IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CA 38/2021

In the matter between:

COMPENSATION COMMISSIONER **Appellant**

and

GEORGIA BADENHORST **Respondent**

APPEAL JUDGMENT

Bloem J:

1. This is an appeal in terms of. section 91(5) of the Compensation for Occupational Injuries and Diseases Act[1] (COIDA). The appellant is the Compensation Commissioner[2] appointed under section 2(1)(a) of COIDA and the respondent was at all times material hereto an employee of the South African Police Service.

2. It is undisputed that on 17 June 2014 and at Port Elizabeth the respondent met with an accident, that the accident arose out and in the course of her employment with the South African Police Service and that the accident resulted in her permanent disablement. A claim for compensation in terms of COIDA was lodged on behalf of the respondent with the appellant.

3. On 17 January 2020 the appellant informed the respondent that "*your claim has been accepted and 20% is awarded for Post Traumatic Stress Disorder*". In terms of section 91(1) of COIDA the respondent lodged an objection against the

[1] Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993).
[2] It will be assumed, rather than found, in this appeal that the Director-General of the Department of Labour duly delegated the power to appeal to the Compensation Commissioner. Reference to Compensation Commissioner will accordingly be reference to the Director-General and *vice versa*.

appellant's decision to limit the degree of post-traumatic stress disorder (PTSD) to 20%. The objection was considered on 9 December 2020 by a tribunal consisting of a presiding officer, assisted by an assessor representing employees, an assessor representing employers and a medical assessor. The appellant and respondent were represented during the proceedings before the tribunal. I shall refer to the tribunal either as "the tribunal" or the "presiding officer" interchangeably. The only issue before the tribunal was the degree of the respondent's permanent disablement. Only one witness testified on behalf of the respondent. The appellant did not adduce evidence.

4. Derick van der Merwe is a psychiatrist, dealing with patients who present with PTSD for about twenty years. On 4 February 2015 he interviewed the respondent's husband whereafter he interviewed her alone. During his consultation with her the respondent informed Dr van der Merwe that on 17 June 2014 she was working in a dirty store room about which she had previously complained to her superiors. She reached above her head for a docket. Instead of pulling the docket she found herself holding onto a snake (the incident). Prior to the incident she had a phobia for cockroaches and snakes. As a result of holding the snake she became incoherent, confused, shocked and acted irrationally. She was medically examined and admitted to a psychiatric institution the following day when a bed became available. Her reaction to the incident was so severe that she developed a stutter. As a result of the stutter she started avoiding people. On 11 November 2014 another psychiatrist, Dr Crafford, made a diagnosis of PTSD, Bipolar Type II mood disorder, major depressive phase and mixed state and panic and generalised anxiety disorder. Based on his consultation with the respondent and her husband, Dr van der Merwe was unable to confirm the diagnosis of Bipolar mood disorder that Dr Crafford had earlier made.

5. As a result of the PTSD, her activities of daily living have been mildly to moderately impaired. Dr van der Merwe testified that those activities include washing oneself, getting something to eat from the kitchen, going to the local store to buy food and clean oneself. Although these are basic activities, their impairment has a significant effect on the person concerned. In the case of the respondent, although she has a driving licence, she stopped driving a vehicle after the incident. The respondent's social functioning has been mildly impaired, in part due to her stuttering; her concentration, persistence pace[3] and motivation have been moderately impaired and her adaptation to stress has been markedly impaired. He established that she finds it difficult to function in environments which cause stress. She occasionally has a severe tremor which would cause her not to pick up a cup of tea or do needlework. She has been anxious since the incident.

6. Dr van der Merwe pointed out that almost all work environments have certain basic stresses, some more than others. He was of the view that the respondent would be unable to cope with the demands of the work of police women, which tend to be robust, like chasing after suspects who may be dangerous. Even if she is required to perform office duties, it would take her thrice the normal time to complete a task.

7. Dr van der Merwe also testified that the respondent demonstrated a mild form of anxiety. When she gets very anxious, she has a severe stutter, so much so that one can hardly understand what she says. In her state of severe anxiety she cannot think or function properly, she works slowly and does not concentrate well. Her anxiety has now become a generalised thing, where any stress tends to generally affect her. In sum, her anxiety has rendered her dysfunctional.

[3] Ironing, which used to take an hour before the incident, now takes her three hours to complete. She generally works slowly since the incident.

8. The prognosis for her recovery has been described as poor because she presents with so many disorders. They include PTSD, stuttering, anxiety, speed of functioning, which impact on each other. In the words of Dr van der Merwe, "*those things make one fear that things are not going to go well, not for a long time*" for the respondent. It is clear from Dr van der Merwe's evidence that the respondent is permanently disabled.

9. In terms of section 49(2)(a) of COIDA, if an employee has sustained an injury set out in Schedule 2, he or she shall for the purposes of COIDA be deemed to be permanently disabled to the degree set out in the second column of Schedule 2. PTSD is an injury which is not mentioned in Schedule 2. Section 49(2)(b) provides that 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. It is in this regard that Dr van der Merwe testified that, in his opinion, the respondent's disablement ranges between 75 and 80%. He used the guidelines of Schedule 2 to contrast the respondent's condition with a person who has lost a leg between the knee and hip. In such a case the percentage of permanent disablement, according to Schedule 2, is between 45 and 70%. He also contrasted her condition with a person who has lost an arm at the shoulder or between the elbow and shoulder, in which case the percentage of permanent disablement is 65%. In his view the respondent is worse off than a person who has lost a leg between the knee and hip or an arm above the elbow. In his view 20% is completely inappropriate,[4] which is less than the 25% in Schedule 2 awarded to a person who has loss of both phalanges of the thumb. In his view, if regard is had to the respondent's total

[4] Dr van der Merwe used the words "grossly unjust".

condition as a result of the incident, the percentage of her permanent disablement must be determined at 75%.

10. The tribunal relied on Dr van der Merwe's undisputed evidence that the respondent's PTSD and its sequelae are more serious than in the case of a person who has lost a leg, arm or an eye, in which case the percentage of permanent disablement is determined in Schedule 2 to be between 45 and 70%, 65 and 30% respectively. The tribunal found that the appellant's determination "*of 20% is unreasonable and therefor the Compensation Commissioner is ordered to pay the objector a 75% permanent disability*". It is against that finding that the appellant appeals.

11. To be entitled to compensation under COIDA, an employee must prove that he or she has contracted a disease mentioned in the first column of Schedule 3 and that such a decease has arisen out of and in the course of his or her employment. PTSD is not mentioned in Schedule 3. Section 65(1)(b) of COIDA provides that in such a case the employee must prove that the PTSD that he or she has contracted has arisen out of and in the course of his or her employment. In this case it is common cause that the incident was the cause of the PTSD. That factual concession was made by Mr Mhambi, counsel for the appellant, in his heads of argument.[5] Our courts have recognised PTSD as an occupational disease, as contemplated in section 65(1) of COIDA.[6]

12. One of the grounds of appeal was that the tribunal did not have the power to change "*the awarding of 20% permanent disability to 75% permanent disability*".

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[5] Counsel stated in the heads of argument that "*the fact that the respondent has suffered PTSD [arising out of in the course of her employment] is not in dispute*" and that he would confine himself "*to what is purely relevant to determining the degree of permanent disability, and the misdirection of the tribunal*".
[6] *Odoyar v Compensation Commissioner* 2006 (6) SA 202 (N) at par 17.

Mr Mhambi submitted that the tribunal did not have the power to do a patient assessment and, in turn, measure, calculate and score the respondent's disability. Counsel furthermore submitted that the tribunal did not have the power to decide on the degree of permanent disability and allocate its own percentage. It was submitted that "*the tribunal's only power, duty and jurisdiction was to consider the objection lodged in terms of section 91, in particular, whether the degree awarded by the appellant was adequate or inadequate, in the light of all the evidence; and refer the matter back to the appellant to increase or reduce the percentage, if necessary. The allocation and awarding an impairment score is the discretion of the Director-General*".

13. Section 91(2)(a) provides that an objection against a decision by the Director-General shall be considered and decided by the presiding officer, assisted by assessors (the tribunal). The powers of the tribunal are set out in section 91(3)(a) in terms whereof it, after considering an objection, could do one of two things. It could either confirm the decision in respect of which the objection was lodged. In other words, the tribunal could confirm the appellant's decision to determine the degree of the respondent's permanent disability at 20%. Alternatively, it could *"give such other decision as [it] may deem equitable".*

14. In her notice of objection against the appellant's decision to award her 20% permanent disablement, the respondent stated that she "*objects against the awarded percentage for permanent disability as this percentage is incorrect*" and that her "*permanent disability percentage should increase*". In his opening address before the tribunal, Mr Horn, counsel for the respondent who also appeared before us with Mr Dyer, stated that "*the only issue is the correct percentage of disability that ought to be awarded*". As pointed out above, the respondent lodged an objection with the appellant in terms of section 91(1) against the appellant's

decision. It was the appellant who referred the objection to the tribunal for adjudication, well knowing the nature of the objection. It is ironical that the very same person who referred the respondent's objection to the tribunal now questions the tribunal's powers to make a decision on the very issue that it referred to that tribunal.

15. After the evidence of Dr van der Merwe was heard and after Mr Horn had concluded his submissions, the presiding officer invited Mr Sitelo, who represented the appellant at the tribunal, to make submissions. The record reflects the following after the presiding officer's invitation:

> "*MR SITELO: The evidence was led based on his evidence of a medical document which was not rebutted because we did not have any expert witness to rebut that evidence and as such, Chairperson, I have no further submissions.*
>
> *CHAIRPERSON: Okay, any submission on the 75 percent considering the evidence that was placed? No submissions?*
>
> *MR SITELO: No*."

16. It is clear from the above that the only issue before the tribunal was whether the degree of permanent disablement ought to be assessed at a higher percentage. At no stage was the tribunal's power to increase the percentage of the permanent disablement questioned.

17. Section 91(2)(c) provides that the provisions of sections 6, 7, 45 and 46 of COIDA shall apply *mutatis mutandis* in respect of the consideration of an objection by the tribunal.

18. Section 45 deals with the consideration of claims by the Director-General. It reads as follows:

"***45 Consideration of claim***

(1) The Director-General shall consider and adjudicate on a claim for compensation, and for that purpose may carry out such investigation as he may deem necessary or he may formally hear the claim.

(2) If the Director-General decides upon a formal hearing, he shall in the prescribed manner give notice of the date, time and place of the hearing to the claimant and employer.

(3) If the Director-General considers it necessary that any person, including the claimant and the employer, should be present at a formal hearing to be interrogated, he may issue a subpoena for the appearance of such witness.

(4) Upon application by a person who in the opinion of the Director-General has a sufficient interest in the subject of a formal hearing, the Director-General shall issue a subpoena for the appearance of a person except if he is of the opinion that such person cannot further the investigation, in which case the Director-General shall issue a subpoena only if the party applying therefor deposits with the Director-General a sum sufficient to cover the necessary expenses to be incurred by the witness as well as the cost of the service of such subpoena.

(5) The provisions of section 6 shall apply mutatis mutandis to a person subpoenaed in terms of subsection (3) or (4).

(6) The Director-General may from time to time adjourn a formal hearing to a date, time and place determined by him.

(7) The Director-General shall keep or cause to be kept a record of the proceedings at a formal hearing, and upon payment of the prescribed fees any person may obtain a copy of such record."

19. Section 46 deals with the persons who could appear before the Director-General at a formal hearing when an employee's claim for compensation under COIDA is first considered. It reads as follows:

"***46 Appearance of parties***

(1) (a) Every party to a claim for compensation or his representative may appear before the Director-General at a formal hearing.

(b) The Director-General may designate any person to investigate a claim, attend a formal hearing, cross-examine witnesses, adduce rebutting evidence and present arguments.

(2) No person other than an advocate or attorney shall be entitled to any fees or remuneration except such necessary expenses as the Director-General may allow.

> *(3) No fees or remuneration shall be claimed from an employee or employer except with the approval of the Director-General.*
>
> *(4) (a) The Director-General may of his or her own motion or on an ex parte application by a party to a claim for compensation, order any attorney employed by such party or a representative who has allegedly, contrary to subsection (2), claimed fees or remuneration, to submit to him or her a statement showing what he or she has received or contracted to receive from his or her client, and to submit for taxation his or her bill of costs, including attorney and client costs, against such client.*
>
> *(b) Upon such taxation the Director-General may allow such fees, costs and expenses as he may consider reasonable in the circumstances.*
>
> *(c) If an amount has been paid in excess of the amount allowed upon taxation, the excess shall be refunded to the person concerned, and any agreement in terms of which such an excess is otherwise payable shall be void as to that excess.*
>
> *(5) The provisions of subsections (2), (3) and (4) shall also apply to any act in connection with a claim for compensation which is not the subject of a formal hearing.*
>
> *(6) Any person who agrees or attempts to collect any money contrary to the provisions of this section shall be guilty of an offence."*

20. Sections 45 and 46 set out the powers of the Director-General once a decision has been taken to hold a formal hearing to consider the employee's claim for compensation. For instance, he may give notice of the date, time and place of the formal hearing. He may issue a subpoena for the appearance of persons to be present at the formal hearing. He may adjourn the formal hearing. He shall keep a record of the proceedings of the formal hearing. He may designate any person to attend the formal hearing, to cross-examine witnesses, to adduce rebutting evidence and present arguments. At the conclusion of the formal hearing he shall, in terms of section 45(1), adjudicate on the claim for compensation, meaning that he has to make a decision on the matter in dispute after considering all the evidence adduced during the formal hearing.

21. In my view section 91(2)(c) can only mean that, when the tribunal considers an objection against the Director-General's decision, the tribunal is placed in the same position as the Director-General when it considers an employee's claim for compensation in terms of sections 45 and 46. The tribunal accordingly has the same powers as the Director-General, as referred to above. It follows that the hearing of the objection by the tribunal is not a review of the Director-General's decision based on the record of proceedings. It is a rehearing of the issue referred to the tribunal. That hearing is conducted in accordance with sections 45 and 46. It therefore means that, after considering the evidence adduced during the hearing and the parties' submissions, if it does not confirm the Director-General's decision, the tribunal can "*give such other decision as [it] may deem equitable*". That includes the decision to increase the percentage of the objector's permanent disablement. Had the Legislature intended to limit the powers of the tribunal, as suggested on behalf of the appellant, one would have expected it to have made such limitation clear. Instead, the ordinary grammatical meaning of the words used is that the tribunal has the broad power to make any decision that it deems equitable. In the circumstances, the respondent's submission, that only the Director-General has the power to award a percentage to an employee's permanent disablement and that the tribunal consequently does not have the power to interfere with the Director-General's discretion by increasing such percentage, cannot be sustained.

22. It was also submitted on behalf of the appellant that the tribunal failed to justify the awarding of 75%, as opposed to 20% in respect of the respondent's permanent disablement. That submission is closely connected to the further submission that the tribunal erred when it accepted Dr van der Merwe's evidence. Counsel

submitted that Dr van der Merwe dismally failed to give grounds for recommending a permanent disablement of 75%.

23. The submission is factually incorrect. Dr van der Merwe testified how the incident has impacted on the pre-existing disorders, like being bipolar and having a phobia for cockroaches and snakes, and how the incident created new disorders, like anxiety and stuttering. Based on her present stabilised condition, Dr van der Merwe compared the respondent with an employee who has lost a leg, arm or eye and determined her permanent disablement at 75%. That reasoning cannot be faulted, especially if regard is had to the fact that the appellant did not adduce any rebutting evidence.

24. In all the circumstances, the appellant failed to demonstrate that there is reason to interfere with the tribunal's finding. The appeal must accordingly be dismissed. The general rule, that costs should follow the result, should apply in the circumstances.

25. In the result, it is ordered that:

    25.1. The appeal be and is hereby dismissed.

    25.2. The appellant shall pay the respondent's costs of the appeal.

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G. H. BLOEM
Judge of the High Court

Roberson J

I agree:

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J M ROBERSON
Judge of the High Court

APPEARANCE:

For the appellant:	Mr M H Mhambi, instructed by The State Attorneys, Port Elizabeth and Yokwana Attorneys, Grahamstown.
For the respondent:	Mr M F Horn with Mr E Dyer, instructed by Mark Rossouw Attorneys, Port Elizabeth and Whitesides Attorneys, Grahamstown.
Date of hearing:	3 December 2021.
Date of delivery of judgment:	25 January 2022.