THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 56/2017

Reportable

In the matter between:

THE ROAD ACCIDENT APPEAL TRIBUNAL	**FIRST APPELLANT**
THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	**SECOND APPELLANT**
PROF G J VLOK NO	**THIRD APPELLANT**
DR C F KIECK NO	**FOURTH APPELLANT**
DR C LIEBETRAU NO	**FIFTH APPELLANT**
DR R K MARKS NO	**SIXTH APPELLANT**

and

LARTZ GOUWS	**FIRST RESPONDENT**
ROAD ACCIDENT FUND	**SECOND RESPONDENT**

Neutral citation: *RAF & others v Gouws & another* (056/2017) [2017] ZASCA 188 (13 December 2017)

Coram: Navsa, Saldulker & Mocumie JJA and Tsoka & Makgoka AJJA

Heard: 14 November 2017

Delivered: 13 December 2017

Summary: Interpretation and application of Road Accident Fund Act 56 of 1996 and Regulations thereunder – primary purpose of Appeal Tribunal is to determine a dispute concerning seriousness of injury – Appeal Tribunal does not

have final say on question of link between the driving of a motor vehicle and the injuries allegedly sustained – causation to be determined by court.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Navsa ADP (Saldulker & Mocumie JJA and Tsoka & Makgoka AJJA concurring.)

[1] This appeal, with leave of the court below (Tuchten J), concerns the ambit of the powers of the first appellant, the Road Accident Appeal Tribunal (the Tribunal). The question for determination is whether it is within the Tribunal's statutory remit to finally determine the nexus between the injuries allegedly sustained, on which a claim for compensation is premised, and the driving of a motor vehicle. The appellants, which include The Road Accident Appeal Tribunal, The Health Professions Council of South Africa[1] (HPCSA) and the four members who, at its instance, served on the Tribunal, contend that it is indeed within the Tribunal's statutory power to make such a determination. The first respondent, Mr Lartz Gouws, who is a claimant for purposes of s 17 of the Road Accident Fund Act 56 of 1996 (the Act), contends otherwise. The court below, the Gauteng Division of the High Court, Pretoria found in favour of Mr Gouws. It is that decision against which the present appeal is directed. The appeal turns on the interpretation and application of the relevant statutory provisions. The background is set out hereafter.

[1] Established in terms of s 2 of the Health Professions Act 56 of 1974.

[2] Mr Gouws allegedly sustained injuries as a result of being struck by a motor vehicle whilst walking in a parking area and being flung over two vehicles in the vicinity. The collision was said to have occurred on 24 July 2010. On 16 August 2012 Mr Gouws lodged a claim for compensation with The Road Accident Fund (the Fund), a statutory insurer, under s 17 of the Act. At this juncture, it is convenient to consider the circumstances under which the Fund, established under s 2 of the Act, is liable to compensate a claimant.

[3] In terms of s 17(1), the Fund, inter alia, is 'obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury . . . *caused by or arising from the driving of a motor vehicle* by any person at any place within the Republic, if the injury . . . is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee'. (My emphasis.) The proviso in s 17(1), following immediately on the aforesaid quoted part, reads as follows:

'Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for *a serious injury* as contemplated in subsection (1A) and shall be paid by way of a lump sum.' (My emphasis.)

Section 17(1A) reads 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 injuries are assessed in relation to the circumstances of the third party.

(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act 1974 (Act 56 of 1074).' (My emphasis.)

[4] Consonant with s 17(1A), s 26 of the Act enables the Minister to 'make regulations regarding any matter that may be prescribed in terms of [the] Act, or which it is necessary or expedient to prescribe in order to achieve or promote the object of [the] Act'. The object of the Fund, set out in s 3 of the Act, is 'the payment of compensation in accordance with [the] Act for loss or damage wrongfully caused by the driving of motor vehicles'. Sections 26(1) and 26(1A) provide:

'(1) The Minister may make regulations regarding any matter that shall or may be prescribed in terms of this Act or which it is necessary or expedient to prescribe in order to achieve or promote the object of this Act.

(1A) Without derogating from the generality of subsection (1), the Minister may make regulations regarding –

(a) the method of assessment to determine whether, for purposes of section 17, *a serious injury* has been incurred;

(b) injuries which are, for the purposes of section 17, not regarded as serious injuries;

(c) the resolution of disputes arising from any matter provided for in this Act.' (My emphasis.)

[5] The prescribed method referred to in ss 17(1A), 26(1) and 26(1A) is to be found in the Regulations promulgated under the Act (the Regulations).[2] Regulation 3(1)*(b)* dictates how an assessment of an injury in terms of s 17(1A)*(a)* of the Act is to be conducted by the medical practitioner concerned. It provides as follows:

'*(b)* The medical practitioners *shall assess whether the third party's injury is serious* in accordance with the following method:

i) The Minister may publish in the Gazette, after consultation with the Minister of Health, a list of injuries which are for purposes of Section 17 of the Act not to be regarded as serious injuries and no injury shall be assessed as serious if that injury meets the description of an injury which appears on the list.

ii) If the injury resulted in 30 % or more impairment of the whole person as provided in the AMA Guides,[3] the injury shall be assessed as serious.

iii) An injury which does not result in 30 % or more impairment of the whole person may only be assessed as serious if that injury:

(aa) Resulted in serious long term impairment or loss of body function;

(bb) Constitutes permanent serious disfigurement;

(cc) Resulted in severe long term mental or severe long term behavioural disturbance or disorder; or

(dd) Resulted in loss of a foetus.' (My emphasis.)

I pause to note that both s 17(1) of the Act and Regulation 3(1)*(b)*, in terms, limit the assessment by the medical practitioner to one concerning the seriousness of the injury.

[6] Prior to the submission of his claim, Mr Gouws' injuries were assessed by Dr M de Graad, an orthopaedic surgeon, who, on his behalf, completed the prescribed RAF4 form. At this stage it is necessary to have regard to the relevant

[2] Road Accident Fund Regulations, GN R770, *GG* 31249, 21 July 2008.
[3] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Sixth Edition.

part of Dr de Graad's report submitted to the Fund in which she stated the following in relation to his injuries:

'5. SERIOUS INJURY: THE NARRATIVE TEST

5.1 Serious long term impairment or loss of body function.

Shoulder replacement on the left Artrodesis of the right thumb. Both upper limbs involved that is restricting him from doing his normal work.'

The description set out above is one, ostensibly, within the ambit of Regulation 3*(b)*(iii)*(aa)*.

[7] On 18 October 2012 Mr Gouws' claim for compensation in relation to general damages was rejected by the Fund. The material part of the letter written to him on behalf of the Fund informing him of that fact reads as follows:

'Be informed that the Fund rejects your client's claim for general damages on the basis that:

Dr M de Graad assessed your client in accordance with the prescribed assessment method and concluded that the injury is not serious, as evidenced by the Serious Injury Assessment Report (RAF 4), we await your medico legal reports and photographs of injuries.'

As is clear from what is set out earlier, Dr de Graad, contrary to what is set out in the aforesaid letter, did assess Mr Gouws' injuries as being serious. Counsel on behalf of the Tribunal rightly did not seek to justify the stated basis for the decision rejecting Mr Gouws' claim. Simply put, the basis for the Fund's decision was fallacious. Mr Gouws understandably was aggrieved by the fund's rejection of his claim on the basis set out above.

[8] I interpose to state that in terms of Regulation 3(3)*(d)* the Fund, if not satisfied that the injury has been correctly assessed:

'[M]ust:

(i) reject the serious injury assessment report and furnish the third party with reasons for the rejection; or

(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 these Regulations, by a medical practitioner or an agent.'

Those are the options open to the Fund. In the event of a further assessment, Regulation 3(3)*(e)* provides as follows:

'The Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in these Regulations.'

There was no further assessment but there was a rejection of the report. A dispute arose. In the event of a dispute both the claimant and the Fund have a right to refer a dispute to an appeal tribunal. In relation to these options and the dispute resolution provided for by way of an appeal process, see the decision of this court in *RAF v Faria* 2014 (6) SA 19 (SCA), paras 30-32.

[9] The Regulations, in some detail, provide for an appeal process. This is foreshadowed by s 26(1A)*(c)* of the Act, set out in para 4 above. Regulation 3(4) provides as follows:

'If a third party wishes to dispute the rejection of the serious injury assessment report, or in the event of either the third party or the fund or the agent disputing the assessment performed by a medical practitioner in terms of the regulations, the disputant shall:

a) within 90 days of being informed of the rejection or the assessment, notify the Registrar that the rejection or the assessment is disputed by lodging a dispute resolution form with the Registrar;

b) in such notification set out the grounds upon which the rejection or the assessment is disputed and include such submissions; medical reports and opinions as the disputant wishes to rely on; and

c) if the disputant is the Fund or agent, provide all available contact details pertaining to the third party.'

[10] The procedure set out in the preceding paragraph and further procedures for the finalisation of an appeal process provided for in Regulation 3 were followed by Mr Gouws. On 22 February 2013, after an exchange of correspondence with the Registrar of the HPCSA[4] in relation to a prospective consideration by an appeal tribunal of the dispute referred to it by Mr Gouws, his attorneys submitted a further

[4] The Registrar of the HPCSA has the responsibility to appoint members of the Tribunal and provide administrative support to the Tribunal. See definition of 'Registrar' in Regulation 1 and Regulation 3(8), which reads as follows:
'(a) After receiving the notification from the other party or the expiry of the 60 day period, referred to in subregulation (6), the Registrar shall refer the dispute for consideration by an appeal tribunal paid for by the Fund.
(b) 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.
(c) 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.'
'Registrar' is defined in the Regulations as the 'Registrar of the Health Professions Council of South Africa established in terms of section 2 of the Health Professions Act, 1974 (Act No. 56 of 1974)'.

'medico-legal' report by Dr de Graad dated 19 February 2013, past hospital records, a radiological report, consultation notes of a neurosurgeon, a letter from Dr Jonker, an orthopaedic surgeon, clinical evaluation notes by Dr Julyan, another orthopaedic surgeon, theatre notes by Dr Julyan and further consultation notes by a radiologist. The documents submitted were all directed at showing that the injuries sustained were serious within the meaning of that expression provided for in Regulation 3(1)*(b)*. The tests set out in Regulation 3(1)*(b)*(iii) are popularly referred to as the narrative test.

[11] On 21 July 2014, Mr Gouws was informed that the third, fourth, fifth and sixth appellants had been appointed to determine the appeal. On 26 August 2014, Mr Gouws was informed of the outcome of his appeal. The letter informing him of this, by the HPCSA, on behalf of the Tribunal, bears repeating in its entirety:

'We refer to the above matter and hereby inform you that Road Accident Fund Appeal Tribunal resolved at its recent meeting held on 01 August 2014 as follows –

i. He is currently 50 years old of age. On 24 July 2010 he was in an accident where he sustained soft tissue injury to his left forearm, tenderness in his chest.
ii. There is no indication that he had acute injury to his left shoulder or his right thumb as well as the carpal tunnels.
iii. The committee took notice that he had various surgery procedures which include a bicep tendon repair. Posterior bank card repair and later on an athetosis of first metal Carpal Phalangeal Joint of the right thumb.
iv. He also had a posterior bank card repair as well as a coronary bypass.
v. With all the information available the committee cannot find a link between his left shoulder and his right thumb as well as the carpal tunnels.
vi. The committee must take notice that he was a karate instructor and with the information available the committee cannot bring the accident to his present condition as well as his surgeries he had.
vii. With all the information available the committees is of the opinion that his injuries are not serious under the Narrative test.

We trust you find the above in order.'

[12] The powers of the Tribunal set out in Regulation 3(11) are clearly directed at a determination of whether the injuries sustained are serious within the narrative test.

For example, Regulations 3(11)*(a)* and *(b)* which are part of the overall powers of the Tribunal, provide:

'(11) The appeal tribunal shall have the following powers:

(a) 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 these Regulations, by a medical practitioner designated by the appeal tribunal.

(b) Direct, on no less than five days written notice, that the third party present himself or herself in person to the appeal tribunal at a place and time indicated in the said notice and examine the third party's injury and assess whether the injury is serious in terms of the method set out in these Regulations.'

In term of regulation 3(11)*(g)* an appeal tribunal has the power to:

'*(g)* Determine whether in its majority view the injury concerned is serious in terms of the method set out in these Regulations.'

In terms of regulations 3(11)*(h)* and *(i)* the Tribunal has the power to:

'*(h)* 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 appropriate to substitute.

(i) 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 report.'

[13] As is apparent, the Tribunal took the view that Mr Gouws' injuries were not causally connected to the collision referred to above. At this stage it is necessary to record that in terms of Regulation 3(13) the findings of a Tribunal 'shall be final and binding'. I consider it necessary at this stage to repeat what is set out in para 11 above, namely, that in terms of ss 3(11)*(a)* and *(b)*, what is in contestation before an appeal tribunal is the correctness of the medical practitioner's assessment of the seriousness of the injuries allegedly sustained and consequently the correctness or otherwise of the Fund's rejection of the report.

[14] Subsequent to the decision of the Tribunal being communicated to Mr Gouws, his attorneys submitted further extensive documentation to the Tribunal in support of his contention that the injuries he sustained were directly attributable to the collision described above. The Tribunal did not have regard to the further

information supplied as it had already made its decision. For present purposes it is not necessary to deal with the dispute concerning the nature and consequences of the clinical observations made by medical personnel who attended to Mr Gouws soon after the collision and why invasive shoulder surgery was only performed a few days later. We are also not required to deal with the persuasiveness or otherwise of all the documentation in favour of, or against the view that the injuries were not sustained as a result of or connected to the collision. Furthermore, in deciding this case the relevance of Mr Gouws being a karate instructor need not be determined.

[15] For completeness I record that in her medico-legal report, Dr de Graad said the following concerning the carpal tunnel syndrome that Mr Gouws complained of:

'**Mild carpal tunnel syndrome:**

The carpal tunnel syndrome is not necessarily related to the injuries. It is uncommon for men to develop carpal tunnel syndrome. One must thus give the patient the benefit of the doubt and conclude that there is a nexus between a carpal tunnel syndrome and the injuries sustained. Provision must be made for carpal tunnel release of both hands.'

That conclusion does not appear to detract from the seriousness of the shoulder injury which Dr de Graad had regard to in assessing the seriousness of Mr Gouws' injuries.

[16] Aggrieved by the Tribunal's decision, Mr Gouws applied to the court below for, inter alia, the following relief:

'1. That the First Respondent's decision of 1 August 2014 under reference number RAFA/001125/2013 be reviewed and set-aside.

2. That the matter is referred back to the Road Accident Fund Appeal Tribunal (First Respondent) for reconsideration by a different panel to be constituted by the Registrar of the Third Respondent.

3. That the Road Accident Fund Appeal Tribunal as appointed in paragraph 2 above, be directed to *inter alia* take into account all relevant and available hospital records, radiological reports, consultation notes, letters, clinical evaluations, theater reports and medical legal reports as appear from this application of the Applicant and all such further documents that may become available before the hearing of the appeal.'

[17] Mr Gouws complained that the Tribunal had disregarded the documentary expert evidence supplied by him, which accepted that his shoulder injury was related

to the accident and that it resulted in serious long term impairment. Furthermore, in his founding affidavit, he stated that if the Tribunal had been concerned about the nexus between his injuries and the collision referred to earlier, it had the power, in terms of Regulations 3(11)*(a)* to *(e)* to obtain further information. Mr Gouws stated that he had no idea why the fact that he was a karate instructor had been taken into account. In a supplementary affidavit, he stated that from the record supplied in terms of Rule 53 of the Uniform Rules, there appears to have been no basis upon which the undisputed information supplied by experts on his behalf was rejected. In his replying affidavit Mr Gouws complained that he had not been apprised that causality was in issue and had therefore not been given an opportunity to deal with it. He also denied that the Tribunal has the power to consider questions regarding the nexus between the injuries and the collision.

[18] Tuchten J, in adjudicating Mr Gouws' application, had regard to the methods to determine the seriousness of an injury identified in Regulation 3. The court below took into account the history of the assessment by Dr de Graad of Mr Gouws' injuries and his appeal to the Tribunal. The following appears at para 9 of the judgment of the court below:

'The tribunal thus found that the injuries which the applicant had suffered had not been caused by the accident on 24 July 2010. The applicant took the decision of the tribunal on review. The applicant asks that the decision of the tribunal be set aside and the matter remitted for consideration afresh. Whether the review should succeed is before me for adjudication. It was common cause between counsel that it was implicit in the decision of the tribunal that the tribunal had found that its jurisdiction extended to the issue of causation.'

[19] The court below considered the submission on behalf of the appellants that it was implicit in terms of the Act and the Regulations that a determination with regard to causation was within the Tribunal's statutory remit. The following are the material parts of the judgment of the court below:

'Counsel conceded that legal causation remained indeed for the court to decide in due course but submitted that the question whether medical causation was established in a particular case had been entrusted in first instance to the Fund and then to the tribunal. Medical causation, counsel said, was to be found in the interrelationship between the injury and the pathology which gives rise to it. But counsel had difficulty in identifying the separate

scopes, if any of medical and legal causation in relation to the present dispute. I do not see any myself.

Furthermore, I think division of the duty to decide causation between the Fund and the Tribunal on the one hand and the court on the other would potentially give rise to intolerable confusion as to the boundaries of jurisdiction. To compound the confusion, this suggested role of the Fund and the tribunal would only arise when the issue of a serious injury was raised. In all other cases, on the analysis of counsel for the opposing respondents, the court would retain complete (ie not merely partial) jurisdiction to determine causation. It seems to me improbable and unwieldy for certain aspects of causation arising in certain categories cases to be withdrawn from the jurisdiction of the court while other aspects of other categories remain.

If counsel's submission is correct, then if a tribunal finds an injury or set of injuries to be serious, on whatever ground, then the Fund would be disabled from arguing at the trial that the plaintiff had not established causation. This could have far reaching and even absurd consequences.

The courts have for decades determined causation. Difficult questions arise in this regard from time to time. In my view the courts, duly informed by expert evidence and argument, are better suited to make this adjudication than the administrative decision makers in question.'

[20] The court below concluded that there was nothing in the language of the legislation concerned which empowered the Tribunal to determine whether the injuries assessed by it were caused by or arose from the driving of a motor vehicle. It made an order in the terms set out in para 15 above and ordered the second appellant to pay Mr Gouws' costs, including the costs of two counsel.

[21] It is against the order referred to in the preceding paragraph that the present appeal is directed. Before us counsel on behalf of the Tribunal accepted that there was no express provision in the Act or the Regulations that conferred on it the power to determine finally whether the injuries submitted to it for assessment were caused by or arose out of the driving of a motor vehicle. Counsel on behalf of the Tribunal persisted with the position adopted in the court below, namely that it was implicit in the legislation that the Tribunal had that power. In this regard, reliance was placed on the decision of this court in *Johannesburg Municipality v Davies & another* 1925 AD 395. It was submitted on behalf of the Tribunal that the scheme of the Act and

the Regulations was to ensure that deserving and qualifying claims are met. This, so it was argued, could only be achieved if the cause and the extent of the injury or injuries involved were determined. Section 17 of the Act, so it was contended, makes it clear that the injury for which a claimant is to be compensated must be caused by or arise from the driving of a motor vehicle.

[22] Furthermore, so it was asserted, Regulation 3(11)*(d)*, which clothes the Tribunal with the power to examine pre- and post-accident medical reports when it assesses the seriousness of the injury, supports the argument that it is implicit in the Regulations that the Tribunal has the power to determine the connection between the injuries and the event allegedly giving rise to them.

[23] A further argument on behalf of the Tribunal is that it is rightly within the professional terrain of medical experts to determine cause and effect in relation to injuries. Support for this latter contention was sought to be found in an article by M Slabbert and H J Edeling entitled 'The Road Accident Fund and Serious Injuries: The Narrative Test'.[5] The following are the quotes upon which reliance were placed. First, where the authors take issue with the 'loose' use of the word injury:

'Problems arise in relation to the loose use of the word "injury" where the context appears to relate to complications, impairment or disability. This can easily lead to confusion. In essence "injury" refers to the physical damage that occurs at the moment of the accident, "complication" to the subsequent pathological developments, "impairment" to the long-term symptoms and losses resulting from the injuries, and "disability" to the effects of the impairment on the various elements of the individual's life taking into account the circumstances.'

Second, where the authors question the adequacy of the prescribed RAF 4 report form:

'Point 4 refers to the *AMA Guides* rating which should be completed if the injury sustained does not appear on the non-serious list of injuries. In point 4.1 the doctor is required to describe the nature of the motor vehicle accident, despite the fact that he or she often has no knowledge or limited knowledge of what happened and he or she must therefore speculate. It would be more relevant to ask the doctor whether he or she is satisfied that the

[5] M Slabbert and H J Edeling 'The Road Accident Fund and Serious Injuries: The Narrative Test' (2012) 268 *PELJ* 15 2.

injured was indeed injured in a motor vehicle accident, and whether the injuries claimed for were in fact caused by the motor vehicle accident in question.'

[24] The submissions on behalf of the Tribunal are superficially attractive. After all, the proposition that the Act and Regulations were designed to ensure that deserving and qualifying injuries are compensated is unassailable. So, it seems to follow, and one would expect that the Tribunal ought to be able to decide finally whether the injuries calling for assessment did indeed arise out of or were caused by the driving of a motor vehicle. However, one has to weigh these submissions in light of the provisions of the Act and the Regulations and view them against first principles and policy considerations.

[25] In *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* [1998] ZACC 17; 1999 (1) SA 374 (CC) and *Pharmaceutical Manufacturers Association of South Africa & another: In re ex parte President of the Republic of South Africa & others* [2000] ZACC 1; 2000 (2) SA 674 (CC), the Constitutional Court made it clear that it is a fundamental principle of our law that public power can only be exercised within the bounds of the law. Repositories of power can only exercise such power as has been conferred upon them by law.[6] This is a description of the principle of legality.

[26] It will be recalled that even though counsel on behalf of the Tribunal conceded that there was no express provision conferring upon it the power of finally deciding the question of causation, he nevertheless submitted that such power, having regard to the object of the Act, could be implied in terms of *Davies*. The following is the relevant dictum relied on:

'Here it may be as well to remark that the rule that a power is to be implied to do that which is reasonably incidental to what has been expressly authorised is no new rule of construction of statutes, it is merely an example of a proper implication to draw.'[7]

[27] As stated above, the general rule is that express powers are needed for the actions and decisions of administrators.[8] As pointed out by Professor Hoexter,

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[6] Paras 56-58 of *Fedsure* and paras 17-20 of the *Pharmaceutical* case.
[7] At 402.

implied powers may, however, be ancillary to the express powers or exist either as a necessary or reasonable consequence of the express powers.[9] Furthermore, the author goes on to state that 'a court will be more inclined to find an implied power where the express power is of a broad, discretionary nature – and less inclined where it is a narrow, closely circumscribed power'.[10] Where the administrative action or decision is likely to have far reaching effects, it is less likely that a court will in the absence of express provisions find implied authorisation for it.[11]

[28] The Road Accident Fund Amendment Act 19 of 2005 (Amendment Act), which came into effect on 1 August 2008 brought about significant changes to the Act. It limited the Fund's liability for compensation in respect of claims for non-pecuniary loss (general damages) to situations where a serious injury as defined in the Act has ensued. That has been dealt with above, in brief, under the discussions of sections 17 and 26 of the Act and the Regulations. The Amendment Act also, by way of the introduction of s 21, abolished certain common law claims which for present purposes we need discuss no further. The Amendment Act also limited the amount of compensation the Fund is obliged to pay in relation to claims for loss of income or for a dependent's loss of support, arising from the bodily injury or death of a victim of a motor accident. These are far-reaching changes expressly catered for in the legislation.

[29] The amendments in express terms referred to in the preceding paragraph militate against importing the far-reaching suggested powers of the Tribunal that will see it have the final word on the question of causation. The power of the Minister to make regulations in terms of s 26(1A)*(c)*, namely, for the resolution of disputes arising from any matter provided for in this Act, is the genesis for the power of the Tribunal. Regulation 3 bears the title 'Assessment of serious injury in terms of section 17(1A)'. That subsection, as discussed above, directs that the assessment of an injury shall be based on 'a prescribed method'. This, of course, relates first to an assessment by a medical practitioner and thereafter has relevance in the appeal

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[8] See also Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 43.
[9] Ibid at 44 and the authorities cited there, namely, *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A) at 567A and *Chonco v Minister of Justice and Constitutional Development* 2010 (4) SA 82 (CC).
[10] Page 45.
[11] Page 45.

process, which is directed at determining whether the assessment by the medical practitioner was rightly made. In this regard, both the Fund and the claimant may be disputants.[12]

[30] In the present case, the Tribunal, an appellate body, purported to have the power to decide finally upon the question of causation. In this regard the second to sixth appellants, in their answering affidavit relied expressly on the powers conferred upon the Tribunal by Regulation 3(13). The Fund was cited as a respondent in the court below but did not participate in the proceedings in the court below or in this court. It appears that the Fund considered itself bound by the Tribunal's decision. Thus, it did not contend that *it* ultimately had the prerogative to concede or challenge causation.

[31] In paras 10 and 11 of its judgment, set out in para 19 above, the court below reflected that the Tribunal adopted the position that *it* had the power to decide on whether there was a nexus between the injuries allegedly sustained and the driving of a motor vehicle. In para 10, Tuchten J noted that whilst counsel on behalf of the Tribunal had conceded that 'legal causation' was ultimately for the courts to decide, it was nevertheless submitted that 'medical causation' was the preserve of the Fund and the Tribunal. The court below went on to state that counsel on behalf of the Tribunal had difficulty in distinguishing between 'medical' and 'legal' causation. As stated above, in para 11, Tuchten J recorded that the division of the 'duty' to decide causation between the court on the one hand, and the Tribunal on the other, would give rise to 'intolerable confusion as to the boundaries of jurisdiction'.

[32] In heads of argument filed in this court on behalf of the Tribunal, it latterly appears to be suggested that the Tribunal is entitled to 'express an opinion' on the nexus between the driving of a motor vehicle and the alleged injuries. This attempt to dilute its earlier position is negated by the provisions of Regulation 3(13) on which, inter alia, it had relied and by the passive attitude of the Fund. That Regulation makes 'findings' of the Tribunal final and binding. In para 49 of its heads of argument the Tribunal stated:

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[12] See Regulations 3(4) and (5).

'The facts of this matter, considered against the authorities referred to above, indicate that the Tribunal was authorised and enjoined to consider and pronounce upon the link between the injury and the accident relied upon.'

This demonstrates confused thinking on the part of the Tribunal. When the Tribunal 'pronounces' on causation it must be considered to arrive at a finding which would then, in terms of Regulation 3(13) be final and binding. As set out in para 30 above, the Fund appears to have considered itself bound by the Tribunal's finding in relation to causation.

[33] The medical practitioner who conducts the initial assessment of the seriousness of the injury is not, in making that assessment, precluded from expressing a view on whether the injury was caused by or arose from the driving of a motor vehicle. In the event of the medical practitioner casting doubt on whether there was a link between the alleged injury and the driving of a motor vehicle, the Fund can decide whether to contest causation or to concede it. In adopting a position on whether to contest causation, the Fund is not limited to the views expressed by the medical practitioner, but may have or acquire other information to inform its decision. In the ordinary course causation is an issue that is ultimately decided by the courts. A dispute between the Fund and a claimant in relation to causation has to be referred to a court for adjudication. When that issue is decided by a court, it does not follow that medical practitioners are necessarily the only experts upon whom reliance may be placed. Courts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion.

[34] If, after the initial assessment by the medical practitioner, the Fund exercises the option of a rejection of the report, a dispute arises in relation to the correctness of the assessment of the seriousness of the injury by the medical practitioner and where, as far as the Fund is concerned, causation is not in issue, that dispute is left to be dealt with by the Tribunal, which will have the last say on the matter, subject of course to whether that decision is susceptible to judicial review. In the present case, as described in para 7 above, the Fund disputed the assessment of the injury on fallacious grounds. The Fund did not inform Mr Gouws that causation was in issue nor did it independently adopt a position in relation thereto. It wrongly abdicated that position to the Tribunal. As pointed out above, the contestation before the Tribunal

could only be in relation to the assessment by the medical practitioner of the seriousness of the injury and the finality of its decision is in relation to that aspect.

[35] The effect of what is suggested on behalf of the Tribunal is that the jurisdiction of the court is ousted. The only challenge to a decision by the Tribunal in relation to causation on the suggested basis will therefore be in the form of a review which, contrary to the suggestion on behalf of the Tribunal, will not be time or cost efficient. One might rightly ask where the funding for such an exercise will come from and how it might impact on indigent persons.

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

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

[38] The article by Slabbert and Edeling, referred to in para 23 above, on which reliance was placed by counsel on behalf of the Tribunal, takes the matter no further. The authors' criticism of para 4.1 of the injury assessment report form (RAF 4) detracts from the submission that the Tribunal has the final say on causation. The

authors state that the medical practitioner is required to describe the nature of the motor vehicle accident 'despite the fact that he or she often has no knowledge or limited knowledge of what happened and he or she must therefore speculate'. One might rightly ask how, in the absence of complete knowledge or information, the medical practitioners and, indeed, the Tribunal, can have the final say on causation.

[39] As stated above, Mr Gouws was given no notice that causation was an issue that was going to be addressed by the Tribunal and was not afforded an opportunity to make representations, either on whether a conclusion of the kind finally arrived at was justified or on whether a final decision on that issue was within the Tribunal's statutory remit.

[40] It is up to the Legislature to decide whether to intervene and detract further from the right of claimants, perhaps on the basis of affordability and ultimately in the interest of the public, by way of further legislative amendments. In that event there will no doubt be careful scrutiny by affected parties of the constitutionality of such provisions. Following on this judgment the legislature, or the Minister, may consider whether, for the purposes of greater clarity regarding prospective disputes, including those with greater complexity than the present one,[13] legislative change is called for. That is an aspect beyond our remit. Returning to the present case, in my view, principle and policy compel a conclusion against the Tribunal. The essential findings of the court below cannot be faulted.

[41] In light of the above, the following order is made:
The appeal is dismissed with costs including the costs of two counsel.

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M S Navsa

Acting Deputy President

[13] In the present case the dispute, as it finally appears to have crystallised, after a finding by the Tribunal, even though the initial basis for the rejection by a medical practitioner was erroneous, was whether the shoulder injury assessed as serious by the medical practitioner, was caused by or arose from the driving of a motor vehicle. The seriousness of the shoulder injury, *per se*, does not appear to have been in dispute. Prospectively, questions might arise about whether a differentiated assessment by a medical practitioner is competent in the event of a concern about whether some of a number of injuries are related to or arose from the driving of a motor vehicle. The Act and the Regulations appear to have been crafted on the basis of causation not being in issue.

Appearances:

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For the Respondent:	F A Ras SC (with him M Tromp) Instructed by: Johan van de Vyver Attorneys, Pretoria Symington & De Kok Attorneys, Bloemfontein