THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 326/2020

In the matter between:

DEPARTMENT OF LABOUR:
THE COMPENSATION COMMISSIONER **APPELLANT**

and

ROEBEL STEPHANUS BOTHA **RESPONDENT**

Neutral citation: *Department of Labour: The Compensation Commissioner v Botha* (Case no 326/2020) [2022] ZASCA 38 (04 April 2022)

Coram: PETSE DP and SCHIPPERS, NICHOLLS and CARELSE JJA and MEYER AJA

Heard: 17 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be at 12h00 on 04 April 2022.

Summary: Labour law – Compensation for Occupational Injuries and Diseases Act 130 of 1993 – whether injury on duty resulted in disablement – extent of permanent disablement and compensation payable – remittal to tribunal for determination.

ORDER

On appeal from: North Gauteng Division of the High Court, Pretoria (Leso AJ and Baqwa J, sitting as court of appeal):

1 The appeal and the cross-appeal succeed in part.

2 The order of the court a quo is set aside and replaced with the following order:

‘(a) The decision of the Tribunal is set aside and it is declared that the appellant is entitled to compensation as envisaged in s 22(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, as amended (COIDA).

(b) This matter is remitted to a Tribunal constituted in terms of s 91(3) of COIDA for a decision on the appellant’s degree of disablement as a result of the accident on 26 January 1998.

(c) The Tribunal shall finalise this matter within six (6) months of the date of this order, including a calculation of the amount of compensation payable to the respondent.

(d) The respondent shall pay the costs of the appeal, which costs shall include the costs of two counsel, where so employed.

3 The appellant shall pay the costs of the appeal and cross-appeal, which costs shall include the costs of two counsel.

JUDGMENT

Nicholls JA (Petse DP and Schippers and Carelse AJJA and Meyer AJA concurring):

[1] This appeal concerns a claim in terms of the COIDA by a claimant who was injured while on duty, 24 years ago. COIDA was introduced as social legislation to provide for compensation for disablement or death caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.[1] It is a system of no-fault compensation which relieves the employee of having to prove negligence, simultaneously relieving the employer, on payment of contributions to the Compensation Fund, of the eventuality of an expensive damages claim. COIDA has 'a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large'.[2]

[2] The appellant, the Compensation Commissioner (the Commissioner), has appealed against a judgment of the North Gauteng Division of the High Court, Pretoria (Leso AJ with Baqwa J concurring) (the high court), sitting as a court of appeal, in terms of s 91(5) of COIDA. The high court reversed the decision of a Tribunal, set up in terms of s 91(3) of COIDA, not to award any compensation to Mr Roebel Stephanus Botha (Mr Botha), the respondent. It granted an order setting aside the decision of the Tribunal and declaring Mr Botha to be 60% permanently disabled. The Commissioner was ordered to calculate the amount owing to Mr Botha within 30 days of the order. No order was made as to costs.

---

[1] Preamble to COIDA.
[2] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) para 9.

[3] Mr Botha filed a cross-appeal against the high court's order that he was 60% permanently disabled, and the costs order. He contended that although correct in upholding his appeal, the high court erred in determining that he was 60% permanently disabled. He contends that he is 100% permanently disabled and should not, in any event, have been deprived of his costs as he was substantially successful. Special leave to appeal was granted by this Court in two separate applications, in respect of the appeal as well as the cross-appeal.

[4] Mr Botha's right to compensation arises out of s 22(1) of COIDA, which provides that '[i]f an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act'. The jurisdictional requirements for compensation under s 22(1) are as follows: (i) the person must be an employee as defined in COIDA; (ii) she or he must have been injured, contracted a disease, or died in an accident as defined in COIDA; (iii) the accident must have occurred in the course and scope of the employment; and (iv) the accident must have been the cause of the injury and resultant disablement suffered by the employee.

[5] It is common cause that most of the requirements of s 22 have been met. It is not disputed that Mr Botha was an employee as defined in COIDA. Nor is it disputed that he injured himself in an accident whilst on duty. It is not contended that Mr Botha is excluded on any administrative grounds of non-compliance with the provisions of COIDA. Importantly, it is not disputed that he is permanently disabled and has been unfit to work since the accident. Mr Botha is therefore entitled to compensation in terms of s 22 of COIDA, if he can show that the accident resulted in his disablement.

[6] The central issue in this appeal is whether there is a causal connection between the accident that occurred whilst Mr Botha was on duty and the permanent disability which he, admittedly, suffers. What gives rise to this inquiry is the Tribunal's finding that, in light of Mr Botha's pre-existing medical conditions at the time of the accident, the medical evidence does not show that Mr Botha's permanent disablement was caused by the injury he suffered on duty.

[7] On 26 January 1998, a police motor vehicle in which Mr Botha was a passenger, collided with a mini-bus taxi while giving chase to a suspect. As a result of the collision he suffered a whiplash injury and muscle spasms. He resumed work the following day, 27 January 1998, and on the same day was treated by Dr Griesel, who found him unfit to work.

[8] In order to contextualise the extent of the injury he suffered on 26 January 1998, it is necessary to delve into Mr Botha's medical history. This is complicated by a dearth of medical evidence documenting exactly what occurred, and the date thereof. From the limited records, the following can be gleaned:

(a) In 1995 or 1996 (according to both a psychologist's report and an occupational therapist's report dated in May 2012), Mr Botha suffered a neck injury while training for the South African Police Service specialised police reaction force. He was in severe pain and reported the injury to the training instructor, but did not lodge a claim with the Commissioner in respect of this incident. The consequences were severe – he began losing balance, experienced weakness in his legs, headaches, frequent urination, and stiffness in both hands. He was diagnosed as having had a spinal stroke.

(b) On 3 November 1997, a letter from a neurosurgeon, Dr Daan de Klerk, states that Mr Botha has an 'interesting history . . . the left leg is weakening. He is becoming cripple, but no pain'. The MRI is reported to have shown that there was a gross disc prolapse at C5-6 and degeneration at L4-5 vertebrae. The greatest

problem was ‘his extremely narrow canal and serious compression of the cord and the MR already reflect[ed] central changes in the chord’.

(c) On 4 November 1997, Mr Botha underwent his first spinal fusion. Dr de Klerk noted the presence of ‘massive osteophytes’ as well as ‘midline pressure’. According to the occupational therapist Mr Botha complained that he was allowed only one month off work. This meant that he returned to duty without having properly recuperated.

(d) Less than 3 months later, on 26 January 1998, the motor vehicle collision, which is the subject of this claim, occurred. It is not clear exactly what Mr Botha’s state of health was at this time. Dr Griesel, who saw him the following day, found him unfit to work due to ‘whiplash injury (soft tissue), muscle spasms: neck, shoulders, arms and L leg’. This finding was confirmed by Dr Griesel in other medical reports in terms of COIDA during 1998.

(e) In March 1998, only two months after the accident, Mr Botha underwent his second cervical spine fusion operation.

(f) A follow up examination with Dr de Klerk on 21 January 1999 records that Mr Botha had stabilised, but his foot remained a problem.

(g) On 22 September 1999, he consulted a neurologist, Dr Bhagwan, who reported that Mr Botha indicated that he had ‘a 2 year history of numbness in the upper limbs precipitated by abducting his shoulders. He is presently walking with the aid of one elbow crutch and this he has been doing since 26 January 1998. He also experiences a burning sensation in his lower back and has spasms in the right lower limb and right upper limb’. He was assessed as having ‘left C5/6 myeloradiculopathy’ and ‘severe hypercholesterolaemia’. As the date of the injury on duty is incorrectly recorded as being on 27 January 1998, it is not clear if Mr Botha was using the crutch before the motor vehicle collision or afterwards.

(h) On 22 March 2000, Dr Griesel completed a medical report in terms of COIDA in which he concluded that Mr Botha was permanently incapacitated and his condition had not stabilised.

(i) There are no available medical records from 2000 until 2011 when it is recorded that Mr Botha had undergone three ankle fusion procedures and the excision of the coccyx.

(j) On 31 January 2011, Dr Rossouw completed a medical report in terms of COIDA in which he found Mr Botha 80% physically impaired and 50% intellectually impaired. A follow up report by Dr Rossouw on 18 October 2011 concluded that he had 80% loss of function, 30% psychological loss, and 60% whole body impairment; he would never work again; his condition had not stabilised and was progressive; and he may require further corrective surgery. Reference was made to triple arthrodesis on the left ankle and excision of the coccyx.

(k) On 15 May 2012 and 20 May 2012 respectively, Dale Davidson, a clinical psychologist, and Ms P Naidu, an occupational therapist, provided reports setting out Mr Botha's disability in their respective fields. The extensive report of Ms Naidu provided a detailed overview of his disability and concluded that as a result of the injury at work and the subsequent surgeries his disabilities were of a permanent nature.

(l) On 7 August 2012, Dr Rossouw found that Mr Botha was permanently unfit for work and that his condition would progressively deteriorate – the issue was not loss of movement but loss of strength.

(m) The final medical report in terms of COIDA was that of Dr Basson, dated 15 August 2013, wherein he certified that the injuries were the result of the accident and found that Mr Botha's condition had not stabilised and that he was unfit for work. He also noted the anatomical defects as being on the neck and the ankle, with a loss of movement.

[9] Despite the above, and contrary to the findings in the medical reports, the Commissioner wrote to Mr Botha on 31 January 2014 refusing an award for compensation on the basis that Dr Rossouw had found that he suffered no

permanent disability as a result of the accident. However, this was factually incorrect, as Dr Rossouw had stated in his report that Mr Botha was permanently incapacitated.

[10] The refusal prompted Mr Botha to lodge an objection in terms of s 91(3) of COIDA. The Tribunal set up in terms of COIDA dismissed the objection. The reasons provided were that Mr Botha had a pre-existing injury to the neck which had resulted in a C4-C6 cervical fusion. The whiplash injury sustained in the motor vehicle accident had aggravated the pre-existing injury, which led to another fusion in exactly the same place. Reference was made to a report by Dr Basson on 22 September 1999 (this was clearly meant to refer to Dr Bhagwan's report dated 28 September 1999), in which it was recorded that Mr Botha had been on crutches for a two-year period prior to the consultation. As Mr Botha consulted with Dr Bhagwan on 22 September 1999, this period must have commenced in 1997 before the injury on duty took place on 26 January 1998, so reasoned the Tribunal. In addition, Mr Botha had had surgery to his left ankle in 1999, which was unsuccessful, as well as three operations in 2011. There was no medical report which linked the arthrodesis of the left ankle and big toes and the C5-6 myeloradiculopathy to the on-duty motor vehicle accident. The tribunal concluded, in light of the above, that Mr Botha was unable to rebut the conclusion of the Commissioner that he suffered from pre-existing 'degenerative spon[d]ylotic changes with end plate osteophytosis and disc space narrowing throughout his lumbar spine'.

[11] The high court set aside the Tribunal's decision and declared that Mr Botha was 60% permanently disabled. It ordered the Commissioner to calculate the amount payable to Mr Botha within 30 days. No reasons were given by the high court for its finding of 60% permanent disablement.

[12] On appeal to this Court, it was argued by counsel for the Commissioner that, in light of his previous health problems, Mr Botha had not shown that the injury he suffered in the accident on 26 January 1998 resulted in his permanent disablement. Put differently, Mr Botha had failed to prove on a balance of probabilities that the cause of his permanent disablement was the injury he sustained on duty. It was correctly, and very fairly, conceded by counsel for the Commissioner that the appropriate and equitable course of action would be to refer Mr Botha for a further medical examination. The purpose would be to consider whether the accident on duty aggravated his pre-existing medical condition to the extent that it rendered him permanently disabled.

[13] The first inquiry is whether any causal link has been established. In *Basson v Ongevallekommissaris*,[3] an employee with a pre-existing back injury had an accident while on duty. Concerning the causal connection between the injury and the disablement, the court held that it was not required that the injury suffered by the employee should be exclusively as a result of the accident. It was sufficient that it be a 'contributing factor' to the injury. The court therefore held that the Commissioner would still be liable if the pre-existing condition was exacerbated by the accident, rendering the employee incapacitated, in that but for the accident, the employee would not have suffered the injury presently complained of.

[14] On the facts before this Court, it is clear that the whiplash injury exacerbated the pre-existing injuries. Drs Griesel, Rossouw and Basson all certified, in the medical reports submitted in terms of COIDA, that they were satisfied that the injury had been caused by the accident. The tribunal itself found that the 'whiplash injury aggravated the pre-existing neck injury and affected the

[3] *Basson v Ongevallekommissaris* [2000] 1 All SA 67 (C).

fusion on levels C4-C6'. A causal link has thus been established between the injury suffered on duty and the permanent disablement of Mr Botha.

[15] This leads to the second inquiry, which is to what extent the pre-existing injury contributed to his permanent disablement. This is impossible to establish on the medical records before this Court. What is however apparent from the evidence is that Mr Botha has suffered permanent disablement. This has had a devastating impact on his quality of life and there is no doubt that he should be compensated for this. The question is the extent of his disablement and how his previous medical history impacted on his permanent disablement.

[16] Compensation for permanent disablement is regulated by s 49 of COIDA, which provides:

'(1)*(a)* Compensation for permanent disablement shall be calculated on the basis set out in items 2, 3, 4 and 5 of Schedule 4 subject to the minimum and maximum amounts.

(2)*(a)* If an employee has sustained an injury set out in Schedule 2, he shall for the purposes of this Act be deemed to be permanently disabled to the degree set out in the second column of the said Schedule.

(b) If an employee has sustained an injury or serious mutilation not mentioned in Schedule 2 which leads to permanent disablement, the Director-General shall determine such percentage of disablement in respect thereof as in his opinion will not lead to a result contrary to the guidelines of Schedule 2.

(c) If an injury or serious mutilation contemplated in paragraph *(a)* or *(b)* has unusually serious consequences for an employee as a result of the special nature of the employee's occupation, the Director-General may determine such higher percentage as he or she deems equitable.'

[17] Counsel for Mr Botha argued that in terms of the deeming provisions of s 49(2)*(a)* read with Schedule 2 of COIDA, Mr Botha is 100% disabled. That section deems as permanently disabled, to the degree set out in Schedule 2, an employee who has sustained an injury identified therein. The severity of the

injury is determined with reference to Schedule 2, which then attributes a percentage of disability as a result of the injury. Schedule 2 lists the injuries in the first column and the percentage of permanent disability allocated to each injury in the second column. The injuries primarily relate to the loss of a body part, such as a limb, toe, finger, eye, and loss of sight or hearing. In addition, the Schedule provides for 100% permanent disability for certain injuries, such as total paralysis. It is the sixth item in the first column on which counsel for Mr Botha relies. This provides that if an employee suffers any injury not listed in the Schedule which leads to permanent total disablement, she or he will be deemed to be 100% disabled. It is on this basis that it is contended that Mr Botha is 100% disabled. Given his incapacity, it is argued, the high court misdirected itself, with reference to Schedule 2, by declaring Mr Botha to be 60% disabled.

[18] This argument is devoid of merit. 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,[4] 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.

[19] Further, this argument ignores s 49(2)*(b)*, which grants the Director-General a discretion to determine a percentage of permanent disablement for a serious injury not provided for in Schedule 2. The section specifically states that

[4] *Churchill v Premier, Mpumalanga and another* [2021] ZASCA 16; [2021] 2 All SA 323 (SCA); [2021] 6 BLLR 539 (SCA); 2021 (4) SA 422 (SCA) para 14.

the result should not be contrary to the guidelines set out in Schedule 2. In applying these guidelines, courts have cautioned against applying a mechanical approach to Schedule 2.[5] It should also be borne in mind that the schedules are no more than a set of administrative guidelines issued by the Director-General to assist decision-makers exercising powers in term of COIDA.[6] Where the injuries have not been listed in Schedule 2 it has not been the approach of the courts to invoke the deeming provision. Rather, Schedule 2 has been used as a guideline in determining what is fair and reasonable compensation once the extent and nature of the permanent disablement has been established by the relevant medical experts.[7]

[20] In the particular circumstances of this case and in the absence of any evidence to that effect, there is no option but for the Commissioner to obtain further medical reports, detailing the extent to which the pre-existing injuries were the cause of Mr Botha's current permanent disablement. Once these have been procured the Tribunal should determine the compensation payable with the benefit of proper medical evidence. In coming to its decision, the Tribunal should bear in mind that employees should be assisted as far as possible and any interpretation should be to the benefit of the employee.[8]

[21] Cognisant that Mr Botha was injured 24 years ago, and submitted his claim for compensation in August 1998, strict time limits are to be imposed on the Tribunal to make its determination. The delays in finalising his claim are

---

[5] *Healy v Compensation Commissioner and Another* 2010 (2) SA 470 (E) paras 19 and 21.
[6] Ibid para 2 where the court held that a knee injury not included in Schedule 2 rendered the employee 45% permanently disabled as opposed to the 18% determined by the Tribunal.
[7] *Odayar v Compensation Commissioner* 2006 (6) SA 202 (N); (2006) 27 ILJ 1477 (N); *Urquhart v Compensation Commissioner* [2005] ZAECHC 32; [2006] All SA 80 (E); [2006] 1 BLLR 96 (E); *Compensation Commissioner v Georgia Badenhorst* [2022] ZAECHC 1 (E); *Pretorius v The Compensation Commissioner and Another* [2007] ZAFSHC 128 (FB); *J L v Rand Mutual Assurance* [2019] ZAGPJHC 392 (GJ).
[8] *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C) 694F-G; *Urquhart v Compensation Commissioner* [2006] 2 All SA 80 (E); 2006 (1) SA 75 (E) 84A-C; *Pretorius v The Compensation Commissioner and Another* [2007] ZAFSHC 128 (FB) para 15.

unreasonable, egregious and unexplained. There is no reason why medical reports setting out as accurately as possible the extent to which the accident on duty contributed to Mr Botha's permanent disablement, should not be obtained within six months. Should Mr Botha require his own medical report, this too should be obtained within the six-month period. I can see no reason why the latter should not be at the Commissioner's expense, in view of the fact that it relates to an injury on duty.

[22] As to costs, it was conceded by counsel for the Commissioner that the *Biowatch* principle should apply and, indeed, that the only reason for the remittal is because the Tribunal erred in the first place when it decided that no compensation whatsoever was payable. This being the case, there is no reason why Mr Botha should be out of pocket, especially taking into account the unconscionable delay in finalising his claim. Both parties employed two counsel and accepted that any costs award should reflect this.

[23] To the extent that condonation was sought by both parties for the late filing of the cross-appeal and the heads of argument respectively, it is hereby granted.

[24] In the result I make the following order:

1 The appeal and the cross-appeal succeed in part.

2 The order of the court a quo is set aside and replaced with the following order:

> '(a) The decision of the Tribunal is set aside and it is declared that the appellant is entitled to compensation as envisaged in s 22(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, as amended (COIDA).

(b) This matter is remitted to a Tribunal constituted in terms of s 91(3) of COIDA for a decision on the appellant's degree of disablement as a result of the accident on 26 January 1998.

(c) The Tribunal shall finalise this matter within six (6) months of the date of this order, including a calculation of the amount of compensation payable to the respondent.

(d) The respondent shall pay the costs of the appeal, which costs shall include the costs of two counsel, where so employed.'

3 The appellant shall pay the costs of the appeal and cross-appeal, which costs shall include the costs of two counsel.

_____

C H NICHOLLS

JUDGE OF APPEAL

APPEARANCES

For appellant:	M Sikhakhane SC (with him, S Nhantsi)
	(Heads of argument drawn by Z Z Matabese SC, with him S Nhantsi)
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
For respondent:	T P Krüger SC (with him, H Worthington)
Instructed by:	Gildenhuys Malatji Incorporated, Pretoria
	Honey Attorneys, Bloemfontein