IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

07/11/2022
DATE

SIGNATURE

CASE NO: A546/2017

In the matter between:

GERHARDUS MALAN BOTHA	Appellant
and	
FEMA	First Respondent
WORKMEN'S COMPENSATION FUND	Second Respondent
V M MAHOLA	Third Respondent

JUDGMENT

MBONGWE J: [TLHAPI J CONCURRING]

INTRODUCTION:

[1] This is an appeal against the whole judgment and order of the third respondent dated 22 September 2016 following the hearing of two objections the appellant had raised in terms of the provisions of section 91 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA" or "the Act"). In particular, the appellant's objections were in respect of the basis relied upon by the first and second respondents in their respective determination of the degree of his permanent disablement in each of the two separate incidents in which he had sustained injuries while on duty.

[2] The appellant has filed applications for condonation of his late filling of the notices of appeal and application for the amendment of his grounds of appeal. The latter notice was filed subsequent to the appellant's engagement of legal representation for the hearing of this appeal. This and the tardiness of the court file had occasioned two postponements of the hearing of the appeal with costs reserved. The first and second respondents have taken issue in this regard and seek a dismissal of the application for condonation with costs.

[3] I have considered the reasonableness of the delay in the prosecution of the appeal and the opposition to the granting of condonation, which was raised from the bar, and have come to the conclusion that a reasonable explanation has been given for the delay and that the appellant has good prospects of success in this appeal. Condonation ought to be and is granted. The reasons for this decision appear later in this judgment.

[4] The gravamen of the appellant's contention is that the first and second

respondents had ignored pertinent medical evidence in favour of a rigid application and reliance on the guidelines issued by the Director-General of the Department of Labour in their determinations of his degree of disablement. The appellant contended that this approach has resulted in the under- evaluations of his level of permanent disablement and lesser amounts paid for his temporary disablement. Both objections were opposed by the first and second respondents before the tribunal, and dismissed by the third respondent in the end. The decision of the third respondent is the subject of this appeal.

THE PARTIES

[5] The appellant is Mr Botha who got injured in two separate incidents during 2007 and 2011 while on duty and in the employ of an equal number of employers, respectively.

[6] The first respondent is the Federated Employers' Mutual Association, a mutual association appointed in terms of section 2(1)(a) of the Act for purposes and under the conditions set out in of section 30, being to effectively step into the

shoes of the second respondent.

[7] The second respondent is the Compensation Commissioner appointed in terms of section 2(1)(a) of the Act for the purpose, *inter alia*, of adjudicating upon claims lodged in terms of the provisions of the Act.

[8] The third respondent was appointed in terms of section 91(2)(b) to chair the tribunal established in terms of section 91(2)(a) of the Act and to adjudicate on the two objections raised by the appellant against the awards made to him by the first and second respondents, respectively, following his claims for injuries sustained in the two incidents referred to in para 4 and described more fully in paragraphs 8

and 10 herein below. By law the third respondent was assisted by assessors representing the employers, on the one hand and employees on the other and had in its discretion engaged medical assessors.

BACKGROUND FACTS / FACTUAL MATRIX

[9] The appellant was an employee as defined in the Act who sustained occupational injuries to his back on 28 June 2007 while in the employ of Redis Construction Africa. This occurred when the appellant jumped from a height of between 1 to 1.5 metres to save a fellow employee from being struck by steel hanging from a crane. In response to a question during the hearing of his objections, the appellant stated that he had felt a burning pain on his lower back extending to his legs subsequent to jumping. The accident was reported to the Compensation Commissioner on 5 July 2007.

[10] The appellant received periodic payments for temporary disablement from the first respondent, the Federated Employees Mutual Assistance (FEMA) from March 2008 until February 2009 for the fusions of the L3/L4 and L5/S1. In this regard, FEMA determined his permanent disablement at 20% and paid him a lump sum of R94,279.90. The degree of permanent disablement was calculated predominantly on the basis of medical reports and the evidence of doctors, namely, Professor Lekgwara, (neurosurgeon), Dr Seleke (orthopaedic surgeon and Dr Prins (orthopaedic surgeon) and the circular instructions issued by Directors-General of the Department of Labour.

[11] For the aforementioned injuries the appellant was awarded 15% and 5% permanent disablement in terms of the circular instructions which recommends the allocation of 15% for the first fusion and 5% for any further fusion - (first claim).

[12] The appellant did not resume his duties with his pre-accident employer, but had pursued studies with UNISA for a while prior to taking up a different employment with Belloord during 2010. On 1 September 2011, the appellant sustained further injuries to his back when he was assaulted by a fellow employee during a work related disciplinary hearing.

[13] The injuries sustained in the incident of 1 September 2011 resulted in the fusions of the L2 and L3. The appellant received periodic payments for temporary disablement from the Workmen's Compensation Fund and a lump sum payment of R64,845.00 on 21 February 2013. His degree of permanent disablement was determined at 10% - (second claim).

[14] The Compensation Fund is a Schedule 3A Public Entity of the Department of Employment and Labour and administers the Compensation for Occupational Injuries and Diseases Act 130 of 1993 as amended by the Compensation for Occupational Injuries and Diseases Act 61 of 1997.

[15] It is to be noted that the Compensation Commissioner appears to have awarded 5% for each fusion in the appellant's second claim ostensibly on the basis that the appellant had been awarded 15% permanent disablement for the first fusion in the accident of 2007. The Commissioner further argued that the appellant was only entitled to 5% in terms of Circular 157. This argument was premised on the fact that the fusion of the L3 was a repeat and ought not be compensated for. Both contentions by the Commissioner were flawed and at odds with the principle in the *Basson* matter cited in full later hereunder. In that matter the court found that an employee who at the time of sustaining an injury to his back had still been functional despite a pre-existing degenerative condition to his back and that his

permanent disablement was triggered by the occurrence of the accident. The court found that the Commissioner was liable to compensate the employee.

[16] In my view, to ignore the injury of L3 and repeat fusion and not compensate for is adversarial. The tribunal ought to have enquired whether the repeat fusion could have exacerbated the existing level of disablement: - see *Pretorius v Compensation Commissioner*, below, wherein the court stated that the role of the tribunal is supposed to be inquisitorial rather than adversarial and rejected an award by the Commissioner. Furthermore, the interpretation of the provisions of COIDA by the Commissioner was unduly restrictive according to the principle in *Kirtley v Compensation Commissioner* also cited in full below.

[17] In line with the principle in the *Basson* matter and the generosity with which the provisions of the Act have to be interpreted, the Commissioner should have awarded 15% and 5% permanent disablement for the injuries sustained in the second accident in accordance with the directives of the circular instructions relied on. The accumulative degree of disablement of the appellant should have been calculated at 40% if the basis of calculation by the first and second respondents are anything to go by. However, as will be shown later, the calculations by these respondents were a nullity.

[18] Liability to compensate the appellant in both incidents in terms of the Act was not disputed and is accordingly not in issue.

[19] As a consequence of his dissatisfaction with each of the respective awards by the first and second respondents, the appellant lodged two objections in terms of the provisions of section 91(1) of the Act. The objections were considered and dismissed by the third respondent in a judgment dated 22 September 2016: - a

decision that gave rise to this appeal.

GROUNDS OF THE APPEAL

[20] Though the relevant notice is titled grounds of appeal, it is not apparent from the contents therein whether the Appellant intended to pursue, in the present hearing, a review of the decision of the third respondent or an appeal against it. On the one hand, the appellant alleges bias against him by the third respondent in favour of the first and second respondents. This allegation is premised on the fact that third respondent, having been hired and paid by the first and second respondents to adjudicate in the matter against them, could not have been objective in the determination of the matter. These allegations presuppose a review of the proceedings and decision of the third respondent. The arguments presented on behalf of the appellant were purely in the nature of an appeal and excluded review proceedings.

THE LAW

OVER - VIEW OF THE NATURE AND PURPOSE OF COIDA

[21] The purpose of the enactment of the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993 ('COIDA') was, as per the pre - amble to the Act, 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…."*

[22] Compensation is paid by the Compensation Fund, a Schedule 3A Public Entity of the Department of Employment and Labour, created to administer the Compensation for Occupational Injuries and Occupational Diseases Act 130 of 1993 as amended

by the Compensation for Occupational Injuries and Diseases Act 61 of 1993.

INJURIES

PERMANENT DISABLEMENT AND CALCULATION OF COMPENSATION

[23] In terms of the provisions of section 1 of COIDA, permanent disablement: -

> *"in relation to an employee and subject to* the *provisions of section 49, means the permanent inability of such an employee to perform any work as a result of an accident or occupational disease for which compensation is payable."*

[24] With regard to the categorisation of injuries, Section 49(1) 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."*

[25] In terms of Item 4 of Schedule 4, permanent disablement of 100% entitles an employee to a monthly pension of 75% of his monthly earnings at the time of the accident giving rise to the claim subject to certain limits.

[26] In terms of Section 49(2)(a) where an employee has sustained an injury as 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.

[27] Schedule 2 provides that "*any other injury causing permanent total disablement*" is deemed to be 100% of permanent disablement.

GUIDING LEGAL PRINCIPLES

[28] The interpretation and understanding of the provisions of section 49 and Item 4 of Schedules 4 and Schedule 2 are crucial for the determination of fair compensation for an injured employee. Both these components require constant cognisance of the purpose of the Act for a proper application of its provision. The Act is befittingly described as a 'social security legislation that ensures the provision of relief in the form of adequate compensation to employees who sustain injuries or contract diseases in the course and scope of their work or compensation to the families of employees who died as a result of such injuries or diseases.'

[29] Where an occupational claim has arisen, the approach to its processing was expressed in *Healy v Workmen's Compensation Commissioner* 2010 (2) SA 470 (ECG) para [18] in the following terms:

> *"The starting point for determining the percentage of a permanent disablement is Schedule 2. It, like the Compensation Act of which it is part, must be interpreted generously so as to do justice to the employee to the extent possible within the 'give and take framework' of the Compensation Act."*

[30] In my understanding, the court implied the application of 'the rule of elimination', that is, first is a consideration whether despite a generous interpretation and exercise of discretionary authority, the injury concerned is excluded from the category of injuries envisioned in Schedule 2.

[31] In *Visagie NO v Vergoedingskommisssaris* (2009) 30 (*IL J*) 2366 (T) the court found that it was the duty of the Commissioner to exercise his discretion, based on the facts, to determine the particular category of Schedule 2 to which the injury

is to be allocated. The court discouraged a preference for the application on the Director-General's Circular Instructions for the calculation of an injured employee's level of permanent disablement. The court also found that the Act, being a social legislative instrument, envisions the exercise of the discretion given in favour of the employee, particularly considering the length of the period between the occurrence of the accident and the determination of compensation.

MATERIAL FOR CONSIDERATION

[32] Every available medical report and evidence relating to the assessment of an injured has to be considered in order to place the injury in the correct category. It is at this stage that the Director-General's exercise of discretionary authority becomes crucial. In their pronouncements and in line with the spirit and purpose of COIDA, the courts repeatedly encourage generosity in favour of the injured employee in the exercise of discretionary powers.

[33] In *Kirtley v The Compensation Commissioner and the Minister of Labour* (2005) 26 ILJ 1593 (E)] the appellant, a senior works inspector at a university, had sustained injuries in the course of his work. After his discharge from hospital he continued being treated for his back pain, undergoing physiotherapy and consultations with an orthopaedic surgeon. His condition did not improve. Nine months after the accident two independent medical specialists found that he was 100% permanently disabled and incapacitated for the open labour market. It was opined that his condition would only worsen than improve over time. Three other experts corroborated the reports. The Commissioner had ignored these reports and preferred to rely on the finding of the its Chairperson that a disability is only permanent where the claimant has lost a limb. The court held that the appellant's

condition fell entirely into the categories listed in Schedule 2 of the Act and that, therefore, he was 100% disabled.

DISCRETIONARY AUTHORITY

[34] The Act clothes the Director-General of the Department of Employment and Labour with wide discretionary powers in occupational claims. Being legislative discretionary powers, the exercise thereof has to accord with the provisions of section 33 of the Constitution Act of 1996 which espouse justice and fairness as elements to result therefrom. Further, and by the operation of the law, the exercise of legislative discretionary powers constitutes an administrative action. A decision taken in the exercise of such authority is subject to and reviewable in terms of the provisions of the Promotion and Administration of Justice Act 3 of 2000.

[35] Although not explicitly provided for in the Act, the Director-General issued circular instructions as guidelines in the determination of the degree of disablement of an injured person. As will appear hereunder, the guidelines

constantly face fierce criticism in the pronouncements by the courts, particularly as their application is often given undue priority over pertinent provisions of the Act. The provisions of the Act envision the individual medical assessment of the injuries sustained for purposes of; the identification and placing thereof in the

correct category in order to facilitate the determination of the percentage of

compensation payable, based on the earnings of the injured at the time the injury was sustained. The circular instructions on the other hand, though often asserted to factor in medical evidence, provide an abstract and arbitrary

mathematical calculation of the extent of permanent disablement.

[36] In my view, circular instructions should find no application in respect of injuries either objectively falling under Schedule 2 or are within a 10% range below. This should by no stretch of imagination be perceived to interfere with the threshold of injuries in Schedule 2, but should provide a reasonable space for the weighing of the reasonableness of a decision taken in the exercise of discretionary powers. The *Kirtley* matter is authority against a "*restrictive interpretation of the Act*" and the exercise of discretionary powers in favour of the injured.

INJURIES & CAUSATION

[37] The statutory default position is that the Compensation Commissioner is liable to compensate an employee for an injury sustained or disease contracted in the work place. The cause of the injury or disease, the existence of a pre-existing condition of the employees and the determination of the resultant extent of permanent disablement of the employee concerned, are the dominant causes of litigation in occupational injury or disease claims. Hereunder are guidelines in the main litigated aspects of occupational injuries or diseases claims.

[38] In the matter of *Basson v Ongevallekomissaris* [2000] 1 ALL SA 67 (C) the court had to grapple with the issue of causality. The court found that although the appellant had a pre-existing degenerative condition to the back, he had an active life and was functional before the accident. His permanent disablement was triggered by the lifting of the object at work.

[39] In *Pretorius v Compensation Commission & Another* [2008] JOL 21550 (O) the court described the task of a tribunal as inquisitorial and not adversarial and that it entailed an active and meaningful role before and during the hearing of the objection, and should not follow a mechanical approach to decide on an award to

be granted. The court also noted that although a claim for pain and suffering may not be entertained in terms of COIDA due to the fact that the Act exclusively considers patrimonial loss, pain rendering an employee unable to work could entitle an injured person to compensation in terms of the Act.

[40] With the applicable guiding principle having been set out, I now turn to consider the merits of the matter at hand.

MAIN ISSUE

[41] At the heart of this appeal is a challenge to the basis of the determinations of the periods of the appellant's temporary total disablement and the corresponding amounts paid, as well as the calculation and determination of his degree of permanent disablement, resulting from the injuries sustained in each of the two instances of his injuries.

APPELLANT' CASE

[42] The appellant's contention is that the payment for his temporary disablement should have ensued for a longer period due to his condition and that his permanent disablement should have been determined at no less than 45% to an inability to do any work, according the doctors who assessed him. The appellant impugns what he refers to as the first and second respondents' absolute application of the guidelines issued by the Director-General in their respective determinations of the degree of his permanent disablement in each instance and, a disregard of medical evidence in the reports of his assessments.

[43] I am inclined to agree with the appellant's contention that by their application of

the guidelines and reliance thereon, the first and second respondents had impermissibly undermined the value of medical evidence and the categorisation of his injuries in terms of the Act. The categorisation of an occupational injury is a legislative primary measure of an injured employee's degree of permanent disablement. The Commissioner and the tribunal had failed to recognise this imperative.

[44] A fair assessment of the functionality of an injured person for the purpose of determining the degree of his permanent disablement, in my view, should occur at least three months after the lapse of the period of temporary disablement or the extended period thereof, and the injured has returned to work. The inability to resume duties even after the extended period of temporary disablement should indicate a reconsideration and the placing of the injuries in Schedule 2, that is, 100% disablement for the work the injured was doing at the time the injury was sustained.

TEMPORARY TOTAL DISABLEMENT

[45] In respect of the appellant's objection to the lengths of the respective periods of his temporary disablement, and the simultaneous termination of periodic payments to him by the first and second respondents, respectively, I am in agreement with the first and second respondent's contention that the absence of proof of requests for extensions of the two respective periods of his temporary disablement, in terms of section 47(5)(b) supported by medical evidence of continuing medical treatment, negates his objections to the terminations of periodic payments upon the end of the statutorily prescribed minimum periods of twelve months.

[46] Had the appellant requested for extensions that were supported by medical evidence the Director-General would have been obliged, in terms of section 47(5)(b) to exercise his discretion whether to grant the extension(s) for a further period determined by him, but not exceeding a total of 24 months, depending on whether the continuing treatment had prospects of improving the functionality of the appellant.

[47] In any event, in terms of section 48(1), the right of entitlement to temporary total disablement expires:

> *"48(1)(a) upon termination of such disablement or if the employee resumes the work he was employed in at the time of the occurrence of the accident or any work of the same or greater earnings;*
>
> *48(1)(b) if the employee is awarded compensation for permanent disablement."*

[48] It is common cause that the appellant had taken up new employment in March 2010, that is, twelve months after the termination of his temporary disablement in February 2009, although it has not been disclosed to the court what work he was employed to do, or whether he had earned the same or a greater amount than he was earning at the time of the accident in 2007. Save for the common cause fact that he had pursued studies with the University of South Africa *''to improve his skills''*, it was not disclosed to the court when the appellant had commenced and completed doing so and what his earnings were. It was indicated earlier that the appellant had attended an assessment in January 2010 and took up new employment two months later. While the lack of detailed information regarding the appellant's new employment in 2010 renders it impossible to conclusively place

him within the ambit of the provisions of section 48(1)(a), that is all academic considering the nullity of the assessments of his respective levels of permanent disablement determined by the first and second respondents. The finding of nullity of the assessments is dealt with in detail shortly hereunder.

ARGUMENTS ON PERMANENT DISABLEMENT

[49] The first respondent argued that it being common cause that the appellant was able and did take up another employment in 2010, it (first respondent) should not have been cited as a party in the proceedings pertaining the objection to the appellant's extent of permanent disablement. It further made the submission that any existing level of the appellant's permanent disablement was a consequence of injuries sustained in the incident of September 2011. This submission was made despite the common cause knowledge that the appellant had had a fusion of the L3 in the accident of 2007, amongst other injuries, and a repeat fusion thereof in the September 2011 incident.

[50] But for the nullity of the assessments, I am inclined to agree with the first respondent and find that the appellant had regained his functionality when he took up new employment in 2010 and that his present level of permanent disablement was as a result the occurrence of September 2011. This finding is in line with the principle in the matter of *Basson v Ongevallekomissaris* [2000] 1 ALL SA 67 (C) wherein the court had to grapple with the issue of causality. In that matter the court found that although the appellant had a pre-existing degenerative condition to the back, he had an active life and was functional before the accident concerned. His permanent disablement was triggered by the lifting of the object at his work. I would, therefore, consider the fused vertebrae of the appellant as a result of the

accident of 2007(first claim) as a pre-existing condition and hold that his current level of permanent disablement was triggered by the occurrence of the incident of September 2011(second claim) for which the second respondent is liable.

NULLITY OF CALCULATIONS BY THE RESPONDENTS

[51] The respondents further submitted that there was nothing untoward in their calculations of the extent of the appellant's permanent disablement according to the circular instructions, submitting that it is only in special circumstances that this is avoided and that the appellant had not shown that such special circumstances existed. This contention is to be rejected firstly for the respondents' failure to state what the special circumstances are and, secondly,

the finding that the respondents' assessments were a nullity..

[52] Prior to dealing with the nullity of the respondents' assessments, it is imperative to refer to the distinction between a claim for damages and a claim for compensation for occupational injuries or diseases in terms of the provisions of COIDA. The distinction clearly demonstrates the basis for the finding of nullity of the assessments. In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening*) 1999(2) SA 1 (CC) Yacoob J stated the distinction between a claim for damages and compensation in terms of COIDA in as follows: -

> *"[12] The purpose of the Compensation Act, as appears from its long title, is to provide compensation for disability caused by occupational injuries or disease sustained or contracted by employees in the course of their employment. The Compensation Act provides for a system of compensation which differs substantially from the rights of an employee to claim damages at common law. Only a brief summary of this common law*

position is necessary for the purposes of this case. In the absence of any legislation, an employee could claim damages only if it could be established that the employer was negligent. The worker would also face the prospect of a proportional reduction of damages based on contributory negligence and would have to resort to expensive and time - consuming litigation to pursue a claim. In addition, there would be no guarantee that an award would be recoverable because there would be no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were lost. On the other hand, an employee could, if successful, be awarded general damages, including damages for past and future pain and suffering, loss of amenities of life and estimated 'lump-sum' awards for future loss of earnings and future medical expenses, apart from special damages including loss of earnings and past medical expenses.

[53] *[13] By way of contrast, the effect of the Compensation Act may be summarised as follows, an employee who is disabled in the course of employment has the right to claim pecuniary loss through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled. The procedure provides for speedy adjudication and for payment of the amount due out of a fund established by the Compensation Act to which the employer is obliged to contribute on pain of criminal sanction. Payment of compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the*

employee's contributory negligence. The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant's actual pecuniary loss. 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 s 35(1) deprives the employee of the right to a common law claim for damages.

[54] *[14] The Compensation Act supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute. Compensation is payable even if the employer was not negligent. Though the institution of the regime contemplates a differentiation between employees and others, it is very much an open question whether the scheme is to the disadvantage of employees."*

[55] Relevant for purposes of the present matter and the nullity I referred to above is the distinction specifically between compensation in terms of COIDA and a claim for damages in terms of the Road Accident Fund Act 56 of 1996, as amended.

OCCUPATIONAL INJURIES CLAIMS VIS –A VIS RAF DAMAGES CLAIMS

[56] The first and second respondents were in unison that their determinations were based primarily on the medical reports and evidence in particular of Professor Lekgwara (Neurologist), Dr Prins (Orthopaedic Surgeon) and Dr Seleke (Orthopaedic Surgeon) as well as the calculations in terms of the circular

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instructions. The reference to circular instructions as part of the provisions of COIDA is clearly misplaced (see *Odayar* v *Compensation commissioner*, par 73, below). By their own admission, the respondents used the RAF's, WPI and AMA models to purportedly determine the appellant's degrees of disablement.

[57] I pause to state that the respondents and the tribunal had ignored the reports of the assessments of the appellant by the following doctors:

57.1 On 07 August 2008, Dr Booysens stated in his report that a high signal was noted around the screws at level L4, L5 and S1 that could be suggestive of instability or an infective process (page 115 Bundle A).

57.2 On 29 September 2008, Dr Du Preez who reported that the appellant had an acute and chronic back pain with burning and numbness in the legs as well as the lack of bladder and bowel control since the injury (page 123 Bundle A).

57.3 On 03 November 2008, the Neurosurgeon, Dr Trevou, diagnosed the appellant with Residual Cauda Equina Syndrome and stated that the injuries resulted from the accident (page 129 Bundle A).

57.4 On 16 April 2009, Dr Coetzee reported that the appellant had mechanical backache with right sciatica and proposed the removal of the instrumentation inserted during the Laminectomy and fusion. This after the appellant's permanent disablement was assessed at 20% approximately two months earlier in February 2009. He further stated that the appellant was permanently disabled (page 135 Bundle A).

57.5 On 24 April 2009, Dr Coetzee removed the instrumentation and reported that the appellant was not fit for normal work (page 138 Bundle A).

57.6 On 30 July 2009, Dr Coetzee reported that the appellant is permanently disabled due to Lumber Spondylosis (page 142 Bundle A).

57.7 On 01 October 2009, Dr Coetzee reported that the appellant will not be able to work anymore (page 144 Bundle A).

57.8 On 11 January 2010, Dr Coetzee examined the appellant and reported that the appellant was not healing satisfactorily, still had a weakness in both legs and would not be able to work anymore.

[58] In terms of the provisions of the Road Accident Fund Act 56 of 1996 the severity of injuries sustained by a victim of a motor vehicle accident is measured in terms of the concept referred to as 'Whole Body Impairment' (WPI). In terms of section 17 of the RAF Act the injury sustained by a victim of a motor vehicle accident must impact on at least 30% of body functioning for the claimant to be entitled to a claim for general damages. Multiple injuries are rated individually in percentages using the Narrative Test or the American Medical Association rating system (AMA) or both. The cumulative percentage qualifies the injured to claim general damages if it reaches or exceeds the prescribed threshold of 30%.

[59] A claim for damages in terms of the RAF Act consists of two components, namely, general and special damages. The general damages component of the claim consists of pain and suffering, loss of amenities of life and disfigurement. Special damages consist of hospital and medical expenses incurred or still to be incurred as a result of the injuries sustained in the motor vehicle accident. Every amount claimed under special damages has to be proven.

[60] The above components of a road accident fund claim are not part of a claim under the provisions of COIDA and, therefore, not considered. What the provisions of

COIDA focus on is the degree of disablement of the injured employee the categorisation whereof determines the compensation payable.

[61] The amount payable in a claim for damages can either be agreed upon between the parties or is determined by the court, exercising its discretion based on fairness.

[62] On their own admissions, the three medical experts on whose medical legal reports and oral evidence the first and second respondents relied in the calculation of the appellant's extent of permanent disablement applied the WPI and the AMA models and the circular instructions to do so. This was impermissible

[63] COIDA prescribes the processing of occupational injury claims in terms of which injuries are categorised in terms of Schedule 2 read with the provisions of section 49, according to their severity and impact on the functioning of the body after the accident. The placing of an injury in the correct category and in accordance with the provisions of section 49 read with Schedule 2 is therefore crucial. It is particularly on the aspect of the categorisation of the injury where a grey line may exist. The discretionary powers have to be exercised in favour of the injured in such instances by placing the particular injury in the more severe category of injuries.

[64] To each category the Act allocates the percentage of the injured employee's monthly earnings at the time of the accident payable consequent to permanent disablement.

[65] The above brief comparison of the processing and determination of occupational injury claims in terms of the provisions of COIDA and that of a claim for damages in terms of the RAF Act illustrates the impossibility of achieving the correct level

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of permanent disablement as per in the provisions of COIDA using RAF formulae. In the present matter the first and second respondents unfathomably and impermissibly employed models used in RAF claims for damages to purportedly determine the level of permanent disablement of the appellant in terms of COIDA.

ANALYSIS AND FINDINGS

[66] It is important to note that by their own admission, the three medical experts on whose assessments and determination of the appellant's level of disablement employed the concepts of Whole Person Impairment (WPI) of the functionality of the injured, the American Medical Association ratings model (AMA) and the Director General's circular instructions. The first named models of calculation are used in road accidents fund claims for damages arising from bodily injuries sustained in motor vehicle accidents.

[67] Hereunder I traverse firstly the standing legal principles regarding the application or applicability of the Director-General's circular instruction, followed by a comparison between calculations of compensation for occupational injury and the degree of permanent disablement in terms of COIDA and, a claim for damages in terms of the Road Accidents Fund Act 56 of 1996, as amended.

CIRCULAR INSTRUCTIONS 157

[68] The application of the guidelines contained in the Circular Instruction 157, is arbitrary and contrary to the mechanisms set in place by and for the determinations intended in the provisions of COIDA. A determination based thereon undermines the categorisation of injuries in terms of COIDA as a means to determine the level of permanent disablement of an injured employee. In the

Healy matter, the court expressed misgivings to the application of administrative guidelines to determine the degree of disablement of an occupational injured employee finding that;

> "*[19] the administrative guidelines were applied without testing the outcome against Schedule 2 in order to ensure that there was consistency between them.*"

The court went further to state that;

> "*[21] In applying the administrative guidelines as they did, they misconceived the seriousness of the appellant's disablement and awarded compensation that was so inadequate that the award could not reasonably have been made.*"

[69] The issue was whether the Compensation Commissioner had been correct in determining the degree of permanent disablement of the appellant at 18% using the guidelines issued by the Director General. The appellant had argued that his degree of permanent disablement should have been determined at 45%. The court found that the guidelines applied did not adequately measure the degree of disablement of the employees in light of their personal circumstances. The court concluded that in applying the guidelines mechanically, the Commissioner erred in his determination of the degree of disablement of the employee and the assessment was consequently set aside as inconsistent with the provisions of Schedule 2. The court further concluded that the determination should be based on an assessment of the injured individually. It stated that the core consideration should be;

"whether and to what extent the injured employee is still useful in the labour market in the line of their employment and that the level of disablement should be assessed in that light."

[70] In *Mouton v Compensation Commissioner* 2008 JOL 22387 (C) the court found that the presiding officer had erred in assessing the disability of the appellant by merely calculating a mathematical average of the assessments of three expert witnesses.

[71] In *Pretorius v The Compensation Commissioner & Another* [2008] JOL 21550 (O) and in *Visagie NO v Vergoedingskommissaris* (2009) 30 ILJ 2366 (T) the court found that the presiding officer in the tribunal had elevated the circular instructions to the status of rigid rules that must be applied absolutely and to not have regard to all relevant information and evidence.

[72] In the *Healy* matter the court further found at para [21] that:

"In applying the administrative guidelines as they did, they misconceived the seriousness of the appellant's disablement and awarded compensation that was so inadequate the award could not reasonably have been made."

[73] The argument by the first respondent that it was entitled to determine the appellant's extent by employing the guidelines and the corresponding finding in the judgment of the third respondent fall foul of the above principles and ought to be rejected.

[74] In the matter of *Odayar v Compensation Commissioner* 2006 *IL J* 1477 (N) the court found that despite its publication in the Government Gazette, the circular

instruction remained nothing more than an internal memorandum setting out guidelines on the manner in which compensation claims relating to post-traumatic stress disorder ought to be dealt with, and that reliance on the circular which restricted the classification of post-traumatic stress disorder was a misinterpretation of the Act. The court held that the Act did not confer upon the Director-General the authority to issue regulations.

[75] It is apparent from the judgment of the third respondent that its decision and order were premised primarily on the medical assessment reports and oral evidence of the appellant by the three medical experts referred to earlier. It is further appears from the oral evidence particularly of Professor Lekgwara and in the judgment itself that the three experts had employed the Whole Person Impairment and the American Medical Association ratings as well as the circular instructions of the Director-General to determine the degree of permanent disablement of the appellant. From resultant calculations the tribunal concluded that the payments and determinations were:

> *"fair and reasonable and awarded in terms of COIDA and circular Instruction 157, were correct."*

ANALYSIS AND FINDINGS

[76] The premise of the above findings and conclusion constituted a misdirection and error of law. The tribunal had ignored the legislative provisions of COIDA providing for the mechanism to be employed in the determination of the degree of permanent disablement in occupational injuries claims and unfathomably employed models used for the determination of road accident fund claims for damages. As can be discerned from the difference in comparison of the

processing and determinations of occupational injury and RAF claims, it is impermissible and is an exercise in futility to use the prescribed methods of calculation designed for the one regime to purportedly seek to achieve the outcomes of the other. That is what the first and second respondents have done and, regrettably, accepted by the tribunal. The appeal must consequently succeed.

CONCLUSION ON MERITS

[77] It has to be concluded, therefore, that the level of permanent disablement of the appellant has not been determined by respondents in terms of the enabling provisions of COIDA. In *Pretorius v Compensation Commissioner & Another* [2008] JOL 21550 [O] the court found that the tribunal considering the appeal appellant's abjection had misconceived its role and remitted the matter to the Commissioner. I find in this matter that the respondents have impermissibly ignored the applicable provisions of COIDA and relevant medical evidence in favour of inappropriate models of determining the degree of both temporary and permanent disablement of the appellant. The respondents' employment of the provisions of an inappropriate legislative instrument and abstract formulae, was a deviation from the mandate given to them and has resulted in an absurd outcome causing an injustice to the appellant. A proper re-assessment of the appellant's level of disablement by the first and second respondents is ought to be directed and undertaken by the respondents. Thus the appellant must

succeed.

CONDONATION

[78] The judgment of the tribunal was handed down on 22 September 2016. The appellant alleges in his founding affidavit to have received the judgment on 26 September 2016. In terms Section 91(5)(a) of COIDA, any person affected by the decision of the Commissioner may appeal to any provincial or local division of the high court having jurisdiction. In terms of the rules, a notice of appeal against the decision of the Magistrate's Court has to be filed with the Registrar of the high court within 20 days of the appellant receiving the Magistrate's written judgment. The appellant, who has been representing himself, only filed a document in this court which he titled;

"*Aansoek om appel, en Aansoek om Kondonasie*" on 09 October 2017, that is, over twelve months since his receipt of the judgment of the tribunal. At para 7 of the founding affidavit under the heading "*'PURPOSE OF AFFIDAVIT*" the applicant states:

> "7. *I depose to this affidavit in support of my application for condonation of the late filing of the Notice to appeal; the filing of the Amended Notice of Appeal; and failure to prosecute the appeal timeously.*"

[79] An amended notice of appeal and application for condonation were served and filed on 07 December 2018 subsequent to the appellant finding legal representation. The principle with regard to condonation applications is that a party seeking the indulgence of the court for the failure to bring an appeal within the stipulated period has to bring its application for condonation as soon as it becomes aware of the need to do so. (see *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA

124 (A) at 129G and *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671 B – D). None of the respondents filed opposition papers to the original and or amended applications. Only at the hearing of this appeal did the first and second respondents raise opposition to appellant's application for condonation and sought a dismissal thereof with costs. The respondents were clearly opportunistic in this regard in light of the application for condonation being substantive. The opposition and grounds therefor ought to have been on affidavit and not be by way of arguments from the bar.

APPLICABLE PRINCIPLES

[80] In considering the application for condonation, it necessary to have regard to the applicable legal principles. In order to succeed, a party seeking condonation has to satisfy certain relevant yet inter –related requirements: - good cause; period of delay; explanation of the delay; prospects of success on appeal and prejudice. These requirements are dealt with in the precedent cases that follow hereunder.

[81] It is trite that an application for condonation must set out justifiable reasons for non-compliance with the time frames set out in the rules for the filling of a court process of with an order of the court or directive. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at C – F, Holmes JA stated the applicable principle thus:

> "*In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the*

case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion…."

[82] In *Foster v Stewart Scott Inc.* (1997) n18 ILJ 367 (LAC) at para 369, Froneman J stated the principle in the following terms:

"It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and a good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-366A."

[83] It follows from the above principles that while inter-related, a reasonable explanation for the delay coupled with good prospects of success on appeal enhance the chances of the success of the application for condonation. A weak explanation, but good prospects of success and /or the importance of the case will allow for the granting of an application for condonation. The exercise of

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discretionary powers in favour of granting condonation is influenced by a positive finding on the reasonableness of explanation and good prospects of success of the matter. A good explanation without prospects of success on the merits warrants a refusal of condonation.

[84] The absence of prejudice on the other party is also a consideration, particularly where the prejudice may not be cured by an order of costs. In *National Union of Mine Workers v Council for Mineral Technology* [1998] ZALAC 22 at 211D -212 at para 10, the court stated the legal position thus:

> *"The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."*

[85] I turn back to the present matter. The granting of condonation must be premised on and be in pursuit of justice. (See *Grootboom v National Prosecuting Authority*

& Another (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC).

[86] I now consider the facts upon which the appellant relies in seeking condonation for the delay in bringing this application. In his founding affidavit the appellant states that he has not been in gainful employment since his injuries in the September 2011 incident. He was hospitalised for a period of approximately forty-five days after the receipt of the judgment of the third respondent. He had not been successful in his efforts to find legal representation as a result of lack of funds. He was able to get the legal assistance of the Law Clinic of the University of Pretoria and was represented before the tribunal.

[87] The appellant was again on his own after the tribunal's judgment was handed down, having been advised by the university that it could not assist him in his appeal. He approached, but was unsuccessful when he sought assistance from Legal Aid South Africa. The appellant had approached the Pro Bono office and was referred to at least two consecutive advocates for assistance. The lack of funds still prevented him from getting assistance. In the meantime, he had continued to file appeal papers on his own. It was closer to the hearing of his appeal in 2018 that he decided on selling his motor vehicle to raise money for legal representation. He alleges to have found representation for a reduced amount of fees.

[88] The initial hearing of this appeal had to be postponed as the appellant's legal representative had found that the appellant's papers required amendments of the grounds of appeal and the application for condonation. The appellant was represented by counsel in the present hearing.

[89] In considering the application for condonation I had regard to all the facts in this case. As the outcome of this case will indicate, the appellant would not have had to come to this court had the respondents handled his claims correctly and in accordance with the provisions of COIDA. The tribunal was not of assistance either as it went on to adopt principles of no application in occupational injuries claims, which resulted in the declaration of nullity of the assessments on which its judgment was grounded. The denial of condonation to the appellant can only be a denial of justice.

CONCLUSION (CONDONATION)

[90] The mere success of the appellant in demonstrating the injustice the conduct of the respondents has caused him is sufficient for this court to grant him the condonation sought for justice to prevail. Furthermore, the efforts the appellant has made in pursuit of justice, despite his challenges resulting from the occupational injuries he sustained and, most importantly, the invalidity of the respondents' determinations of the appellant's degrees of his disablement, warrant the granting of the application for condonation so that re - assessments and proper determinations be made.

COSTS

[91] The general principle that cost follow outcome applies in this matter. It is noted that the appellant has represented himself mainly in this matter. The costs he is entitled to shall consequently be limited to those he may be able to prove over and above those of his counsel.

ORDER

[92] Resulting from the findings in this judgment, the following order is made;

1. The appeal is upheld.

2. The judgment and order of the third respondent is set aside.

3 The matter is remitted to the first and second respondents as per the conclusion in para 90, above.

4. The first and second respondents are ordered to the costs inline with para 91, above, which shall include the costs of counsel for the appellant.

M P N MBONGWE, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA.

V V TLHAPI, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 07 NOVEMBER 2022.

MATTER HEARD ON January 2022.

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