



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

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

7/8/2024

DATE

SIGNATURE

CASE NO: 3887/15

In the matter between:-

ABJ OLIVIER

Applicant/Plaintiff

VS

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

First Respondent

**THE REGISTRAR OF THE HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

Second Respondent

THE APPEAL TRIBUNAL

Third Respondent

ROAD ACCIDENT FUND

Fourth Respondent/Defendant

Coram: Kooverjie J**Heard on:** 23 July 2024

Delivered: 7 August 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 13H00 on 7 August 2024.

- Summary:**
1. In order to grant an extension under Section 9(2) of PAJA, the interests of justice requirement must be met.
 2. A court may substitute an order of an administrator only if exceptional circumstances exist in terms of Section 8(1)(c)(ii) of PAJA. One such circumstance is if the court is in as good a position as the administrator to grant such order.

ORDER

It is ordered:-

1. The decision of the Appeal Tribunal of 20 June 2020, namely that the applicant is not entitled to non-pecuniary loss arising from injuries he sustained in the collision which occurred on 17 July 2012, is set aside.
2. The Appeal Tribunal's decision of 20 June 2020 is substituted as follows:
"It is declared that the injuries sustained by ABJ Olivier in the collision which occurred on 17 July 2012 are serious and that ABJ Olivier is entitled to an award for non-pecuniary loss [general damages] for the injuries he sustained in the collision which occurred on 17 July 2012."
3. The fourth respondent is ordered to pay the costs of the review application.
4. The quantum of the claim for non-pecuniary loss is referred to the trial court for determination.

JUDGMENT

KOOVERJIE J

- [1] In this judicial review, the applicant seeks to set aside the decision of the Tribunal of the Health Professions Council of South Africa ("the Tribunal") of 20 June 2020. The application is brought in terms of Section 6(1) of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").
- [2] The applicant contends that the impugned decision ought to be reviewed and set aside as irrelevant considerations were taken into account and the relevant considerations were not considered in arriving at the decision (as contemplated in Section 6(2)(e)(iii) of PAJA), and that the decision was arbitrarily or capriciously taken (as contemplated in Section 6(2)(e)(v) of PAJA).
- [3] The Tribunal found that the applicant was not entitled to general damages arising from his injuries which he sustained in the collision that occurred on 17 July 2012.
- [4] The applicant further sought a substitution of the Tribunal's order in terms of Section 8(1)(c)(ii) of PAJA whereby it sought relief in the following terms:
- "It is declared that the injuries sustained by ABJ Olivier in a collision which occurred on 17 July 2012 are serious and that ABJ Olivier is entitled to an award for non-pecuniary loss (general damages) for the injuries he sustained in the collision which occurred on 17 July 2012."*

- [5] The matter was neither opposed by the Road Accident Fund, nor the Health Professions Council of South Africa ("HPCSA"). In fact, the HPCSA filed its notice to abide.

ISSUES FOR DETERMINATION

- [6] Even though this matter remains unopposed, a written judgment is deemed appropriate for the reasons below. First and foremost, the applicant is not automatically entitled to the relief it seeks.
- [7] The specific issues to be determined are, namely:
- 7.1 whether this court can condone non-compliance in terms of Section 7 of PAJA;
 - 7.2 whether the applicant has made out a case in terms of Section 6(2) of PAJA;
 - 7.3 in the event that such decision was not justified, then an enquiry as to whether this court may substitute the decision of the Tribunal.

CONDONATION

- [8] It is evident that the review was instituted beyond the 180-day period as contemplated in Section 7 of PAJA. By virtue of Section 9(2) of PAJA a court may condone the late institution of these proceedings provided that a case has been

made out, more particularly if it is in the interest of justice to grant such extension. Prospects of success play a vital role in making the said decision.¹

- [9] The matter first proceeded to trial where the court granted an order in the applicant's favour in respect of his claim for loss of earnings and awarded a Section 17(4) undertaking. The aspect of general damages was opposed by the Road Accident Fund on the day of trial. The Road Accident Fund thereafter filed its notice of appeal in respect of the judgment. To date it has filed to prosecute the appeal.
- [10] The applicant explained that the delay was not intentional. It was pointed out that between the period when the decision of the HPCSA was issued, that is from July 2020 until 2023, various attempts were made to settle the issue with the Road Accident Fund. The HPCSA's decision was communicated on 22 June 2020.
- [11] The applicant attempted to engage with the Road Accident Fund and wished to mediate the issues without incurring costs in unnecessary litigation. On 23 August 2022, despite the Road Accident Fund filing its notice of appeal, paid the applicant its claim in respect of loss of earnings as per the court order.
- [12] The Supreme Court of Appeal in the *Camps Bay Rate Payers and Residents Association* matter² set out the test for determining whether condonation is justified. The court expressed:

¹ City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC) at paragraphs 46-48

² Camps Bay Rate Payers and Residents Association vs Harrison 2010 (2) All SA 519 (SCA)

"The question whether the interest of justice requires the grant of such extension depends on the facts and circumstances of each case; the parties seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and the relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issues to be raised in the intended proceedings and the prospects of success."

- [13] Undoubtedly the delay in this instance is rather extensive, almost a period of three years. However, in deliberating whether it is in the interest of justice, I am mindful that various factors come into play. The prospects of success weigh heavily in favour of the applicant and is a factor that should be weighed against the delay. Moreover there has been no prejudice expressed by either the Road Accident Fund or the HPCSA. I am therefore of the view that the application in terms of Section 9(2), extending the 180-day period, be granted.

THE APPLICANT'S INJURIES AND SEQUELAE

- [14] The applicant's injuries and sequelae were canvassed by the various experts who examined the applicant. In essence, the physical injuries sustained were:
- 14.1 a concussive head injury that resulted in a moderate brain injury;
 - 14.2 a facet fracture of the C7 vertebrae;
 - 14.3 fractured ribs;
 - 14.4 soft tissue injuries of the back and neck;
 - 14.5 an ankle fracture and sprains on the right ankle.

[15] Notably certain of the experts determined that the accident had a neuropsychological effect on the applicant. The experts referred to were the neuropsychologist, B Mallinson, the neurologist, Dr Pearl, and Mr Moody, the industrial psychologist who established that the injuries sustained were severe in nature as contemplated in Section 17(1)(A)(a) and (b) of the Road Accident Fund Act. Mr Mallinson, the neurologist, concluded that the applicant sustained a whole person impairment (WPI) of 26% and on the Narrative Test - 5.3. It was pointed out that the applicant suffered from severe long-term behavioral disturbance disorder.

[16] It was further pointed out that the court on the previous occasion could only have granted a substantive monetary award for loss of earnings as it accepted the applicant's long-term orthopedic injuries as well as the neurological prognosis. The court accepted that the injuries sustained would have a negative effect on his ability to function in the workplace.

[17] Notably the Fund has to date furnished no contrary expert findings. Their only objection was that the applicant did not comply with the 30% or whole body impairment requirement and on the narrative test, the applicant did not qualify, thereby rejecting the claim for general damages.

THE HPCSA'S CONSIDERATION OF THE MATTER

- [18] The applicant, upon the Fund's rejection of the claim for general damages, filed his appeal with the HPCSA. The Tribunal concluded that the injuries sustained were not considered to be serious in terms of the narrative test. In its reasons of 21 July 2020, it indicated that the applicant's expert medico-legal reports were considered and after consulting with their own orthopedic surgeons as well as a neurosurgeon, a determination that the injuries were severe, was not justified.

THE CURRENT EXPERT FINDINGS

- [19] The applicant persists with the argument that the Tribunal failed to holistically consider the injuries sustained and the sequelae thereof. The Tribunal failed to address the plaintiff's serious long-term impairment as per the expert reports and it further argued that it failed to independently examine the plaintiff through its experts. This was necessary in light of the Tribunal not accepting the applicant's expert findings.

- [20] The plaintiff's uncontested experts' reports demonstrated that the applicant was affected both neuropsychologically as well as physically. I have further noted that the experts examined the applicant long after the collision. In summary:

20.1 Dr Heyman noted that the applicant sustained a head injury with a concussion and indicated that the applicant's amenities would be affected due to his chronic lower back pain;

20.2 Ms Toerien, the occupational therapist, explained that as a result of the lower back pain, conservative interventions are necessary and would affect his work ability and his productivity in the future. She further noted

the applicant's complaints of memory difficulties, thereby referring the applicant for a neuropsychological assessment;

- 20.3 Mr Mallinson, the neuro-psychologist, established that the applicant's short-term memory has been affected. It was recorded that since the accident the applicant has become very disorganized, and is impatient, irritable and aggressive. The neuropsychological testing revealed, *inter alia*, poor auditory attention, difficulty with numerical reasoning, mild planning and double tracking abilities. Mr Mallinson opined that the foregoing deficits are consistent with those commonly seen in a concussive brain injury and are permanent. Mr Mallinson further elaborated the applicant's difficulties in the usage of electronic aids and in his cognitive shortcomings. He indicated that due to his motor slowing as well as his reported difficulties with organisation and memory he would be less efficient in the work environment and especially if he is to seek employment outside of the family business.
- 20.4 Dr Pearl, the special neurologist, confirmed that the applicant has continuous back pain and is unable to pick up heavy items. He consumes painkillers at least three times a week. The applicant experiences neck and right ankle stiffness and is short tempered, easily frustrated and irritable. Since the accident the applicant has decreased his workload because he cannot handle stress. He is disorganized and forgetful. The applicant experienced post-grade amnesia of approximately 3-4 hours following the accident. Dr Pearl records a WPI of 26% in respect of the spinal, cervical and lumbar injuries. She further made reference to her

initial medical report wherein she qualified the applicant on the Narrative Test 5.3, due to his long-term mental and behavioral disturbance.³

- [21] It is trite that in terms of Regulation 3(1)(b)(iii)(aa) an injury which does not result in 30% or more may still be assessed as serious if the injury resulted in severe long-term mental and behavioral disorder premised on the Narrative Test.
- [22] It was pointed out that there are shortcomings in the Tribunal's findings. There was no attempt made to motivate why the applicant's expert findings were flawed. The Tribunal merely concluded that his head injuries were mild and recorded:
"Discussion: Head injury mild. C/spine and L/spine with full pain free ROM. Given the near normal clinical findings, neurophysiological tests were not indicated."
They further concluded that the applicant would meet the demands of his job.
- [23] In my view, the experts have set out in detail the shortcomings the applicant would suffer in the future due to his physical and neuropsychological prognosis. The injuries suffered fall in the category of severe injuries. Consequently the impugned decision cannot stand.

SUBSTITUTION OF THE DECISION

- [24] Substitution of an administrator's decision is the exception rather than the rule. Remittal of a matter is preferred and is the proper cause. Courts will be slow to

³ Dr Pearl's reports – Caselines paginated pages 001-34 to 001-57

assume a discretion which has by statute been entrusted to another functionary. The rule is that the administrators are best equipped, due to their experience and expertise, to make the necessary decisions.⁴

[25] In *Trencon*⁵ the court at paragraphs 47 stated:

"It is settled law that courts would, but for an exceptional reason, refer the matter to the original decision maker than substitute its own decision for that of an administrator. This is because courts appreciate the principle of due deference. 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 the court is in as good a position as an 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 the 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 would involve the consideration of fairness to all implicated parties. It is prudent to emphasize that the exceptional circumstances require an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."

[26] The applicant argued that the circumstances of this matter warrants a substituted order. It is settled law that a court may do so in only exceptional circumstances,

⁴ Gauteng Gambling Board vs Silverstar Development Ltd and Others 2005(4) SA 67 (SCA) at paragraph 29

⁵ Trencon Construction (Pty) Ltd vs Industrial development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC) at paragraph 47

by virtue of Section 8(1)(c)(ii) of PAJA when the court finds that a substitution is appropriate.⁶

[27] Over time our courts have identified certain factors that make room for exceptional circumstances. Substitution is appropriate only where exceptional circumstances exist and where the order of substitution is just and equitable. One of such factor is if the court is in as good a position as an administrator to make the necessary determination. I am in agreement with the argument that the HPCSA has already adjudicated on this matter and there would be no basis to remit the matter to the Tribunal as the evidence would be the same. No new reports are forthcoming. Furthermore the HPCSA has indicated its decision to abide by this court's decision. The RAF has not opposed this application at all and neither has it presented this court with any contrary evidence.

[28] The court in *Trencon* at paragraph 48 further expressed:

"A court will not be in as good a position as an administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally a court ought to evaluate the stage at which an administrator's process was situated when the impugned administrative decision was taken. For example, the further along in a process, the greater the likelihood of the administrator having already exercised a specialized knowledge. In this circumstances a court may very well be in the same position as an administrator to make a decision. In other instances some matters may concern decisions that

⁶ Tripartate Steering Committee v Minister of Basic Education 2015 (5) SA 107 at paragraph 50

are judicial in nature. In those instances – if the court has all the relevant information before it – it may very well be in as good a position as an administrator to make the decision.”⁷

[29] In these circumstances, no doubt a foregone conclusion exists. It would make no sense to defer the matter to the Tribunal as it has already considered the matter.

At paragraph [49] in **Trencon** where the court stated:

“A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator’s discretion and it merely be a waste of time to order the administrator to reconsider the matter.”

[30] The aforesaid two factors have to be considered cumulatively as they are interdependent and interrelated. Therefore there can never be foregone conclusion unless the court is in as good a position as the administrator.⁸ Ultimately the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties.

[31] In this instance this court has all the necessary evidence before it. It is required to consider the very same evidence presented to the HPCSA and the Road Accident Fund. The expert reports set out the injuries and the negative prognosis.

CONCLUSION

⁷ In this regard the court referred to *Theron en Andere vs Ring van Wellington van die NG Sending Kerk in Suid-Afrika en Andere*, 1976 (2) SA 1 SA.

⁸ Paragraph 50 of *Trencon*

- [32] It is necessary to emphasize that on the particular facts before me, a substitution order would be just and equitable. Matters of a similar nature that may come before court in the future must be assessed on their own peculiar facts. The inclination to grant substitution orders must be measured against the specific facts of each matter. It is only in the case of exceptional circumstances and where a just and equitable decision, may a court substitute the original administrative decision.
- [33] A court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. The approach should entail affording appropriate deference to the administrator.⁹ In **Steenkamp**¹⁰ the Constitutional Court expressed:
- "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury ... The remedy must be fair ... It must be just and equitable in light of the facts"*
- [34] Insofar as costs are concerned, there is no reason why the fourth respondent should not be liable for the costs of this application.
- [35] In the premises, the decision of the Tribunal is set aside and substituted with an order of this court.

⁹ Trencon at paragraph 42

¹⁰ Steenkamp N.O. vs Provincial Tender Board Eastern Cape 2007 (3) SA 121 (CC) at paragraph 29


H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant:

Instructed by:

Adv RJ de Beer (SC)

Arthur Moore Incorporated

c/o Surita Marais Attorneys

Counsel for the first, second and third respondents:

*No appearance – will abide the
decision of the court*

Date heard:

23 July 2024

Date of Judgment:

7 August 2024