



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: AR 191/2022

In the matter between:

TREVOR ARCHAN RAMANAND

APPELLANT

and

**DEPARTMENT OF LABOUR:
COMPENSATION COMMISSIONER**

RESPONDENT

Coram: Mossop J (Smart AJ concurring)

Heard: 10 March 2023

Delivered: 14 April 2023

ORDER

On appeal from: The Tribunal of the Department of Labour: Compensation Commissioner (sitting as the tribunal of first instance):

1. The appeal succeeds.
2. The decision of the tribunal dated 4 March 2022 is set aside and substituted with the following order:
'The Objector's objection succeeds, with costs on the scale as between party and party, and the Award of Compensation dated 28 August 2019 is set aside and replaced with the following order:

(a) The Compensation Commissioner is ordered to publish to the Objector's attorneys and to his erstwhile employer, the South African Police Services, within twenty (20) days of this order, a written Superseding Award of Compensation, in favour of the Objector, in the following terms:

- (i) That his earnings for the purposes of calculating the compensation due to him remains unchanged at R25 088.48;
- (ii) That the commencement date of compensation, in the form of a monthly pension, remains unchanged at 14 January 2015;
- (iii) That the percentage of the Objector's disablement is determined at 100 percent;
- (iv) That the annual increases to the monthly pension accrues from 14 January 2015 onward.'

3. The respondent shall pay interest at the rate of 10,25 percent on the amount of compensation payable *a tempore morae* (i.e. from the date of the original award on 28 August 2019, to date of payment).

4. The respondent shall pay the costs of the appeal on the scale as between party and party, including the costs of two counsel where so employed.

JUDGMENT

MOSSOP J (SMART AJ concurring):

Introduction

[1] This is an appeal brought in terms of section 91(5)(a) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the Act).

Representation

[2] When the appeal was argued, the appellant was represented by Mr Kruger SC and the respondent was represented by Mr Sibeko. Both counsel are thanked for the assistance that they provided to the court.

The accident

[3] The appellant is a former warrant officer employed by the South African Police Service (SAPS), who had served his employer for some 25 years before a catastrophic event befell him on 14 January 2015. Whilst he was on his way to serve a protection order, he and his colleague, with whom he was on duty, were informed by a member of the public that someone was attempting to interfere with a parked motor vehicle a short distance away from where they then were. The appellant and his colleague drove to the place described to him by the member of the public and observed two men near a motor vehicle. It appeared as if they were changing the number plate on the motor vehicle. The appellant alighted from his motor vehicle and challenged the two men. One of them produced a firearm and fired two shots at him. The first shot hit the appellant on his right upper abdomen and the second shot 'whistled past his ear' and hit the windscreen of the SAPS vehicle, shattering it.

[4] According to the appellant, his life was saved by the fact that he was wearing a bullet proof vest, which assisted in absorbing the impact of the bullet that struck him. After attempting, but failing, to arrest his attackers, the appellant was taken to St Augustine's Hospital in Durban where he was treated for shock and a soft tissue injury to his abdomen. After receiving that treatment, he returned later that same day to his police station but was unable to function and was sent home. He ultimately never regained his functionality at work and in July 2016, the SAPS determined that he was unfit for further duties and his employment with it was terminated.

The appellant's condition and treatment

[5] As a direct result of the events of 14 January 2015, the appellant sought further medical treatment after he was treated at St Augustine's Hospital. On 16 January 2015, he consulted with his general practitioner, who referred him to a specialist psychiatrist, Dr Vasavan Agambaram (Dr Agambaram). Dr Agambaram diagnosed him as suffering from Post Traumatic Stress Disorder (PTSD) and treated him for that condition. In February 2015, the appellant was admitted to the M-Care Private Hospital for treatment by a multi-disciplinary team, including therapy by an industrial psychologist, Dr A Moola.

[6] The appellant did not respond well to the treatment that he received. Accordingly, in March 2015, he was admitted to Life St Joseph's Hospital for further treatment, which included a course of six electro-convulsive therapies. After his discharge from that institution, he returned to work on 1 April 2015. However, the symptoms that he experienced were exacerbated by his exposure to his former work environment and he managed only one day at work.

[7] During October 2015, the appellant sought a further opinion on his condition and consulted with a different psychiatrist, namely Dr A T Barrett (Dr Barrett), who confirmed that he was suffering from PTSD. Dr Barrett noted that the appellant had no prior psychiatric history. She found him to be significantly impaired in his functioning and proposed that he be regarded as temporarily disabled for a period of six months to assess whether his condition would improve over this period.

[8] During the same month, October 2015, the appellant saw an occupational therapist, a Ms D Pillay (Ms Pillay), who confirmed the diagnosis of Drs Agambaram and Barrett. She found that the appellant had been exposed to a traumatic event, namely the events that occurred on 14 January 2015. Ms Pillay investigated the appellant's work and medical history in some detail and ascertained that he had previously experienced a back problem which was unrelated to the symptoms that he was then

experiencing. She also confirmed that he had no prior psychological complaint.

[9] Ms Pillay prepared a thorough report on the appellant, comprising some 35 pages. He was subjected to a battery of tests by Ms Pillay. She ultimately found that there was a substantial limitation on the appellant's occupational functioning but given the recency of the stressful event relative to the date upon which she consulted with the appellant, she was not prepared at that stage to consider the appellant as being permanently disabled. She concluded that:

'It is evident that the client is afflicted with severe/extreme PTSD symptoms which are currently preventing him from adequate affective, cognitive, functional and occupational performance. It is unlikely that the client will be able to return to his former occupational performance in the short term. Prognosis for future independent skilled occupational performance within his occupational field or an alternate field can only be ascertained only [sic] after a period of six months of intensive therapeutic intervention.'

[10] Dr Agambaram, the specialist psychiatrist, also prepared a report on the appellant. In an opinion expressed in May 2019, Dr Agambaram described the appellant's prognosis as 'poor'. He concluded that the appellant had a 'total permanent disability' as a consequence of suffering from PTSD and that the appellant's condition was due to the result of the events on 14 January 2015, which he described as 'the accident'. In a further note dated 13 February 2020, Dr Agambaram stated that:

'The above has a chronic history of PTSD and is on medication. His dose has been adjusted accordingly. The above has significant social and occupational impairment. He is permanently disabled and is not able to work in the open labour market.'

This opinion was expressed approximately five years after the events of 14 January 2015.

The appellant's claim

[11] As a result of his condition, the appellant lodged a claim with the respondent in terms of section 43(1)(a) of the Act, which is the successor to the Workmen's Compensation Act 30 of 1941.

[12] On 28 August 2019, the respondent published a compensation award, without providing reasons despite a request for such reasons, in which it determined that the appellant's degree of permanent disablement was assessed at 39 percent.

[13] At the time of the events of 14 January 2015, the appellant earned a salary of R25 088.48. As a consequence of the compensation award, the appellant would accordingly receive a monthly pension of R7 337.80.

The appellant's objection

[14] The appellant lodged an objection to the award in terms of section 91(1) of the Act, which objection was heard by a tribunal (the tribunal) comprised of a presiding officer assisted by three assessors, one of whom was a medical assessor, who were appointed in terms of section 91(2) of the Act.

[15] Before the tribunal, the appellant contended that he ought to be classified as 100 percent disabled in terms of schedule 2 of the Act and not merely 39 percent disabled.

The tribunal's proceedings and decision

[16] The tribunal conducted its proceedings on the papers only and called no *viva voce* evidence. Indeed, it was, significantly noted by the tribunal that the parties:

' . . . agreed that it would not be necessary for the Applicant to give *viva voce* evidence as the facts contained in "Exhibit A" were common cause and not in dispute.'

Exhibit 'A' apparently comprised the documents relied upon by the appellant, which included all his expert's reports. The judgment went on further to record that:

'The Applicant provided reports by various experts, ie. Dr A T Barret [*sic*] ; Devindree Pillay (Occupational Therapist) and Dr V A Agambaram all of which was accepted and undisputed by the Respondent.'

[17] On 4 March 2022, the tribunal delivered the following ruling:

'It is therefore a unanimous decision of the tribunal that :-

1. The calculation of the permanent disability of the Applicant at 39% is correctly calculated;
2. The Applicant's objection is hereby dismissed with no order of costs.'

The appeal

[18] The dismissal of the appellant's objection has resulted in this appeal. Section 91(5)(a) of the Act provides as follows:

'(5)(a) Any person affected by a decision referred to in subsection (3) (a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding—

- (i) the interpretation of this Act or any other law;
- (ii) the question whether an accident or occupational disease causing the disablement or death of an employee was attributable to his or her serious and willful misconduct;
- (iii) the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;
- (v) the right to increased compensation in terms of section 56.'

The issues on appeal

[19] The issues on appeal are relatively crisp. The appellant contends that he is entitled to be regarded as being 100 percent disabled in terms of the Act.¹ In support of this submission, the appellant's notice of appeal

¹ An assessment of 100 percent disablement does not, however, mean that the appellant would be entitled to his full salary. In terms of schedule 4, such a disablement would result in him being paid a monthly pension of 75 percent of his salary calculated at the time of the accident.

sets out various grounds on which it is alleged that the tribunal erred in confirming his disablement at only 39 percent. In broad terms, two principal grounds are relied upon: firstly, it is contended that the tribunal incorrectly interpreted the Act and secondly, that the compensation ultimately awarded to him was so inadequate that it could not reasonably have been awarded. It was further contended that the tribunal was not entitled to rely on the provisions of a document that was referred to as 'Circular Instruction 172' (the circular), it being submitted that the circular aimed to override, amend or modify the provisions of the Act and is in conflict with it. Finally, it was contended that the appellant was entitled to his costs before the tribunal on the scale as between attorney and own client.

[20] The respondent, on the other hand, denies all of the above and contends that by virtue of the provisions of the circular, the appellant has correctly been assessed as being only 39 percent disabled. The monthly pension awarded to the appellant has accordingly been correctly calculated.

The circular

[21] In its judgment, the tribunal recorded that the respondent had relied upon the circular in determining the compensation to be awarded to the appellant. The circular must consequently be considered in some detail.

[22] The circular is dated 21 May 2003 and was issued under the hand of the then Director-General of Labour and was published in the *Government Gazette* on 27 June 2003.² The circular was ostensibly issued in order to clarify the position in regard to the compensation of claims arising out of PTSDs.

[23] The relevant part of the circular reads as follows:

'4.2 Permanent Disablement

² Circular Instruction Regarding Compensation for Post Traumatic Stress Disorder (PTSD), GN 936, GG 25132, 27 June 2003.

Payment of permanent disablement shall be made, where applicable, when a Final Medical Report and/or the report from the panel is received. Permanent disablement shall only be determined after 24 months of optimal treatment. The Compensation Commissioner shall calculate the permanent disablement and 100% impairment due to PTSD shall be equivalent to 65% permanent disablement whereas impairment less than 20% will not be awarded permanent disablement.'

[24] In addition, the circular provided in para 3 thereof, that inter alia, the impairment was to be evaluated using the Global Assessment Functioning (GAF) Scale.

Judicial consideration of the circular

[25] The circular has in the past been the subject of judicial scrutiny. In particular, it has enjoyed the attention of this very court. In *Odayar v Compensation Commissioner*,³ Theron J (with Hugo J concurring) found, dealing with the same circular, that:

'[16] The Act does not confer upon the Director-General of the Department of Labour the power to issue regulations. Despite being published in the *Government Gazette*, the circular is no 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.

[17] The provisions of the circular are, in fact, contrary to the provisions of the Act. In terms of s 65(1)(b) of the Act, an employee who claims compensation for an occupational disease such as post-traumatic stress disorder must prove that the disease arose "out of and in the course of his or her employment". An employee need not prove exposure "to an extreme traumatic event or stressor" as required by the circular.'⁴

[26] The circular has also been considered in *J L v Rand Mutual Assurance*,⁵ where the court stated the following:

³ *Odayar v Compensation Commissioner* 2006 (6) SA 202 (N).

⁴ *Ibid* paras 16 and 17. See also *Knoetze v Rand Mutual Assurance* [2022] 2 All SA 458 (GJ) para 57 and *J L v Rand Mutual Assurance* [2019] ZAGPJHC 392 para 48.

⁵ *J L v Rand Mutual Assurance* [2019] ZAGPJHC 392 para 48.

'The circular does not purport to be issued in terms of any provision of the Act. It purports simply to be an attitude which the Department should consider assuming in dealing with PTSD cases. If the Director-General did not have express statutory power to issue this circular, then it was barely a policy document which did not bind anyone but was a mere pointer to the preferred exercise of a discretion. The consequence, as I see it, is that the circular did not constitute subsidiary legislation and therefore, for purposes of the definition of "law" in section 1 of the Interpretation Act 33 of 1957, it did not qualify as "Any law; proclamation, ordinance, Act of Parliament or other enactment having the force of law".'

[27] Why this should be so is, perhaps, best explained by Harms JA in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*,⁶ where the learned judge succinctly stated the following regarding the status of policy determinations by bureaucratic functionaries:

'I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear.'

[28] I do not believe that the decision in *Odayar* is incorrect and I must conclude that the provisions of the circular are not binding, but remain, at best, merely an expression of its author's attitude to PTSD and how such claims should be dealt with by his functionaries.

The approach of a tribunal

[29] In hearing objections to decisions of the respondent, the tribunal does not merely play the part of an impartial referee ensuring that the rules are applied equally to each of the parties. It is required to adopt a more inquisitorial approach, and a more proactive approach, in its quest to

⁶ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7.

arrive at an equitable decision.⁷ In *Pretorius v Compensation Commissioner and another*, the court stated that:

‘The tribunal should not, like in this matter, follow a mechanistic approach. An equitable award need not be an award equal to that stipulated in the guidelines. The medical evidence, consisting of signs, symptoms and medically acceptable clinical and laboratory diagnostic techniques, as well as the subjectively quantifiable complaints of the individual should be considered. The subjective complaints of the individual must however be in synch with the medical evidence. The tribunal should exercise its discretion judiciously and not arbitrarily. It should not approve the director-general's decision without proper consideration and thereby reducing itself to a body that rubber stamps the director-general's decisions. It should set out its reasons in sufficient detail to enable the employee and if necessary the court of appeal to discern the principles used in making the assessment. The Compensation Act should not be interpreted restrictively so as to prejudice an employee if it is capable of being interpreted in a manner more favourable to him or her.’⁸

The purpose of the Act and its interpretation

[30] Mr Kruger, correctly in my view, noted in his heads of argument that the Act is an important piece of social legislation. Its purpose is to be ascertained from its preamble, namely:

‘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.’

[31] As was stated in *Davis v Workmen's Compensation Commissioner*:

‘The policy of the Act is to assist workmen as far as possible. See *Williams v Workmen's Compensation Commissioner* 1952 (3) SA 105 (C) at 109C. The Act should therefore not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.’⁹

⁷ *Pretorius v Compensation Commissioner and another* (2010) 31 ILJ 1117 (O) para 14.

⁸ *Ibid* para 15.

⁹ *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C) at 694F-G.

[32] The Act is thus essentially concerned with providing appropriate social security to employees who have suffered disablement as a result of an occupational injury or disease and its provisions are to be interpreted generously to promote this purpose.¹⁰ In addition, in *Mahlangu and another v Minister of Labour and others*,¹¹ the court stated that the Act: 'must now be read and understood within the constitutional framework of s 27 and its objective to achieve substantive equality.'

Section 27 of the Constitution guarantees everyone a right to access to social security and enjoins the State to take steps to progressively realise this right.

The uncontroverted evidence

[33] At the hearing before the tribunal, there was no dispute regarding the expert medical reports relied upon by the appellant. Neither was there any dispute about the facts of the matter. Implicit in this is that the events of 14 January 2015 are not disputed, nor is the significance of those events in the development by the appellant of PTSD. It can safely be accepted therefore that the respondent accepted that there was a single stressful event that brought upon the appellant's PTSD. In other reported cases which have dealt with PTSD it was often difficult to pinpoint a single stressful event that triggered the disorder, it being triggered by a gradual accumulation of stressors. That is not the case in this matter. It must be so that being shot at and being hit by a bullet must be an extremely frightening experience and forces one to reflect on one's mortality. That the appellant has suffered from PTSD as a consequence of his experience is not difficult to understand. The appellant's experts have confirmed this event as being the catalyst that brought on his condition.

¹⁰ *Mahlangu and another v Minister of Labour and others* [2020] ZACC 24; 2021 (2) SA 54 (CC) par 52.

¹¹ *Ibid.*

[34] It is also not disputed that Dr Agambaram found the appellant to be permanently disabled due to PTSD. This was not a decision arrived at immediately after the events of 14 January 2015. A number of years have elapsed since that day and Dr Agambaram remains of the view that the appellant is unable to compete on the open labour market. He is thus unemployable given his condition. No evidence was led on behalf of the SAPS before the tribunal and accordingly no expert medical evidence was adduced to gainsay the evidence of Dr Agambaram on this issue. The reports of the appellant's experts thus went unchallenged and Dr Agambaram's final findings remain undisturbed.

The errors of the tribunal

[35] It appears to me that in considering its judgment, the tribunal fell into the trap cautioned against in *Pretorius*. It mechanically confirmed the respondent's approach and provided no trace of its reasons for upholding the respondent's decision. It incorrectly elevated the circular to something akin to a statute and simply ratified its application to the facts of this case. It acknowledged in its judgment that the respondent had relied upon the contents of the circular to arrive at its assessment of the appellant's disablement, but did not question whether the respondent was entitled to rely on the circular.

[36] That the tribunal merely rubber stamped the decision of the respondent is evident from the fact that the calculation that generated the answer of a 39 percent disablement in respect of the appellant was not mentioned at all during the course of the tribunal's written judgment. Nor for that matter was there any indication what the GAF scale comprises and what values should be allocated in this matter using this scale. The tribunal simply found that:

'... the manner in which the permanent disability was calculated as set out in the respondent's heads of argument is plausible and given the Applicant's circumstances appears to be just and equitable.'

The heads of argument referred to in the extract mentioned above are not before this court. We do not know what was stated therein. That we are

now aware of how the calculation is to be performed arises not from the judgment of the tribunal but from Mr Sibeko's heads of argument submitted to us in advance of the appeal.¹² This, naturally, is entirely unsatisfactory.

[37] In passing, I mention that I have difficulty in understanding what the plausibility of the respondent's decision has to do with the matter. The calculation is either correct and is sustainable in law or it is not. 'Plausible' seems to me to indicate that something may have the appearance of being correct when it may not necessarily be so.¹³ It was the function of the tribunal to ascertain whether the calculation was correct in law, not that it merely appeared to be correct.

[38] On a procedural level, Mr Kruger made the following submissions about the circular:

- (a) It did not form part of the record before the tribunal;
- (b) It was not attached to the respondent's written submissions to the tribunal, nor did the respondent lay any foundation for its introduction before the tribunal; and
- (c) The tribunal was accordingly not entitled to rely on it in coming to its decision.

These submissions appear to be correct and were not refuted.

[39] In any event, so submitted the appellant, the tribunal was not entitled to rely on the circular as it offends against the Act. Relying on *Odayar*, it was submitted that the Director-General of Labour (the Director-General) lacked the power to impose the provisions of the circular. In purporting to do so, the Director-General had exceeded his powers and had acted without legal authority. Accordingly, so it was submitted, the tribunal's reliance on the circular was improper and resulted in the misinterpretation of the provisions of the Act.

¹² The equation is the following: $100\% - 40\% \text{ GAF} = 60 \times 65 = 39\% \text{ permanent disablement}$.

¹³ <https://dictionary.cambridge.org/dictionary/english/plausible>. The definition of the word 'plausible' is: 'Seeming likely to be true, or able to be believed' or 'possibly true'.

[40] It was argued by Mr Sibeko that the provisions of the circular are applicable to PTSDs and that the assessment of the appellant's permanent disablement arising out of a PTSD was correctly assessed at 39 percent. The respondent submitted that, as a PTSD is not referred to in schedule 2 of the Act, there is a lacuna in the legislation and the respondent is accordingly empowered by the Act to provide guidance on the assessment of permanent disablement arising out of a PTSD.

[41] The difference between the position of the appellant and the respondent lies in the reliance by the respondent on the provisions of the circular, which equates a 100 percent disablement arising out of PTSD to only a 65 percent total disablement. Mr Sibeko was asked to address the court on why this conversion was necessary but could not advance any reason why this conversion had been introduced. I could not independently think of any reason either.

[42] I consequently agree with the submission of counsel for the appellant that the decision of the tribunal was based upon a misinterpretation of the Act. The circular was not binding on the respondent or the tribunal and in law has no status. The Act does not permit the Director-General to override the provisions of the Act and to issue instructions that are binding upon employees. Thus an injury that renders an employee 100 percent disabled cannot by a diktat of the Director-General be transformed into a 65 percent disablement.

[43] There are other aspects of the tribunal's judgment that excite some unease. Firstly, the following is stated in the judgment:

'The applicant presented himself at the hearing as a well groomed, able bodied person without the necessity of any assistance whatsoever, be it physical OR mental, that is, a lack of following and understanding the proceedings.'

[44] From this, it appears that the tribunal relied upon the physical appearance of the appellant before it as a reason why it upheld the respondent's earlier decision. If this is true, it is a gross and severe misdirection. The condition of the appellant has nothing to do with how he looks or presents himself but has everything to do with how he functions in his chosen career. It would appear that the considered findings of the medical experts that the appellant is not able to function were discounted by this observation of the tribunal. Given the uncontroverted evidence adduced by the appellant referred to previously, there was no place for such a 'diagnosis' by the tribunal, of which only one person has a medical qualification and which person has, in any event, not professionally examined the appellant. The appellant could not have known that the tribunal would regard itself as competent to assess whether he, indeed, suffered from PTSD by the way he appeared or conducted himself and would in such circumstances not have had the ability to correct or contradict the conclusion of the tribunal based upon the consideration of such superficial criteria.¹⁴

[45] Secondly, in its judgment, the tribunal found that:

'The Applicant's Representative failed to convince this tribunal that PTSD can emanate from an "accident" which qualifies PTSD as an "occupational injury" which falls within the category of Item 6 of Schedule 2 thereby according it a 100% permanent disablement.'

The Act defines an accident as meaning 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury'.¹⁵ The tribunal appears to have lost sight of the fact that the respondent did not dispute that the events of 14 January 2015 were the trigger that brought on the appellant's condition. By accepting the expert reports, the respondent accepted the facts disclosed therein and the conclusions drawn therein. It is accordingly not clear why the tribunal needed to be convinced that the appellant's condition arose from an accident. There was no other hypothesis before it other than the

¹⁴ *Board of Education v Rice* [1911] AC 179 at 182.

¹⁵ Section 1.

appellant's that the events of 14 January 2015 were the catalyst that triggered the occurrence of the PTSD.

[46] Finally, the tribunal appears to have overlooked the fact that where possible, it should interpret the Act in a manner that is most beneficial to a claimant. The tribunal appears not to have considered the long service of the appellant in serving his employer and his community and that the compensation it confirmed as being correct was pitifully small in relation to these factors. In fact, it was so inadequate that it could be regarded as not having been reasonably awarded.

Schedule 2

[47] Having found that the circular ought not to have been applied by virtue of the facts of this matter, it is necessary to consider whether the appellant is correct in contending that he falls to be regarded as 100 percent disabled in terms of the provisions of schedule 2 to the Act.

[48] Schedule 2, like the Act of which it is a part of, must be interpreted generously so as to do justice to the employee to the extent possible within the 'give and take framework' of the Act.¹⁶

[49] Section 49(1)(a) of the Act reads as follows:

'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.'

[50] The relevant portion of schedule 2, upon which the appellant relies, reads as follows:

Injury	Percentage of permanent disablement
Loss of two limbs	100
Loss of both hands, or of all fingers and both thumbs	100
Total loss of sight	100

¹⁶ *Healy v Compensation Commissioner and another* [2008] ZAECHC 167; 2010 (2) SA 470 (E); (2009) 30 ILJ 859 (E) para 18.

Injury	Percentage of permanent disablement
Total paralysis	100
Injuries resulting in employee being permanently bedridden	100
Any other injury causing permanent total disablement	100

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

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

[53] It is so that schedule 2 was considered in *Department of Labour: Compensation Commissioner v Botha*,¹⁷ and, in particular, the provisions of the sixth classification. Nicholls JA stated the following:

¹⁷ *Department of Labour: Compensation Commissioner v Botha* [2022] ZASCA 38; (2022) 43 ILJ 1066 (SCA).

'It is inconceivable that any injury not listed in Schedule 2 should attract an award of 100% permanent disablement, irrespective of the nature of the injury. There are countless injuries which an employee may suffer in the workplace which are not listed in the Schedule. As pointed out by this Court, almost anything which unexpectedly causes illness, injury to, or death of, an employee falls within the concept of an accident. Should an injury, which is not listed in Schedule 2, befall an employee as a result of such an accident, this does not axiomatically mean that he or she is 100% disabled. The extent of the disability must be determined in light of the facts of the specific case and according to medical evidence.'¹⁸ (Footnote omitted.)

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

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

Costs

[56] Regarding the question of costs, the appellant argued that there is a duty on the State and its organs to both know the law and to apply it properly. In this instance it has not done so. It was submitted on behalf of the appellant that he has been put to the expense of this appeal and should not be out of pocket because this has occurred, it being contended that the scale of those costs should be on the attorney and own client scale. I am in agreement with all these submissions, save the scale of the

¹⁸ Ibid para 18.

costs to be awarded. In *Botha*, where the delay by the respondent in finalising the appellant's claim was described as being 'unconscionable', the Supreme Court of Appeal agreed that the appellant should not be out of pocket but only awarded costs on the party and party scale.¹⁹ I am unpersuaded that merely being incorrect attracts a punitive costs order in the absence of any mala fide conduct.

Conclusion

[57] In my view, it was undisputed that the injury sustained by the appellant arose from the stressful events that he experienced on 14 January 2015. It was thus caused by an accident contemplated by the Act. His PTSD rendered him totally unfit to continue with his employment and it was also undisputed that he was certified as being 100 percent disabled. His condition accordingly fell within the sixth classification in schedule 2 to the Act. There was accordingly no need for the respondent to rely on the circular and the fact that it did, meant that it misinterpreted the provisions of the Act. The appeal must therefore succeed.

[58] In all the circumstances, I would propose that the appeal be upheld in the following terms:

1. The appeal succeeds.
2. The decision of the tribunal dated 4 March 2022 is set aside and substituted with the following order:

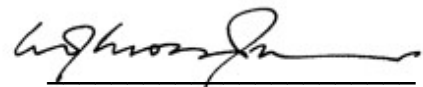
'The Objector's objection succeeds, with costs on the scale as between party and party, and the Award of Compensation dated 28 August 2019 is set aside and replaced with the following order:

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

(i) That his earnings for the purposes of calculating the compensation due to him remains unchanged at R25 088.48;

¹⁹ *Department of Labour: Compensation Commissioner v Botha* [2022] ZASCA 38; (2022) 43 ILJ 1066 (SCA) para 22.

- (ii) That the commencement date of compensation, in the form of a monthly pension, remains unchanged at 14 January 2015;
 - (iii) That the percentage of the Objector's disablement is determined at 100 percent;
 - (iv) That the annual increases to the monthly pension accrues from 14 January 2015 onward;'
3. The respondent shall pay interest at the rate of 10,25 percent on the amount of compensation payable *a tempore morae* (i.e. from the date of the original award on 28 August 2019, to date of payment).
4. The respondent shall pay the costs of the appeal on the scale as between party and party, including the costs of two counsel where so employed.

**MOSSOP J**

I agree:

SMART AJ**APPEARANCES**

Counsel for the appellant : Mr. P. Kruger SC
Instructed by: : Cornelius Boshoff Attorneys
Locally represented by:
Tatham Wilkes Incorporated
200 Hoosen Haffejee Street
Pietermaritzburg

Counsel for the respondent : Mr V. G. Sibeko
Instructed by : The State Attorney
Second floor, Magistrate's Court
Building
302 Church Street
Pietermaritzburg

Date of Hearing : 10 March 2023

Date of Judgment : 14 April 2023