



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: A69/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>19/06/2024</u> DATE	
 SIGNATURE	

In the appeal between:

CAPE UNION MART INTERNATIONAL (PTY)LTD

Appellant(Objector)

and

THE COMMISSIONER: COMPENSATION FUND

Respondent(Defendant)

JUDGMENT

MKHABELA AJ (KUMALO J CONCURRING):

Introduction

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

[2] The appeal is pursuant to a decision taken by a Panel which was appointed to adjudicate the appellant's objection in terms of Section 91(2)(a) of COIDA (the Panel).

[3] The appeal is predicated on two grounds, firstly that the Panel's decision not to deal with the appellant's objection of 21 June 2021 is not sustainable. Secondly, the Panel's decision to reclassify appellant's assessment process to

fall under sub-class 1520 was wrong. The appeal also pertains to costs as it is alleged that the Panel erred in not granting costs in appellant's favour which were incurred in the hearing before the Panel.

Background facts

[4] Cape Union Mart International (Pty) Ltd ("CUMI") lodged an objection in terms of Section 91(1) of COIDA against the decision of the Commission in terms of which CUMI's business activities have been allegedly incorrectly classified for assessment purposes as provided for in Section 83 of COIDA.

[5] Section 91(1) of COIDA provides as follows:

"(1) Any person affected by a decision of the Director-General or a trade union or employers' organization of which the person was a member at the relevant time may, within 180 days after such decision, lodge an objection against the decision with the commissioner in the prescribed manner.

(2) (a) An objection lodged in terms of this section shall be considered and decided by the presiding officer assisted by two assessors designated by him, of whom one shall be an assessor representing employees and one an assessor representing employers."

[6] It is common cause between the parties that CUMI indeed lodged the objection in terms of the provisions of Section 91 of COIDA as already stated.

[7] CUMI is the proprietor of five distinctive national chains of retail stores as well as an online retail platform.

[8] There are currently 263 retail stores trading as CUMI namely Old Khaki, Poetry, Tread & Miller and Keedo situated across the breath of South Africa. The number of retail stores fluctuates from time to time on a yearly basis depending largely on the economic climate prevailing at the relevant times.

[9] The stores are located in shopping centres throughout the country and sell outdoor apparel and equipment, ladies, men and children's fashion, clothing, footwear, accessories and homeware.

[10] On 1 June 2020, the office of the Compensation Commissioner ("the Commissioner") issued a notice of assessment to CUMI in which CUMI's business was incorrectly described as that of a general dealer, and advising CUMI that it has been assessed in terms of the provisions of Section 83(2) of COIDA.

[11] Section 83(2) of COIDA provides as follows:

"Notwithstanding subsection (1), the Director-General may –

- (a) assess a particular employer or category or employers on such other basis as he may deem equitable;
- (b) levy a minimum assessment in respect of a particular employer or category of employers."

[12] The assessment indicated that CUMI was liable to pay an amount of R2 253 103.33 (two million two hundred and fifty three thousand, one hundred and three rand and thirty three cents) which was payable before the due date of 1 July 2020. The assessment that led to the amount in question was made on 1 June 2020.

[13] As an indication of an intention to abide by the provisions of COIDA, CUMI paid the assessed amount, but did so under protest.

[14] On 7 July 2020, and pursuant to its grievance pertaining to the alleged wrong classification of the nature of its business, CUMI submitted an application dated 30 June 2020 for a change of the nature of the business classification to the office of the Compensation Commissioner.

[15] In its application, CUMI contended that the true nature of its business was incorrectly classified under sub-class 0720 as "*general dealer*" whereas the

correct classification should have been under sub-class 1520 as *“outdoor clothing and footwear dealer”*.

[16] On 23 October 2020, CUMI received written notification from the Commissioner that pursuant to its letter or application of 7 July 2020, its business activities had been reclassified under sub-class 1540 with effect from 1 March 2020. In the latest reclassification, the Commissioner described CUMI's business as *“outdoor goods, clothing and footwear”*.

[17] Aggrieved by the Commissioner's reclassification of its business as an *“outdoor goods, clothing and footwear”* dealer under sub-class 1540, CUMI issued a notice of objection against the Commissioner's decision.

[18] At the heart of CUMI's discontent was the fact that when its business was incorrectly classified under sub-class 0720, the rate was calculated at 0.66%. The rate remained at 0.66% when CUMI was again incorrectly reclassified under sub-class 1540.

[19] As a consequence of the wrong reclassification, CUMI contended that it would have to make a significant higher employee contribution to the Compensation Fund as a result of the incorrect rate.

[20] On 19 May 2021, CUMI received a further assessment from the Commissioner in the amount of R2 502 980.02 (two million five hundred and two thousand nine hundred and eighty rand and two cents). This amount was still based on the alleged incorrect reclassification of CUMI's business under sub-class 1540.

[21] Again, CUMI made payment of the amount under protest and subsequently lodged a further objection dated 21 June 2021. This meant that CUMI had lodged two objections, one dated 24 February (2021) which was pursuant to the Commissioner's assessment of 1 June 2020 and the second

one dated 21 June 2021 pursuant to the second assessment dated 19 May 2021.

[22] Notwithstanding various correspondence requesting the Commissioner to deal with CUMI's objections, the Commissioner simply ignored CUMI's demands. Not even a letter of demand from CUMI's attorneys provoked any response from the Commissioner.

[23] Ultimately CUMI obtained an order¹ by way of a mandamus compelling the Commissioner to comply with the provisions of COIDA as provided for in Section 91 to deal with the objection.

[24] The Court order resulted in the Commissioner complying with Section 91(1)(a), who then constituted a Panel to consider CUMI's objection as contemplated by Section 91(2)(a) of COIDA.

[25] In the Panel, CUMI led evidence of Mr Edwin Katzen, who testified that the business of CUMI had been incorrectly classified for assessment purposes as provided for in terms of Section 83 of COIDA.

[26] The gravamen of CUMI's objection was that its business was incorrectly classified under sub-class 1540 as general dealer instead of the correct classification under sub-class 1520 as *"outdoor clothing and footwear dealer"*.

[27] The allegedly incorrect assessment indicated that CUMI was obliged to pay an amount of R2 253 103.33 which was calculated at a rate of 0.66%.

[28] CUMI contended that it was incorrectly assessed twice under sub-class 1540 at the rate of 0.66% when in CUMI's view, the correct assessment, was supposed to be under sub-class 1520 at the rate of 0.35%.

¹ The Pretoria High Court granted a mandamus against the Commissioner on 18 May 2022 compelling the Commissioner to deal with CUMI's objection in terms of Section 91 of COIDA.

[29] CUMI maintained that it understands that companies are classified as a whole but it should be taken into account since it is material to its classification that only one brand, being Cape Union Mart, sells equipment.

[30] CUMI also led evidence in the Panel through Mr Stevenson, who corroborated the evidence of Mr Katzen.

[31] The Commissioner led its case through Mr Cweba, who testified that he worked on this matter after the objection but was not involved prior to the objection. He confirmed that he was employed by the Compensation Fund in the division of registration sub-directorate for a period of 18 years.

[32] Mr Cweba testified that the person who took part in the decision to classify CUMI, was one Mr Maduga, who is a deputy director.

[33] Mr Cweba informed the Panel that equipment increases risk and that if you were to exclude equipment, the classification would be categorised as 1520. Further, his testimony was to the effect that an employer cannot choose its category for purposes of assessment.

[34] Mr Cweba was adamant that CUMI's business falls under two sub-classes and that in such a case, the attitude is to take the higher rate irrespective of percentages of commodities sold. Hence he maintained that CUMI's outdoor equipment falls under sub-class 1540.

[35] The Commissioner's next witness was one Ms Makopo, who testified that she is a supervisor for 13 years and worked on this current matter.

[36] Ms Makopo's evidence was that she had recommended that the reclassification should be changed from sub-class 1520 to sub-class 1540 because of the goods CUMI was actually selling. Her evidence is that sub-class 1520 is retail clothing and under sub-class 1540 classification is where there are

furniture ships and hardware dealer, bag dealer, sports goods, dealer knives, kitchen tools and hard lamps.

[37] She indicated that one of the grounds of CUMI's objection was based on percentages and that at the time of considering the objection, the Commissioner did not have the breakdown of the business in terms of the percentages of the various goods in the business. However, Ms Makopo maintained that after looking at CUMI's business she had noticed that some of its business fall under sub-class 1520 while others fall under sub-class 1540.

[38] According to Ms Makopo an available remedy for CUMI is for the employer to opt for a separate registration. This is because if the two businesses are combined, the employer will pay as if all employees are high risk.

[39] The advantage of a separation is that the employer will pay only for high risk employees as compared to paying as if all employees are high risk if there is a combination of goods that both fall under sub-class 1520 and sub-class 1540 respectively.

[40] Ms Makopo conceded that the Commissioner had not advised CUMI to separate its business in order to fall under sub-class 1520 and thereby being assessed for equipment only in that separated business.

[41] After the Commissioner had led evidence, the Panel heard legal submissions. It was contended on behalf of CUMI that the provisions of Section 83(2) of COIDA requires that CUMI must be assessed on an equitable basis.

[42] Further that CUMI has been over-assessed in the amount of R1 327 806.67.

[43] In respect of the equipment sold by CUMI, it was argued that such equipment represents a low percentage in comparison to total sales and that

such items do not pose any inherent risk for any of the employees working for CUMI.

[44] In respect of the Commissioner's submissions, it was pointed out that equipment does not fall under sub-class 1520 but under sub-class 1540.

[45] It was pointed out to the Panel that Ms Makopo's evidence was that outdoor is riskier than clothing because if clothes were to fall on an individual, he or she will not sustain injuries compared to a situation of a gas stove or gazebo falling on an individual. The remedy of CUMI requesting for a separate registration was reiterated as an option available.

[46] The Panel concluded that its jurisdiction was to deal only with the objection that took place in February 2021 and the objection dated 21 June 2021 was not dealt with owing to the absence of the record.

[47] In respect of the dispute between CUMI and the Commissioner, the Panel noted that the main dispute was whether CUMI was correctly classified or not. The Panel affirmed that some of the "*commodities*" sold by CUMI fall under sub-class 1540 and under sub-class 1520 and observed that the majority of the commodities fall under sub-class 1520.

[48] The Panel disagreed with CUMI's submission that the Panel should apply the dominant impression test to determine the true nature of CUMI's business in order to determine the appropriate classification. It opined that it does not have authority to formulate policies on behalf of the Commissioner.

[49] The Panel reasoned and considered that it would be unfair and unjust to say CUMI's business fall under sub-class 1540 and upheld the objection without an award of costs. It further made an order that CUMI should be classified in terms of s 83(1) of COIDA.

[50] The Panel took into account the fact that COIDA is silent on what needs to happen if an entity sells commodities that fall under more than one sub-class.

[51] Dissatisfied with the ruling of the Panel, CUMI lodged an appeal to this Court in terms of Section 91(5)(a) of COIDA.

[52] The grounds of appeal are as follows:

52.1 The Learned Chairperson erred in concluding that he was required to deal with an objection of 21 June 2021 (in addition to one of February 2021). He ought to have concluded that in addition to the objection of February 2021 there was also an objection of 21 June 2020 and that he was required to deal with it.

52.2 The Learned Chairperson erred in not applying the dominant impression test to determine the true nature of objector's business in order to determine the appropriate classification.

52.3 The Learned Chairperson erred in concluding that the business of the objector "*[s]trictly speaking ... falls under both subclasses*" being subclasses 1520 and 1540.

52.4 The Learned Chairperson ought to have concluded whether on the classification method used by the defendant, or by applying the dominant impression test the objector's business falls under subclass 1540.

52.5 The Learned Chairperson erred in concluding that based on "*the risk phenomenon*", certain of the objector's business falls under subclass 1540 and ought to have concluded that considering the merchandise the objector trades in, it is not justified to classify the objector's business or part of it to fall under subclass 1540.

52.6 The Learned Chairperson upholding the objector's objection erred in not granting the objector consequential relief and ought to have made an order that:

52.6.1 The objector's classification be changed from 1540 to 1520;

52.6.2 With respect to the assessment of 19 May 2021 a new assessment on the correct classification must be issued

based on the objector's classification of sub-class 1520 and that the difference in the assessment must be repaid to the objector;

52.6.3 With respect to the assessment of 1 June 2020, similar relief must be provided.

52.7 The Learned Chairperson erred in concluding that the objector is silent on what *"needs to happen if an entity sells commodities that fall under more than one sub-class"* and ought to have concluded, considering that assessment must be done in a fair, reasonable and just basis that the objector's business must be assessed as falling under sub-class 1520.

52.8 The Learned Chairperson erred in ordering the objector must be assessed in terms of section 83(1) of COIDA.

52.9 The Learned Chairperson erred in concluding that it was in the interest of justice not to make an order that the defendant must pay the objector's costs and ought to have concluded that it was equitable for the defendant to pay the objector's costs considering the following:

52.9.1 There is no substance and/or rationality in the decision by the defendant that the objector falls under sub-class 1540;

52.9.2 The evidence on behalf of the defendant illustrates that on a factual basis it is not justified;

52.9.3 This evidence also confirms that there was no proper investigation by the defendant to determine the correct classification of the objector. The manner in which it was done leaves much to be desired;

52.9.4 On the other hand, it is glaringly clear from the evidence submitted by the objector it cannot fall under sub-class 1540 and that the true nature of its business means that sub-class 1520 is applicable;

52.9.5 Based on a lack of documentation, particularly policies, guidelines and instructions, it is also glaringly clear that a

totally unacceptable and improper approach was followed to determine the classification of the objector;

52.9.6 The objector, under protest, has complied and paid the assessments;

52.9.7 The objector was required to incur legal costs to have a situation which is clearly wrong rectified;

52.9.8 Under the circumstances, equities required that the defendant must pay the costs of the objector in filing its objections and presenting its case before the Chairperson and the assessors. Relief therefore is also sought in this regard.

Analysis

[53] In my view, what is central to the appeal is contained in the appellant's many grounds of appeal – it is whether the Chairperson's failure to deal with the objection of 21 June 2020 owing to the lack of supporting documents was correct or not.

[54] The other ground of appeal that is also central to the appeal is whether the Panel was correct in ordering that the appellant, as an objector, should be assessed in terms of Section 83(1) of COIDA, having found that CUMI's business fell under both sub-classes 1520 and 1540.

[55] In view of the approach I adopt, it is not necessary to deal exhaustively with all the appellant's grounds of appeal. This is in light of the outcome of the two grounds of appeal as alluded to above being dispositive of the appeal.

[56] There is undisputed evidence from both the sides that some of CUMI's business falls under sub-classes, namely under 1540 and 1520.

[57] Further, there was evidence by Ms Makopo that she had recommended that the classification of CUMI be reclassified from sub-class 1520 to sub-class

1540 because of the goods camping goods CUMI was actively selling, which included camping equipment through Union Mart.

[58] However, Ms Makopo conceded that at the time of her recommendation that the reclassification should be changed from 1520 to 1540, the Commissioner did not have the breakdown of CUMI's business in terms of the percentage of the various goods sold in the business.

[59] Ms Makopo's concession should have been significant to alert the Chairperson of the Panel to fashion an appropriate remedy.

[60] Furthermore, the Chairperson also appreciates that the equipment part of CUMI's business does not fall under sub-class 1520 but under 1540. Hence the decision that in his view the majority of CUMI's business fall under 1520.

[61] Since there was no policy adopted by the Commissioner to deal with an employer whose business sell goods or equipment that fall in both 1520 and 1540 sub-classes, the correct and appropriate remedy was to direct the Commissioner to formulate new policy to cater for this novel scenario.

[62] This reasoning is fortified by the Chairperson's own observation and acknowledgement that he did not have authority, as a Panel, to formulate new policies on behalf of the Commissioner.

[63] In the light of the peculiar circumstances of this case and the accepted evidence that CUMI's business consists of both sub-classes 1520 and 1540 and in the absence of an existing policy to deal with such novel situations, there is no option but for the Commissioner to re-classify CUMI.

[64] Since the current regulation do not cater for a situation in which an employer 's business falls under both 1520 and 1540, the Commissioner should reclassify CUMI ' business using the just and equitable basis envisaged in terms of Section 83 (1) of COIDA.

[65] If still aggrieved, CUMI would still be competent to lodge a fresh and new objection.

[66] The Commissioner must also commence *de novo* all CUMI's classification including the one that was not considered by the Panel namely the classification that led to the objection of 21 June 2021. Such reclassification should have a ²retrospective effect once decided.

[67] I now turn to the respondent's grounds in opposing the appeal. The reasons are not succinctly phrased. However, upon reading the respondent's heads of argument, the following can be gleaned:

67.1 The Panel whose discussion is the subject of this appeal was not supposed to have entertained CUMI's objection.

67.2 The current appeal does not involve the interpretation of COIDA and therefore should not be entertained.

[68] In view of the stance that I adopt to remit the matter back to the Commissioner, it is not necessary to deal with the grounds of appeal, suffice to say that they do not pose a challenge in the upholding of the appeal. The rationale of the opposition to the appeal is linked to the assertion that the Panel was not supposed to have been constituted in the first place.

[69] In view, this submission ill-conceived because the jurisdiction of this court is predicated on Section 91(5) (a) of COIDA. It must be appreciated that once there is a decision of a Panel in terms of section 91(2) (a), an aggrieved employer has a statutory right of appeal to the High Court. Accordingly, the grounds of opposition to the appeal on the basis that this court may not have jurisdiction to hear the appeal is without merit.

[70] For all these reasons I am inclined to uphold the appeal. What remains is the issue of costs. Nothing militates against the general rule that costs should

² The section provides as follows: "

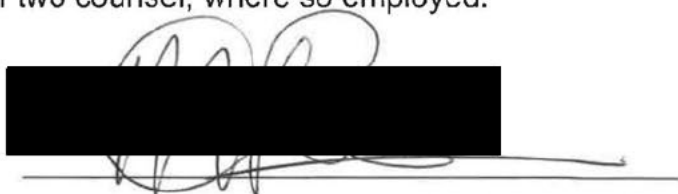
follow the result. The appellant has been substantially successful and is therefore entitled to all of its costs

Order

[71] In the result, I make the following order:

1. The appeal succeeds.
2. The decision of the Panel is set aside and it is declared that the appellant is entitled to have its business reclassified in terms of a section 83 (2) (a) of COIDA.
3. The matter is remitted to the Commissioner to reclassify the appellant and must take into account that its businesses fall into sub-class 1520 and sub-class 1540.
4. The Commissioner shall finalise the new classification as soon as practically possible but not later than six (6) months from the date of this order.
5. The appellant shall be entitled to raise a new or fresh objection in the event it would still be aggrieved by the Commissioner's new classification.
6. In the event of any new objection, the Commissioner shall appoint new members of a Panel to hear the appellant's objection which will be constituted by new members other than the ones that hear the objection that led to the current appeal.
7. The respondent shall pay the costs of the appeal, which costs shall include the costs of two counsel, where so employed.

I hand down the order.



R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Electronically submitted therefore unsigned

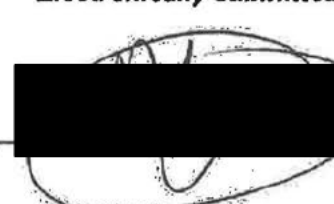
I concur




R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Electronically submitted therefore unsigned

I concur




M P KUMALO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **19 June 2024**.

Appearances

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State Attorney, Pretoria

DATE OF THE HEARING:

7 September 2023

DATE OF JUDGMENT:

19 June 2024