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

CASE NO:4035/2019

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

26 MAY 2023 .....
DATE

In the matter between:

ILSE LOTTER	**APPLICANT**
And	
ROAD ACCIDENT FUND APPEAL TRIBUNAL	**FIRST RESPONDENT**
THE ROAD ACCIDENT FUND	**SECOND RESPONDENT**
THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	**THIRD RESPONDENT**
PROF A ADEN	**FOURTH RESPONDENT**
DR Z MAYET	**FIFTH RESPONDENT**
DR DM MANYANE	**SIXTH RESPONDENT**
DR TS BOGATSU	**SEVENTH RESPONDENT**

DISCLAIMER

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/ their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the judge or his secretary. The date of judgment is deemed to be 26 May 2023.

JUDGMENT

Coram NOKO AJ

Introduction

[1] The applicant seeks the review and setting aside of the decision of the first respondent which determined that the injuries suffered by the applicant did not qualify as serious injuries as contemplated in terms of Road Accident Fund Act 56 of 1986 (as amended) (*the Act*). The application is being opposed only by the first and third respondents.

Background

[2] The applicant was involved in a motor vehicle accident on 15 January 2012 and suffered emotional shock/ psychological injuries. The applicant was driving a motor vehicle following another motor vehicle driven by her brother-in-law in which her sister and her two children were passengers. The insured vehicle negligently collided with the vehicle driven by the brother-in-law and thereafter proceeded to collide with the applicant's motor vehicle. The applicant's brother-in-law and one child were fatally injured and the applicant's sister and her sister's other child sustained serious injuries. The applicant did not suffer physical injuries but only psychological injuries which were as a result of

the applicant having witnessed the fatal accident where her brother-in-law and her nephew died. The applicant lodged a claim for general damages in terms of the Act with the second respondent. The second respondent rejected the general damages claim by the applicant.

[3] It is common cause that the applicant was examined by several health and medical practitioners to assist in the determination of the compensation for damages suffered pursuant to the motor vehicle accident. The medical examinations were at the instance of both the applicant and the second respondent. Relevant to this dispute the applicant was examined and or assessed by Dr Theo Enslin, an Independent Medical Examiner and Dr David A Shevel, a psychiatrist, Dr Maaronganye, a psychiatrist, Ms Kgomotso Montwedi, an Occupational Therapist and Dr Amanda Peta, a Clinical Psychologist. Both Drs Shovel and Enslin certified that the applicant satisfied the requirements for and is entitled to be compensated for general damages.

[4] The applicant was examined at the instance of the second respondent by Dr MS Moloto, an Orthopaedic surgeon and Dr Maaroganye who was a psychiatrist. Dr Moloto certified that the applicant does not qualify for non-pecuniary or general damages as the orthopaedic injuries did not satisfy the requirements in terms of the AMA Test. Dr Moloto further reported that an Occupational Therapist must be engaged to assess whether the applicant qualifies for the general damages in relation to psychological injuries and its sequalae. The applicant was further assessed by a psychiatrist Dr Kagisho Maaroganye and in his assessment concluded that the applicant suffered from Post Traumatic Stress disorder (PTSD).

[5] In view of Dr Moloto having reported that the applicant does not qualify for the general damages after examining the applicant as orthopaedic surgeon the second respondent rejected the claim for general damages. The attorneys for the second respondent having stated that *"[W]e confirm our client's instructions to reject your RAF 4 Form on the basis of our Orthopaedic Surgeon report completed by Dr MS Moloto served on your office on the 9th October 2017"*.[1]

Legislative scheme

[6] Where the second respondent is not satisfied that a claimant was not correctly assessed for general damages the fund may refer the claimant for further assessment[2] alternatively reject the claim and give reasons. If the claim is rejected the claimant may lodge appeal in terms of regulation 3(4) by completing and lodging dispute resolution form (RAF 5) with the registrar of the Health Professions Council of South African within 90 days of the rejection. The Health Professions Council will constitute an Appeal Tribunal which will determine the dispute.

[7] In the determination of the dispute the Appeal Tribunal will follow the procedure as set out in regulations 3(4) to 3(13). The said procedure includes, considering submitting the claimant to a further assessment, or conducting its own examination and or obtaining further medical reports. The Appeal Tribunal may also hold a hearing and receive legal arguments from both sides and seek recommendation from a legal practitioner in relation to legal issues raised and may consider submissions, opinions or medical reports from both parties.

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1 Annexure X3 to the Applicant's Founding Affidavit.
2 See Regulation 3(1)(b).

[8] In view of the rejection of the claim by the second respondent the applicant lodged an appeal with the third respondent. The third respondent constituted an Appeal Tribunal which consisted of the fourth to the seven respondents, being three Orthopaedic Surgeons and a Neurologist. The Appeal Tribunal decided that the applicant did not qualify for compensation for general damages.

[9] The record of the decision and the reasons of the first respondent was made available to the court and was referred in *ad verbatim* in para 25 of the applicant's founding affidavit. The decision of the first respondent to dismiss the appeal was on the basis that the applicant's injuries were not serious.

[10] Being aggrieved by the decision of the Appeal Tribunal the applicant launched this proceeding for an order reviewing and setting aside of the decision of the Appeal Tribunal, further that the court should declare that the applicant's psychological injuries and the sequelae satisfy the requirements for general damages and that the applicant be compensated accordingly, alternatively that the third respondent be ordered to re-appoint an Appeal Tribunal to determine the dispute pursuant to the rejection of the applicant's general damages by the second respondent.

[11] The applicant seeks to challenge the decisions on the following basis that, first, that the first respondent considered irrelevant facts to arrive at its decision. Secondly, that the first respondent was biased in favour of the second respondent. Thirdly, that the decision of the first respondent was taken without good reason, as contemplated in terms of subsection 5(3) of Promotion of

Administrative Justice Act (PAJA), as the first respondent failed to furnish adequate reasons for its decision.

[12] The first respondent in retort contended that, first, *[T]he psychological sequelae as suffered by the Applicant does not qualify in terms of the Narrative Test as a serious injury.* Secondly, *[T]he finding of the first respondent was not unreasonable or irrational.* Thirdly, *[T]he Applicant has failed in her duty to take reasonable steps in order to minimise the damage suffered.*[3] The respondents having stated that *"[I]t is common cause that, as a result of the accident the applicant suffered from emotional shock and trauma, including Post-Traumatic Stress Disorder (hereinafter PTSD). What is in dispute is the seriousness of the damages suffered".*[4]

Issues for determination.

[13] The application for condonation as the applicant has filed its answering affidavit outside the prescribed time lines. [5]

[14] The court is called to determine whether the first respondent's decision is susceptible to review and should be set aside.

Condonation

[15] The respondents have delivered the opposing affidavit out of time and have therefore applied for the condonation for the late filing of the answering affidavit. The applicant in reply stated that there is no opposition to the application for condonation and to this end this court having noted that the

[3] See Respondents' Heads of Arguments Caselines A4-2, at para 1,2.
[4] Respondents' Heads of Argument Caselines A4-2 at para 2.2.
[5] See the parties joint practice note under Caselines A2- 3 at para 9.

condonation is exclusively within the discretion of court and was persuaded that no prejudice will visit any party if condonation is granted for the late filing of the opposing affidavit.

Arguments and submissions by the parties.

[16] Though the applicant did not delineate her arguments under specific headings I have for clarity and coherence purposes captured the arguments under the headings set hereunder.

Irrelevant considerations

[17] The counsel for the applicants advanced the following contentions, first, that the first respondent had regards to the opinion of an orthopaedic surgeon appointed by the second respondent who specifically stated that the applicant does not qualify for general damages in relation to the applicant's assessment of the applicant's orthopaedic injuries. This was not relevant as the injuries were psychological and not orthopaedic in nature.

[18] Secondly, that the first respondent could have had regard to clear indication by Dr Moloto that for the purposes of psychological injuries and *sequelae* the applicant should be examined by the correct medical expert and suggested a clinical psychologist in this regard. In addition, the first respondent should have been guided by the reports which were prepared by a psychiatrist, namely Dr Maaroganye, who was appointed by the second respondent and also Drs Enslin and Shevel (psychiatrist) who were appointed by the applicant. All

these medical practitioners confirmed that the applicant qualified in terms of the narrative test and should be compensated for the general damages.[6]

[19] Thirdly, that the first respondent further had regards to the contents of the reports of both Clinical and Occupational psychologists who were appointed at the instance of the second respondent. Their reports are irrelevant, so the argument went, when compared with the reports which were compiled by the psychiatrists as the latter were better qualified to provide a persuasive opinion as medical practitioners whereas clinical and occupational psychologists were not medical practitioners.

[20] The respondent on the other hand, denied that irrelevant factors were considered and stated that reference was made of the reports of other experts including the applicant's own Occupational Therapist "*who reported that the applicant had stopped taking her anti-depressants and anti-anxiety tablets as she felt it was affecting her working ability*".[7] In addition, psychological report from Ms K Montwedi reported that the *"[T]he identified cognitive fallouts are very mild and should not interfere with her work abilities and her daily activities"*. Dr Amanda Peta who reported that the applicant's psychological perspective is entirely favourable and she does not seem to have suffered a major *sequelae*.[8] To this end, so contends the respondents' counsel, even though there is clear psychological damage as a result of the accident, the sequelae seem to be unclear except that the applicant failed to take measures to minimise the damage.

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[6] The conclusion by these Drs were supported by other applicant's Drs, namely, Dr HB Enslin (Orthopedic surgeon), Ms Crosby (Occupational therapist) Mr Anthony Townsend, (a clinical psychologist).

[7] Para 3.4 on Caseline A4-4

[8] Para 3.7 on Caselines A4-6

[21] I have noted that the respondents contended in the papers before this court that all reports were considered but annexure X10 states that the reports of T Enslin, Shevel, Maaronganye, both T Enslin and Shevel stated that the injuries were below 30% WPI. These reports make no reference to qualification for general damages on the basis of narrative tests and reference should have been made of Drs Enslin and Shevel whose reports whilst they confirmed that the applicant does not qualify in terms of WPI they concluded that the applicant does qualify for general damages under the Narrative Test.

[22] It is also axiomatic that the rejection of the general damages by the second respondent was based on irrelevant consideration being the report of Dr Moloto who made assessment in relation to orthopaedic injuries. The said Dr Moloto having stated unequivocally that assessment for general damages in relation to psychological injuries is deferred to a specialist in that discipline. The first respondent should have decided on this fact alone that the rejection of the general damages by the second respondent was based on wrong facts. Of utmost importance for consideration should have been a report as per RAF 4 which is a prerequisite to assess whether compensation for general damages should be allowed or not.[9] This would have been noted from the reports from Drs Enslin and Shevel. The refusal to have regards to such reports justifies the conclusion that the appeal tribunal had regards to the irrelevant considerations in coming to its conclusion.

[9] The importance of RAF 4 was also conceded by the first respondent who asserted in respect of the applicant's contention that the second respondent's Dr Maaroganye also stated that the applicant qualifies for general damages and stated on Caseline A5-6 in para 36.3 of the first and third Respondent's Opposing Affidavit where it is stated that *"[I]t needs to be remembered, that in order to be compensated for non-pecuniary damages, an administrative step has to be concluded, being the completion of a RAF 4 assessment in which an expert indicates whether the applicant would be entitled to either compensation in terms of the AMA Guides on a WIP basis alternatively via the Narrative Tests"*. Further at para 66.4, that *"[I]n relation to this specific expert, none of these aspects and procedures have been followed and as such it is submitted that the contentions made in this paragraph are without any basis and consequently denied by the respondents*".

[23] The above conclusion is further fortified by the conclusion reached by the first respondent which was on the basis of the reports by the experts who did not complete the RAF 4 and were not qualified to prepare such reports as they were not medical practitioners or certified to make assessments contemplated in terms of regulation 3. The Supreme Court of Appeal held in *Duma v RAF* 2013 (6) SA 9 SCA at para [33] that a person not registered as a medical practitioner may not complete a valid RAF 4 serious injury report.[10] The deference of Dr Moloto on behalf of the second respondent that Clinical psychologist should assess the applicant to determine eligibility for non-pecuniary damages would have been of no consequence as the psychologist is not a medical practitioner. There were also no impediments which barred the first respondent and/or even the second respondent to have the applicant being assessed by further medical practitioner/s.

[24] The arguments in the opposing affidavit, including the reference to other reports which were not set out in the first respondent's decision appears to have been afterthought and intended to embellish reasons stated in the report are irrelevant for the purposes of this *lis*. The facts set out in the affidavits are ordinarily not intended to relook into the decision taken by the Appeal Tribunal and attempts to modify and or add on those reason should be frowned at from whence they lurk.

Acting contrary to the enabling legislation.

[25] The applicant advanced two contentions in this regard, first, that regulation 3(8)(b) specifically provides that the Appeal Tribunal shall consist of

[10] See a contrary view in *Mngomezulu, Zamokwakhe Comfort v Road Accident Fund* (04643/2010[2011] ZAGP JHC (8 September 2011) quoted with approval in unreported judgment of *Chairikira v The Road Accident Fund Tribunal and Others* (72371/2014) [2021] Gauteng Division (8 February 2021), Fourie J

the three independent medical practitioners with expertise in the appropriate areas of medicine. As such failure by the third respondent and to proceed with the panel adjudicating despite a plea by the applicant that the panel was not properly constituted (and should at least have a psychiatrist as a member) was unreasonable and offended the very regulation prescribing the composition of the Appeal Tribunal. The panel members did not have expertise in the appropriate areas of medicine, being psychiatry. The failure to react to the objection raised by the applicant with regard to the composition of the panel denied the applicant an opportunity in terms of regulation 3(9) to object to the composition of the panel.

[26] Secondly, the members of the panel were supposed to be three and in this instance the panel was constituted by four members. This is inconsistent with regulation 3(8)(b) as members should be three medical practitioners and a health practitioner.

[27] The respondent contended in retort that the fact that the tribunal has exceeded the number of required experts does not *ipso facto* constitutes an irregularity and instead it would work in favour of the applicant. This contention was informed by the decision in *L Roux v Road Accident Fund Appeal Tribunal* 2016 JDR 0648 (GP)[11] where it was held that such will rather benefit an appellant. Le Roux judgment also referred to *Brown v Health Professions Council of South Africa* Case no 6449/2015 (Western Cape Division) Bozalek J where he stated at para 46 that "*it does not follow from regulation 3(8)(b) that, should the report of a particular medical specialist or practitioner such as an*

[11] See First and Second Respondents heads, para 32-31, CaseLines A4-30

occupational therapist serve in front of them, the panel is incomplete or improperly constituted unless it too comprises an occupational therapist".

[28] The respondent contended further that second issue raised by the applicant that it is an irregularity for the first respondent for not ensuring that at least a psychiatrist is appointed on the panel is unsustainable. In this regard, so went the argument, the applicant failed to show the required qualifications which ought to apply to members of the panel.[12] Regulation 3(8)(b) refers to independent medical practitioners with expertise in the appropriate areas of medicine being appointed by the registrar. The members of the panel were all medical practitioners as defined by the Health Professions Act 56 of 1974. Section 1 of the Act defines "*medical practitioner as a person registered as such under this Act*". The respondent further submitted that the applicant appears to have confused the expertise as required in terms of regulation 3(8)(b) with being a specialist[13]. The panel members were specialists though not a requirement it would be improper to state that they do not hold suitable expertise.[14] The specialist in medical sphere referring to *"… a doctor who works in and knows a lot about one particular area of medicine"*.[15]

[29] In support of its argument above the respondent's counsel made reference to Dr Enslin who is not a specialist but satisfied the requirements as envisaged in regulation (2008) 3(1)(b) after completing a specified training course to make assessment of injuries for general damages claim. He needed not to be a

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[12] See para 5.4 of the respondent heads CaseLines A4-21

[13] The word specialist may be defined as a person who concentrates on a particular subject or activity; a person highly skilled in a specific and restricted field. Para 28 A4-29. And medical specialist means a "*medical practitioner who has been registered as a specialist in a speciality or related specialities and a subspecialiaty (if any) in medicine in terms of these Regulations"*. A4-25 para 16.

[14] Respondent's Heads of Arguments at para 26 on Caselines A4-27.

[15] Respondents' Heads of Arguments at para 29 on Caseline A4-29.

psychiatrist and or even an orthopaedic surgeon. In the end since the regulation makes no reference that a psychiatrist should have been appointed on the panel the applicant should discharge the onus to persuade the court of the authority or the reading in the regulation that at least one of the panel members should have been a psychiatrist. And further that the "… *orthopaedic and neurologist did not have expertise in the appropriate areas of medicine*".[16]

[30] The issue which this court need to consider is to determine what is the appropriate area of medicine. I have noted an aggressive and vociferous attempt by the respondent that the panellist members need not be specialists but fails to explain what appropriate areas of medicine would be. It follows from the respondents' contention that it would be correct to have a gynaecologist being on a panel to assess injuries relating to the nervous system or a psychiatrist being on a panel to assess orthopaedic injuries. The respondent indirectly admitted the weakness of the analogy in this example as it is stated in para 47.2[17] indeed there was on panel a medical practitioner who is proficient in the type of the injuries the applicant purported to have suffered. The essence is an acknowledgment that the type of injury should provide a cue as to the kind of a medical practitioner is proficient in a specific area of medicine to be on the panel.

[31] I note that the meaning of the word appropriate means suitable or relevant. If the usage of the word appropriate was not important then the legislator would have stated that any medical practitioner should be appointed on the Appeal Tribunal for any type of injuries. This appears to be absurd and in

[16] Para 8 on Caselines A4-23.

[17] See respondents' opposing affidavit on Caseline 5-622. At the same time contending that the Dr Moloto, an orthopedic surgeon who was appointed by the second respondent should have assessed the applicant as he was a general practitioner before becoming a specialist and had *"… the competency to comment on the state of the applicant's mental wellbeing"*.

support hereof it was held in *Mokhemisa CP obo M v Health Professions Council of South Africa and Others* (33540/2017) [2019] Gauteng Division (31 May 2017), per Snyman AJ that it was intended to mean that *"the expertise must be ascertained having regard to the injuries sustained by the claimant"*. One should find it difficult to fathom the reason underpinning the contention that a general practitioner is as good as a medical practitioner who has expertise in any relevant field of medicine.

[32] It follows that the contention by the applicant that the panel was not properly constituted is meritorious and the impugned decision of the first respondent is susceptible to be reviewed and should also be set aside.

Unfair process

[33] The applicant contended that it is not apparent from the report and or reasoning by the first respondent for not having invoked the provisions of the regulations and refer the applicant for another assessment if the RAF 4 report by Dr Enslin was insufficient. Noting further that second respondent did not put into dispute the integrity of that report.

[34] The first respondent advanced as its reason for not referring the applicant for further examination as being the fact that unnecessary costs would be incurred in instances where the decision of the second respondent was correct from the beginning.[18]

[35] In retort, the first respondent contended that the provision that the appeal can obtain further medical reports is not peremptory and can be done instances

[18] See para 48.9 of the First Respondent Opposing Affidavit on Caselines A5-625.

where it is imperative. The respondent made reference to *JH v Health Professions Council of South Africa* 2016 (2) 93 (WCC) where it was held that the Tribunal Appeal is possessed with discretion and not obligated to always obtain further medical reports.

[36] The appeal tribunal is further enjoined in terms of regulation 3(11) to examine the applicant alternatively refer the applicant for a further assessment to determine if the applicant qualifies for the general damages.

[37] The fact that the applicant requests to include another expert (psychiatrist) was not considered thereby denying her the opportunity to present arguments before being dismissed rendered the decision taken unfair. The refusal by the third respondent to provide the applicant with reply that her request was dismissed was unfair and also denied the applicant the opportunity to formally challenge the composition of the panel on the Appeal Tribunal.

Biasness

[38] The applicant contended that the first respondent appears to have rejected the reports submitted at the instance of the applicant and failed to provide reasons why such reports were discarded and further why they were not considered in contrast to other reports. The affidavit from the first respondent confirms that the reports from the two experts, namely, Kgomotso Montwedi, an Occupational Therapist and Dr Amanda Peta, a Clinical Psychologist, commissioned at the instance of the second respondent whose reports suggest to the first respondent that the applicant did not suffer serious injuries to warrant compensation for general damages.

[39] The applicant contended further that there are two averments in the affidavit of the respondent from which it became apparent that the first respondent was biased. First, in paragraph 14.2 of the opposing affidavit the first respondent sided with the second respondent as it is stated that *"[I]t needs to be pointed out that at the stage of rejection all current medico-legal reports were in possession of the Road Accident Fund, and same had been duly considered prior to a decision having been reached"*. The applicant contends that there was no basis for the respondent to make such a statement under oath having regard to the fact that the second respondent was very specific that the rejection of the claims for general damages was based on the medico-legal report prepared by Dr Moloto and not on any other report or reports. In addition, the statement by the respondent in this regard was not supported by confirmatory affidavit from the second respondent. Secondly, the first respondent further stated that there was no need to refer the applicant for further assessment or examination as the rejection of the claim for general damages was correct from the beginning. The evidence clearly indicate that the rejection was based on the report of Dr Moloto who unequivocally stated that he is not qualified to proffer a proper assessment of psychological injuries. There was therefore no basis for the first respondent to state that the rejection was correct from the beginning and bar any exculpatory explanation the inference of bias is inevitable.

[40] The absence of bias is catalyst for a fair process which earns credence in the eyes of the public. The administrator is therefore enjoined to always be impartial. Devenish having stated that *"[T]he partiality or appearance of partiality of even one member of an administrative tribunal suffices to vitiate the*

whole proceedings".[19] I note that there is merit in the complaint by the applicant and worse the first respondent makes no indication as to whether the said statements were based on information which served before the appeal tribunal or is confirmed by affidavit or otherwise by the second respondent. Absent any explanation leaves me with an ineluctable conclusion that the respondent was not impartial and was biased in favour of the second respondent and to this end the impugned decision is found wanting, reviewable and bound to be set aside.

Failure to provide adequate reasons

[41] Section 5(3) of PAJA provides that in instances where an administrative action is not backed by adequate reason provided then it must be presumed that such an administrative decision was taken without a good reason. The applicant having contended that since the first respondent denied the contents of both X5 and X10 the respondent should have then provided the basis upon which the decision was taken. On a proper reading of paragraphs 20 and 42 of the respondent's opposing affidavit though not in the perfect draftmanship the first respondent does not deny the report annexed to the pleadings marked X10 but only deny the contents of the paragraphs of the applicant's founding affidavit and not the contents of their report as suggested by the applicant. To this end the contention by the applicant is unsustainable.

Conclusion

[42] Having regard to reason explained above I find that the decision by the first respondent that the applicant did not qualify for general damages is incongruent to facts which served before the Appeal Tribunal and the grounds

[19] Devenish GE, Govender K and Hulme D, "*Administrative Law and Justice in South Africa*", 2001, Butterworts, at 338.

for the review justify the conclusion that the decision is reviewable. In the result the application must succeed.

Costs

[43] There is no basis to deviate from the general principle that the costs should follow the results.

[44] In consequence, I make the following order:

1. The decision of the first respondent dated 1 August 2018 that the applicant did not suffer serious injuries as contemplated in secion17(1A) of the Road Accident Fund Act, (as amended) as read with Regulations issued thereunder, is reviewed and set aside.

2. The third respondent is directed to re-appoint a new Appeal Tribunal, constituted in terms of regulation 3(8) consisting of only 3 medical practitioners with expertise in the appropriate fields of medicine and if necessary, an additional health practitioner with expertise in any appropriate health profession to assist in an advisory capacity.

3. The new Appeal Tribunal is ordered to allow the applicant and the second respondent to be represented at the hearing and to provide further submissions and or any evidence as the applicant and second respondent may wish to present.

4. The first and third respondent are ordered to pay the costs of the application jointly and severally the one paying the other to be absolved.

NOKO MV,
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

Applicant's Counsel	:	Adv MJ Fourie, Circle Chambers
Applicant's Attorneys	:	Erasmus de Klerk Attorney
1st and 3rd Respondents' Counsel	:	Adv M Hugo
1st and 3rd Respondents' Attorneys	:	Dyson Incorporated
Date of hearing	:	16 February 2023.
Date of judgment	:	26 May 2023.