THE SUREME COURT OF APPEAL

In the matter between:

THE WORKMEN'S
COMPENSATION COMMISSIONER APPELLANT

and

SUZANNA JOOSTE RESPONDENT

CORAM: HEFER, SMALBERGER, MARAIS, SCHUTZ et

ZULMAN JJA

HEARD: 22 MAY 1997

DELIVERED: 29 MAY 1997

JUDGMENT

SMALBERGER JA…

SMALBERGER JA:

This is an appeal, with the necessary leave, against a decision of a full bench of the former Cape of Good Hope Provincial Division (Friedman JP and Van Zyl J). The appeal concerns the interpretation of certain provisions, and in particular sections 89 and 94, of the now repealed Workmen's Compensation Act 30 of 1941 ("the Act").

The relevant facts are common cause. They are set out accurately and succinctly in the judgment of the court a quo as follows:

> "From 4 October 1989 until 4 March 1992 Sanna [Suzanna] Jooste (the respondent), who was a workman as defined in Section 3 of the Act, was employed by Tygerberg BMW Coachworks in the spray-painting department. Towards the end of 1991 she started experiencing chest-tightness and difficulty in breathing. She saw a number of general practitioners. After presenting [with] a particularly severe episode of bronchospasm, her general practitioner issued a certificate on 4 March 1992 putting her off work for six months. She was referred to the Respiratory Clinic at the Groote Schuur Hospital where she was seen for the first time on 22 June 1992. Dr White, a specialist in respiratory

> diseases attached to the Respiratory Clinic, diagnosed the condition as sensitisation to workplace chemicals, probably isocyanates, and that she was suffering from occupational asthma. She returned to work after six months, but her employer refused to take her back as it was feared that because of her condition she would be unable to continue working in the spray-painting department and there was not other work available. Her employment was consequently terminated in or about September 1992. Since that date she has not been engaged in employment which qualifies her [as] a workman as defined in the Act."

When the respondent contracted occupational asthma, it was not a scheduled disease in terms of the Act. Nor was it such at the time when she ceased to be a workman in terms of the Act. It became a scheduled disease with effect from 1 January 1993 when the responsible Minister, in terms of Government Notice 3311 of 11 December 1992 ("the Government Notice"), and by virtue of the power vested in him in terms of section 94(2) of the Act, amended the Act by adding "occupational asthma" to the list of occupational diseases in the Second Schedule.

Arising from these facts, a claim for compensation was submitted on 12 February 1993 to the appellant ("the Commissioner") on the respondent's behalf in terms of the Act. On 2 July 1993 the respondent was informed that her claim had been rejected. She duly lodged an objection to the Commissioner's decision in terms of section 25 (2) (a) of the Act. The objection was heard in March 1994, and was dismissed on 17 October 1994. The respondent appealed to the court a quo in terms of section 25 (7)(b) of the Act against such dismissal. Her appeal was upheld with costs, and the court ruled that "[she] is entitled to compensation calculated on the basis that the date of her disablement for employment is 4 March 1992." It is against this order that the present appeal lies.

Argument in the court a quo centred on two main issues. In regard to the first, the court came to the conclusion that the provisions of section 89 of

the Act did not "preclude a claim by a person who, while he was a workman, contracted an industrial [scheduled] disease as a result of which he became disabled for employment and ceased to be a workman". In other words, it is not a prerequisite for a successful claim for compensation that the claimant should still be a workman at the time when the claim for compensation is made. This conclusion, which in my view was correct, essentially for the reasons given by the court a quo, was not challenged on appeal.

In respect of the second issue, the court held that it was no answer to the respondent's claim that she was no longer a workman as defined when occupational asthma was added to the list of scheduled diseases because

> "on a proper construction of the Government Notice, read with section 94, a workman who became disabled for employment and who ceased to be a workman by reason of having contracted industrial [occupational] asthma, became entitled, as from 1 January 1993, to claim the benefits provided by the Act in respect of occupational diseases."

This finding is the focus of the present appeal.

A workman's right to compensation in respect of a scheduled industrial disease arises from section 89 of the Act, the relevant part of which reads:-

> "Where it is proved to the satisfaction of the commissioner in such manner as he may determine that the workman is suffering from a scheduled disease due to the nature of his occupation and is thereby disabled for employment, or that the death of the workman was caused by such disease, the workman shall be entitled to compensation as if such disablement or death had been caused by an accident..."

(In terms of section 2 of the Act a "scheduled disease" means "any disease specified in the Second Schedule to this Act", and "disablement" means "disablement for employment or permanent injury or serious disfigurement"; section 3(1)(c) provides that a "workman" includes "when a workman is dead or under disability, his representative, his dependants and any other person to whom or for whose benefit compensation is payable.")

It is apparent from the clear wording of section 89 that in order to found

a right to compensation the claimant must establish that he or she is (1) a workman, (2) suffering from a scheduled disease, (3) due to the nature of his or her occupation, and (4) as a result thereof disabled for employment. With regard to (3) and (4), it is common cause, as I have mentioned, that the respondent, due to the nature of her occupation, suffered from occupational asthma, which was diagnosed in 1992, and that as a consequence she was disabled for employment from September 1992. It remained for her to establish (1) and (2). In my view it is inherent in the section that on the facts of this case it would have required proof that she was a workman when she contracted the disease and remained one until the time of her disablement. (I leave open the question of whether a person in the respondent's position who had became a workman after contracting a scheduled disease, but the nature of her occupation had caused an aggravation of such disease to the point of

disablement, would not also qualify for compensation - cf Workmen's Compensation Commissioner v Van Zyl 1996(3) SA 757 (A).) It seems equally clear that the disease had to be a scheduled one and that the respondent's status as a workman and the existence of such disease had to coincide. The section provides in explicit terms that a workman is only entitled to compensation if he or she is suffering from a scheduled disease. Consequently, a person who is not a workman, or is no longer a workman, when he or she first suffers from a scheduled disease, or a person who ceased to be a workman by reason of disablement caused by a non-scheduled disease, would not be entitled to compensation. Up to the time that the respondent ceased to be a workman in September 1992 occupational asthma was not a scheduled disease. When the Minister, with effect from 1 January 1993, amended the Second Schedule by adding occupational asthma to it, the respondent had ceased to be a workman.

Prima facie, therefore, the respondent failed to satisfy all the requirements of section 89 entitling her to compensation. She could only hope to be successful if the amendment to the Second Schedule by the addition of occupational asthma was retrospective.

Although the court a quo did not specifically say that the amendment operated retrospectively, that was the effect of its judgment and order. For there to be the required coincidence between the respondent's position as a workman and the existence of occupational asthma as a scheduled disease it was necessary for the amendment to became operative as of a time prior to its coming into effect on 1 January 1993, so that the law at the relevant time would be taken to be what it was not (Van Lear v Van Lear 1979(3) SA 1162 (W) at 1164 E). One is not here dealing with the ambit and scope of the relevant legislative enactments, but rather with the question from when the amendment

brought about by the Government Notice is taken to be the law. This is retrospectivity in the true sense (Adampol (Pty) Ltd v 1989(3) SA 800 (A) at 811 A-H). (While it may be more accurate in the present instance to speak of the amendment as "retroactive" - see Devenish: Interpretation of Statutes at 188 - I purpose, because of the use of the word "retrospective" in section 94(1) of the Act, to continue to use that word, in the interests of consistency.)

Section 94 of the Act, leaving aside the proviso in subsection (2), reads as follows:

> "(1) After carrying out such investigation as he deems necessary the commissioner may recommend to the Minister the addition to or deletion from the Second Schedule of any disease or occupation: Provided that the commissioner may recommend that any such addition be of retrospective effect from a specified date.
>
> (2) The Minister may, by notice in the Gazette, amend the said Schedule in accordance with any such recommendation..."

Having regard to what is stated in section 94(1), the Government Notice would have been preceded by an investigation by the Commissioner followed by a recommendation by him that occupational asthma be added to the Second Schedule. The obvious and underlying intention in giving effect to such recommendation and amending the Schedule was to confer a right to compensation in respect of disablement caused by a disease which had not previously given rise to such a right. It was sought to achieve this by extending the category of workers entitled to benefits under the Act to include those who became disabled for employment as a result of suffering from occupational asthma. Although the Government Notice expressly provides for the addition of occupational asthma to be "as from 1 January 1993" the question remains whether, as from that date, it also applied retrospectively to former workers who had ceased to be such through being disabled by occupational asthma (as

well as the dependants of deceased workers), and who otherwise would not have had a claim for compensation under the Act. I am mindful of the fact that the Act should, where the situation permits, be interpreted, not restrictively, but broadly in the manner most favourable to the workman (Davis v Workmen's Compensation Commissioner 1995(3)SA 689 (C) at 694 F - G). To the extent that the Government Notice is remedial in effect, the remedy it seeks to promote should be extended as far as principle and the language of the relevant enactments reasonably permit (Looyen v Simmer & Jack Mines Ltd v Another 1952(4) SA 547 (A) at 554 C). But that does not mean that other well-recognised canons of construction should be disregarded in the search for the legislature's intention. They must be accorded due weight and, ultimately, may be decisive.

There is at common law a prima facie rule of construction that a statute

(or any amendment or legislatively authorised alteration thereto) should not be interpreted as having retrospective effect (National Iranian Tanker Co v MV Pericles GC 1995(1) SA 475 (A) at 483 H; Protea International (Pty) Ltd v Peat Marwick Mitchell & Co 1990(2) SA 566 (A) at 570 B - C). The presumption against retrospectivity arising from this rule may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration (Lek v Estate Agents Board 1978(3) SA 160 (C) at 169 F - G). In an appropriate case the language of the enactment, far from rebutting the presumption, may fortify it.

There is nothing in the express provisions of the Act or the Government Notice making the amendment brought about by the latter retrospective, notwithstanding the fact that the Minister had the power in terms of section 94(1), on the recommendation of the Commissioner, to make it so. Nor are

there any compelling indications from which retrospectivity can be implied. The fact that far from excercising his powers in that regard the Minister did quite the opposite and stipulated instead that the amendment would take effect only from a future date, fortifies the conclusion that the addition of occupational asthma to the Second Schedule was neither recommended, nor intended, to be retrospective. The prior investigation would no doubt have revealed whether there was a need to make the addition retrospective, and what the financial implications would be.

If any addition to the list of scheduled diseases must be taken to be fully retrospective irrespective of whether or not the Minister expressly made it so, what purpose is served by empowering the Commissioner and the Minister to determine the extent, if any, to which it is to be retrospective? None, it would seem. If it be suggested that the purpose of so doing is to allow them to temper

what would otherwise be fully and unlimited retrospective operation, such a view would effectively turn the power inherent in section 94 on its head. Instead of the section being read in accordance with its ordinary meaning as providing a discretionary power to decree retrospectivity, it would have to be read as a power to restrict retrospectivity to a specified date in the past. If that is what was intended, the language chosen to convey such intention is singularly ill-chosen. The Commissioner is not empowered by section 94(1) to recommend a limit to what would otherwise have been a fully retrospective operation by an addition to the list of diseases. He is empowered to recommend that an addition which would otherwise have had only prospective operation, should have retrospective operation. Another consequence of retrospectivity would be to render nugatory (because of the coming into effect of the provisions of section 7) any common law rights a workman may

otherwise have had against his employer in respect of any disablement arising from occupational asthma. Although the financial circumstances of workmen may militate against the enforcement or attempted enforcement of such rights, they nonetheless remain real and are not merely illusory. This is a further reason not to infer retrospectivity too readily. The court a quo does not appear to have given due weight to these considerations, which in my view are conclusive indicators that the amendment was not intended to be retrospective. One of the arguments advanced on behalf of the Commissioner both before us and in the court a quo was that if the Government Notice were to act retrospectively it would throw open the floodgates, not only to claims by erstwhile workers who had been disabled by occupational asthma before the Second Schedule was amended, but also by dependants of deceased workmen, perhaps even as far back as the Act's inception, there being no limit to the

period of retrospectivity. It could hardly have been the Legislature's intention

to permit that and allow claims on an unlimited scale. The court a quo sought

to counter this argument with reference to what it considered to be the limiting

provisions of sections 50 and 54 of the Act. It reasoned as follows:

> "Section 54, read with section 50, provides that no claim shall be entertained unless it is lodged with the Commissioner within six months after the date of the accident. According to the proviso to section 54(3) the right to benefits under the Act shall lapse if the accident does not come to the notice of the Commissioner within twelve months of the date of the accident. Applied to an industrial disease the period of twelve months would be reckoned from the date of disablement for employment which may be fixed by the Commissioner in terms of section 91 as the date of the 'accident'. Consequently only those persons whose date of disablement is fixed as being during the period of twelve months preceding 1 January 1993, would be entitled to claim."

What the court a quo appears to have overlooked is that a failure to claim

within the six month period prescribed by section 54(1) is, in terms of section

54(3), subject to the provisions of section 50(l)(b)(ii) which apply mutatis

mutandis. The effect thereof is that a failure to claim will not bar the right to compensation if such failure was occasioned "by mistake, absence from the Republic or other reasonable cause". The fact that no claim could have been made previously because occupational asthma was not a scheduled disease would no doubt constitute "reasonable cause". Furthermore, the proviso to section 54(3) provides that

> "the right to benefits under this Act shall lapse if the accident [for 'accident' read 'disablement' or 'death'] does not come to the notice of the employer or of the commissioner or of the mutual association (if any) responsible for the payment of those benefits, within 12 months of the date of the accident."

In most or many instances the employer would be aware of the workman's disablement, and almost certainly his death, and the cause thereof. Consequently the right to benefits will not necessarily lapse as envisaged by the court a quo. (I leave open the question of whether a right to benefits could

have "lapsed" ("verval") when no such right existed prior to the amendment of the Second Schedule.) It follows that if the Government Notice had retrospective operation section 54 read with section 50 would not necessarily limit the period of retrospectivity in the way suggested by the court a quo, and thus not preclude a result which the legislature could never have intended and would never have countenanced. But even if the sections did have a limiting effect that in itself could not detract from the other compelling arguments against retrospectivity.

The court a quo further held that:

> "If the Government Notice were to be construed in the manner contended for on behalf of respondent [appellant], it would mean that a workman who became disabled for employment on account of industrial [occupational] asthma and who, because of such disablement, was no longer able to work and ceased to be a workman in, say, December 1992, would be deprived of the benefits envisaged by the addition of industrial [occupational] asthma to the Second Schedule as from 1 January 1993. To place such an interpretation on the Government Notice

would be prejudicial to a workman in the position in which appellant [respondent] found herself and could not, in my view, have been the intention of the Minister who issued the Government Notice."

In the absence of a pre-existing right the consequences alluded to could not be prejudicial to the respondent, but it cannot be gainsaid that they would, in a sense, operate unfairly against her. In a situation such as the present where an amendment has been brought about there must necessarily be a cut-off point or determining date where those who fall short of it are unfortunate and those who go beyond it favoured. This is an inevitable consequence where rights may only be enforced from or after a certain date but not before. It does not, per se bear on the question of retrospectivity (cf Adampol (Pty) Ltd v Administrator, Transvaal (supra) at 812 H).

In my view the amendment brought about by the Government Notice is not retrospective in effect. When it came into operation on 1 January 1993,

and occupational asthma became a scheduled disease, the respondent had ceased to be a workman. The underlying requirement for a valid claim inherent in section 89, that she be a workman and simultaneously suffer from a scheduled disease (occupational asthma) is lacking. It follows that she is not entitled to compensation under the Act.

The result is an unfortunate one for the respondent and one cannot but help having sympathy for her. But any other conclusion flies in the face of what I conceive to be the clear intention of the legislature as expressed in the relevant provisions of the Act read with the Government Notice.

The following order is made:

1) The appeal is allowed, with costs.

2) The order of the court a quo is set aside and there is substituted in its stead the following:

"Appeal dismissed with costs".

J W
SMALBERGER
JUDGE OF APPEAL

HEFER JA)
MARAIS JA)
SCHUTZ JA)
ZULMAN JA)CONCUR