IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

18/12/2018
DATE

SIGNATURE

CASE NO: 61311/2017

In the matter between:

BESTER, PM	APPLICANT
and	
THE COMPENSATION COMMISSIONER	1st RESPONDENT
THE DIRECTOR-GENERAL: DEPARTMENT OF LABOUR	2nd RESPONDENT
THE MINISTER OF LABOUR	3rd RESPONDENT

JUDGMENT

MOLOPA-SETHOSA J

[1] On 22 October 2018 I made the following order:

1. The application is dismissed with costs.

[2] I undertook to furnish reasons at a later stage for the order. The following are the reasons.

[3] The applicant has launched an application for an order in the following terms:

> *"1. To review the Award of Compensation granted in favour of Applicant, dated 16 August 2016 (being an award superseding one or more of the awards dated 10 June 2016 and/or 9 October 2015);*
>
> *2. That the award of Compensation granted in favour of Applicant, dated 16 August 2016, is reviewed and set aside in terms of the provisions of the Promotion of Administrative Justice Act, 2000 ("**the PAJA**") and substituted with the following orders:*
>
> *3. That it is in the interest of justice that Applicant be exempted from the obligation to exhaust any internal remedy, as provided for in Section 7(2)(c) of the Promotion of Administrative Justice Act, 2000 ("**the PAJA**");*
>
> *4. That Second Respondent, alternatively First respondent, is hereby ordered and directed –*

4.1 to publish, within 20 (twenty) days of this order, ***a written award of Compensation*** *in favour of Applicant, granting Applicant compensation and reasonable medical aid as provided and prescribed in the Compensation for Occupational Injuries and Diseases Act, 1993 (****"the COID Act"****), for his occupational disease, Post-Traumatic Stress Disorder, indicating the following compensation:*

(a) Applicant's Permanent Disablement is 100%; and

(b) Applicant's compensation in respect of such 100% Permanent Disablement, is calculated on the basis of his earnings as at January 1994; and

(c) Applicant's compensation is paid in the form of a monthly pension, said monthly pension to commence on 1 April 1993;

4.2 Indicate clearly on the Award of Compensation, referred to in prayer 4.1, that such Award supersedes all previous awards granted in favour of Applicant (including the awards of 10 June 2016 and/or 9 October 2015);

5. *That Respondents are hereby ordered and directed to compensate Applicant, as envisaged in Section 8 of PAJA, in addition to any amounts paid to Applicant by the employer in terms of the Award of Compensation stated in prayer 4.1, in an amount equal to the interest that would have accrued*

on such benefits, calculated at a rate of 10.50% per annum, from 1 July 1993 to date of payment;

6. *That Respondents, jointly and severally, shall bear Applicant's costs in the application on a scale as between attorney and own client;*

7. *Such further and/or alternative relief as the honourable Court deems meet"*

[4] The respondents brought an application for condonation for the late filing of the answering affidavit. At the commencement of the proceedings it was indicated on behalf of the applicant that the applicant was not opposing the respondents' application for condonation. Condonation was thus granted.

[5] From the relief sought, as set out above, the applicant in essence seeks to review the decision of the first respondent made on 16 August 2016 in making an award in favour of the applicant for the payment of compensation under the provisions of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereinafter *"COIDA"*); and in addition to the review of the award aforesaid, that he be exempted from the obligation to exhaust any internal remedies as provided for in terms of the provisions of s7(2)(c) of PAJA. The applicant further seeks that this Court substitutes the first respondent's decision with its/this Court's decision.

[6] The applicant was employed as a police officer by the South African Police Service ("SAPS"), and was a Captain as at 15 March 1993. He alleges that he was diagnosed with Post Traumatic Stress Disorder ("PTSD") on 12 May 1993, as a result of which he was found medically unfit for further service in SAPS, and was discharged from service on 31 January 1994.

[7] The applicant avers that 'as a result of the permanent disablement of the applicant' the matter was reported to SAPS/the employer on 15 March 1993. The matter was reported to the first respondent on 1 June 2010.

[8] By way of a letter dated 13 March 2013 the first respondent requested that the applicant, amongst others, furnish respondents with reasons why his employer's report was only completed on 1June 2010 (while the alleged 'accident' was said to have arose on 15 March 1993). No response in this regard seems to have been furnished to the respondents, save for an aggressive letter from the applicant's attorneys dated 25 March 2013-annexure PMB 22.1-, which does not deal at all with the reason why the aforesaid employer's form was only signed and submitted on 1 June 2010 [about 7 years after the alleged 'accident']. One notes that both the First, and the Final medical Report in respect of Post-Traumatic Stress Disorder were signed by Dr Shevel on the same day, i.e. 25 November 2009!

[9] From the employer's report of the accident dated 1 June 2010 the description of the 'accident' suffered by the applicant is said to be that he

"witnessed a man that was stabbed in the chest by a mob"

[10] It is stated at item 11(2) in the record of the proceedings of medical board that the cause of his anxiety is that

> *"He has been placed in a very stressful position in the black townships and he feels he cannot cope any longer."*

[11] It is further stated in item 12 in the record of the proceedings of medical board that there is a possibility that his condition is likely to improve if placed in a less stressful position.

[12] One can infer that this would mean that if he were to be removed from 'black townships' and or the stressful position he alleges he was working under at the time, i.e. working in black townships, his stress level would go down and he would stabilize. Dr. Shevel states in the medical report dated 25 November 2009 that the applicant has stabilized.

[13] From the record of the proceedings of medical board-annexure PMB 2.1- it appears at item 10 that Dr Kaplan was of the opinion that Dr Shevel's report and suggestion that the applicant be boarded out of SAPS as medically unfit was correct, whereas Dr Salant and Mrs Alberts were of the opinion that the applicant "be transferred to an administrative position in SAPS that is not so stressful as his present job. Two out of three seem to have been against the applicant being medically boarded.

[14] At item 15 of the proceedings of medical board under 'what part of the entire disability arose' it is stated '50%'. In the Notice of motion, the applicant prays amongst others that the Court substitutes the decision of the respondents and orders that the 'applicant's permanent disablement is 100%'.

[15] At item 18 of the record of the proceedings of medical board the board recommended that the applicant returns on duty on condition he is placed in a less stressful position. However, the applicant was medically boarded with effect 31 January 1994.

[16] The respondents must have had the above mentioned reports when the first respondent made a decision to award 33% permanent disability percentage("PD") to the applicant; and it is against this award that the applicant take issue, contending that the decision of the first respondent is irrational. The applicant further contends that the first respondent failed to make a decision in respect to the claim of the applicant within a reasonable time; i.e. that there has been unreasonable delay by the respondents in taking administrative action.

[17] The respondent contends that the applicant has failed to exhaust internal remedies and has not shown any exceptional circumstances, as envisaged in s7(2)(c) of PAJA, that therefore this Court is precluded from substituting the decision of the first respondent.

[18] It is common cause that the first respondent issued 5 claim awards between 10 October 2015 and 16 August 2016 respectively; the latter award in issue herein, dated 16 August 2016, superseding all other awards. The applicant has not been happy and/or satisfied with the award. All the awards made a 33% PD award to the applicant.

[19] According to annexure PMB101.1, the applicant's complaint with regard to an award dated 09/10/2015 was that it has an "END DATE" and that the Claim award is not indicated as "Superseding Claim Award".

[20] Following the complaint above, a new Award was issued on 10 June 2016. This award sought to rectify the two complaints above, i.e. the issue pertaining to the End Date and Superseding of the Award. The award specifically records the following:

> *"This award supersedes my previous award dated 09 October 2015, as there was an end date and the starting date of the pension was incorrect."*

[21] Following the award of 10 June 2016 above, the applicant was still not satisfied and to this end he addressed a letter dated 20 June 2016 in which letter he recorded that the award of 10 June 2016 still does not address his objections fully and that he is proceeding with his objection. He further requested the office of the first respondent/the Commissioner to indicate the hearing date of the objection.

[22] Following the applicant's letter above, first respondent issued another Award dated 16 August 2016[The 5th award]. The award specifically records that:

> *"This award supersedes the award dated 09 October 2015 as it has an end date and the starting date was incorrect, Award dated 09 October 2015 as the 2008 increment and the starting date was incorrect and award dated 09 October 2015 as the remarks was incorrectly stated.*

[23] Following the award dated 16 August 2016, the Applicant was still not satisfied and as a result addressed a letter dated 26 August 2016

wherein he indicated that the Award of 16 August 2016 does not address the terms of his objection fully. He also requested that the office of the Commissioner should notify him of the date of the hearing of the objection. . As stated above, in this application, the applicant seeks to review and set aside the decision taken by the first respondent on the 16 August 2016.

[24] This award was published on 17 August 2016. It is common cause that this award supersedes all other preceding awards.

[25] It is common cause that the applicant has lodged an objection. Because the applicant was not satisfied with the correction made in the award he insisted on the hearing of his objection to the award. The objection was lodged on 04 February 2016 in terms of section 91 of COIDA against this decision. On the same date, on 4 February 2016 the applicant simultaneously requested reasons for the decision of 16 August 2016

[26] The documents attached to the notice of objection do not state why in the opinion of the applicant the award of 33.00% permanent disability is arbitrary, capricious, and unfair and at odds with the prescripts of PAJA.

[27] On 05 December 2016, the applicant was notified that his objection will be heard on 08 May 2017. On 2 May 2017 the first respondent informed the applicant's attorneys that the hearing would be postponed since their witness was not available. The applicant's attorney insisted that she would proceed to attend the hearing [despite the respondent having informed the applicant that the respondent's necessary witness

was not available]. The applicant and/or his attorneys informed the respondents that 'any senior' official could be a witness for the respondent, and therefore the respondents have no need/reason to postpone. This cannot be correct. Surely it is trite that the respondents deal with many/various Government departments, and not only with the applicant's case. It cannot be expected that all senior officials would therefore be suitable to be witnesses at any given time in the applicant's matter; it would surely require someone who knows about the matter, who has perhaps handled the applicant's files, not just any senior official. I find this approach by the applicant and/or his attorneys to be unreasonable, and this amounts to being unnecessarily difficult and unreasonable, considering the nature of the respondents' 'business'/work.

[28] On 5 May 2017 the applicant's attorney insisted on getting a new date for the hearing of the objection, and was given the date of 20 June 2017; on 15 June 2017 the respondent indicated to the applicant's attorneys that the hearing of the objection could not be proceeded with on 20 June 2017 as the legal officer for the compensation fund would be on leave and therefore unavailable on the date of 20 June 2017 set down.

[29] In July 2017 the applicant's attorneys made a request for the matter *to be heard. The respondent avers that the request was not addressed to* the roll administrator, as well as to the legal officer handling the case. A date was thus not agreed upon.

[30] Prior to an agreed date suitable to all parties being provided, the applicant launched this application. His objection is still pending before the first respondent. The applicant instituted the current proceedings on

05 September 2017, notwithstanding the fact that his objection was due to be adjudicated, so contends the respondents.

[31] The respondents submitted that if one considers the fact that the Commissioner had sought to rectify the errors that were contained in all the previous awards, the two postponements in respect of the actual hearing of the objection were not unreasonable. Further that the first respondent had sought to address the complaints of the applicant without resorting to the actual hearing of the matter.

[32] The applicant's complaint seems to have largely been around the fact that the Treasury will not effect payment on the Umehluko claim awards if the remarks are not exactly correct and indicate the correct dates indicate the correct dates in respect of the previous claim awards issued for the particular employee and supersedes all previous awards

[33] The applicant submitted that the Court is entitled to review the decision(s) of the first respondent in terms of section 6(2)(g) of PAJA and similarly substitute the first respondent's decision with the Court's decision.

[34] The respondent contends that the applicant has failed to exhaust the prescribed internal remedies and that there exist no exceptional circumstances that justifies the exemption of the applicant from the obligation to exhaust internal, that therefore this Court is precluded from substituting the decision of the first respondent; further that the Court is not suited to exercise the discretion bestowed upon the first respondent/the Commissioner, i.e. the discretion to determine the

percentage of disability in the circumstances where the Act does not prescribe such percentage.

[35] The respondents contend that based on the above, the applicant's application was instituted prematurely and that he failed to exhaust the internal remedies.

[36] The hearing date of his objection was only postponed twice for reasons that were communicated to the applicant. The fact that the applicant was not entirely satisfied with the reason for the postponement of the hearing cannot serve to justify the applicant's failure to exhaust the internal remedies.

[37] Further that the applicant failed to set out exceptional circumstances that justify the order of substitution; alternatively, that the grounds advanced for the substitution order do not constitute exceptional circumstances as envisaged in remedies as envisaged in s7(2)(c) of PAJA to justify the order of substitution.

[38] The respondent further contends that the applicant has failed to set out the legal and/or factual basis for an order declaring that his permanent disability is at 100%.

[39] Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship

between internal administrative remedies and the judicial review of administrative decisions. 7(2) of PAJA provides as follows:

> *"(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
>
> *(b) Subject to paragraph (c), a Court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
>
> *(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."*

[40] Thus, unless exceptional circumstances are found to exist by a Court, on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action. The Supreme Court of Appeal has noted in *Nichol & Another v The Registrar of Pension Funds & Others* 2008 (1) SA 383 SCA at para 15 that

"it is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under section 7(2)(c). Moreover the person seeking exemption must satisfy the Court of two matters; first there are exceptional circumstances and second it is in the interest of justice that the exemption be given".

[41] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although Courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

[42] Approaching a Court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. In *Bato Star Fishing Pty Ltd v Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 CC at para [45] the Court emphasized that

"... The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decision taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

[43] The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasized that what constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case; See *Zondi v MEC for Traditional and Local Government Affairs* 2005(3) SA 589 CC para 113-4. Thus, the need to allow executive agencies to utilize their own fair procedures is crucial in administrative action.

[44] In ***Bato Star*** *supra* at Para 48, O'Regan J held that—

> *"A Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker .... A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker."*

[45] Once an administrative task is completed, it is then for the Court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.

[46] It is important to note that internal administrative remedies may require specialized knowledge, which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information.

[47] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognizes this need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a Court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is, therefore, not absolute.

[48] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue, see Nichol supra, at para [16] and [17]. Thus, where an internal remedy would not be effective and or where its pursuit would be futile, a Court may permit a litigant to approach the Court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.

[49] In terms of section 7(2), the Court may permit the litigant to approach the Court directly where internal remedies would not be effective and where its pursuit would be futile.

[50] Clearly the applicant has not demonstrated that the internal remedies would not be effective and/or that pursuit of internal remedies would still be futile. There exist, therefore, no exceptional circumstances that justify invocation of section 7(2)(c) of PAJA.

[51] Furthermore, other than to merely state that it would be in the interest of justice that the applicant be exempted from the obligation to exhaust internal remedies, the applicant does not state why, in his opinion, it is in the interest of justice that he be exempted therefrom. It is not sufficient to merely allege that it is in the interest of justice that he should be exempted without stating the factual basis for such a conclusion.

[52] There exists no exceptional circumstances that justifies that this Court substitute the decision of the first respondent.

[53] Section 8(1)(c)(ii)(aa) of **PAJA** provides:

> *"(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-*

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;"

[54] Only in exceptional circumstances would it therefore be appropriate for a Court to depart from the ordinary rule, as set out in section 8(1)(c)(i) of PAJA, and not refer a matter back to the relevant administrator for a fresh decision. Thus in the unlikely event this Court were to review and set aside the impugned decision, it should – absent exceptional circumstances – send the matter back to the Commissioner for reconsideration.

[55] In respect of appropriate relief in the context of a review application, the Constitutional Court held as follows in ***Steenkamp NO v Provincial Tender Board,*** *Eastern Cape*:

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-

law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. ... Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration, compelled by constitutional precepts and at a broader level, to entrench the rule of law."

[56] Most recently, in ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC)***, the Constitutional Court emphasised the need – in appropriate cases – for orders of substitution to be granted. In that case, it considered the test for "*exceptional circumstances*" in section 8(1)(c)(ii)(aa) of PAJA as follows:

"[G]iven 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 the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. 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 enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."

[57] The applicant has not provided the honourable Court with the existence of any exceptional circumstances that warrant an order of substitution.

[58] None of the grounds advanced by the applicant constitute exceptional circumstances that warrant the order of substitution. The fact that the hearing of the appeal was postponed on two occasions does not warrant an order of substitution. The objection was yet to be adjudicated when the applicant instituted the current application.

[59] The respondents contend there is even more reason why the Honourable Court cannot substitute the decision of the Commissioner with its own decision and that is that this Court is not suited to make the decision with regard to percentage of the applicant's disablement if regard is had to the following-

[59.1] Section 49(1) of the COIDA Act provides that "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 minimum and maximum amounts.

[59.2] In terms of Section 2(a) of the COIDA Act if " *an employee has sustained an injury set out in Schedule 2, he shall for the purpose of this Act be deemed to be permanently disabled to the degree set out in the Second Column of the said Schedule (i.e schedule 2).*

[59.3] In terms of section 2(b) *"if an employee has sustained an injury or serious mutilation not mentioned in Schedule 2 which leads to permanent disablement, the Director-General shall determine the percentage of disablement in respect thereof as in his opinion will not lead to a result contrary to the guidelines of Schedule 2"*.

[59.4] In terms of Section 2(c) *"if an injury or serious mutilation contemplated in para (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 may determine such higher percentage as he or she deems equitable"*.

[59.5] Schedule 2 lists various injuries and accords each one of such injuries a percentage of disablement. It is notable from Schedule 2 that a Post Traumatic disorder is not listed in Schedule 2 and is therefore not accorded a percentage of disablement.

[59.6] Because Post Traumatic Disorder is not listed in Schedule 2 and consequently not accorded a percentage it follows that a percentage of disablement thereof ought to be determined by the Director General. Put differently, the Director General ought to exercise his discretion in respect of the percentage of disablement to be accorded to Post Traumatic Disorder.

[59.7] The discretion of the Director General would obviously have to be exercised taking into consideration the factual circumstances of the case.

[60] In this particular case, because the hearing of the objection did not take place, the Director General did not have the opportunity to exercise his discretion as he is called upon by the Act. Only after the Director-General has exercised his discretion can such discretion then be subjected to review on the grounds set forth in PAJA.

[61] This Court has also not been provided with any factual and/or legal basis for substituting the discretion of the Director-General with its own decision in the manner that it is called upon to.

[62] In the circumstances, I am of the view that the applicant has not made out a proper case for the relief sought.

[63] For all the above considerations, I made the order referred to above on 22 October 2018 as follows:

1. The application is dismissed with costs

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

Appearances as follows:
Counsel for plaintiff: Adv. L Kellermann SC
Instructed by: Cornelius Boshoff Attorneys

Counsel for defendants: Adv. W N Mothibe
Instructed by: The Office of the State Attorney