

SOUTH AFRICA / JUDGMENT

Felix v Department of Labour; the Compensation Commissioner - Appeal (A210/2023) [2023] ZAWCHC 301 (28 November 2023) [2023] ZAWCHC 301

COURT

Western Cape High Court, Cape Town

BEFORE

Cloete, Kusevitsky

CASE / FILE NUMBER

A210/2023

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FLYNOTES:

LABOUR – Occupational injuries – Compensation award –
Diagnosed
with PTSD – Retired on ground of ill health – Alleges
compensation awarded inadequate – Award
could not reasonably
have been made – Contends Tribunal's decision was
based on fundamental misconception of
evidence – Compelling
and materially uncontested evidence – Decision-makers
incorrectly applied 20% to his disability
for compensation
purposes – Compensation award should have been based on
total disability – Clinical opinion
that appellant was 100%
unable to work at all – No symptoms of any pre-existing mood
disorder – Tribunal committed
material misdirections –
Misconceived evidence which led to startling findings –
Appeal succeeds with costs –
Percentage of disablement is
determined at 100% – Compensation for Occupational Injuries
and Diseases Act 130 of 1993,
s 91(5)(a)(iii).
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN

CAPE DIVISION, CAPE TOWN)
Case
No: A210/2023
In

the matter between: JOSEPH
BRIAN FELIX
Appellant
and
THE

DEPARTMENT OF LABOUR: THE
COMPENSATION COMMISSIONER
Respondent

Coram: Cloete et Kusevitsky JJ

Heard: 24 November 2023
Delivered
electronically: 28 November 2023

JUDGMENT

CLOETE J (KUSEVITSKY J concurring):

- [1] This is an unopposed appeal^[1] in terms of s 91(5) of the Compensation for Occupational Injuries and Diseases Act^[2] (“COIDA”) against the decision of the presiding officer sitting with assessors (“Tribunal”) delivered on 17 May 2023, confirming an earlier award of the Compensation Commissioner (“Commissioner”) of 8 December 2021 and simultaneously dismissing the appellant’s objection lodged against that award in terms of s 91(1) thereof.
- [2] In particular the appellant relies on s 91(5)(a)(iii), namely that the amount of compensation awarded is so inadequate that the award could not reasonably have been made. Linked to this are his contentions that the Tribunal’s decision was based on a fundamental misconception of the evidence before it as well as an incorrect interpretation of COIDA and relevant case law.
- [3] The appellant is a former member of the South African Police Service (“SAPS”). After experiencing a series of traumatic incidents while carrying out his duties during the period 1993 to 1998, a trigger event occurred on 22 October 1998 resulting in him being diagnosed with post traumatic stress disorder (“PTSD”). After being on occupational injury leave from 2006 he was advised by SAPS on 29 November 2011 that he would be retired on the ground of ill health as from 28 February 2012. He has not been employed in any capacity, whether in SAPS or elsewhere, since that date.
- [4] The appellant does not dispute that the Commissioner correctly:

(a) accepted his diagnosis of PTSD; (b) the date of 22 October 1998 was that of the “accident” or event giving rise thereto; (c) his permanent disablement as a result; and (d) the assessment of the appellant’s earnings for compensation purposes at R5520.25 per month. However the essence of the objection before the Tribunal, and the crux of this appeal, is the appellant’s contention that both decision-makers incorrectly applied 20% to his disability for compensation purposes resulting in a lump sum award of R45 300. The appellant’s case is that his compensation award should have been based on total (or 100%) disability.

[5] It is settled law that the purpose of COIDA ‘...is to assist workmen as far as possible... [t]he Act should therefore not be interpreted restrictively so as to prejudice a

workman if it is capable of being interpreted in a manner more favourable to him’: see *Davis v Workmen’s Compensation Commissioner*.^[3] It is equally settled that for purposes of compensation ‘...a psychiatric disorder or psychological trauma is as much a personal injury... as a physical one’: see *Urquhart v Compensation Commissioner*.^[4]

[6] Although the Commissioner did not provide reasons for his award he based it on s 49(1) read with s 49(3) of COIDA. Section 49(3) is not relevant to the issue before us. Section 49(1)(a) provides that:

‘Compensation for permanent disablement shall be calculated on the basis set out in items 2, 3, 4 and 5 of Schedule 4 subject to the minimum and maximum amounts.’ [s 49(1)(b) was deleted by s 18(b) of Act 61 of 1997].

[7] One of the grounds of objection advanced by the appellant before the Tribunal was that the Commissioner failed to grasp he had sustained an injury which led not only to permanent disablement, but which furthermore had unusually serious consequences as a result of the special nature of his occupation. Accordingly, it was contended, the Commissioner erred in failing to apply s 1, s 49(2)(a), (b) and (c) read with Schedule 2, and item 6 of Schedule 2 read with s 65(6) of COIDA.

[8] Section 1 defines ‘permanent disablement’ in relation to an employee (subject to s 49) as ‘the permanent inability of such employee to perform any work as a result of an accident or occupational disease for which compensation is payable’. Section 49(2) reads as follows:

‘(2)(a) If an employee has sustained an injury set out in Schedule 2, he shall for the purposes of this Act be deemed to be permanently disabled to the degree set out in the second column of the said Schedule.

(b) If an employee has sustained an injury or serious mutilation not mentioned in Schedule 2 which leads to permanent disablement, the Director-General [in the present context, the Commissioner] shall determine such percentage of disablement in respect thereof as in his opinion will not lead to a result contrary to the guidelines of Schedule 2.

(c) If an injury or serious mutilation contemplated in paragraph (a) or

- (b) has unusually serious consequences for an employee as a result of the special nature of the employee's occupation, the Director-General [Commissioner] may determine such higher percentage as he or she deems equitable.'
- [9] Item 6 of Schedule 2 is '[a]ny other injury causing permanent total disablement – 100%'. The injuries at items 1 to 5 of Schedule 2, which also "attract" 100% disablement are loss of two limbs, loss of both hands or of all fingers and both thumbs, total loss of sight, total paralysis and injuries resulting in an employee being permanently bedridden. Section 65(6) provides that COIDA applies equally to an accident and an occupational disease 'except where such provisions are clearly inappropriate'..
- [10] In *Department of Labour: Compensation Commissioner v Botha*[5] the Supreme Court of Appeal, in dealing with item 6, stated:
- '[17] ...It is the sixth item in the first column on which counsel for Mr Botha relies. This provides that if an employee suffers any injury not listed in the Schedule which leads to permanent total disablement, he or she will be deemed to be 100% disabled. It is on this basis that it is contended that Mr Botha is 100% disabled. Given his incapacity, it is argued, the high court misdirected itself, with reference to Schedule 2, by declaring Mr Botha to be 60% disabled.
- [18] This argument is devoid of merit. It is inconceivable that any injury not listed in Schedule 2 should attract an award of 100% permanent disablement, irrespective of the nature of the injury. There are countless injuries which an employee may suffer in the workplace which are not listed in the Schedule. As pointed out by this Court,[6] almost anything which unexpectedly causes illness, injury to or death of, an employee falls within the concept of an accident. Should an injury, which is not listed in Schedule 2, befall an employee as a result of such an accident, this does not axiomatically mean that he or she is 100% disabled. The extent of the disability must be determined in light of the facts of the specific case and according to medical evidence.
- [19] Further, this argument ignores s 49(2)(b), which grants the Director-General a discretion to determine a percentage of permanent disablement for a serious injury not provided for in Schedule 2. The section specifically states that the result should not be contrary to the guidelines set out in Schedule 2. In applying these guidelines, courts have cautioned against applying a mechanical approach to Schedule 2.[7] It should also be borne in mind that the schedules are no more than a set of administrative guidelines issued by the Director-General to assist decision-makers exercising powers in terms of COIDA. Where the injuries have not been listed in Schedule 2 it has not been the approach of the courts to invoke the deeming provision. Rather, Schedule 2 has been used as a guideline in determining what is fair and reasonable compensation once the extent and nature of the permanent disablement has been established by the relevant medical experts.[8]'

[11] Returning to the facts of this matter, in a pre-trial minute signed on 3 October 2022 by the parties' representatives prior to the hearing before the Tribunal, the respondent did not challenge the content of any of the documents, exhibits or medical reports in the trial bundle, which were the same documents that served before the Commissioner. The pre-trial minute records the following:

'2. Discovery of Documents

2.1 The parties have compiled a Bundle of Exhibits, containing all the exhibits they intend using at the hearing... .

2.2 The Bundle of Exhibits is adduced as a joint Trial Bundle, to be received into evidence, marked "Exhibit A".

2.3 This Pre-trial Minute is to be received into evidence, marked "Exhibit B".

2.4 Respondent is required to stipulate which document/s (if any) contained in the Trial Bundle, are disputed; which portion thereof is disputed, and ... what the basis for such dispute is:

None.

2.5 A party is only required to prove the portion/s of an exhibit (or its content) which the other party has stipulated is being disputed.'

[12] Accordingly, given the documentary evidence admitted at the Tribunal hearing, it was common cause that:

12.1 In her report dated 23 February 2011, Ms C Marais (an occupational therapist) concluded that it was not possible to accommodate the appellant in the SAPS, as any aspect related to that employment 'triggers anxiety, flashbacks, hyperarousal and causes secondary traumatisation. Resuming his duties in the SAPS will aggravate his condition and put the employee, employer and community at risk'. She continued that '[d]espite continuous psychiatric treatment and therapeutic support by the psychologist and occupational therapist... [the appellant] ...remains functionally disabled due to post traumatic stress disorder with episodes of psychosis (paranoia). With his unpredictable behaviour and hypersensitivity to secondary traumatisation he will be a high risk to the employer, the community and himself should he be expected to resume his duties in the SAPS';

12.2 In his report dated 15 November 2011 psychiatrist Dr J Van der Westhuizen recorded that the appellant had been on sick leave for psychiatric reasons since 2006 and was still not able to return to work. Although he was treated psychiatrically and earlier returned to work (in a non-operational capacity as SAPS tried to accommodate him), he suffered relapses of severe depression in 2004 and 2006, and every episode 'was characterised by severe relapse symptoms' of PTSD. The appellant's functioning had deteriorated dramatically over the five years preceding 2011, to the point where

he had completely withdrawn socially. He was unable to manage his own 'business' and affairs and had become totally dependent on his wife. He could not make any decision, had poor concentration and cognitive abilities. He also had residual symptoms of psychosis. Furthermore the appellant had nine admissions to a psychiatric ward over the preceding twelve years. Dr Van der Westhuizen concluded that the appellant would never be able to work again in the open labour market; and

12.3 Dr Van der Westhuizen in his final progress report to the Department of Labour of 8 August 2014 confirmed the appellant was permanently disabled to work. He suffered from PTSD or Schizo-Affective Disorder ("SAD") and despite having received psychiatric treatment including pharmacotherapy and psychotherapy from 1998 to 2014, he would not be able to return to his duties.

[13] Importantly, in his report of 15 November 2011 Dr Van der Westhuizen further recorded that:

'Although his initial diagnosis was that of Post Traumatic Stress Disorder and Major Depressive Disorder over the last couple of years it became evident that this man suffers from Schizo-Affective Disorder which became his main disability. This is a chronic condition with deterioration in all spheres of functioning which was clearly evident with Mr Felix.'

[14] Dr Van der Westhuizen also testified before the Tribunal. His expertise as a specialist psychiatrist was not disputed. His evidence was that the appellant was first diagnosed with PTSD by a Dr Isabella

Werkman who emigrated in 1998 whereafter he became Dr Van der Westhuizen's patient. The latter had independently confirmed

her diagnosis and the appellant still remained his patient at the time of his testimony on 23 January 2023 (i.e. just over 24 years later).

[15] His evidence was further that the appellant first presented with symptomatology leading to the further diagnosis of SAD during 2010. In his opinion the appellant's PTSD was a contributing factor to his SAD. As he put it:

'Schizo-affective disorder, often in psychiatry, we use diagnosis to describe symptomatology, and Mr Felix also developed symptoms of psychosis during that time, as I mentioned. Therefore, pick post-traumatic stress disorder in itself, psychotic episodes are not part of that. So that was why I made the diagnosis to address that part in treating his psychotic episodes. However, I do believe that this post-traumatic stress was a complicating factor because his delusions and hallucinations were very related to symptomatology of the post-traumatic stress disorder.'

[16] Dr Van der Westhuizen further testified that the first time he recommended the appellant be boarded as an employee of SAPS was in around 2007, three years prior to him developing symptoms of SAD. In 2007 already he had concluded that the appellant was permanently disabled to work as a result of his PTSD. In his opinion the appellant would never be fit to

return to his normal duties. He agreed with the opinion of Ms Marais. In his expert opinion the appellant was not only permanently disabled to the extent of 20% but rather 100% since he is wholly unable to render work in the open labour market.

- [17] Given the admitted contents of the reports of Dr Van der Westhuizen and Ms Marais it is difficult to understand why the Tribunal permitted cross-examination by the Commissioner's representative. Much of it focused on how his diagnosis fitted in with a tool known as the Global Assessment of Functioning ("GAF").

He swiftly put paid to any reliance on GAF scoring as the following passage in the record demonstrates:

'Adv Peter: So for you, if I can say in a layman's term... to assess a person to come up with their impaired functionality. You need to look. Then you, you assess and come up with the GAF scoring.

Dr Van der Westhuizen: No, the GAF score is a Global Assessment of Functioning so if somebody is dead he will have a zero.

Adv Peter: Ok.

Dr Van der Westhuizen: ...so this [i.e. the GAF]... doesn't only look at his assessment for work or for the specific diagnosis, it is how he globally functions. But yes, it is related to the diagnosis.'

- [18] Dr Van der Westhuizen emphasised it was his clinical opinion that the appellant was 100% unable to work at all. In response to a question from assessor Dr Mnyanda whether he had picked up symptoms of any pre-existing mood disorder, Dr Van der Westhuizen replied that he had not. Despite having modified his treatment of the appellant over the period 1998 to 2014 there were no signs of remission.

- [19] Notwithstanding all this compelling and materially uncontested evidence the Tribunal nonetheless found as follows:

'8.14 The evidence clearly demonstrates that the findings by Van der Westhuizen (sic) on the future employability of Applicant, are inconclusive.

8.15 It is also uncertain how Van der Westhuizen could come to the conclusion that Applicant "is permanently unemployable in the open labour market" without any evidence to this effect, i.e. in the absence of a neuropsychiatric evaluation or corroborative evidence by an occupational therapist's report to support his assessment...

8.17 The dilemma with Van der Westhuizen's evidence is, firstly, the ambiguous nature of the method or tool used in his assessment of the Applicant's permanent disablement, and secondly, the lack of evidence from Werkman, who allegedly treated Applicant for PTSD that Applicant was diagnosed with PTSD before 1998, and from whom he took over the treatment of Applicant...

8.19 It must also be recognised that the courts have frequently been pointing out that direct and credible evidence of events usually carries greater weight than the opinion of an expert seeking to reconstruct those events afterwards, especially where the material on which that is based is scant...

8.32 The Applicant, relying solely on the evidence of the expert, Van der Westhuizen, failed to show that Werkman diagnosed him with PTSD.'

[20] These findings are startling in the circumstances. But it did not stop there. Equally egregious was the following finding in the decision:

'8.63 It is the Tribunal's view that it is therefore opaque that it ever could have been the legislature's intention that Schedule 2 be read to include PTSD where it is not expressly provided for, as Schedule 2 does not list such injury, and read with Section 49, could therefore not be constituted as a permanent disablement as contemplated in Schedule 2.'

[21] Individuals in the position of the appellant should be entitled to safely assume that members of Tribunals of this nature have sufficient experience and are au fait with legal developments such as Urquhart which 17 years ago restated the already long established legal position about a psychiatric injury. While it is accepted that the Commissioner would not have been aware of the decision in Ramanand[9] given that his award was made on 8 December 2021, the Tribunal was aware thereof since: (a) it was handed down by a Full Bench of the KwaZulu-Natal High Court, Pietermaritzburg on 14 April 2023 and the Tribunal only gave its decision on 17 May 2023; and

(b) It was referred to by the Tribunal in its decision at paragraph 8.124. However the Tribunal only quoted selectively from that judgment (in relation to the scale of costs awarded) and thus appears to have deliberately refrained from heeding that court's findings on the merits. The following paragraphs of Ramanand are instructive:

'[51] The appellant contends that it is not disputed that a medical expert... has determined him to be totally permanently disabled and that such disablement falls within the last category of classification referred to in the table above (the sixth classification) [referring to item 6 of Schedule 2].

[52] Schedule 2 to the Act specifically identifies those injuries that entitle a claimant to claim total disablement. The sixth classification does not specify the nature of the injury, unlike the five classifications that appear before it. The sixth classification is dependent for its applicability not on the nature of the injury, but on the effect of that injury, whatever it may be. It stands to reason that the legislature could not have thought of every type of injury that would lead to 100 percent disablement. The range of human activity is vast and the possibility for misfortune is virtually limitless. Any injury that results in 100 percent disablement thus falls within the sixth classification, irrespective of the physical nature of the injury. It must be assumed that the sixth classification was inserted in the schedule for a purpose. It seems to me that that purpose is to cater

for injuries that were not initially thought of or capable of description when the Act was conceived but which result in 100 percent disablement. An excessive exposure to nuclear radiation may be one such example of this.

[53] It is so that schedule 2 was considered in ...Botha...

[54] In my view, this does not create an impediment to the success of the appeal. The appellant's case is not that because his injury is not listed in schedule 2 he is automatically 100 percent disabled, as alluded to in Botha. Botha makes it plain that the extent of the disablement must be determined with reference to the facts of the case, which facts would include the opinions of the medical experts who have ventured an opinion in the matter. In this case only the appellant presented evidence, none of which was disputed by the respondent. His injury [PTSD], whilst not mentioned in schedule 2, nonetheless thus falls within the sixth category mentioned in schedule 2 by virtue of the fact that he is totally permanently disabled.

[55] I must thus find that the appellant's contention regarding the classification of his injury as falling within the sixth classification is correct.'

[22] Apart from the material misdirections of the Tribunal highlighted above the court's findings in Ramanand, with which I fully agree, demonstrate that the appeal must succeed.

[23] The appellant asks for costs on the scale as between attorney and client. Given the sheer extent of the Tribunal's misdirections and their consequences to the appellant, coupled with the delay by both the Commissioner and the Tribunal in finalising his claim with the obvious attendant prejudice to him, it is my view that such an

order is appropriate. Counsel for the appellant also asked this court to make a detailed order in terms of the draft provided, setting out how the superseding award should be calculated. In light of the history of this matter I agree that this is warranted and have no difficulty with the terms of the proposed draft, save for that pertaining to interest claimed.

[24] Section 1 of the Prescribed Rate of Interest Act[10] provides that interest is calculated at the prescribed rate at the time when such interest begins to run unless a court, on the ground of special circumstances relating to the debt, orders otherwise. Interest would have begun to run when the Commissioner made his award on 8 December 2021 and apart from the delay there are no special circumstances which could militate in favour of awarding interest from the date of the incident itself. The court in Ramanand took the same approach to interest payable in its order and counsel for the appellant indicated he had no difficulty with that. The prescribed rate of interest applicable as at December 2021 was 7%.

[25] The following order is made:

1. The appeal succeeds with costs, including those pertaining to the respondent's opposition to the appellant's condonation

application and the respondent's abortive application for postponement of the appeal. Such costs shall be paid on the scale as between attorney and client and including the costs of senior counsel;

2. The decision of the Tribunal, dated 17 May 2023, is set aside and substituted with the following order:

“The Objector’s Objection succeeds, with costs on a scale as between attorney and client, including the costs incurred in eliciting the evidence of expert witness/es; and the Award of Compensation, dated 8 December 2021, is set aside and replaced with the following order:

- (a) The Compensation Commissioner is ordered to publish to the Objector’s (appellant’s) attorneys and to his erstwhile employer (the SAPS), within twenty (20) days of this order, a written Superseding Award of Compensation, in favour of the Objector in the

following terms:

(A) The following terms will remain unchanged:

(i) His earnings for purposes of calculating compensation: R5 520.25;

(ii) The Date of the Accident: 22 October 1998;

(B) The following terms are to be substituted:

(i) The percentage of disablement is determined at 100%;

(ii) The Commencement Rate of the Pension is to reflect R4 140.19 per month, being 75% of the earnings set out in paragraph (A)(i)

above;

(iii) The Commencement Date of the Pension is to reflect as 22 October 1998;

(iv) Periodic increases to the aforesaid Pension shall be calculated from 22 October 1998 onwards in terms of s 57(1) of the Compensation for Occupational Injuries & Diseases Act, 1993;

(C) The Compensation Commissioner is ordered to clearly state that the award supersedes the Award of Compensation dated 8 December 2021.’

3. The respondent shall pay interest on the Compensation Award as from 8 December 2021, calculated at the rate of 7% per annum to date

of payment.

J I CLOETE

I agree.

D KUSEVITSKY

For appellant: Adv T P Kruger SC Instructed by: Cornelius Boshoff Attorneys (Mr R Boshoff) For respondent in application for postponement: Adv Y Abbas Instructed by: State Attorney (Mr S Appalsamy)

[1] The respondent only filed a notice to oppose the appellant's application for condonation for the late request

for the allocation of a date for the hearing of the appeal and late lodgement of the record, due to the tardy and inaccurate preparation of the transcript by the stenographers, and this was thus beyond his control. The respondent did not deliver an opposing affidavit and we were satisfied that condonation should be granted. The respondent however brought an application for postponement of the appeal on the morning of the hearing. The affidavit filed in support thereof demonstrated the inexcusable delay in advancing opposition to the appeal and after hearing argument the postponement application was refused.

[2] No. 130 of 1993.

[3] 1995 (3) SA 689 (C) at 694F-G. See also *Williams v Workmen's Compensation Commissioner* 1952

(3) SA 105 (C) at 109C; *Pretorius v Compensation Commissioner and Another* (2010) 31 ILJ 1117 (O) at para [15]; *Ramanand v Department of Labour: Compensation Commissioner* (2023) 44 ILJ 1816 (KZP) at para [46].

[4] 2006 (1) SA 75 (E) at para [14].

[5]

(2022) 43 ILJ 1066 (SCA).

[6] *Churchill v Premier, Mpumalanga and Another* 2021

(4) SA 422 (SCA) at para [14].

[7] *Healy v Compensation Commissioner and Another* 2010

(2) SA 470 (E) at paras [19] and [21].

[8] *Odyar v Compensation Commissioner* 2006

(6) SA 202 (N); *Urquhart supra*; *Compensation Commissioner v Georgia Badenhorst* [2022] ZAECHC 1 (E); *Pretorius v The Compensation Commissioner and Another* [2007] ZAFSHC 128 (FB); *JL v Rand Mutual Assurance* [2019] ZAGPJHC 392 (GJ).

[9] See fn 3 above.

[10] No 55 of 1975.

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Prepared on 10 October 2026 · Esheria