western Cape High Court's reasoning on appeal, it did not supplant the view expressed by the High Court on relevance (see *City of Cape Town v South African National Roads Agency Ltd* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) (SCA SANRAL)).

⁵ *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8

⁶ [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA) at para 32

as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available.”

- [28] Regulation 3(1)(a) stipulates that a third party who wishes to claim general damages shall submit himself or herself to an assessment by a medical practitioner registered as a medical practitioner under the Health Professions Act 56 of 1974.
- [29] ⁷Regulation 3(3)(a) determines that a third party who has been so assessed shall obtain from the medical practitioner concerned a serious-injury assessment report, defined in Regulation 1 as a duly completed RAF4 form. This form read with Regulation 3(1)(b) requires the medical practitioner to assess the seriousness of an injury in accordance with three sets of criteria, namely: (a) In terms of Regulation 3(1)(b)(i) the Minister may publish a list of injuries which does not qualify as serious. This list has been published in the Road Accident Fund Amendment Regulations, 2013.
- [30] The assessor should therefore check primarily whether an injury falls into this category before determining whether it is serious or not. (b) Regulation 3(1)(b) (ii) provides that the third party’s injury must be assessed as “serious” if it resulted in 30 percent more Impairment of the Whole Person (WPI) as provided in the AMA guides (Rondelli et al American Medical Association’s Guides to the Evaluation of Permanent Impairment 6ed (2008)).

⁷ (Duma v RAF 202/2012, Kubeka v RAF 64/2012, Meyer v RAF 164/2012 and Mokoena v RAF 131/2012

[31] (c) If an injury does not qualify as “serious” in terms of the above, it may nonetheless be assessed as serious under the Narrative Test (Regulation 3(1)(b)(iii)) if the injury (aa) resulted in a serious long-term impairment or loss of a body function; (bb) constitutes permanent serious disfigurement; (cc) resulted in severe long-term mental or severe longterm behavioural disturbances or disorder; (dd) resulted in loss of a foetus.

[32] In terms of section 7(2) of PAJA stipulates that no court shall entertain a review of an administrative decision unless and until any internal appeal provided for has been exhausted.

[33] It is trite that when dealing with a review one looks at how the decision was reached or was one examines the conduct of the proceedings in reaching that decision and not the decision itself. Thus, in determining whether a gross irregularity was committed in making the decision the focus is on the reasons provided by the decision maker and not the decision itself.⁸

[28] Given my limited access to the first respondent's decision record, only having a letter from the HPCSA and RAF referred to as Annexure B, acquiring the complete record is essential for a thorough review of the case. The applicant has already sought the full record through their notice of motion, a request I am inclined to grant. Therefore, I decree that the respondents must deliver the complete record within ten days of receipt of this order. I have considered the draft order and have amended it.

[29] I hereby order as follows:

⁸ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2008 \(2\) SA 24](#) (CC) at (265.)

1. An order directing the First and Second Respondent -the Road Accident Fund Appeal Tribunal (HPCSA) to deliver records and reasons in respect of the finding and ruling on the 24th February 2023 regarding the applicant's injuries in that they are classified as non-serious in terms of the narrative test, within 15 days of being served with this order.
2. In the event the first respondent not being in possession of the required records in respect of the applicant's injuries, in that they are not serious in terms of the narrative test must provide an affidavit indicating the whereabouts of the records of the applicant's injuries within 15 days of being served with this order.
3. The applicant may amplify his application upon receipt of the record.
4. Cost of application.

E N B KHWINANA
ACTING JUDGE OF NORTH GAUTENG
HIGH COURT, PRETORIA

DATE OF HEARING: 02 & 04 NOVEMBER 2023

DATE OF JUDGMENT: 18 JANUARY 2024

COUNSEL FOR APPLICANT: ADV TJ MOKOENA

INSTRUCTED BY: MPHULOANE INC. ATTORNEYS