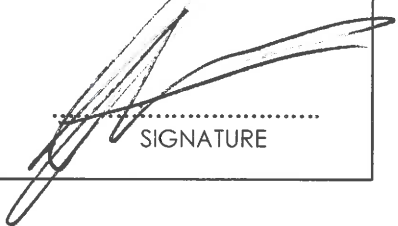




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
8/3/2021 DATE	
 SIGNATURE	

Case Number: 2267/2016

**ADV MARYKE VAN ROOYEN
obo NKOSINATHI CHRISTOPHER MOKOENA**

Applicant

AND

**THE HEALTH PROFESSIONS COUNCIL OF SOUTH
AFRICA**

Fist respondent

DR J CROSIER

Second respondent

DR R REID

Third respondent

DR A J LAMBRECHTS

Fourth respondent

THE ROAD ACCIDENT FUND

Fifth respondent

JUDGMENT

H G A SNYMAN AJ

INTRODUCTION

[1] This is an application for the judicial review and setting aside of a decision

by the Road Accident Fund Appeal Tribunal dated 30 October 2018. The impugned decision was that Mr Nkosinathi Christopher Mokoena (*“Mr Mokoena”*) is not entitled to non-pecuniary loss arising from injuries he sustained in a collision that occurred on 18 March 2013. Mr Mokoena is an adult, unemployed male born on 25 December 1983.

- [2] The application is brought in terms of section 6(1) of the Promotion of Administrative Justice Act, Act 3 of 2000 (*“PAJA”*). The applicant contends that the impugned decision ought to be reviewed and set aside as irrelevant considerations were taken into account, or relevant considerations were not considered in arriving at the decision [see section 6(2)(e)(iii) of PAJA], or that the decision was arbitrarily or capriciously taken [see section 6(2)(e)(v) of PAJA].
- [3] The applicant initially also relied on section 6(2)(a)(iii), namely that the administrator who took the decision was biased or reasonably suspected of bias. The applicant’s counsel expressly did not persist with this in argument before me.
- [4] The relief sought is not only for the decision to be reviewed and set aside, but that this court should substitute and vary the decision by correcting it. In terms of section 8(1)(c)(ii) of PAJA this court may grant such an order, instead of for instance referring the matter back to the Appeal Tribunal, *“in exceptional cases”*.

THE PARTIES

- [5] Adv Maryke van Rooyen N.O. brings the application in her capacity as *curatrix ad litem* for Mr Mokoena, appointed as such in terms of an order of this court per Baqwa J dated 27 February 2018.
- [6] The first respondent ("*the HPCSA*") is a statutory body established in terms of section 2 of the Health Professions Act, Act 56 of 1974 ("*the Health Professions Act*"). The Registrar of the HPCSA ("*the Registrar*") is charged in terms of the regulations under section 26 of the Road Accident Fund Act, Act 56 of 1996 (respectively the "*regulations*" and "*the RAF Act*") to refer disputes regarding a claimant's entitlement to non-pecuniary loss to an appeal tribunal. The appeal tribunal must in terms of paragraph 3(8)(b) consist of three independent medical practitioners with expertise in the appropriate area of medicine. In terms of paragraph 3(8)(c) of the regulations 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.
- [7] In terms of the power as aforesaid, the HPCSA appointed the second respondent ("*Dr J Crosier*"), the third respondent ("*Dr R Reid*") and the fourth respondent ("*Dr AJ Lambrechts*") to constitute the relevant appeal tribunal for purposes of this matter ("*the Appeal Tribunal*"). Dr J Crosier and Dr AJ Lambrechts are orthopaedic surgeons. Dr R Reid is a neurologist.

- [8] Masephule Dinga Incorporated attorneys (*"Masephule Dinga"*) were the attorneys of record in this matter on behalf of the HPCSA and the Appeal Tribunal. They filed the record of proceedings for purposes of the review on behalf of these respondents on 18 June 2019. Although a notice of intention to oppose on behalf of the HPCSA and the Appeal Tribunal was filed on 9 May 2019, no opposing affidavits were ever filed.
- [9] When the applicant on 22 January 2021 served and filed the notice of set down on this court's opposed motion roll of 22 February 2021 on Masephule Dinga, Masephule Dinga indicated in an email of the same date that the applicant's attorneys should rather direct their correspondence to the HPCSA as they have no further involvement in this matter.
- [10] On Friday 19 February 2021 the applicant's attorneys received an email from Adv Ntsane Mathibli, Legal Services of the HPCSA. The HPCSA requested to be provided with the initial notice of motion, with the founding papers and the amended notice of motion to enable it to attend to the matter. The applicant's attorneys of record forwarded these to the HPCSA on the same date. By Sunday 21 February 2021 the HPCSA advised that it would abide the ruling of this court. Although this was not expressly stated, it follows that this applies to both the HPCSA and the Appeal Tribunal.
- [11] The fifth respondent (*"the RAF"*) opposed the application. Fourie Fismer Incorporated attorneys (*"Fourie Fismer"*) were the RAF's attorneys of record.

The RAF filed an answering affidavit deposed to by Mr Bernard Willem Bahlmann, an attorney practicing at Fourie Fismer (*“Mr Bahlmann”*). However, Fourie Fismer formally withdrew as the RAF’s attorneys of record on 18 February 2021, i.e. a few days before this matter was heard. It was submitted by counsel on behalf of the applicant in his practice note that it is common knowledge that the RAF does not instruct attorneys to assist in its litigation at present. Counsel for the applicant therefore stated that there would presumably be no representation for the RAF at the hearing.

- [12] As it turned out, only counsel on behalf of the applicant appeared before me when the matter was called at 12:00 on Tuesday 23 February 2021.

BACKGROUND

- [13] Mr Mokoena sustained severe injuries in a collision that occurred on 18 March 2013 at the four way crossing of OR Tambo and Hans Strydom Streets, Emalahleni (*“the collision”*). He suffered damage that entitled him to lodge and prosecute a claim under the RAF Act. A claim form was duly lodged with the RAF and in due course Mr Mokoena instituted an action under the instant case number in this court.

- [14] One of the heads of damages that Mr Mokoena claimed was a claim for non-pecuniary loss (also referred to as *“general damages”*). Non-pecuniary damages can be described as damages suffered by a person that is not

quantifiable in monetary terms. The aim of awarding these damages is to compensate a plaintiff for any harm suffered of injuries sustained including pain and suffering, disfigurement, emotional harm, permanent disabilities and loss of amenities of life.

- [15] In terms of section 17(1) of the RAF Act, the obligation on the RAF to compensate a third party for non-pecuniary loss is limited to compensation for a serious injury as contemplated in section 17(1A). Paragraph 3(1)(b) of the regulations provides the process that needs to be followed in order to establish whether an injury constitutes a serious injury for purposes of section 17(1)(A) of the RAF Act.
- [16] In terms of paragraph 3(1)(a), read with the definition of medical practitioner in paragraph 1 of the regulations, an injured third party must be assessed by a medical practitioner, registered in terms of the Health Professions Act. After the assessment of the injuries, the medical practitioner must complete the prescribed RAF4 Serious Injury Assessment form, which needs to be submitted to the RAF.
- [17] The medical practitioner first needs to determine whether the injuries or any combination thereof fall within the list of exclusions provided for in paragraph 3(1)(b)(i)(aa) to (pp) of the regulations. If not, the injury shall be assessed as serious in terms of paragraph 3(b)(ii) if the injury resulted in 30% or more Impairment of the Whole Person as provided for in *“the AMA Guides”*. The

“AMA Guides” is defined in paragraph 1 to mean “*the American Medical Association’s Guides for the Evaluation of Permanent Impairment, Sixth Edition, or such edition thereof as the Fund may from time to time give notice of in the Gazette*”.

- [18] In terms of paragraph 3(b)(iii)(aa) to (dd) an injury which does not result in a 30% or more Impairment of the Whole Person may still be assessed as serious if that injury resulted in a serious long-term impairment or loss of a body function; constitutes permanent serious disfigurement; resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or resulted in loss of a foetus. This is referred to as the narrative test.
- [19] In summary, therefore, a plaintiff will only qualify for general damages if the injury sustained is not one of those excluded in terms of the regulations, resulted in Impairment of the Whole Person of 30% or more, or the injury sustained falls within any one or more of the four categories of injuries in terms of the narrative test.
- [20] In a notice dated 30 September 2016, the RAF conceded that it was liable to compensate Mr Mokoena for damages arising from the injuries sustained in the collision, subject to the provisions of the RAF Act.
- [21] Mr Mokoena was examined and assessed as contemplated in paragraph

3(1)(b) of the regulations by a number of the medical practitioners in order to assess whether he qualifies for a serious injury in terms of section 17(1A) of the RAF Act.

[22] Dr H Senske (orthopaedic surgeon) (*“Dr Senske”*) assessed him and determined that Mr Mokoena suffered from Impairment of the Whole Person of 13%. However, Dr Senske expressed the view that since Mr Mokoena suffered from permanent serious disfigurement, he qualifies for general damages (in terms of the narrative test).

[23] Dr G Reid (orthopaedic surgeon) (*“Dr Reid”*), who was appointed by the RAF to assess Mr Mokoena's injury, recorded in his original report that Mr Mokoena was not entitled to an award for non-pecuniary loss. Dr Reid later changed his view as appears from a joint minute prepared by him and Dr H Senske. In the joint minutes the two orthopaedic surgeons agreed that: *“Patient has not reached 30% or more Whole Person Impairment, but would qualify to be awarded general damages on the grounds of serious long-term impairment.”*

[24] Dr Schevil (psychiatrist) (*“Dr Schevil”*) assessed Mr Mokoena's Impairment of the Whole Person at 20% on his clinical assessment alone. Taking all factors into consideration, he assessed the Impairment of the Whole Person at 45%, i.e. far in excess of the required 30%. Dr Schevil also assessed Mr Mokoena as qualifying for an award of non-pecuniary loss on the basis of

Mr Mokoena having suffered severe long-term impairment, as well as severe long-term mental disturbance or disorder as required in terms of the narrative test.

[25] Dr JPM Pienaar (plastic and reconstructive surgeon) (*“Dr Pienaar”*) found that Mr Mokoena suffered serious permanent disfigurement.

[26] Dr JJ du Plessis (neurosurgeon) (*“Dr du Plessis”*) diagnosed a mild concussive head injury. However, he deferred to a psychiatrist and a clinical psychologist, both who confirmed that Mr Mokoena qualifies for an award for non-pecuniary loss, namely Dr Schevil referred to above and Dr Olivier (clinical psychologist) (*“Dr Olivier”*). Dr Olivier confirmed that Mr Mokoena is entitled to general damages on the basis of the narrative test.

[27] Dr JA Smuts (neurologist) (*“Dr Smuts”*), in his addendum report confirmed that the seizures that Mr Mokoena suffered from were due to post-accident epilepsy. Dr Smuts recorded in the last page of the RAF4 form that he assessed the Impairment of the Whole Person of Mr Mokoena on a neurological basis at some 54%.

[28] The above reports were all submitted to the RAF for a decision on Mr Mokoena's entitlement to non-pecuniary damages. No response was initially forthcoming.

[29] After the exchange of pleadings, a trial date was obtained for 28 February

2018. A few days before the trial, the attorneys for the RAF informed Mr Mokoena as envisaged in paragraph 3(3)(d) of the regulations that the serious injury assessment reports as furnished were rejected. The handler at the RAF who dealt with the claim stated in this regard that the RAF was not satisfied that Mr Mokoena's injuries had been correctly assessed under the AMA Guides. In reaction, Mr Mokoena lodged an appeal to the Appeal Tribunal.

[30] On 17 September 2018 the Registrar advised that the second to fourth respondents would determine the appeal. The Appeal Tribunal therefore comprised a neurologist and two orthopaedic surgeons.

[31] On 30 October 2018 the Registrar advised that the Appeal Tribunal *inter alia* resolved at its meeting on 26 October 2018 regarding Mr Mokoena that:

“v. WPI: 13% (*Senske*); 4% (*Reid*); 9% (*Pienaar*); 25% (*Schevil*).

viii. *Narrative test / disability: Does not qualify.*

ix. *Appeal Tribunal decision: Non-serious musco-skeletal injuries”.*

[32] The applicant instituted the present application for the review and setting aside of the above decision on 11 April 2019.

[33] Mr Mokoena's action for damages under the same case number was finalised on 11 June 2019. In terms of this court's order of that date per

Mokose J, the RAF was ordered to pay the applicant in her representative capacity on behalf of Mr Mokoena the amount of R1,034,916.39 in respect of his claim for past and future loss of earnings and in respect of his claim for past hospital and medical expenses. In paragraph 2 of the order, it was recorded that the applicant's claim for non-pecuniary loss (general damages) still formed the subject matter of this review application against the Appeal Tribunal's decision.

ARGUMENT ON BEHALF OF THE APPLICANT

[34] The Appeal Tribunal in what was described in the heads of argument on behalf of the applicant as "*strange*", disagreed with their two colleagues, i.e. the two orthopaedic surgeons (Dr H Senske and Dr Reid), who agreed that Mr Mokoena qualifies for non-pecuniary loss. It was submitted on behalf of the applicant that the orthopaedic surgeons on the Appeal Tribunal (Dr J Crosier and Dr R Reid) did not have the benefit of assessing Mr Mokoena in person. Without reasons ever being provided, they simply stated that Mr Mokoena does not qualify under the narrative test.

[35] It was argued on behalf of the applicant that the Appeal Tribunal did not only refuse to endorse the agreement reached by their colleagues, but they also ventured to reject the Serious Injury Assessment Report/s by Dr Smuts and Dr Schevil, who both in their own field of expertise gave unchallenged assessments that Mr Mokoena does qualify for general damages. It was

submitted on behalf of the applicant that the Appeal Tribunal seemingly did not consider the neurological aspect at all.

[36] In Mr Mokoena's submission document to the Appeal Tribunal clear reference was made to the report of Dr Smuts as well as his addendum report. Special emphasis was placed on the fact that he suffers from epilepsy. There was no neurologist to refute this. It was further argued that specific reference was also made to the RAF4 form and Dr Smuts' assessment of Impairment of the Whole Person of some 54% (more than the required 30%). The ruling and reasons furnished by the Appeal Tribunal simply made no reference to Dr Smuts, or to the neurological basis of the contentions on behalf of Mr Mokoena.

[37] The applicant also relied thereon that Dr Schevil assessed Mr Mokoena's Impairment of the Whole Person at 39%. His basic diagnosis was one of "*post-traumatic organic brain syndrome with symptoms consistent with frontal lobe disfunction*". Dr Schevil also confirmed "*complex partial seizures*", which he referred to a neurologist. It was pointed out on behalf of the applicant that more importantly, Dr Schevil also diagnosed that Mr Mokoena suffers from "*post-traumatic organic psychotic symptoms ...*". It was pointed out that the RAF had no counterpart psychiatrist. The Appeal Tribunal also did not include a psychiatrist as part of the Appeal Tribunal. There was simply no basis upon which the Appeal Tribunal could regard itself qualified to "*confirm the rejection of (Dr Schevil's) Serious Injury Assessment*

Report ...”, rather than “consider(ing) it appropriate to accept (Dr Schevil’s) Serious Injury Assessment Report”.

[38] It was argued on behalf of the applicant that the Appeal Tribunal’s “confirmation” of the RAF’s arbitrary rejection of both Dr Smuts’ and Dr Schevil’s Serious Injury Assessment Reports, is clearly arbitrary and irrational. More so if one has regard to the fact that the examining orthopaedic surgeon had agreed to support an award for non-pecuniary loss.

[39] In my view the submissions on behalf of the applicant have merit.

ARGUMENT ON BEHALF OF THE RAF

[40] In its answering affidavit the RAF raised two points *in limine*. The first was that this court is not “*capable by law*” to grant the order asked for in prayer two of the notice of motion, i.e. to substitute the decision of the Appeal Tribunal with a decision of its own. It was submitted in this regard that section 8(1)(c)(ii) of PAJA provides that the court may in exceptional circumstances substitute, vary or correct a defect that resulted from an administrative action, but that the applicant failed to mention any exceptional circumstances. As I see it, this is not a point *in limine* at all. It is an issue of fact, namely whether the applicant has shown that this is an exceptional case or not.

[41] It is further argued as part of this first point *in limine* that this court has no jurisdiction to set aside the RAF’s decision to reject the serious assessment

reports filed by the applicant. It is then stated that legal argument will be presented to this court at the hearing of this application in support of this. However, this never happened as no heads of argument were ever filed on behalf of the RAF and no one appeared on its behalf before this court at the hearing. It is trite that this court indeed has the necessary jurisdiction in terms of section 8(1)(c)(ii) of PAJA, in the event that it upholds the review, to substitute the decision of the Appeal Tribunal with its own, i.e. not to refer the matter back. In terms of section 8(1) of PAJA this court may grant any order that is just and equitable, including if it is an exceptional case, to substitute the decision of the Appeal Tribunal with its own. In the result, the first so-called point *in limine* raised by the RAF has no merit.

[42] The second point *in limine* is that the applicant failed to make use of all the remedies available to him in terms of the regulations, more specifically regulation (9)(b)(i) read with section 5 of PAJA.

[43] Paragraph 3(9)(b)(i) of the regulations provides that if a party is aggrieved by any one or more of the appointments made by the Registrar to the Appeal Tribunal, then the aggrieved party shall within 10 days deliver a written motivation to the Registrar and the other party, setting forth grounds upon which the party objects to the appointment made. It is common cause that the applicant did not do so.

[44] The RAF's reference to section 5 of PAJA appears to be wrong. Reference

was apparently intended to be made to section 7(2)(a) of PAJA, which provides that no court shall review an administrative action in terms of PAJA unless any internal remedy provided for in terms of any other law has first been exhausted.

[45] In view of the facts and circumstances of this matter, what the RAF suggests is no internal remedy as envisaged in section 7(2)(a). That would have been an alternative remedy if the applicant applied for the decision to appoint the Appeal Tribunal to be set aside. That is not what is at stake here. What is stake here is the setting aside of the decision by the Appeal Tribunal.

[46] There was, as I see it, no reason for the applicant to object to the appointment of the medical practitioners to the Appeal Tribunal. It included two orthopaedic surgeons. The joint report by the orthopaedic surgeons for the applicant and for the RAF, which served before the Appeal Tribunal confirmed that Mr Mokoena was entitled to non-pecuniary relief. Under the circumstances there was also no basis upon which the applicant could complain about the appointees to the Appeal Tribunal.

[47] The RAF's second point *in limine* can therefore also not succeed.

[48] Turning to the merits, Mr Bahlmann makes several statements in the answering affidavit in an attempt to challenge what is set out in the founding affidavit with reference to the reports of the medical practitioners who found

that Mr Mokoena indeed suffered serious injuries, which would entitle him to non-pecuniary loss. For instance, he states that the RAF was of the intention to cross-examine Dr Smuts and Dr Schevil on their "*baseless findings*" and that the RAF intends to pursue its intentions if the decision of the Appeal Tribunal is indeed set aside (and the matter referred back). There are, however, no contrary or challenging reports by any medical practitioners attached to the answering affidavit in support of this.

[49] Clearly the statement cannot be made that the findings of the applicant's experts were baseless, least of all not based on only an affidavit by the RAF's attorney. Moreover, without any expert to support this, the RAF's deponent for instance states in paragraph 16 that a neurosurgeon such as Dr du Plessis is the only person competent to diagnose a brain injury. He goes so far as to state that the psychiatrist prescribes the medicine to help the patient cope with the mental disorder and the psychologist assists the patient with the managing of the mental illness in day-to-day life. Again, there is no basis upon which the attorney qualifies himself to express opinions like these.

[50] As I see it, the opposition of the RAF to the application is therefor wholly unsupported by facts and relevant expert opinions and does not provide an answer against the case made out by the applicant for the decision of the Appeal Tribunal to be reviewed and set aside.

[51] What was in my view at least required is for a medical practitioner with the

necessary expertise to have confirmed under oath what is stated in the answering affidavit. There is not even an explanation before court how the Appeal Tribunal reached the impugned decision.

[52] Under the circumstances, I regard the RAF's opposition to the application to be based virtually entirely on hearsay.

[53] As I see it, the mere fact that the orthopaedic surgeons in their joint report referred to above, concluded that Mr Mokoena is indeed entitled to non-pecuniary damages, in the absence of any explanation to the contrary, provides grounds for the Appeal Tribunal's decision of to be set aside.

[54] In determining whether the RAF's answering affidavit throw serious doubt on the applicant's case, the following principles enunciated by the SCA in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)** at para 13 (although stated in regard to an application where final relief was claimed), are of importance:

"A real, genuine and bona fide dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or

countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the Court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the Court takes a robust view of the matter." (My emphasis)

- [55] In my view the RAF's answering affidavit does not throw serious doubt on the applicant's case. The cumulative effect of this fact, and the fact that the Appeal Tribunal did not present any version to this court explaining on what basis they arrived at the impugned decision, leaves me with no alternative but to find that the impugned decision 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 [see section 6(2)(e)(iii) of PAJA], or that the decision was arbitrarily or capriciously taken [see section 6(2)(e)(v) of PAJA].

THE APPEAL TRIBUNAL'S DECISION TO BE SUBSTITUTED

- [56] The considerations to be taken into account in deciding whether a matter should be referred back to the administrator, in this instance the Appeal

Tribunal, or whether this court should replace the Appeal Tribunal's decision with its own, are summarised as follow by Lewis JA in the matter of **Westlinghouse Electric Belgium SA v Eskom Holdings (SAC) Ltd and another** 2016 (3) SA 1 (SCA) at [72] to [74]:

"[72] *In Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) para 29 Heher JA said:

'An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. . . . That is why remittal is almost always the prudent and proper course.'

He relied in this regard on inter alia the Constitutional Court decision in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) paras 46 – 49. The court in *Gauteng Gambling* nonetheless considered that there were exceptional circumstances in that matter and, because of the inevitability of the outcome, accepted that remittal was not necessary and substitution was appropriate.

[73] *The question is essentially one of fairness. In Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA) ([2002] 4 All SA 145) Hefer AP said (para 14):

'(T)he remark in Johannesburg City Council v Administrator, Transvaal and Another [1969 (2) SA 72 (T) at 76D – E] that the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also

enter the picture. There will be no remittal to the administrative authority where such a step will operate procedurally unfairly to both parties.'

[74] Most recently the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) ([2015] ZACC 22) reversed a decision of this court which had ordered remittal to a bid-evaluation committee: the committee had wrongly concluded that one of two bids was non-responsive. The Constitutional Court held, however, that substitution was the appropriate remedy. Khampepe J said (para 47):

'To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of the administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.' [Footnote omitted.]

The court said further that the first enquiry is whether it is in as good a position to make the decision as the administrator was. Second, it must determine whether a substituted award is a foregone conclusion."

[57] In this matter Mr Mokoena's injuries were sustained eight years ago. As I see it, it is indeed a matter of fairness for this issue to be dealt with expeditiously. In view of the delays that will obviously be occasioned by a referral back to the Appeal Tribunal, it will not be fair to both parties to refer the matter back.

- [58] Based on the uncontested reports of the medical practitioners upon which the applicant relies, the outcome before the Appeal Tribunal is inevitable.
- [59] This court is in as good a position as the administrator to make the decision. Should the RAF have held a different view, it should have presented this court with expert reports confirmed under oath, which challenged this. The fact that it failed to do so is decisive.
- [60] In the result, I find that a remittal is not necessary and that substitution is appropriate. This is one of those exceptional cases envisaged in terms of section 8(1)(c)(ii) of PAJA

COSTS

- [61] In paragraph three of the notice of motion the applicant moves for an order that the RAF, and any other respondent who opposes the application, be ordered to pay the costs. Further that, if the RAF opposes the application it be ordered to pay the costs of the application on the scale as between attorney and client.
- [62] In paragraph 11 of the answering affidavit it is *inter alia* stated in this regard on behalf of the RAF that *“the cost order soughtis the main reason the Application is opposed.”* .
- [63] At the hearing counsel on behalf of the applicant only asked for a costs order

against the RAF. However, no longer on the scale as between attorney and client.

[64] There is no reason why costs in this matter should not follow the event.

[65] Under the circumstances the following orders are made.

ORDER

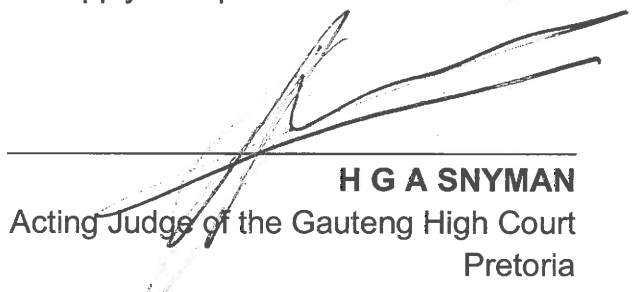
1. The decision by the Road Accident Fund Appeal Tribunal (as constituted by the second to fourth respondents herein) on 30 October 2018 (per annexure “**NCM11**” to the founding affidavit) that Nkosinathi Christopher Mokoena is not entitled to non-pecuniary loss arising from injuries he sustained in the collision which occurred on 18 March 2013, is set aside;
2. The Road Accident Fund Appeals Tribunal’s decision of 30 October 2018 is substituted as follows:

“It is declared that the injuries sustained by the applicant, Nkosinathi Christopher Mokoena, in the collision which occurred on 18 March 2013, are serious and that Nkosinathi Christopher Mokoena is entitled to an award for non-pecuniary loss (general damages) for the injuries he sustained in the collision which occurred on 18 March 2013.”

3. The fifth respondent is ordered to pay the costs of the application, such costs to include:

- 3.1. the costs of senior counsel;

- 3.2. the costs of the application enrolled for 30 September 2019 (when fifth respondent sought a postponement).
4. The quantum of the claim for non-pecuniary loss is referred to the trial Court for determination.
5. The applicant (plaintiff) is given leave to apply for a preferential trial date.



H G A SNYMAN
Acting Judge of the Gauteng High Court
Pretoria

Virtually heard: 23 February 2021

Electronically delivered: 8 March 2021

Appearances:

- | | |
|---|---|
| For the applicant: | Adv J O Williams SC
Instructed by Marais Basson Attorneys |
| For the 1 st to 4 th respondents: | No appearance: Letter to abide, CaseLines AAA-1.
Attorneys withdrawn, CaseLines, W1 to W5. |
| For the 5 th respondent: RAF: | No appearance: Attorneys withdrawn Zodumo Hlwatika (ZodumoHl@raf.co.za) |