



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

CASE NUMBER: 34933/2016

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

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SIGNATURE

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DATE

In the matter between

PETER ELVIN SIBANDA

Applicant

and

**THE HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

First Respondent

DR J B PRINS

Second Respondent

PROF M NGCELWANE

Third Respondent

DR R RANGONGO

Fourth Respondent

DR L NDLOVU

Fifth Respondent

THE ROAD ACCIDENT FUND

Sixth Respondent

JUDGEMENT

RIP AJ

Introduction

- [1] In this matter the Applicant seeks to review a decision by a Tribunal of the Health Professions Council of South Africa (“*the HPCSA*”) in terms of which the Applicant’s injuries, which he sustained as a result of a motor vehicle collision, does not qualify as “*serious injuries*”, as envisaged in Section 17(1)A of the Road Accident Fund Act, No. 56 of 1996 (“*the Act*”), as amended.
- [2] The 1st to 5th Respondents, being the HPCSA and Tribunal members in their official capacities chose to abide by the decision of the Court and confirmed their decision to abide via an e-mail dated 2 September 2022.
- [3] The 6th Respondent, being the RAF, initially gave notice of intention to oppose and filed an opposing affidavit. Later, on 31 May 2021, the attorneys for the 6th Respondent served a Notice of Withdrawal as Attorneys of Record.¹
- [4] At the hearing of the matter there was no appearance on behalf of the 6th Respondent, and it is evident that the 6th Respondent did not proceed with its opposition to the application.
- [5] The background to the application is as follows:-
- (1) The Applicant was injured in a collision which occurred on 24 September 2014 and instituted action.
 - (2) The RAF conceded liability on 2 February 2016.
 - (3) In support of the Applicant’s claim for non-pecuniary damages, a RAF4 Form was completed by Dr J P M Pienaar, a Plastic & Reconstructive Surgery Specialist, on 18 February 2016.
 - (4) The RAF also appointed a Plastic & Reconstructive Surgery Specialist, namely Dr S S Selahle.

¹ “RHAM6” on Case Lines

- (5) The matter then proceeded and on the day of trial the RAF rejected the Applicant's claim for general damages.
- (6) Thereafter, on 11 June 2018, the RAF officially rejected Dr Pienaar's serious injury assessment (RAF4 Form).
- (7) Consequently, an appeal was lodged to the HPCSA Tribunal on 20 June 2018.
- (8) The HPCSA appointed a tribunal on 11 February 2019 consisting of the 2nd to 5th Respondents. The Tribunal considered the appeal on 23 February 2019 and communicated its decision on 25 February 2019.
- (9) Initially, the Tribunal communicated that it simply found the injuries to be "*non-serious*" and that minutes of the meeting would be provided at a later date.
- (10) On 26 February 2019 the Applicant was provided with the report of Dr S S Selahle.
- (11) On 27 February 2019 Dr Pienaar and Dr Selahle compiled a Joint Minute in which the following was recorded:-

"We hereby agree on the history and physical findings as well as propose treatment plan and scar revision surgery ...

We further agree that the patient will be left with a serious permanent disfigurement as a result of the accident. The patient qualifies under the narrative test. The patient has reached MMI."

- [6] When one take cognisance of Dr Selahle's report, which was attached to the founding papers as Annexure "MCN4", it is clear that Dr Selahle was of the view that the Applicant qualified on the narrative test for general damages as a result of serious disfigurement.

[7] The application for review is based upon two grounds listed in the Promotion of Administrative Justice, No. 3 of 2000 (“PAJA”), namely:-

- (1) Relevant considerations not taken into account and irrelevant considerations were taken into account (Section 6(2)(e)(iii) of PAJA);
- (2) Irrationality (Section 6(2)(f)(ii) of PAJA).

RELEVANT CONSIDERATIONS ALLEGED TO NOT HAVE BEEN TAKEN INTO ACCOUNT

[8] The Applicant alleges the following facts to support the ground of review:-

- (1) None of the experts on the HPCSA Tribunal were Plastic & Reconstructive Specialists. The Tribunal consisted of three Orthopaedic Surgeons and one Neurosurgeon;
- (2) The Tribunal was made aware that the specialists who qualified the Applicant’s injuries as serious under the narrative test is a Specialist Plastic & Reconstructive Surgeon;
- (3) The injury in question is a permanent scarring of the Applicant, which falls in the scope of practice of a Plastic & Reconstructive Surgeon;
- (4) When referring the dispute to the HPCSA Tribunal, the Applicant’s attorneys explicitly informed the Tribunal that the Applicant was examined by Dr Selahle, the Plastic Surgery expert of the RAF.

[9] The Applicant argues that the Tribunal has the power to order any party to place medico-legal reports before the Tribunal and that in the circumstances that the Tribunal should have had regard to all of the medico-legal reports.

[10] The conclusion put forward is that because of the Tribunal having taken a decision without regard to a mandatory or material consideration, such decision is susceptible to review.

[11] I agree that if this is the case that such a decision does make it susceptible to review as is supported by the Constitutional Court decision of *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agricultural, Conservation & Environment, Mpumalanga Province & Others.*²

[12] I agree with the argument put forward on behalf of the Applicant and I find that in the circumstances of none of the members of the Tribunal specialising in the field of Plastic & Reconstructive surgery, that it was certainly a relevant consideration for such Tribunal to consider any expert reports filed in that regard and the non-consideration thereof amounts to a material omission. Consequently, I find that there is merit in the ground of review and consequently the decision stands to be set aside.

[13] The Applicant further puts forward as grounds for review the argument that the decision was not rationally connected to the information placed before the Tribunal.

[14] Specifically, that considering the reports and specifically that of Dr Pienaar, that the conclusion should have been one of a serious injury. Specifically, the HPCSA Tribunal in giving its additional reasons on 16 May 2019, namely:-

“The panel did not feel that the scarring was serious as it can be covered between the hairline.”

[15] I agree with the Applicant that that consideration was an irrelevant consideration that was taken into account by the Tribunal, as whether the injury can be covered or not should not rationally affect the seriousness of the injury.

² 2007 (6) SA 4 (CC) at Par. 89

[16] I consequently conclude that the decision by the Tribunal was irrational and unreasonable in the circumstances and that the Applicant has made out a proper case for the decision to be reviewed and set aside.

REMEDY

[17] Having come to the conclusion that the decision should be set aside, I must now consider what remedy is appropriate in the circumstances. The Applicant seeks an order that the decision be substituted with an order that the injury sustained by the Applicant in the collision, which occurred on 24 September 2014, are serious and that the Applicant is entitled to an award for non-pecuniary loss (general damages).

[18] In discussion with Counsel for the Applicant as to the appropriate remedy, Counsel referred the Court to the matter of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd & Another*.³ I have considered this matter and find it to be of application in the current circumstances.

[19] In that matter the Constitutional Court discussed the test for exceptional circumstances when considering Section 8(1)(c)(ii)(aa) of PAJA. In that matter the Court states the following helpful guidelines:-

“Pursuant to administrative review under Section 6 of PAJA and once administrative action is set aside, Section 8(1) affords Courts a wide discretion to grant ‘any order that is just and equitable’. In exceptional circumstances, Section 8(1)(c)(ii)(aa) affords a Court the discretion to make a substitution order.”⁴

[20] The Court further goes on to state the following:-

³ 2015 ZACC 22

⁴ Par. 34 of the Trencon Judgment

“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 a decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered culminatively. 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 require an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.”⁵

CONSIDERATION OF RELEVANT FACTS AND CIRCUMSTANCES

[21] In this matter, I believe that the delay occasioned by the appeal, firstly to the Tribunal and then the delay occasioned by having to institute the current review, is a factor that must be considered by the Court.

[22] I am aware that there is always an inherent delay in the litigation, but in circumstances where the 1st to 5th Respondents have from the outset abided by the Court’s decision and the 6th Respondent did not proceed with its opposition to the review application, the delay of sending the matter back to the Tribunal becomes highly relevant.

[23] It must also be noted that the Applicant’s relief and request for substitution was contained in its original Notice of Motion and any party determining whether to oppose the application would or should have been aware of that.

[24] I am further of the view that given the documents placed before me, including the expert reports and joint minute of the Plastic Surgeons that the Court has been placed in a position that is as good as the administrator.

⁵ Par. 47 of the Trencon Judgment

[25] I am further of the view that the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrative discretion and “*it would merely be a waste of time to order the ‘administrator’ to reconsider the matter.*”⁶

[26] Having taken cognizance of the circumstances that surround this matter, I am of the view that it would be just and equitable in the circumstances to grant a substitution order.

[27] Consequently, I find that there are exceptional circumstances in this case to justify a substitution order.

[28] I accordingly make the following order:-

1. The decision by the Road Accident Fund Appeal Tribunal (as constituted by the 2nd to 5th Respondents herein) on 25 February 2019 (per Annexure “MCN7” to the Founding Affidavit) that Peter Elvin Sibanda is not entitled to non-pecuniary loss arising from injuries he sustained in a collision, which occurred on 24 September 2014, is hereby reviewed and set aside;
2. The Road Accident Fund Appeal Tribunal’s decision of 25 February 2019 is substituted as follows:-

“It is declared that the injuries sustained by the Applicant in the collision, which occurred on 24 September 2014, are serious and that Peter Alvin Sibanda is entitled to an award for non-pecuniary loss (general damages) for the injuries he sustained in the collision, which occurred on the aforementioned date (24 September 2014);

⁶ Johannesburg City Council v Administrator, Transvaal & Another 1969 (2) SA 72 (T) at 76 D - H

3. The 6th Respondent is ordered to pay the cost of the application, such costs to include the costs of Senior-Junior Counsel;
4. The quantum of the claim for non-pecuniary loss is referred to the trial Court for determination.

C M RIP
ACTING JUDGE OF THE HIG COURT
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 October 2022.

HEARD ON 24 OCTOBER 2022

JUDGMENT DELIVERED ON 28 OCTOBER 2022.

APPEARENCES

On behalf of the Applicant:

Adv Z MARX

Instructed by:

Marais Basson Inc