

SOUTH AFRICA / JUDGMENT

Solomons v Minister of Labour (5910/2008) [2012] ZAWCHC 56 (29 February 2012) [2012] ZAWCHC 56

COURT

Western Cape High Court, Cape Town

BEFORE

Saba

CASE / FILE NUMBER

5910/2008

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 5910/2008

In the matter between:

ABDULLATIEF SOLOMONSPlaintiff

and

THE MINISTER OF LABOUR, NOMINE OFFICIO`

.....Defendant

Judgment delivered: 29 February 2012

Saba, AJ Introduction

[1] This is a special plea to plaintiff's particulars of claim. The plaintiff is represented by Ms Mahomed and the defendant, by Mr Tsegarie.

The Parties

[2] The Plaintiff is an adult unemployed male who was injured during the course of his employment with Titanel Construction. The defendant is the Minister of Labour and is sued in his representative capacity as the Minister responsible for the Compensation Board and the Compensation Commissioner established in terms of COIDA.

- [3] In his particulars of claim, the plaintiff seeks an amount of R206 400, 00 as damages in estimated past, future medical expenses as well as future loss of income or loss of earning capacity. The plaintiff further alleges that the Director-General erred in terms of section 90 (1) (d) of Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA") in not declaring the plaintiff to be disabled to the extent of 100% and unfit to return to work on a permanent basis.

Factual Background

- [4] On or about 8 January 2003 and in Cape Town, the Plaintiff was injured during the course and scope of his employment with Titanel Construction, when a window frame fell from the 10th floor of a construction site onto his right shoulder. As a result of the accident the Plaintiff sustained a severe right mid-shaft clavicle fracture; a broken collar bone; multiple fractures on his ribs. Between 2003 and 2004 the plaintiff underwent four separate procedures to fix the fracture to his right clavicle as well as to manage the complication of sepsis which had developed at the fracture site. On or about 11 April 2005 the Director-General, acting in terms of his obligations under COIDA, declared the Plaintiff to be 25% disabled and awarded compensation to the Plaintiff in terms of Section 49(1)(iii) of COIDA in the amount of R30 000,00.

- [5] The defendant's special plea is based on the following grounds:

5.1. Section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"), prohibits the plaintiff from instituting any claim for pecuniary loss by way of damages against the defendant and defendant is not liable for such damages;

5.2. The plaintiff failed to exhaust the statutory remedies in COIDA

5.3. In the absence of an objection to an award which was properly adjudicated in terms of COIDA, there are no grounds for suggesting that the defendant erred in granting the award.

5.4. The assessment report (dated 9 and 13 December

2004) of Tammy Williams, an occupational therapist fails to support the plaintiff's assertion that his right shoulder is 100% disabled and therefore renders him totally and/or completely unable to acquire and obtain any gainful employment in the open labour market.

5.5. Plaintiff's shoulder was not amputated, which could have pulled him within the ambit of the schedules of COIDA.

- [6] The plaintiff opposed the defendant's special plea on the ground that plaintiff's claim (as set out in paragraphs 17 and 18 of its particulars of claim) for past and future hospital and medical expenses is permitted in terms of section 73 of COIDA.

- [7] The main issues for determination are:

7.1. whether the plaintiff is entitled to institute a claim for pecuniary loss by way of damages against the defendant;

7.2. whether the plaintiff failed to exhaust the statutory remedies available in terms of COIDA;

Legal Position

[8] Section 35 Of COIDA provides:

"No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of an occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death".

Section 90 (1) (d) provides:

" The Director-General may after notice, if possible, to the party concerned and after giving him an opportunity to submit representations, at any time review any decision in connection with a claim for compensation or the award of compensation on the ground-(a)

(b)

(c)

(d) that the decision or award was based on an incorrect view or misrepresentation of the facts, or that the decision or award would have been otherwise in the light of evidence available at present but which was not available when the Director-General made the decision or award".

[9] In *Jooste v Score Supermarket Trading Pty Ltd* 1999

(2) SA 1at 11B-E (referred to by Mr Tsegarie), the following is stated:

"An employee who is disabled in the course of employment has the right to claim pecuniary loss only through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which the employee is entitled

An employee who is dissatisfied with an award of the Commissioner has recourse to a court of law which is, however, bound by the provisions of the Compensation Act. That then is the context in which s35 (1) deprives the employee of the right to a common-law

claim for damages".

[10] This was reiterated in Supreme Court of Appeal case in *Mankayi v AngloGold Ashanti* 2010

(5) SA137 SCA at 156G stated the following:

"The employee's action for the 'recovery of damages in respect of an occupational injury or disease resulting in the disablement or death' of the employee is extinguished." (dictum also approved in *Mankayi v AngloGold Ashanti* 2011

(3) SA 237 CC at paragraph 113)

[11] It is clear from the wording of section 35 (1) of COIDA and the authorities referred to above that a claim for common-law damages is not permitted in the circumstances of this case.

[12] Ms Mohammed conceded that the plaintiff is not entitled to a common-law claim for damages, but, submitted that section 73 of COIDA provides for a claim for past and future medical expenses. She therefore requested that the plaintiff be permitted to amend his particulars of claim so as to bring it within the ambit of section 73 of COIDA.

[13] Section 73 of COIDA provides:

"(1) The Director-General.... Concerned, shall, for a period of not more than two years from date of the accident or the commencement of a disease referred to in s65 (1) pay the reasonable cost incurred by or on behalf of an employee in respect of medical aid necessitated by such accident or disease. (2) If, in the opinion of the Director-General, further medical aid in addition to that referred to in sub-section (1) will reduce the disablement from which the employee is suffering, he may pay the cost incurred in respect of further aid or direct the employer individually liable or the mutual association concerned, as the case may be, to pay it".

[14] Section 35 specifically states that 'no liability for compensation shall arise save under the provisions of this Act in respect of disablement or death'. (My emphasis)

It is not clear on what grounds and in terms of which section the plaintiff wishes this court to amend its particulars of claim to be within the ambit of COIDA.

[15] It is so that section 73 on the other hand makes provision for the payment of reasonable costs incurred by or on behalf of an employee in respect of medical aid necessitated by an accident. However that is not what is sought in terms of paragraphs 17 and 18 of the plaintiff's particulars of claim. The damages claimed in paragraphs 17 and 18 are listed in the following terms: "

1. Estimated past and medical and related expenses

1.1. Hospital expenses

1.2. Medical expenses

1.3. Pharmaceutical expenses R50 000, 00

(This claim constitutes an estimate at this stage and no actuarial principles have been applied thereto)

2. Estimated future medical and other related expenses

....it is anticipated that the plaintiff will require further surgery as well as further ongoing rehabilitative treatment.

These expenses are estimated at a total of R100 000,00

The aforesaid estimate based on the following:

- (a) At the time of the accident, the Plaintiff was employed as a labourer at a construction company earning a monthly income of R2 400, 00:
- (b) By reason of the nature, extent and sequelae of his injuries of his injuries, the plaintiff is 100% disabled and unable to resume any form of employment
- (c) As a consequence, the plaintiff has in the past, and will in the future, suffer a loss of earnings/ loss of earning capacity;
- (d) In accordance with Section 49 (1) (a) of COIDA, compensation for permanent disablement must be calculated on the basis set out in Schedule 4, Item 4 of COIDA;
- (e) Item 4 of Schedule 4 determines that an employee who suffered 100% permanent disability will receive a monthly pension calculated at 75% of the employee's monthly earnings at the time of the accident;
- (f) The plaintiff is therefore entitled to a monthly pension in the amount of R1 800, 00 for the rest of his life;
- (g) Annually, this amounts to R 21 600, 00

SUB-TOTAL 236 400, 00

Less the amount of R30 000,00 already awarded to Plaintiff in terms of Section 49 (1) (3) of COIDA
30 000, 00

TOTAL AMOUNT DUE R206 400, 00 "

[16] I am persuaded by Mr Tsegarie's submission that the allegations contained above form the basis for the claim of damages and such is not permitted in terms of section 35 of COIDA.

Failure to exhaust available remedies in terms of COIDA

[17] Mr Tsegarie submitted that an aggrieved person may only approach the Supreme Court after lodging an objection with the presiding officer (a Director-General in this case) and that, only when he or she is dissatisfied with the outcome may he or she approach the Supreme Court.

[18] Advocate Mohammed submitted that a notice in terms of section 3(1) (a) of Act 40 of 2002 was sent to the Department of Labour Compensation Fund on 2 April 2008 on behalf of the plaintiff.

[19] Section 3 (1) (a) of Act 49 of 2002 provides:

"No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question;

In my view, the notice referred to by Advocate Mohammed is not in respect of a review of the decision of the Director-General in terms of section 90 (1) (d) of COIDA. I find the argument by Mr Tsegarie that the remedies in terms of COIDA were not exhausted by the plaintiff, to have merit.

[20] In the result, I am of view that the special plea was well taken. I make the following order:

20.1 The special plea is upheld with costs.

N SABA

Acting Judge of the High Court

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