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IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / <u>NO</u>	
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>	
(3) REVISED	
DATE <u>14/11/2017</u>	SIGNATURE <u>[Signature]</u>

CASE NO: 28004/2016

DATE DELIVERED:

IN THE MATTER BETWEEN

**M E ADAMS**

**Applicant**

v

**HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA**

**First Respondent**

**THE REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL**

**OF SOUTH AFRICA**

**Second Respondent**

**THE ROAD ACCIDENT FUND APPEAL TRIBUNAL**

**Third Respondent**

**THE ROAD ACCIDENT FUND**

**Fourth Respondent**

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JUDGMENT

**VAN NIEKERK, AJ**

[1] On 17 March 2012 the Applicant was involved in a motor vehicle accident as a result of which the Applicant instituted a claim against the Motor

Vehicle Accident Fund (*“the Fund”*) in terms of the Road Accident Fund Act, no. 56 of 1966 (as amended) (*“the Act”*) for non-pecuniary loss (*“general damages”*) which claims are limited to compensation for *“serious injury”* in terms of amended provisions to the Act. The Fund disputed the Applicant’s entitlement to such damages, whereafter the Applicant on the 31<sup>st</sup> of March 2015 requested dispute resolution in terms of the applicable regulations to the Third Respondent in this application. On 14 October 2015 Third Respondent arrived at a determination that the injuries sustained by the Applicant are not *“serious injuries”* in terms of Section 17(1A) of the Act and this application is a review against such determination of the Third Respondent.

- [2] The applicable legal framework was comprehensively dealt with in *Road Accident Fund v Dume & three similar cases* 2013(6) SA 9 (SCA) par [3] to [10] and is briefly summarised as follows:

[2.1] In terms of Section 17(1) of the Act, the Fund or an agent shall be obliged to compensate any person for any loss or damage which such person has suffered as a result of any bodily injuries to himself or herself or the death of or any bodily harm to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic .....

- [2.2] In terms of Section 17(1)(b) of the Act 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 sub-section (1A) of the Act;
- [2.3] An 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 and such assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act no. 56 of 1974);

***Vide: The Act, Section 17(1A)(a) and (b)***

- [2.4] Regulation 3(1)(b) of the regulations promulgated in terms of the Act regulates the assessment by the medical practitioner envisaged in Section 17(1A) of the Act, and the criteria that the medical practitioner must apply in the assessment of whether or not a third party has suffered "serious injury" is regulated in terms of Regulation 3(1)(b) of the Act;
- [2.5] If the Road Accident Fund is not satisfied that the injury has been correctly assessed as serious, it can reject the serious injury assessment report or direct the third party to undergo a further assessment in terms of Regulation 3(3)(b), and if the third party

disputes the Fund's rejection of the third party's serious injury assessment, the third party is entitled to declare a dispute by lodging a dispute with the Registrar of the Health Professional Council of South Africa in terms of Regulation 3(4);

[2.6] Once a dispute has been declared, the Registrar of the Health Professional Council of South Africa (Second Respondent) proceeds to constitute a Tribunal of at least three medical experts to determine whether the third party does have a "serious injury" and the determination of this dispute by the Tribunal is final and binding in terms of the provisions of Regulation 3(13);

[2.7] The criteria to be applied by the Fund and the Tribunal in assessing the seriousness of the injury are set out in Regulation 3(1)(b)(ii) and (iii) which reads as follows:

*"(ii) If 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 which does not result in 30% or more impairment of the whole person it may only be assessed as serious if that 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 long term behavioural disturbances or disorder;*  
 or  
 (dd) *resulted in loss of a fetus."*

[2.8] There is no appeal to the High Court against the determination of the Tribunal as the aforesaid determination constitutes an administrative act. A party aggrieved by the determination of the Tribunal may request a review of such determination to the extent permitted by the Promotion of Administrative Justice Act ("PAJA").

***Vide: Road Accident Fund v Duma & three similar cases  
 supra at paragraph [19]***

[3] Summarising the aforesaid legislative framework, it is clear that the Act restricts a claim to general damages to injuries which are regarded as "*serious injury*", that the determination of whether or not an injury constitutes a "*serious injury*" is determined in terms of the applicable regulations, and that any dispute relating to whether or not an injury constitutes a "*serious injury*" is resolved in terms of the Act and its regulations by way of medical evidence and an Appeal Board, whose determination in this respect is final and binding. This final and binding determination, being an administrative act, is not appealable but subject to review in terms of PAJA.

- [4] In terms of Section 6 of PAJA, the powers of a court to judicially review an administrative action is restricted to certain classes of action, as set out in Section 6(2) of PAJA.
- [5] In considering the Applicant's Founding Affidavit, Replying Affidavit and Heads of Argument filed on behalf of the Applicant, the Applicant's grounds for review of the determination by the Third Respondent are the following:
- [5.1] Third Respondent acted procedurally unfair in that the Third Respondent did not examine the Applicant and was bound by the findings contained in the medical legal reports which were undisputed and provided to the Third Respondent by Applicant.
- [5.2] Third Respondent misconstrued the power to be exercised by it or exercised its powers irrationally or arbitrarily by failing to address the purpose of the appeal to the Third Respondent, namely to determine in terms of the provisions of Regulation 3 of the Act whether or not the Applicant suffered permanent serious disfigurement, but instead to incorrectly addressed the question whether the injuries suffered in the accident were serious or not;
- [5.3] The Third Respondent failed to provide any reasons why it regarded the disfigurement of the Applicant as not being of a serious nature.

- [6] Ultimately, on review the Court needs to consider the rationality of the decision of the Third Respondent. For this purpose the Court must consider whether or not there is a rational connection between the determinations made by the Third Respondent, the material made available to the Third Respondent for purposes of making the determination, the reasons provided for such determination by the Third Respondent, and the purpose for which the power was given to the Third Respondent.

***Vide: Trinity Broadcasting, Ciskey v Independent Communications Authority of SA 2003 (4) ALL SA 589 (SCA) at par. [21]***

- [7] The individual grounds for review advanced by the Applicant and the issue of the rationality of the determination by the Third Respondent is dealt with separately hereunder.

### **THIRD RESPONDENT ACTED PROCEDURALLY UNFAIR:**

- [8] It was contended on behalf of the Applicant that the Third Respondent failed to avail itself of the discretionary powers afforded to it in terms of Regulations 3(10) and 3(11) which is, generally speaking, of an investigative nature in order to determine whether or not the disfigurement of the Applicant constitutes a "*serious injury*" in terms of the narrative test pertaining to Regulation 3(1)(b)(iii) referred to *supra*. The Third Respondent could have, so it was argued, called for further medical



evidence from an applicable expert, could have called on the Applicant to appear before it, and/or could have subjected the Applicant to a further medical examination but instead thereof made a determination contrary to the two medical legal reports provided by the Applicant.

- [9] The powers of the Third Respondent in terms of Regulations 3(10) and 3(11) are discretionary, and it is clearly a discretion in the wide sense. In considering the decision of the Third Respondent to apply its own collective expertise to the question in issue, which essentially related to the medical legal reports and a subjective determination of the issue of “serious” in terms of the narrative test, the Third Respondent clearly did not consider it necessary to avail itself of the powers afforded to it in terms of the provisions of Regulations 3(10) and 3(11). Whether or not this Court would have followed a different route, called the Applicant to appear before it and/or conducted any further investigation by exercising its powers in terms of the applicable regulations, is neither here or there. A court should give weight to findings or facts and policy decisions made by those with special expertise and experience in the field and a court should pay due respect to the route selected by a decision maker with the necessary knowledge and superior qualification in the specific field than the court has. Concisely put, a court should be very slow to interfere with this discretion afforded to the Third Respondent in terms of Sections 3(10) and 3(11).

***Vide: Bato Starfishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490 (CC) at par. [45]***

- [10] *In casu*, the members of Third Respondent consisted of experienced, highly qualified specialist medical practitioners. There are no grounds upon which this court can proverbially “second guess” their decision in this respect. In the premises, this ground for review must fail.

**THIRD RESPONDENT MISCONSTRUED THE POWER TO BE EXERCISED BY IT:**

- [11] This ground for review was referred to in the Applicant’s Heads of Argument as “*The main ground of the Applicant’s review application ....*” and formulated as follows:

*“The purpose of the appeal was to determine in terms of the provisions of Regulation 3 whether the Applicant had suffered permanent serious disfigurement. The Appeal Tribunal did not address this issue and simply and incorrectly addressed the question whether the injuries which the Applicant suffered in this accident were serious or not. In this sense the Appeal Tribunal either misconstrued the power to be exercised by it or exercised its powers irrationally and arbitrarily.”*

- [12] In the Opposing Affidavit one of the members of the Third Respondent deposed to an affidavit, stating that the appeal was against the decision of the Fourth Respondent to reject a “*serious injury assessment*” in respect of the Applicant. The deponent proceeds to set out documentation attached to her appeal, which included the RAF4 form – serious injury assessment by Dr Enslin (General Practitioner), a narrative test report by Dr Enslin, an RAF4 form: serious injury assessment by Dr Erlank (Plastic Surgeon) and

colour photographs. In paragraph 10 of that affidavit, the aforesaid deponent states as follows:

*"We deliberated and resolved that based on medical evidence the Applicant's injuries do not reach Whole Person Impairment of 30% and do not constitute serious injuries under the Narrative Test."*

[13] It is trite law that the "*narrative test*" referred to by such member only apply where injuries reach a WPI (whole person impairment) of less than 30%, for which purpose the criteria in assessing the seriousness of the injuries as set out in Regulation 3(1)(b)(ii) and (iii) applies. In terms of the aforesaid criteria, the issue which the Third Respondent had to determine was whether or not the disfigurement of the Applicant constituted "*permanent serious disfigurement*" as set out in Regulation 3(1)(b)(iii)(bb). From the contents of paragraphs 62, 63 and 64 of the aforesaid affidavit, it is clear that the members of First Respondent deliberated the very issue of that which it was required to do, applying the narrative test, and arriving at the determination which it did.

[14] In the premises, this ground for review must fail.

**THIRD RESPONDENT DID NOT ADVANCE ANY REASONS WHY IT REGARDED THE DISFIGUREMENT AS NOT BEING OF A SERIOUS NATURE:**

[15] It is trite law that an organ exercising an administrative power or function, is obliged to provide reasons therefore. If reasons are not advanced at the



time when the power of function is exercised, such reasons may be provided at a later time. The mere failure to provide reasons at the time when the power and function is exercised, does not render the exercising of such power or function reviewable.

- [16] The Applicant was informed of the determination of the Third Respondent by way of correspondence dated 2 December 2015, addressed to the Applicant's attorney of record by the First Respondent, which reads as follows:

*"The above matter bears reference.*

*We refer to the above matter and hereby inform you that Road Accident Fund Appeal Tribunal result at its recent meeting held on 14 October 2015 as follows:*

*The combination of injuries is not regarded as serious.*

*She does not qualify for general damages.*

*We trust you find above to be in order."*

- [17] From the affidavit of a member of the Third Respondent already referred to *supra*, the following transpires:

[17.1] A reference was made to all the sources of information made available to the Third Respondent, including the medical legal assessments of two practitioners who examined the Applicant;



[17.2] In paragraph 62 of that affidavit the factors to which the Third Respondent *inter alia* had regard to in making the determination that the Applicant's injuries are not serious, were set out with comprehensive reference to the two medical legal reports referred to *supra*;

[17.3] The deponent then proceeds to set out the reasoning of the Third Respondent as follows:

"63. Firstly, in considering whether scarring constitutes permanent serious disfigurement, the Tribunal has regard to the influence of the scars on the particular third party's quality of life. These would include for example the degree to which the scars are evident to others, the degree to which they are obscured by hair or clothing, any specific adaptation of hair or clothing to obscure scars and any identified psychological consequences of the disfigurement.

64. In the Tribunal's view, the surgical scarring of the Applicant's leg and arm, considered in the light of her personal circumstances (including her age, gender, occupation, recommended surgical improvement of the scars, general good health and ability as reported in the medical legal reports) could not be construed as serious disfigurement as contemplated by the

*regulations. The same applies to the reported Malunited Clavicle.*

65. *The Tribunal accepted Dr Erlank's clinical diagnosis and the recommended treatment, but disagreed with his view that the reported scarring constitutes serious permanent disfigurement.*

66. *The Tribunal was anonymous that the injuries sustained by the Applicant have not resulted in significant changes to the Applicant's personal circumstances. Accordingly, the Tribunal found that the injuries sustained by the Applicant are not serious as contemplated by the Regulations."*

[18] The aforesaid reasons, with reference to the facts as they pertained in the medical legal reports relating to the Applicant's personal circumstances, are in my opinion comprehensive and adequate. It is clear that the relevant factors have been considered for the question in issue.

[19] It is clear from the Applicant's Founding Affidavit and the Heads of Argument filed on behalf of the Applicant, that the review is not found on a consideration that the facts considered by the Third Respondent were incorrect or inadequate. When, on review, the Court is satisfied that the relevant facts or considerations were considered the enquiry ends there. On review, it is not the function of the Court to prescribe the weight that

must be accorded to each consideration. The weight that the decision maker accords to any particular factor or how it will allow any particular factor to effect the eventual determination, is within the discretion of the decision maker and is not susceptible to interference by a Court of law unless it was done mala fide.

***Vide: MEC for Environmental Affairs & Development  
Planning v Clairison's CC 2013 (6) SA 235 (SCA)  
paragraphs [20] – [22]***

[20] In the premises, it was not required of the Third Respondent to set out to what measure or extent any of the considerations weighed up in the exercise of the discretion of the Third Respondent and a reference simply to the facts and/or factors considered by the Third Respondent in making the determination suffice.

[21] In the premises, this ground of review must also fail.

**RATIONALITY:**

[22] In the Heads of Argument filed on behalf of the Applicant, it is submitted that the value judgement of the Third Respondent is irrational and arbitrary in the absence of a reasoned conclusion which cannot objectively be verified by the evidence at hand.

- [23] The test for rationality requires a rational connection between the reasons and the decision, and not whether the decision is correct in relation to reasons.

***Vide: Bato Starfishing (supra)[42] – [48]***

- [24] What is required is that the Court needs to consider whether there is a rational connection between the conclusion reached by the decision maker and the material made available, the reasons given and the purpose for which the power was given.

***Vide: Trinity Broadcasting (supra)***

- [25] The purpose for which the power was given to the Third Respondent was clearly to limit the award of damages for non-pecuniary damages and the legislator therefore enacted legislation to this respect and promulgated regulations with the intention of establishing a regime where, in the event of certain specified categories of claims, damages only be awarded for “serious” injuries.

- [ 26] As stated by Pretorius J. in an unreported judgement of this Court dated 11 June 2014 under case number 48022/2011 in the matter between ***Sylvester Trevor Maluka (Applicant) and the Road Accident Fund (First Respondent) and seven others in paragraph 13 thereof.***

*“The purpose of the current scheme, due to the amendment to the Road Accident Fund and Regulations in 2008 is to implement the*



*recommendations of the Satchwell Commission where it was found in the commission report, V2, p. 1150, paragraphs 36.186 to 36.187 that: 'It is essential that bold steps be taken to ensure that the proposed Road Accident Benefit Scheme is relieved of the burden of paying compensation or benefits which are neither financially nor morally justifiable'.*

- [27] It is clear that the Third Respondent was in possession of medical legal evidence and the relevant facts pertaining to the Applicant's personal circumstances. Considering all those considerations, the Third Respondent by implication concluded that the nature of the Applicant's disfigurement did not warrant compensation or benefit "*which are neither financially nor morally justifiable*". There is therefore a rational connection between the purpose of the relevant legislation and the conclusion arrived at by the Third Respondent. Whether this Court would have arrived at the same conclusion, is irrelevant. The only consideration is whether there is a rational connection or not.

***Vide: Pharmaceutical Manufacturers Association of South Africa & Another: In re: Ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) par. 90***

- [28] Considering the purpose of the relevant legislation and regulations, the information or evidence available to the Third Respondent in making its

determination, and the resultant determination, it cannot be found that such determination is irrational.

[29] In the result there are no grounds advanced by Applicant for review.

[30] In the result, the application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'P. A. van Niekerk', is written over a horizontal line.

**P A VAN NIEKERK AJ  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**APPEARANCES:**

**FOR APPELLANT: ADV. KRIGE**

**INSTRUCTED BY:**

**FOR RESPONDENT: Mr MAODI**

**INSTRUCTED BY:**

**DATE OF HEARING: 7 NOVEMBER 2017**

**DATE OF JUDGMENT: 17 NOVEMBER 2017**