

CASE NO: 75337/2016

In the matter between:

Applicant

and

Respondent

Dates of Hearing	:	06 & 11 December 2017
Date of Judgment	:	13 February 2018

JUDGMENT

MANAMELA, AJ

Introduction

[1] The applicant seeks an order directing the respondent to calculate and pay a claim for compensation in terms of the provisions of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). The application initially purported to take the form of a *mandamus* and/or review application, both in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 and Rule 53 of the Uniform Rules of this Court. However, it is clear from the papers that the applicant, a lay person, may have drafted the papers without technical legal input and therefore could not craft the relief sought strictly along conventional lines for same. Be that as it may, nothing turns on this, as the Court was able to determine the nature and extent of relief sought by the applicant.

[2] There is proof that the application was served on the respondent by the sheriff on the 07 September 2017, at the respondent's headquarters by handing a copy thereof to a legal clerk of the respondent.¹ However, the respondent failed to deliver a notice of intention to oppose the application or even to react to further notices of set down of the matter. The history of this matter is littered with inaction or what could be considered dereliction of duty on the part of the respondent and its officials. The respondent's officials, at all levels, adopted a very tardy and nonchalant manner in dealing with the applicant. They totally ignored the rights of the applicant as a prospective pensioner and pushed him from pillar to post. The events in this matter squarely fit a textbook case of unfair administrative action. This is totally unacceptable behaviour for persons who are entrusted with the responsibility to serve the public and, more so, because they deal with vulnerable members of our society, who are either afflicted by

¹ See the return of service by the sheriff of the court dated signed at 11 September 2017. A

injuries, diseases or other forms of disability, including in some respects the loss of breadwinners. This type of conduct will not be countenanced by the Court.

[3] The matter came previously before Van der Westhuizen AJ on 01 November 2017, when it was postponed *sine die* for the applicant to file what is referred to as “proper calculations”. Thereafter, it came before me in the unopposed motion court of 06 December 2017 and was stood down until 14 December 2017 to allow the applicant an opportunity to serve on the respondent, the supplementary affidavit constituting a recalculation compiled by an expert of the proposed pension amount payable to the applicant. On 14 December 2017, I reserved this judgment in order to further reflect on the legal issues and rather hand down a written judgment, due to the peculiar circumstances of this matter.

[4] Next, I briefly deal, by way of background, with the material historical aspects of this matter in order to place context to the issues to be determined. I am immensely indebted to Ms E Steyn, who assisted the applicant as counsel, ostensibly upon request of the Court at a previous occasion. She also filed, on behalf of the applicant, written heads of argument, for which I am also grateful.

Brief background

[5] The applicant was born on 05 July 1968 and is therefore a few months shy of his 50th birthday. On 13 June 2012, he was involved in what he considers “a freak accident”, whilst working at CSK Material Handling CC from which he lost his right and dominant hand. He is or was a member of the aforementioned close corporation, although he considers himself a

“working member”. The respondent had initially objected to the claim, as it considered the applicant, an owner rather than a “workman”, but this appears now to be water under the bridge, so to speak.² The applicant, clearly, is entitled to compensation.

[6] The applicant is a father of 5 children and was a breadwinner of his family at the time of the accident. Following the accident, the applicant was admitted at a hospital only on emergency basis to be stabilised, as that hospital refused to accommodate him as a “workman” due to a history of non-payment by the Compensation Fund. His family assisted him financially for him to undergo surgery to his hand at another hospital, but could only afford a brief stay at the hospital due to financial limitations. The applicant abandoned his claim in respect of past medical expenses due to frustration and delay experienced in the hands of the respondent’s functionaries.

[7] On the same date of the accident (i.e. on 13 June 2012), the applicant’s then employer, acting in terms of the provisions of COIDA, submitted an employer’s report of the accident. It was only on 28 November 2012 that the respondent acknowledged receipt of the applicant’s claim. Thereafter there was no meaningful progress and the applicant says that he sent to the respondent no less than 174 electronic mails, persistently urging for necessary attention to be given to his matter. But, as indicated above, the respondent’s officials were either lethargic or indifferent to the plight of the applicant.

² See par 17 of the founding affidavit; certificate issued by the Companies and Intellectual Property Commission on 06 July 2015 in respect of CSKA Material Handling CC.

[8] As a result of the accident and the applicant's loss of his arm, it is stated that the applicant was rendered 55% permanently disabled. On 07 September 2016, the applicant finally received a letter from the respondent advising him that he will be receiving a monthly pension in amount of R 12,000.18 as from 30 August 2013. The respondent considered the latter date to be the stage at which the medical doctor indicated that the applicant's condition became stabilised.³ In the same letter, the respondent promised to pay a lump sum amounting to R396 236.47 representing accrued pension since 30 August 2013.⁴ The applicant preferred payment of a lump sum as opposed to monthly pension.

[9] Dissatisfied with the aforementioned decision by the respondent, on 14 November 2016, the applicant objected against the decision and filed an appeal to the tribunal, as envisaged in terms of section 91 of COIDA. But, again as with previous processes, the applicant had to enlist the assistance of the Chairperson of the Parliament's Portfolio Committee on Labour to reach this milestone. The tribunal found against the applicant, hence this application to the Court.

[10] The judgment of the tribunal reads as follows:

"In terms of Section 52(1) of COIDA 130/1993 the Pensioner must apply to the DG for payment of a lump sum in lieu of the Pension. There was no evidence presented that proved that such application, as contemplated in Section 52(1) of the Act was ever made to the DG. Thus the Tribunal does not have jurisdiction to entertain the Section 52(1) related objection."⁵

³ See annexure "SRK9" at indexed pp 38-39.

⁴ See annexure "SRK9" at indexed p 38.

⁵ See indexed p 49.

Applicable legal principles and the facts (a discussion)

[11] As indicated above, the determination required in this matter is in terms of the provisions of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

[12] The primary objective of COIDA is encapsulated in its preamble which states:

“To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith.”

And the decision of *Mankayi v Anglogold Ashanti*,⁶ accurately captures the mechanisms of COIDA. A few of the provisions of COIDA finds application in this matter. I deem it necessary to quote some of these provisions, before applying them to the issues in this matter.

[13] Section 22 of COIDA grants an employee the right to compensation and reads as follows in the material part:

- “(1) If an employee meets with an accident resulting in his disablement ... such employee ... shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.
- (2) No periodical payments shall be made in respect of temporary total disablement or temporary partial disablement which lasts for three days or less.”

⁶ Unreported version under (126)/2009 [2010] ZASCA 46 (31 March 2010) at par [19].

[14] Section 29 deals with the liability for payment of compensation and reads as follows the material part:

“If an employee is entitled to compensation in terms of this Act, the Director-General or the employer individually liable or the mutual association concerned, as the case may be, shall be liable for the payment of such compensation.”

[15] On the other hand, section 49 provides for the basis for calculation of compensation for permanent disability and reads as follows in the material part:

- “
- (1) (a) 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.
 - (b) ...
 - (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.”

[underlining added for emphasis]

[16] Section 52 deals with the discretion of the Director-General in respect of payment of lump sum in lieu of pension or a portion thereof. It reads as follows in the material part:

- “
- (1) If a pension does not exceed a prescribed amount, the Director-General ' may, upon the application of the pensioner, pay or direct the payment of a lump sum in lieu of that pension or a portion thereof.

- (2) (a) If a pension exceeds the prescribed amount, the Director-General may, upon the application of the pensioner, in lieu of a portion of that pension not exceeding the prescribed amount pay or direct the payment of a lump sum.
- (b) If the balance of the pension payable is less than the prescribed amount per month, the Director-General may pay or direct the payment of a lump sum in lieu of the whole of such pension.
- (3) ...
- (4) Any lump sum in terms of this section shall be calculated on the basis determined by the Director-General, and the payment thereof shall be subject to the control of the Director-General as referred to in section 59."

[underlining added for emphasis]

[17] Section 59 reads as follows in the material part:

"

- (1) Compensation payable in terms of this Act may for reasons deemed by the Director-General to be sufficient, be-
- (a) paid to the employee or the dependant of an employee entitled thereto, or to any other person on behalf of such enrolee or dependant, in instalments or in such other manner as he may deem fit;
- (b) invested or applied to the advantage of the employee or the dependants of an employee;
- (c) paid to the Master of the Supreme Court, a trustee or any other person to be applied in accordance with such conditions as may be determined by the Director-General;
- (2) applied according to one or more of paragraphs (a), (b) and (c)."

[underlining added for emphasis]

[18] The dispute in this matter concerns the manner of calculation of compensation due to the applicant and whether the applicant is entitled to a lump sum payment, as opposed to monthly pension. As stated above, in terms of section 49(1)(a) compensation “for permanent disablement is to be calculated on the basis set out in items 2, 3, 4 and 5 of Schedule 4 subject to the minimum and maximum amounts”. The parties appeared to be *id adem* on the application of the aforementioned provisions. However, they disagree as to the manner in which a calculation is to be made.

[19] It is common cause that the applicant suffered permanent disablement amounting to 55% disability in terms of Schedule 2 of COIDA, as a result of the accident or loss of his arm. The respondent calculated the pension payable to the applicant and communicated this to the applicant in terms of its letter of 07 September 2016 as follows:

“A monthly pension was approved and currently amounting to R12 000.18 as from 30 August 2013 and this was the date on which the doctor indicated that your condition becomes stabilised.

The calculation of pension is: The salary (or the maximum as contemplated by the Act) times 75% times percentage of permanent disablement. In your case it is R24 336 X 75% X 55% = R10 038.60. The annual adjustments were added therefor your current monthly pension amounts to R12 000.18.

A lump sum amounting to R396 236.47 was approved being a refund of the accrued pension.”⁷

[underlining added for emphasis]

⁷ See annexure “SRK9” on indexed p 38.

[20] On the other hand the applicant submits that in terms of Schedule 4 of COIDA permanent disability for 31 to 100% is calculated at 75% of the employee's monthly earnings subject to a prescribed maximum and minimum recommendation of such compensation. The applicant earned a monthly salary of R60 000.00 at the time of the accident. According to the applicant when considering the calculation in terms of item 5 of the schedule for his pension should be as follows: "If 100% disability equate 75% [sic] of return of earnings then it is common cause that 55% disability will equate 41.25% of return of earnings (R60 000.00)".⁸ It is not clear, whether the applicant's objection to the tribunal included a calculation on this basis and, if so as to the total amount submitted by the applicant to be payable in respect of his pension or lump sum payment. The judgment of the tribunal referred to above,⁹ appeared to have dealt with the issue lump sum payment.

[21] The Court previously directed that the applicant should acquire assistance of an appropriately qualified expert in order for "proper calculations" to be made with regard to the amount payable. He enlisted the assistance of a certain Mr Andre Steyn, a registered accountant/chartered accountant (SA) and also senior lecturer at the Department of Financial Accounting of the College of Accounting Science of the University of South Africa. He holds a Bachelor of Commerce in Accounting Science and honours degree in Accounting Science.

[22] Mr Steyn calculated the monthly amount due to the applicant to be limited to R18 252.00 per month and made calculations of past and future amounts due to the applicant, using, among others, an average consumer price index from 2012 to 2033, when the applicant would

⁸ See par 8 of the founding affidavit.

⁹ See par [10] above.

have probably retired around the age of 65 years. The total settlement amount or lump sum suggested by Steyn is in an amount of R6 705 650.87, as opposed to monthly pension. This document is new and was obviously not included in the original papers. It also did not serve at the internal processes of the respondent, including the tribunal, although I directed that a copy be served on the respondent, which was done.

[23] The applicant submits that section 52 grants discretion to the Director-General in respect of payment of lump sum in lieu of pension or a portion thereof. The tribunal refused to entertain this aspect of the objection as it found no evidence that the applicant had approached the Director-General requesting payment of the lump sum. However, the applicant submits that the tribunal did not consider his application in this regard, which is clearly incorrect. I do not see any reason why this Court ought to grant a lump sum payment. But, nothing stops the applicant from taking this aspect through the necessary channels, despite the view that I've taken in the matter and the ultimate order made herein.

[24] It is my view that the manner of calculation of the pension payable adopted by the applicant is the correct one. However, as the calculation by Steyn only related to a lump sum payment, which, as already indicated, I am disinclined to grant, the Court finds itself without benefit of calculations by an expert in respect of the monthly pension payable to the applicant. Therefore, I will order that the respondent calculate and pay to the applicant the pension payable to him using the method adopted by the applicant. But, due to the history of this matter and the frustrations that the applicant suffered in the hands of officials of the respondent, I will take an extra ordinary step in the event of failure by the respondent to adhere to the order within a period of 30 days. This, in my view, will prevent the applicant from being further exposed to continuous maladministration on the part of the respondents officials.

[25] I will therefore exercise my discretion and utilise the calculations used in the calculation for final settlement by Steyn in order to award pension for the period up to and including 28 February 2018. An amount of R1 717 117.60 is stated as outstanding as at end of December 2017. I will further add two amounts of R25 812.79 for the months of January and February 2018. The result is a grand total of R1 768 743.18. I will also direct that the applicant receive a monthly pension as from March 2018. As indicated above this scenario will only apply if the respondent does not comply with the other aspects of the order.

Conclusion and Costs

[26] The applicant did not seek a cost order against the respondent, despite the frustrations he suffered due to conduct of the respondent, which clearly precipitated this application. This was also confirmed in the written heads of argument filed on behalf of the applicant.¹⁰ Therefore, no cost order will be made against the respondent.


Order

[27] In the circumstances, the application is granted with the order being in the following terms:

- (a) the respondent is directed to recalculate the pension owing to the applicant due to injuries sustained by the applicant during the accident on 13 June 2012 on the basis that 55% disability of the applicant equates to 41.25% of return of earnings of R60 000.00 per month within 20 days from date of service of this order;

¹⁰ See par 24 of the heads of argument.

- (b) the respondent is directed to advise the applicant of the recalculated amount in terms of (a) hereof within 20 days from date of service of this order;
- (c) the respondent is directed to make payment to the applicant in the amount recalculated in terms of (a) hereof within 30 days from date of service of this order;
- (d) the respondent is directed to make payment to the applicant monthly as pension further from the amount recalculated in terms of (a) hereof within 30 days from date of service of this order;
- (e) in the event no payment is received by the applicant within 30 days from date of service of this order, the respondent is directed to make payment to the applicant in an amount of R1 768 743.18, plus interest at the rate of 10.5% per annum from 07 September 2017 to date of full payment;
- (f) the applicant is directed to furnish details of a bank account where payment is to be made within 10 days from date hereof;



K. La M. Manamela

Acting Judge of the High Court

13 February 2018

Appearances:

For the Applicant	:	E Steyn
Instructed by	:	Shaun Robert Knowles (previously appearing in person)
For the Respondent	:	No appearance