

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A104/2008

In the appeal of:

COENRAAD JACOBUS GUNTER

Appellant

and

THE COMPENSATION COMMISSIONER

Respondent

CORAM:

WRIGHT, J *et* MOCUMIE, J

JUDGEMENT:

WRIGHT, J

HEARD ON:

23 FEBRUARY 2009

DELIVERED ON:

5 MARCH 2009

- [1] A claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993 (hereinafter referred to as “the Act”) dated 21 of October 2002, was lodged by the appellant in this matter with respondent in the manner prescribed by section 43(1)(a) of the Act.

[2] The claim was based on a motor vehicle accident in which the appellant sustained serious head injuries which took place on Tuesday the 18th of June 2002, while the appellant was allegedly fetching spare parts for a combine used by the appellant's employer for harvesting some sunflowers. At the time of the accident the appellant was employed as a farm manager/foreman by the Gunter Familie Trust (hereinafter referred to as "the Trust"). The claim form was accompanied by an affidavit of the appellant.

[3] On the 2nd November 2004 the appellant's claim was repudiated by respondent in a letter. The reason for the rejection was set out as follows in the letter:

"On the available information I consider that compensation and medical aid expenses are not payable in terms of the abovementioned Act, as the vehicle was driven by Reverend D. J. Goosen, who was not an employee of the trust, furthermore the accident had occurred at 22h00 on a Sunday night".

- [4] It can already be mentioned at this stage that it is common cause that the accident occurred on Tuesday, 18 June 2002.
- [5] Since the appellant was not satisfied with the Compensation Commissioner's decision, he lodged an objection against the decision in terms of Section 91(1) of the Act making it clear that the appellant objected to the two reasons for the repudiation of the appellant's claim as set out in the aforementioned letter.
- [6] A hearing of the objection took place on the 17th of October 2007 by a body hereinafter referred to as "the Tribunal" of which the presiding officer was a Mr. B. A. Ndou. The presiding officer was assisted by two assessors in terms of the provision of Section 91(2) of the Act.
- [7] On 11 April 2008 it was found by the presiding officer that "it is therefore untenable to uphold the contention that the employer was acting in the course and scope of his employment" and "the appeal cannot succeed but has to fail. Consequently the appellant is not entitled to

compensation". The objection of the appellant was therefore dismissed with no order as to costs.

[8] Appellant now appeals against this finding in terms of Section 91(5) of the Act. The reasons why the Tribunal dismissed the appellant's objection are set out in a written document which is contained in the record. The reasons for appellant's present appeal are also contained in the notice of appeal as set out in the record.

[9] At the hearing before the Tribunal it was common cause that the initial rejection of appellant's claim was based on the provisions of Section 22(5) of the Act, which reads as follows:

"For the purposes of this Act the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a vehicle driven by the employer himself or one of his employees and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment."

The above-mentioned inference is clear from a considered perusal of the record. It was from the outset appellant's case that Section 22(5) was not applicable, while the legal representative of respondent argued that the panel (or Tribunal) had only to decide whether Section 22(5) was applicable in this matter. She specifically stated on page 17 of the record that there is no other section that deals with the accident that happened "when the employer is been transported or be in a transport or in a motor vehicle, except that of Section 22(5)". Shortly after that she stated "but the only issue that we do not agree is whether this claim has been repudiated in terms of Section 22(5), and I think that it is the only thing that this panel needs to decide". She persisted with this view during argument, e.g. when she stated:

"Because this claim has been repudiated solely on the basis that the employee was transported with the car that was not owned by the employer, and that Chairperson was not disputed.

....

There is no way that this section cannot be taken into consideration when the decision is made."

- [10] The presiding officer however, came to the conclusion that Section 22(5) does not find application in the matter as appears from paragraph 6.12 of the written reasons. Thereafter he proceeded to consider the fact whether appellant was in fact acting within the scope of his employment when the accident took place, and based its eventual finding on this aspect.
- [11] It is therefore necessary to look at the relevant facts which appear from the record of the evidence which was led during the hearing before the Tribunal.
- [12] During the hearing before the Tribunal the appellant and two other witnesses, to wit the person who drove the motor vehicle at the time of the accident and the trustee of the Trust, testified. The respondent submitted no evidence to rebut the version of the witnesses who testified on behalf of the appellant, nor did respondent proffer any evidence to place a different version than that of the appellant and the appellant's witnesses, before the presiding officer.

[13] The relevant evidence with regard to the appellant's employment at the time of the accident is aptly and concisely summarised by Mr. Laubscher, acting for the appellant, in his heads of argument. With regard to the appellant's duties as employee the following is relevant:

- (a) The appellant as the farm foreman was responsible for the day to day running of the farm and he was also responsible to run errands for the farm and to fetch supplies and goods from town when needed.
- (b) The appellant was responsible to fetch goods in town from time to time and take them to the farm. It is also important to note that the appellant had a wide discretion in the running and the management of the farm.
- (c) The Trustee of the Trust confirmed the fact that it was within the scope and duties of the appellant to fetch spare parts and the like from town. This is especially true in instances where machines broke down and had to be fixed. It was testified by the appellant's employer that it was the appellant's responsibility to take decisions to keep the farming operation going.

- (d) The appellant's employer confirmed that the appellant had the discretion to act out of his own accord in the best interest of the farming operation.
- (e) It was within the appellant's discretion to act as he saw fit as long as his actions were in the best interest of the business. It was clearly stated that the appellant in this regard had a wide discretion as to the execution of his duties.

[14] With regard to appellant's working hours:

- (a) The appellant testified that he did not work according to fixed hours, and that his working hours depended on the work at hand. In this regard it is important to note that the fact that it was the harvesting of the sunflower crop and the appellant had to fetch a spare part for the combine in order to repair same, so that the harvesting can continue.
- (b) On the Tuesday the accident happened, the appellant was on duty and he was on his way to fetch a spare part for the combine.

- (c) It is confirmed by the appellant's employer that the appellant, as farm foreman, had no specific working hours, but that the appellant should be available to see to the running of the farming operation.
- (d) It is also confirmed by the appellant's employer that the appellant was on duty when he travelled to Klerksdorp with Reverend Goosen to pick up the spare parts for the combine.

[15] With regard to the purpose of the appellant's trip to Klerksdorp:

- (a) The purpose of the trip to Klerksdorp, was to fetch spare parts for the combine as it was the sunflower harvesting season and the combine broke down, and had to be fixed with the spare parts that the appellant was on his way to obtain from Klerksdorp.
- (b) The appellant's trip to Klerksdorp was urgent in the circumstances, and therefore a portion of the trip had to be undertaken out of normal business hours. As indicated above, the appellant was not bound to specific working hours as he had the responsibility to

see to the urgent repair of the combine so that the sunflower harvesting can proceed.

[16] With regard to the control of the employer:

The trustee of the Trust confirmed that it was not necessary for the appellant to get instructions from her on each and every occasion for the day to day running of the farm, including fetching parts. Again it is important to note that appellant had a wide discretion in the running and the management of the farm.

[17] Taking into consideration what is mentioned above and relying on the case of **VENTER v COMPENSATION COMMISSIONER** 2001 (4) SA 753 (TPD), Mr Laubscher argued that the presiding officer's finding relating to the question as whether or not the appellant was acting within the course and scope of his employment, was in fact a finding *ultra vires* to the presiding officer's jurisdiction. In the **VENTER**-decision the Director-General ruled and decided that the applicant's back condition was not caused by, or related to, the injuries suffered in the accident.

Objection was taken against this decision, and the Tribunal decided that the applicant in question was not an employee as defined by the Act at all, and therefore the claim was rejected in totality. The Court in **VENTER**'s case dismissed the Tribunal's decision as being *ultra vires*.

- [18] Mr Laubscher's argument was based on the reasoning in the **VENTER**-decision with reference to the Tribunal's dismissal of appellant's claim and in view of the fact that the original rejection was based on Section 22(5) of the Act. There can be no doubt, after perusing its reasons, that the Tribunal's judgment in this matter was based on the fact that since (according to their findings) the employer had no control over the appellant when the accident took place, the appellant was not acting within the course and scope of his employment in this case. Its judgement was therefore not based on Section 22(5) but on Section 22(1) read together with Section 1 of the Act, which defines an "accident" as follows:

“An accident arising out of and in the course of an employer’s employment and resulting in personal injury, illness or death of the employee.” (my underlining)

[19] Mr Laubscher also pointed out, as mentioned in the **VENTER**- decision (*supra*), that the Tribunal as constituted in terms of Section 91 of the Act is a “creature of statute” deriving its powers, obligations and jurisdiction from the four corners of the Act, and more specifically the provisions of Section 91. As such the presiding officer’s only powers, duty and jurisdiction were to consider the appellant’s objection lodged in terms of Section 91, and by coming to the conclusion already mentioned, (based on Section 1 and 22(1) of the Act), it acted *ultra vires*.

[20] In the **VENTER**-decision (*supra*) the Court found that by acting as it did the Tribunal usurped the powers of the Director-General, and on this ground set aside the decision of the Tribunal. The matter was however referred back to the Tribunal to reconsider the objection.

- [21] Mr Bloem, who acted on behalf of the respondent, argued that the **VENTER**-decision (*supra*) was wrongly decided, and relied in his argument on Section 91(3)(a) of the Act, which reads as follows:

“After considering an objection that presiding officer shall, provided that at least one of the assessors, excluding any medical assessor, agrees with him, confirm the decision in respect of which the objection was lodged or give such other decision as may be equitable.” (my underlining)

According to Mr Bloem, the last part of the above quotation gave the Tribunal the power to consider whether the employee (appellant) was in fact being employed within the course and scope of his employment at the time of the accident.

- [22] Although it seems to me that the **VENTER**-decision (*supra*) cannot be faulted, it is not necessary to decide this aspect in view of the conclusion which will result from this court's accepting that the Tribunal could consider whether the appellant was indeed acting within the scope and course of

his employment at the time of the accident. The issues are in fact intertwined to some extent as appears from the respondent's legal advisor's argument, an extract of which reads as follows:

"MS. MATHE:

Chairperson without wasting your time that is my submission that the claim has been clearly repudiated on the basis of Section (22)(5) and therefore most of the things were not in dispute. And the letter of repudiation was clear that it did not arise out of and in the course of employment as your employer did not have control over the transport or it was not registered in the employer's name. That was not disputed Chairperson it was not the employer's car and the employer did not even know that the other person's car was going to be used. It was also not disputed that it was not driven by one of the employee of the Trust, it is therefore my submission that the objection be dismissed."

As this aspect of Mr Laubscher's argument and the question whether the present matter is distinguishable from the **VENTER**-matter is at least more debatable, and the aspect of whether appellant was in fact acting within the course and scope of his employment seems to us to be

clearcut, it is preferable to decide the matter on the above-mentioned assumption.

[23] In passing it may be mentioned that Mr Bloem at some stage mentioned that he doubted this court's jurisdiction to hear this matter, as it was not covered by those so-called jurisdictional facts as set out in Section 91(5)(a) of the Act. He later, however, intimated to this court that he was not proceeding with this argument and that he did not rely on it. In my view this concession was correctly made in view of the fact that according to the Director-General's finding the interpretation of Section 22(5) was applicable, and according to the Tribunal's ultimate finding the interpretation of Section 22(1) as read with the definition of "accident" in Section 1, would be applicable.

[24] In my opinion the legal position which is relevant to the question of whether appellant acted within the course and scope of his employment is set out completely in the well-known case of **MINISTER OF JUSTICE v KHOZA** 1966 (1) SA 410 (AD), where the following is said on page 417 D – G:

“Luidens Wet 30 van 1941 moet die ongeval uit die werksman se diens ontstaan en in die loop daarvan plaasvind. 'In die loop daarvan' beteken dat die ongeval moet plaasvind terwyl die werksman besig is met sy werksaamhede en dit ontstaan 'uit sy diens' as die ongeval in verband staan met sy werksaamhede. Die Wetgewer het daardie verband nie omskryf nie en eis alleen in breë sin 'n kousale verband tussen diens en ongeval. Wanneer hierdie onomskrewe verband gesien word in die lig van die doel en ingrypende omvang van Wet 30 van 1941, moet dit m.i. bevind word dat die kousale verband tussen ongeval en diens in die algemeen voldoende geskep word wanneer die ongeval plaasvind op die plek waar die werksman by die uitvoering van sy diens is. Omdat 'n werksman in die uitvoering van sy diens altyd êrens moet wees, hetsy hy staan, loop, ry of vlieg, sal hy - behoudens sekere uitsonderings - weens sy diens, en dus uit sy diens, beseer word, indien hy beseer word waar hy is wanneer hy sy werksaamhede verrig.” (my emphasis)

See also **RAUFF v STANDARD BANK PROPERTIES**
2002 (6) 693 (WLD), on page 698 F – H and 701 A – B.

[25] Appellant's case was never that he was going to his workplace, but that he was travelling to Klerksdorp to obtain a spare part for the combine, which was urgently needed. This was part of his job. As already mentioned, he did not work according to fixed hours, and he could also use his discretion not only as to whether it was necessary to obtain the part in question, but also as to which form of transportation he would make use of in order to obtain the part in question. He was therefore not a person who always worked at the same place like a factory worker usually does, but that at least part of his employment entailed travelling to various other places to obtain parts or other products which were necessary for his work. This case is therefore distinguishable from that of WARD v WORKMAN'S COMPENSATION COMMISSIONER 1962 (1) TPD 728, (relied on by the Tribunal) where the court in any case came to the conclusion that the questions to be asked is whether the employer was engaged for the purposes of any connection with his employer's business (at 731 F). (In the WARD-case the employee used his own vehicle to travel to work, and it was clear that he had no duty to use his own vehicle. In the present matter it is clear

that the appellant had a duty to use any means of transportation as long as he obtained the parts in question.)

[26] Because the appellant did not travel to his workplace, but was actually performing his work at the time of the accident, Section 22(5) clearly does not apply. This subsection clearly only extends the respondent's liability to persons going to or from their place of work (and not actually working) in certain circumstances defined therein.

[27] It can also be concluded that the Tribunal did not apply the control test correctly, as it is clear that it was not necessary for the appellant to phone his employer (the Trust) to ask her permission either to travel to Klerksdorp to obtain the part or to make use of any specific vehicle or means of transportation. It is clear that in these circumstances the appellant was entitled to use his own discretion, and that he was still doing his work (and therefore under his employer's control) while travelling to obtain the necessary part for the combine.

[28] Since the Tribunal had in any case come to the conclusion that Section 22(5) is not applicable, and since the Tribunal incorrectly found that the appellant was not acting within the course and scope of his employment, the appeal has to succeed.

[29] The following order is therefore made:

1. The Tribunal's decision is dismissed.
2. The objection against the Director-General's finding succeeds, and the appellant is therefore entitled to payment of his claim.
3. Respondent is to pay the appellant's costs of this appeal, as well as the proceedings before the Tribunal.

G. F. WRIGHT, J

I concur.

B.C. MOCUMIE, J

On behalf of the appellant:

Adv. N. G. Laubscher
Instructed by:
Naudes Inc.
BLOEMFONTEIN

On behalf of the respondent:

Adv. G. H. Bloem
State Attorney
BLOEMFONTEIN

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