

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) Reportable Yes
(2) Of interest to other Judges Yes
(3) Revised: Yes/No

Date: 13/08/2024

Signature.....



CASE NO: A5045/2022

In the matter between:

VINCENT CHARLES GORE

Appellant

and

RAND MUTUAL ASSURANCE COMPANY LIMITED

Respondent

ORDER

MAIER-FRAWLEY J (Manoim J and Allen AJ concurring):

Introduction

1. In July 1996 the appellant was involved in a motor vehicle collision whilst *en route* to work. At the time, he was employed as a junior engineer at Western Areas Gold Mining Company Limited and was 23 years of age. He sustained a spinal injury in the collision which rendered him a quadriplegic and wheelchair bound for the remainder of his life. In the result, his budding career in mining engineering was cut abruptly short in its early stages.

2. By virtue of his medical condition, the appellant was declared totally and permanently disabled.
3. The respondent was (and is) the entity licensed in terms of s 30 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA' or 'the Act'), for purposes of assessing and making payment of claims for compensation in relation to occupational injuries or diseases arising out of employment, *inter alia*, in the mining sector.
4. In 1996, a claim was lodged on behalf of the appellant with the respondent for compensation in terms of COIDA pursuant to which an award of compensation was made in favour of the appellant on 18 August 1997 (the **original award**). Thereafter, on 30 April 2012, the original award was reviewed by the respondent at the instance of the appellant, which led to increased compensation being paid to the appellant in respect of his monthly pension (the **revised award**). The revised award included, amongst others, benefits such as an annual bonus and housing allowance, as envisaged in s 63 of COIDA, as well as an augmentation benefit and a constant care allowance. The appellant thereafter queried the computation of the revised award. He was informed on 9 December 2014 that the respondent had reviewed the revised award, as a result of which a reduced award was made (the **reduced award**). The reduced award appeared to exclude applicable benefits payable under s 63 of COIDA, whilst the augmentation benefit which had been paid to the appellant under the revised award, was set aside with immediate effect, resulting in a significant decrease in the monthly pension payable to the appellant.
5. The appellant objected to the reduced award (also referred to in the papers as 'the deprivation decision') in an email, dated 11 January 2015, addressed

to the Board Chairperson of the respondent.¹ A formal objection on the prescribed form was subsequently lodged on 29 September 2017 in terms of s 91(1) of COIDA. This led to a section 91 objection hearing being conducted before a tribunal appointed in terms section 91(2) of COIDA during May and June 2021. The central issue for determination at the hearing was whether the respondent had correctly applied s 51 of COIDA to determine the appellant's earnings when it made the reduced award, including its failure to include s 63 benefits in its computation of the reduced award. This in turn implicated the proper interpretation of s 51 of COIDA.

6. On 16 September 2021, the tribunal delivered the judgment that forms the subject of this appeal in which it dismissed the appellant's objection.
7. The appellant now appeals, in terms of s 91(5)(a)(i) and (iii) of COIDA, against the decision of the tribunal dismissing his objection to the reduced award.
8. The respondent cross-appeals against the ruling of the tribunal to condone the late filing of the appellant's notice of objection after the expiry of the 180-day period provided in s 90(1) of the Act. Its case in this regard is that the objection was lodged out of time and ought not to have been considered at all because the tribunal lacked the power to condone the late filing of the objection.
9. In order to properly contextualise the reduced award, it is necessary to set out the chronology of events that preceded the reduced award.

Broader factual matrix

¹ In a letter dated 22 January 2015, the respondent acknowledged receipt of the appellant's email containing his objection to the reduced award, but clearly mistakenly referred to the date of such email as being 11 January 2014 instead of 11 January 2015. The error is patent in that the deprivation decision resulting in the reduced reward was made in December 2014 and communicated to the appellant on 9 December 2014. Any objection thereto would have followed thereafter, as indeed happened in *casu*.

10. The respondent is licenced in terms of s 30 of the Act 'to carry on the business of insurance to employers against their liabilities to employees in terms of this Act.' Pursuant to its licencing arrangement, the respondent provided insurance cover to Western Areas Gold Mine company Limited (Western Areas) against its liability to its employees. Western Areas secured additional cover with the respondent for its employees. Such additional cover was provided for in an Augmentation Policy. The policy is relevant to the extent that some of the benefits that were paid to the appellant in terms of the revised award, which were subsequently withdrawn by virtue of the reduced award, were covered by the Augmentation Policy.
11. On 15 October 2012, the appellant, represented by Blake attorneys, requested the respondent to reconsider the original award in terms of s 90(1)(d) of COIDA, on grounds that it was based on a misrepresentation of facts in relation to the amount of the appellant's assumed probable future earnings, i.e., the earnings that would notionally be payable to an employee having five more years' experience than the claimant, as envisaged in s 51 of COIDA. To this end, the appellant provided amended remuneration information, which included affidavits by one Swanepoel and one Wagner.
12. There was no controversy about the fact that the original award was incorrectly calculated and that it stood to be reviewed.²
13. By the time the original award was reviewed, Western Areas had been sold to Goldfields. The respondent engaged with Goldfields (the successor employer) to obtain information for purposes of determining the appellant's amended future probable earnings, i.e., earnings related information to

² The original award of 18 August 1997 was based on future probable earnings of R7, 353.94 and afforded the appellant a modest monthly pension and constant care allowance under COIDA but no benefit under the Augmentation Policy, since the future probable earnings fell below the threshold of the Augmentation Policy.

enable it to recalculate the appellant's compensation in accordance with s 49, read with ss 51 and 63 of COIDA.

14. In a letter dated 1 May 2013, Goldfields provided the following information to the respondent, ostensibly in accordance with the employer's understanding of the appellant's deemed-qualification and deemed-experience earnings, as envisaged in s 51 of the Act :

"... I need to mention that there has been various corporate activity since 1996 and all remuneration information has not been filed as this is not required by law (only need to keep 7 years information).

We have gone back as far as we could and made certain assumptions using that information available and the following salaries could be determined. These salaries are only basic salaries which exclude any allowances and bonuses (these could not be determined which would have been applicable for Mr Gore)

The salary determined for a Sectional Engineer which he would have got had he obtained his Certificate of competency (which he was busy obtaining) would have been R 11 118,65. Had he continued to stay in the employment there could have been the possibility of him becoming a Resident Engineer with the basic salary of R 16 929.62." (emphasis added)

The lower figure was ostensibly indicative of the appellant's deemed-qualification earnings whilst the higher figure was ostensibly indicative of the appellant's deemed-experience earnings.

15. In a letter addressed by the respondent to the Department of Labour, dated 30 April 2013, the former referred to the figures that had been provided by Goldfields and tabulated, amongst others, the new amounts that it determined were payable to the appellant in terms of the revised award. The respondent reported as follows:

“We have ultimately received a response from Goldfields, Mr Gore's former employer with confirmation of his amended future probable earnings. According to the projections, Mr Gore would have earned a basic salary of R11 118.65 after 2 years having completed his GCC. Thereafter, he would have been a Resident Engineer with a projected basic salary of R163 929.62³. Based on the above information, we revised our calculations of Mr Gore's pensions as follows:

	Current	New
Pension	R15 888.00	R35 431.37
CAA	R1 550.00	R1 550.00
Total	R 17 388.00	R36 981.37

This amount includes an annual bonus of R 1 138.40 and a housing allowance of R 414.00. The back payments owed to Mr Gore amounts to R2 288 553.60 and his new capitalized value is R9 434 317.30.

If Mr Gore is agreeable, we would appreciate it if he could confirm it in writing in order that we could commence with the implementation of the revised pension...” (emphasis added)

16. The respondent's revised calculations entitled the appellant to qualify for benefits under the Augmentation Policy and thus the revised award included such benefits. The figures provided by Goldfields, the employer, were factored into the respondent's revised award, as too, regular benefits that were applicable to the appellant (ostensibly as envisaged in s 63 of COIDA) for purposes of arriving at the monthly amount payable in respect of the appellant's recalculated pension. In addition, the appellant was entitled to a constant care allowance in terms of s 28 of COIDA, the amount whereof was included in the total monthly amount that was determined by the respondent to be payable to the appellant (R36 981.37) under the revised award.

³ It was common cause between the parties that the underlined amount was incorrectly depicted as R163 929.62 instead of **R16 929.62**.

17. It is common cause that the appellant was thereafter paid in terms of the revised award.⁴ In addition, the back payments (referred to in the letter above) were paid to the appellant in two lump sum payments made on 15 July 2013 and 8 August 2013 respectively.
18. During September 2014, the appellant questioned whether all applicable benefits had been included in the revised award and sought clarity on the manner in which the compensation, including benefits in terms of the Augmentation Policy, had been computed. Correspondence was exchanged between the appellant's representative and the respondent and eventually a meeting was held between the parties on 4 September 2014.
19. On 12 September 2014, being approximately 14 months after the revised award took effect, the respondent wrote to the appellant requesting certain further documentation for it 'to consider the matter,' including 'the submissions made' at the September 2014 meeting. The respondent required: (i) Swanepoel's payslips for the period January to June 1996 as well as Swanepoel's payslip for December 1996 reflecting his 13th cheque payment; (ii) the appellant's employment contract with Western Areas; and (iii) Swanepoel's employment contract with Western Areas.
20. Swanepoel's payslips were thereafter provided to the respondent,⁵ however, the employment contracts could not be located, given the lapse of time.
21. On 31 October 2014, the respondent wrote to the appellant, *inter alia*, informing him as follows:

"The benefit which you are currently receiving in terms of our Augmentation Policy was based on Mr Swanepoel's 1997 earnings, as supplied by yourself,

⁴ On 12 July 2013, the relevant adjustment was made pursuant to which the appellant was paid accordingly.

⁵ It appears from the record that payslips of Swanepoel were provided for the period January until December 1996 as well as for the month of November 1997.

as opposed to his 1996 earnings. This benefit would have been less had RMA used Mr Swanepoel's 1996 earnings in terms of how RMA determined the earnings for purposes of calculating the benefit.

We have further noted that Mr Swanepoel was a Resident Engineer at the time of your accident, which was a very senior position in the Engineering profession and in all likelihood had more than five years work experience than you would have been entitled to at the time. As a result, the benefit awarded to you was premised on earnings of a person holding a senior position with more than the stipulated five years working experience as required in terms of the Augmentation Policy.

Consequently the augmentation benefit which you are receiving was based on a mistake or misrepresentation of fact, and thus stand[s] to be reviewed in terms of clause 1(b) read with clause 10 of the RMA's Augmentation Policy."

22. On 9 December 2014, the respondent sent a letter to the appellant in which it informed the appellant of the outcome of its review of the revised award, and of its decision to render the reduced award. The respondent conveyed therein that the benefit that the appellant had been receiving in terms of the Augmentation Policy (the amount of which had been factored into the computation of the revised award) *'was based on a mistake and/or misrepresentation of facts in that the benefit awarded'* to the appellant *'was premised on earnings of a person holding a senior position with more than the stipulated five years working experience...resulting in an overpayment of the benefit.'* The letter concluded with the respondent informing the appellant that the augmentation benefit that he had been receiving *'is hereby set aside with immediate effect.'*
23. On 12 December 2014, the respondent sent another letter to the appellant, in which it confirmed the reduced award and further advised as follows:

"We wish to confirm that **your current Augmentation monthly pension benefit** is R3 720.16, **which is based on the revised earnings of R11 118.65 received from your former employer.** You will appreciate that **you had submitted the earnings of a person with more than five years working experience than you would have been entitled to at the time.**

This resulted in the incorrect calculation and overpayment of your **Augmentation benefit** in the amount of R1 490 373, 39.

As a result, **RMA has set aside/suspended your Augmentation pension benefit and it will remain suspended until the overpayment amount stated above has been refunded in full to RMA.**" (emphasis added)

24. In a letter dated 17 December 2014, the respondent reported its decision to implement the reduced award to the Compensation Commissioner along the following lines. The respondent conveyed that it had decided to conduct a full audit on the appellant's COIDA and augmentation benefits in order to ascertain whether the benefits were accurately calculated. During the audit process, it discovered that the appellant had submitted incorrect earnings, which resulted in him receiving an inflated monthly pension for the augmentation benefit. The respondent thereafter informed the appellant that it intended to review his augmentation benefit, as the benefit was based on a mistake or misrepresentation, and invited him to submit written representations on why the benefit should not be reviewed. Despite having been afforded an extension of time within which to do so, no written representations were received from the appellant. Thereafter, the respondent reviewed the appellant's augmentation benefit in terms of the Augmentation Policy, based on 'the new future probable earnings of R11 118.65 received from his former employer.' The respondent further contended that the appellant was overpaid for his augmentation benefit by an amount of R1 490 373, 39, 'due to the inflated earnings he had submitted of a person with more than five years working experience than he would

have been entitled to at the time.' As a result, the respondent set aside/suspended his augmentation pension benefit and informed the appellant thereof in its letter of 09 December 2014.

25. In an email dated 11 January 2015 addressed to the respondent's board chairperson, the appellant objected to the deprivation decision/reduced award, amongst others, because the respondent had failed to have regard to its previous own acceptance of the applicability of benefits such as the annual bonus and housing allowance which had been included in the revised award but which had ostensibly been excluded in the reduced award.
26. In response to that objection, during January and February 2015, the respondent proposed that the s 51 earnings dispute (i.e., the deprivation decision dispute) be resolved through an arbitration process and undertook to bear the costs thereof. Thereafter, until October 2015, various letters were exchanged between the appellant's attorneys and the respondent concerning the alternative dispute resolution process proposed by the respondent. I need highlight only two such letters. In a letter dated 13 March 2014, the appellant's attorneys requested a round table meeting prior to the commencement of any litigation or arbitration process. The respondent replied thereto on 30 March 2015, in which letter it agreed to the proposed meeting, whilst stating that 'Our position is that Arbitration is the best suitable option to resolve this matter once and for all.'
27. The parties thereafter met and continued to engage one another concerning the way forward. Ultimately, on 22 April 2016 the parties agreed to resolve the s 51 earnings dispute through arbitration. A written arbitration agreement was concluded and an arbitrator appointed. For reasons that remain unclear, the arbitration process stalled thereafter.

28. On 29 September 2017 the appellant's attorneys informed the respondent of the appellant's dissatisfaction with the fact that the arbitration process had stalled for over a year.
29. As a result of the delays befalling the arbitration process, on 29 September 2017, the appellant submitted a formal objection on the prescribed form in terms of s91(1) of COIDA.
30. On 3 October 2017, the respondent acknowledged receipt of the formal objection, despite which, it sought to reassure the appellant, as follows:

"Note that the Augmentation Policy is a non-statutory benefit which does not have the provision for objection in terms of section 91 [of COIDA].
You will also appreciate that the matter is before an arbitrator, which is the correct forum for adjudication of this dispute.
We will therefore further engage our attorneys to ensure the arbitration proceeds to finality without any further delays." (emphasis added)
31. In February 2019 the parties appointed a new arbitrator and the arbitration proceedings commenced *de novo*.
32. In late 2019 the new arbitrator found that he lacked jurisdiction to resolve the s 51 earnings dispute, which was instead to be set down before the s 91 tribunal for adjudication.
33. The appellant's objection was heard by a tribunal consisting of a presiding officer, assisted by two assessors. A hearing took place over seven days, where both oral and documentary evidence was presented. On 16 September 2021, the Presiding Officer (presumably with the concurrence of the assessors) delivered a judgment in which it ruled that the appellant's objection was dismissed.
34. The appellant now appeals that ruling in terms of s 91(5)(a)(i) and (iii) of COIDA, which provides, in relevant part, as follows:

“Any person affected by a decision referred to in subsection (3)(a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding –

- (i) The interpretation of this Act or any other law;
- (ii) ...
- (iii) the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;
- (iv) ...”

35. Whether or not the tribunal correctly interpreted s51 of COIDA, and whether it misinterpreted the law by attributing an onus to the appellant in terms of COIDA, is what principally informs the present appeal.

Evidence presented at Tribunal

36. The appellant gave evidence at the tribunal hearing and called several witnesses to testify on his behalf. For purposes of judgment, only salient aspects thereof need be highlighted. In essence, the tribunal was seized with determining whether the appellant’s statutory s 51 earnings, as applied in the reduced award, were correctly determined. To that end, the amount of the appellant’s s 51 deemed earnings, calculated on the most favourable basis to the appellant, as envisaged in s 51, was to be assessed and determined at the hearing.
37. Ultimately, the undisputed or unrefuted evidence established that the appellant had obtained a BSC Electrical Engineering degree in 1994. He was the recipient of a prestigious bursary that afforded him formal and informal training and rotation through different JCI Mining⁶ operations. He was

⁶ JCI Mining Company (Pty) Ltd.

appointed in the position of junior engineer in January 1996 and was in the process of training for purposes of obtaining his government certificate of competency (GCC) when the accident intervened. He demonstrated exceptional ability in the workplace, so much so, that he was appointed to the position of fitting and turning foreman within one month, two months later to the position of acting engineer overseer, and shortly thereafter to the position of acting section engineer. Albeit that these were all temporary positions, these appointments reveal that his talents did not go unrecognised.

38. Being confined to a wheelchair and being paralysed from the neck down, means that the appellant can no longer pursue a career as an engineer in the mining industry.
39. Non-variable earnings that were typically paid by the employer (Western Areas) included a housing subsidy, annual bonus and production bonus (aimed at incentivizing production safety). Non-variable earnings were paid on a uniform basis throughout the organisation, save that the amount of the housing allowance of a resident engineer was greater than that of a junior engineer.
40. For purposes of s 51 of Coida, the appellant's deemed qualification would be that of a section engineer after obtaining his GCC. With another five years' experience, he could have become a resident engineer.
41. The general career trajectory of an engineer in the mining industry is different for university graduates (i.e. junior engineers with university degrees or 'degreed engineers' as referred to in evidence) as opposed to those possessing only a diploma level of education (diploma junior engineers). The natural employment progression for a degreed junior

engineer, after obtaining the GCC, is appointment to section engineer, then resident engineer, then assistant manager engineer, then manager engineer. Degreed junior engineers are able to write the GCC in one year, if they apply and are granted an exemption from completing the required two year period of training. Diploma engineers are required to complete two years training before being eligible to write the GCC. More than often diploma junior engineers fail the first time writing the exam and have to re-write same, thus taking longer to become qualified and thus to reach the level of section engineer. The GCC failure rate amongst diploma engineers is very high compared to degreed engineers. Degreed engineers typically do not fail the GCC exam the first time they write it. A typical degreed junior engineer with demonstrated capability could therefore become a resident engineer within a period of 5 years.

42. The expectation of management at Western Areas was for junior engineers to sit the GCC exam as soon as they possibly could in order to get them to the next position as quickly as they could. The company had no past history where degreed engineers did not pass the GCC. Each appointment tier comes with a salary increase and an increase in benefits, therefore it made sense for junior engineers to want to progress beyond their appointment as junior engineers.
43. Evidence was led, *inter alia*, in relation to the curriculum vitae of one Warwick Morley-Jepson, representing the typical junior engineer (as opposed to a junior engineer having special or superior attributes, skills and talents). Morley-Jepson had progressed to the position of resident engineer within a period of five years from obtaining his GCC.
44. Junior engineers earn in line with Paterson C4 scale of earnings. Section engineers are typically positioned at D4 pay grade on the Paterson scale,

whilst resident engineers are positioned at E1 pay grade on the Paterson scale.

45. Only Dr Dzingwa testified on behalf of the respondent. He was the general manager for claims and medical management at the respondent at the time. He however had no knowledge as to how the revised award had been computed or how the reduced award was calculated. He conceded that in so far as the respondent did not have the required information regarding the appellant's non-variable benefits, it ought to have sought additional information 'in order to work out what the s63 total earnings would be.'

Principles governing the proper interpretation of the provisions of COIDA

46. In *Mahlangu*,⁷ the Constitutional Court noted that the ends (purpose or objective) sought to be achieved by COIDA was to afford social insurance to employees who are injured, contract diseases, or die in the course of their employment.⁸ The court held that COIDA must be interpreted through the prism of the Bill of Rights and the foundational values of human dignity, equality and freedom. To interpret COIDA as a mere enactment of the common law would constrain the objectives of the Constitution and have anomalous results.⁹ The court went on to say that COIDA must now be read and understood within the constitutional framework of section 27¹⁰ and its objective to achieve substantive equality.
47. Statutory provisions must be interpreted in a manner that gives effect to the spirit, purport and object of the Bill of Rights.¹¹ Courts must prefer an

⁷ *Mahlangu and another v Minister of Labour and others* 2021 (2) SA 54 (CC).

⁸ Id par 20.

⁹ Id par 49.

¹⁰ Id par 52.

Section 27(1)(c) of the Constitution provides that everyone has the right to have access to social security. Section 27(2) obliges the State to take reasonable legislative steps to achieve the progressive realisation of that right.

¹¹ Section 39(2) of the Constitution states as follows:

interpretation that is consistent with the rights in the Bill of Rights over one that is not, provided that such an interpretation can be reasonably ascribed to the section.¹² When faced with two interpretations of a provision, both of which are consistent with the Constitution, the court must prefer the interpretation that 'best promotes' the rights in the Bill of Rights.¹³ If one interpretation limits a right and one promotes the right, the court must prefer that interpretation which promotes the right.¹⁴

48. The provisions of COIDA must be generously and purposively interpreted. In *Goedgelegen*,¹⁵ the Constitutional Court stated that 'We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees.'
49. The provisions of COIDA ought to be interpreted in the context of the underlying purpose of COIDA, as stated in the Preamble of the Act, being:
"To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith."

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport or objects of the Bill of Rights".

¹² *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001(1) SA 545 (CC) at paras 22-23

¹³ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

¹⁴ *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 89.

¹⁵ *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para 53.

In *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at para 25, the court explained that the question is whether what was done (in *casu*, by the tribunal) constituted compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided. See too: *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at par 17.

50. In *Davis*,¹⁶ the following was said:

“The policy of the Act is to assist workmen as far as possible. See *Williams v Workmen’s Compensation Commissioner* 1952 (3) SA 105 (C) at 109C. The Act should therefore not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.”

Statutory framework

51. In terms of s49(1)(a) of COIDA, 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.’ S49 is to be read in conjunction with ss 51 and 63 apropos permanently disabled employees. Section 51 of COIDA reads as follows:

“51 Compensation for permanent disablement of employee in training or under 26 years of age

(1) If as a result of an accident an employee sustains permanent disablement and at the time of the accident -

(a) was an apprentice or in the process of being trained in any trade, occupation or profession; or

(b) was under 26 years of age,

the Director-General shall determine the earnings of such employee in accordance with subsection (2) for the purpose of the calculation of compensation in terms of section 49.

(2)(a) In the case of an employee referred to in subsection (1)(a), his earnings shall be calculated on the basis of the earnings to which a recently qualified person **or** a person in the same occupation, trade or profession with five years more experience than the employee would have been entitled at the time of the accident, whichever calculation is more favourable to the employee.

¹⁶ *Davis v Workmen’s Compensation Commissioner* 1995 (3) SA 689 (C) at 694 F-G

(b) In the case of an employee referred to in subsection (1)(b), his earnings shall be calculated on the basis of the earnings to which a person of 26 years of age would normally have been entitled if at the time of the accident he had been performing the same work as the employee or a person in the same occupation, trade or profession with five years more experience than the employee, whichever calculation is more favourable to the employee.” (emphasis added)

52. Section 63 provides for the manner in which a claimant’s earnings are to be calculated. It reads, in relevant part, as follows:

“(1) In order to determine compensation, the Director-General shall calculate the earnings of an employee in such manner as in his opinion is best to determine the monthly rate at which the employee was being remunerated by his employer at the time of the accident, including-

- (a) the value of any food or quarters or both supplied by the employer to the date of the accident;
- (b) any overtime payment or other special remuneration in cash or in kind of a regular nature or for work ordinarily performed,

but excluding-

- (i) payment for intermittent overtime;
- (ii) payment for non-recurrent occasional services;
- (iii) amounts paid by an employer to an employee to cover any special expenses;
- (iv) *ex gratia* payments whether by the employer or any other person.

...

(5) If in the opinion of the Director-General it is not practicable to calculate the earnings of an employee in accordance with the preceding provisions, the Director-General may calculate those earnings in such manner as he may deem equitable, but with due regard to the principles laid down in those provisions.” (emphasis added)

53. Section 91 provides for objections to decisions of the Director-General and any appeal against decisions of the Director-General. It reads, in relevant part, as follows:

“(1) Any person affected by a decision of the Director-General or a trade union or employer's organization of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that 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.

(b) ...

(c) The provisions of sections 6, 7, 45 and 46 shall apply *mutatis mutandis* in respect of the consideration of an objection.

(3)(a) After considering an objection the 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 he may deem equitable.” (emphasis added)

54. It is against the backdrop of the abovementioned legal principles and statutory framework that I now turn to consider whether or not the tribunal misinterpreted and thus misapplied the provisions of s 51 (read with s 63), and s91(3) of COIDA, as the appellant submits it did.

Discussion

The main appeal

55. Section 51 was ostensibly enacted to obviate a situation where young vulnerable employees (being under the age of 26 or those who are still undergoing training at the inception of their careers), who become permanently disabled as a result of work related accidents at a time when they have not yet had the time to reap the benefits of established careers, are left without adequate social insurance over their lifetime. Young employees are generally positioned as low income earners on the proverbial corporate ladder, precisely because they have yet to gain experience or to

benefit from opportunities to upskill in order to enhance their employment and career prospects.

56. In terms of s 49 of COIDA, compensation for permanent disablement is to be calculated on the basis set out in items 2, 3, 4 and 5 of schedule 4 '*subject to the minimum and maximum amounts*'. It is common cause that the appellant's case fell within the parameters of item 4. He was accordingly entitled to a monthly pension equal to 75% of the prescribed monthly earnings at the time of the accident. In the ordinary course, the prescribed monthly earnings of an employee who suffers permanent disablement is based on his or her own monthly earnings at the time of the accident. For young claimants or those still in training at the time of the accident, their earnings would generally be relatively low.
57. Section 51 of COIDA establishes a more favourable basis for compensation which is more beneficial to these categories of employees. The appellant was both under the age of 26 and in training to become a qualified engineer once obtaining his GCC. He was employed in the mining engineering industry and conducting work within the engineering profession at the time of the accident. By virtue of s 51(1) of COIDA, when calculating compensation payable to the appellant for permanent disablement in terms of s 49 of COIDA, the appellant's earnings were to be determined by the respondent in accordance with s 51(2) thereof, which provides for two scenarios.
58. In the first scenario, in terms of the plain language of s 51(2)(a), as an employee in training, the appellant's earnings were to be calculated by the respondent on the basis of the earnings to which
 - (i) a recently qualified person; or
 - (ii) a person in the same trade, occupation or profession but with five years more experience than the appellant

would have been entitled to at the time of the accident, whichever calculation was more favourable to the appellant.

59. In the second scenario, in terms of the plain language of 51(2)(b), as an employee under 26 years of age, the appellant's earnings were to be calculated on the basis of the earnings to which
 - (i) a person of 26 years of age would normally have been entitled to, if at the time of the accident such person had been performing the same work as the appellant; or
 - (ii) a person in the same profession but with five years more experience (than the appellant) would have been entitled to,
 whichever calculation was more favourable to the appellant.

60. Both parties accept that s 51 creates a legal fiction. In each instance, the provisions of s 51 contemplate the use of a proxy to determine the permanently disabled employee's deemed earnings (hereinafter referred to as the 'disabled employee'). The proxy is different, depending on the circumstances of the disabled employee at the time of the accident. To that end, s 51 presumes the disabled employee - who is under 26 years of age or who is in training - to be in the same position as the proxy and then to be compensated as if he or she were earning what the relevant proxy was earning at the time of the accident. In each instance, the calculation of earnings which is most favourable to the disabled employee should be adopted.

61. Where the disabled employee is still in training at the time of the accident, the proxy is either:
 - (i) a person who is recently qualified; or
 - (ii) a person in the same trade, occupation or profession having five more years' experience than the disabled employee,

whichever is the more favourable.

62. Where the permanently disabled employee is under the age of 26 years at the time of the accident, the proxy is either:
- (i) a person aged 26 who is performing the same work as the disabled employee at the date of the accident, and the earnings are those to which such person would '*normally have been entitled*'; or
 - (ii) a person in the same trade, occupation or profession having five more years' experience than the disabled employee,
- whichever is the more favourable.
63. As can be seen from the above, in both instances provided for in s 51(1)(a) & (b), i.e. where the disabled employee is either under the age of 26 or is in training at the time of the accident, one of the envisaged proxies is a person in the same trade, occupation or profession having five more years' experience than the disabled employee. How then is such proxy to be selected for purposes of attributing such person's earnings at the date of the accident to the disabled employee?
64. The applicant contends that, on a proper interpretation, the envisaged proxy is a five-years more experienced employee '*with similar attributes, qualifications, ambitions and prospects for career advancement as the appellant*', regard being had to the fact that there is no single or standard employee. In other words, such a proxy is to be selected based on the *subjective* career trajectory of the specific claimant concerned. The respondent contends that on a proper interpretation, the envisaged proxy is a person in his unqualified state but with five years more experience than the disabled employee (*apropos* the trainee category) or is the same age and performing the same work as the permanently disabled employee, but with five years more experience (*apropos* the under 26 category). In other words,

on the respondent's interpretation, the disabled employee's career trajectory is irrelevant.

65. As discussed in cases such as *Endumeni*¹⁷ and *Capitec*,¹⁸ it is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not

¹⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par 18 (*Endumeni*), where the following was said: "

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used..." (emphasis added)

In *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* (330/2023) [2024] ZASCA 107 (03 July 2024), par 24, the Supreme Court of Appeal recently put it thus:

"Natal Joint Municipal Pension Fund v Endumeni Municipality pronounced that 'proper interpretation of a contract requires the whole contract to be read, and grammatical meaning to be attached to the words used in consideration of the surrounding circumstances only known to the parties.' This is the law prevailing on interpretation of contracts, agreements and even legislations." (emphasis added)

¹⁸ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at paras 25, 26 & 51, where the following was said:

"[25]...It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'.

[26]... *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.

[51]...interpretation begins with the text and its structure. They have gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text." (emphasis added)

subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. But, as *Capitec* cautioned, whilst context remains important, 'The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text'.

66. The object or purpose of s 51 is to provide vulnerable employees, being those who are rendered permanently disabled in the early stages of their working life or at a young age (be it in a trade, occupation or profession) with the 'fullest possible protection of their constitutional guarantees', i.e., sufficient compensation over their lifetime, calculated on a basis that would be most favourable to the employee concerned. The legislature contemplated that these categories of employees could be locked in a state of vulnerability for the rest of their lives and that they may therefore depend on the benefits provided in the Act for longer periods than other types of claimants under COIDA. That is no doubt why permanently disabled employees were singled out for 'more favourable' compensation as opposed to employees who are not rendered permanently disabled in work related accidents and who can, on recovery from occupational injuries or diseases, resume their trade, occupation or profession and thereby benefit from promotions and incremental increases in earnings over time.
67. COIDA provides for a system of no-fault compensation for employees who are injured in work-related accidents or who contract occupational diseases. COIDA has replaced the common-law position typically represented by civil claims of a plaintiff employee against a negligent defendant employer by a system which is intended to and does enable employees to obtain limited

compensation from a fund to which employers are obliged to contribute.¹⁹

Aligned therewith is the aim of COIDA, namely, to provide security to employees meeting the requirements of the Act in the provision of benefits provided for and prescribed by the Act.

68. Having regard to the purpose of the Act (discussed above) and its objective to achieve substantive equality, I am inclined to agree with the respondent that COIDA was not designed to provide full indemnification on an individualized basis, based on the subjective attributes of each disabled employee. It seeks to provide compensation to all employees equally, i.e., on a uniform and objective basis. In the context of s 51, when considering the disabled employee's deemed earnings based on the earnings of a person with five years more experience than the disabled employee at the time of the accident, a subjective career trajectory, based on the exceptional ability or the superior skills and attributes of the disabled employee concerned, is not what is contemplated.
69. On the other hand, the respondent's contended for interpretation of a person with five years more experience in the trainee category, namely, an *unqualified person in training but who has five years more experience than the disabled employee*, is not provided for in the text of s 51 and would require a reading into the provision.²⁰ It also appears to me to be non-

¹⁹ See: *The MEC for Education, Western Cape province v Strauss* 2008 (2) SA 366 (SCA) at paras 11-12.

²⁰ As the Constitutional Court cautioned in *Kubya v Standard Bank of South Africa Ltd* ;2014 (3) SA 56 (CC); (*Kubya*) at para 18: "[L]egislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament." (emphasis added)

Mhlantla AJ pointed out in *Kubya* at para 18 fn 23, that " In *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) Kentridge AJ, at paras 17-8, stated:

"I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions.

sensical when assessed contextually. Section 51 deems the disabled employee's earnings to be more than his or her actual earnings (whether as trainee or younger than age 26) at the time of the accident. In relation to permanently disabled employees who are still in training at the time of the accident, s 51(2)(a) requires that the disabled employee's earnings be calculated on the basis of what either a recently qualified person was earning at the time of the accident or what a person in the same occupation, trade or profession having five years more experience (than the disabled employee) was earning at the time of the accident, whichever calculation is more favourable to the disabled employee. The section does not state that the person with five years more experience is a person who was performing the same work as the disabled employee in his unqualified position at the time of the accident. Had this been the legislature's intention, it would have said so, as it did in s 51(2)(b) when providing for the first of two bases for calculating the compensation payable to permanently disabled employees under the age of 26 at the time of the accident.

70. As regards the permanently disabled employee who was under the age of 26 at the time of the accident, the respondent's contended for interpretation of a person with five years more experience, is that the proxy is a person who is the same age as the disabled employee and performs the same work as the

But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

While these remarks referred to constitutional interpretation, they apply even more forcefully in relation to statutory interpretation generally. See also *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 23-4 and 26." (emphasis added)

employee, but has five years more experience. Yet this is also not what the provision says. In terms of s51(2)(b), the disabled employee's earnings must be calculated either on the basis of (i) 'the earnings to which a person of 26 years of age would normally have been entitled if at the time of the accident he had been performing the same work as the employee', or (ii) 'on the basis of the earnings of a person in the same occupation, trade or profession with five years more experience than the employee.' In the first mentioned basis, the envisaged proxy is a person aged 26 who was performing the same work as the disabled employee at the date of the accident. The disabled employee's compensation must be calculated on the basis of what such proxy would normally have earned at the time of the accident. In the second mentioned basis, the proxy is a person in the same trade, occupation or profession as the disabled employee but who has five years more experience than the disabled employee. Had the Legislature intended that the proxy, being a person with five years more experience, was someone who had been performing the same work as the disabled employee at the time of the accident, it would have said so. It did not. In my view, the Legislature sought to differentiate the first mentioned basis from the second mentioned basis, by restricting the proxy in the first mentioned basis within the under age 26 category, to a person who had been performing the same work as the employee, as opposed to the second mentioned basis where there is no reference to the envisaged proxy performing the same work as the employee.

71. The 'five years more experience' proxy in the case of the trainee category, as envisaged in s51(2)(a), appears at first glance to differ from the 'five years more experience' proxy in the under 26 category, as envisaged in s 51(2)(b) of the Act. As regards the former, the compensation is calculated with reference to what the person in the same profession with 5 years more

experience than the disabled employee was earning at the date of the accident. In the under 26 year category, the compensation is determinable on the basis of what the person in the same profession with 5 years more experience than the employee was earning, without reference to the date of the accident. This may have been merely an oversight on the part of the legislature, carrying no attendant consequences. Where the earnings of a five years more experienced employee is considered *without* reference to the date of the accident, such a proxy's earnings could conceivably then be determined at a date other than the date of the accident. Does this mean that the earnings of such a proxy are his or her earnings as at another date, eg, the date of the award? Would such earnings be greater at the date of the award as opposed to the date of the accident? In my view, it is impossible to know, absent some form of divination, which higher courts have cautioned against when applying principles of interpretation.²¹ I will therefore assume, without deciding, that the proxy envisaged for a person with five years more experience in s 51(2)(b) is the same proxy as that envisaged in s 51(2)(a) of the Act and that the earnings of such proxy are to be determined at the date of the accident for purposes of calculating the amount of compensation to be awarded to the disabled employee.

72. As regards surrounding circumstances, in the context of the mining engineering profession, the unrefuted evidence before the tribunal was that the typical career trajectory of a mining engineer is progressive. Junior engineers with degrees generally progress quicker along the typical career

²¹ The cautionary remarks of Cameron J in *NGA v Opperman* 2013 (2) SA 1 (CC) at paras 99, 100 & 105, are apposite in this regard:

"[99]... it has to be assumed that the legislature's enacted text includes only words that matter...

[100]... if the language used by the lawgiver is ignored in favour of other pursuits, the result is not interpretation but divination.

[105]There is then no particular constitutional imperative to squeeze a meaning from the provision. Rather, we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better, in my view, to acknowledge the drafting error, and to leave parliament to correct it." (emphasis added)

trajectory applicable to that category of employees than those having a diploma level of education. Generally, all junior engineers strive to become qualified engineers as soon as possible, as this begets better benefits and higher earnings. It is therefore highly unlikely for a junior engineer to remain at an unqualified level for five years.

73. As the evidence further established, there are two extremes within the mining engineering industry – on the one side of the scale, is a person like the appellant who stood out from his peers due to his specific exceptional skills, capabilities, drive, determination, ambition, aspirations and thus prospects for earlier career advancement. On the other side of the scale, there are those who are content to remain in a position such as a sectional engineer for longer periods, without striving for rapid promotions. In between these two extremes, lies the normal or average employee who progresses along the typical career projectory of a mining engineer at a normal as opposed to an accelerated pace.
74. Taking into account that COIDA's objective is to achieve substantive equality,²² and having considered the triad of text, purpose and context, whilst viewing s 51 through the prism of the Constitution, in my view, on a proper interpretation, a proxy representing a person with five years more experience than the disabled employee, is a person who has progressed further along in his or her career over a five year period from the date of the accident than the disabled employee. *Apropos* the five years more experienced proxy, s 51(2) contemplates where the normal or average junior engineer relative to the disabled employee would be at in his or her profession in five years' time. The word 'profession' denotes either the

²² *Mahlangu*, (fn 7 above) at par 49.

person's occupation, career or vocation.²³ In other words, the section contemplates a generic career trajectory of the normal or average junior engineer possessing either a university degree or a diploma qualification as opposed to a subjective career trajectory of the exceptional junior engineer.

75. It was the respondent's duty to calculate the compensation payable to the appellant under COIDA for purposes of making any award in respect of permanent disablement, as envisaged in s 49, read with ss 51 and 63 of the Act. In terms of sections 6; 7; 45 and 46 of COIDA, wide investigative powers are conferred on the respondent to obtain whatever information is needed to enable it to determine the most favourable basis of calculation in respect of compensation payable to a disabled employee. It goes without saying that a failure by the respondent to employ all available mechanisms to enable it to calculate the correct compensation payable to a permanently disabled employee under both s 51 and s 63, cannot be laid at the door of a claimant.
76. When reviewing any award, in terms of s 90(2) of the Act, 'The Director-General may, after he has considered the evidence and representations

²³ The Cambridge dictionary defines 'profession' as 'any type of work that requires special training or skill because it involves a high level of education' - (see https://dictionary.cambridge.org/dictionary/english/profession#google_vignette)
The Cambridge dictionary defines 'career' *inter alia* as 'the job or jobs you do during your working life especially where this involves making progress to better jobs or is in a particular profession – (see <https://dictionary.cambridge.org/dictionary/english/career>)

A 'career' refers to one's profession or chosen line of work. It also refers to the education, training, and experience needed to grow in one's current role or to move on to another one. (see <https://www.thebalancemoney.com/what-is-a-career-525497>)

The Oxford English dictionary defines 'vocation' as a person's employment or main occupation or a trade or profession (see https://www.google.com/search?q=definition+of+%27vocation%27&sca_esv=1671dfeb145c5278&sca_upv=1&rlz=1C1CHBD_enZA910ZA910&sxsrf=ADLYWIK4jiO6R1d5YsxAvYJNHD8FNBYFw%3A1722239641164&ei=mUqnZo7iCeq1hblPs6Ld4A0&ved=0ahUKEwjOkp7Q4suHAXqWKEAHTNRF9wQ4dUDCBA&uact=5&oq=definition+of+%27vocation%27&gs_lp=Egxnd3Mtd2l6LXNlcuAIGGRIZmluaXRpb24qb2YgJ3ZvY2F0aW9uJzIGEAAYFhgeMgYQABgWGB4yBhAAGBYHjIGEAAYFhgeMgYQABgWGB4yBhAAGBYHjIGEAAYFhgeMgYQABgWGB4yBhAAGBYHjIGEAAYFhgeSJAuUL4OWIEkcAF4AJABAjgBuQKqAb0XqgEGMi0xMC4xuAEDyAEA-AEBmAlLoALxFlCChAAGLADGNYEGEFCAg0QABiABBiwAxxhDGloFwglFEAAYgATCAgYQABgNgB6YAwCIBgQGBqgSBwcxLjAuOS4xoAeHRQ&scient=gws-wiz-serp)

submitted to him and made such inquiry as he may deem necessary, confirm, amend or set aside his decision, and may suspend, discontinue, reduce or increase compensation awarded.²⁴ In terms of s 91(2)(c), a tribunal that considers an objection in terms of s 91 of COIDA, is conferred the same wide powers of investigation provided for in ss 6; 7; 45 and 46 of the Act to obtain whatever information is required to enable it to assess an objection. In the context of the present matter, the tribunal was tasked with the duty to determine whether the appellant's s 51 earnings were correctly determined by the respondent when computing the reduced award.

77. For purposes of determining the appellant's compensation within the context of the mining engineering profession, the earnings of the following four different proxies ought to have been considered by the respondent when reviewing the revised award, for purposes of arriving at the reduced award, and the most favourable outcome applied :

- (i) Re a recently qualified person: the proxy would be a section engineer, having obtained the GCC qualification, and the earnings of a section engineer at the date of the accident are to be considered;

²⁴ Section 90 provides as follows:

"90. Review of decisions by Director-General

(1) The Director-General may after notice, if possible, to the party concerned and after giving him an opportunity to submit representations, at any time review any decision in connection with a claim for compensation or the award of compensation on the ground—

- (a) that the employee has not submitted himself to an examination referred to in section 42;
- (b) that the disablement giving rise to the award is prolonged or aggravated by the unreasonable refusal or failure of the employee to submit himself to medical aid;
- (c) that compensation awarded in the form of a periodical payment or a pension is excessive or insufficient because of existing or changed circumstances;
- (d) that the decision or award was based on an incorrect view or misrepresentation of the facts, or that the decision or award would have been otherwise in the light of evidence available at present but which was not available when the Director-General made the decision or award.

(2) The Director-General may, after he has considered the evidence and representations submitted to him and made such inquiry as he may deem necessary, confirm, amend or set aside his decision, and may suspend, discontinue, reduce or increase compensation awarded.

(3) For the purposes of this section compensation shall include medical aid.

- (ii) Re a person in the mining engineering profession having five years more experience than the appellant, the respondent had to consider where the average junior engineer would be in his or her career five years into the future to determine the yardstick for the appellant's deemed earnings. Having regard to the evidence led at the tribunal hearing, in the generic mining engineering career trajectory of junior engineers with university degrees, this would equate to the earnings of a resident engineer at the date of the accident, whilst in the generic mining engineering career trajectory of junior engineers with a diploma level of education, this would equate to the earnings of a sectional engineer;
- (iii) Re a permanently disabled employee who is younger than 26 at the time of the accident: the proxy is a person aged 26 who was performing the same work as the disabled employee at the date of the accident. The disabled employee's compensation must be calculated on the basis of what such a proxy's normal earnings were at the time of the accident. In the present context, the earnings of a junior engineer aged 26 at the time of the accident would have had to be considered.
- (iv) Re a person in the mining engineering profession having five years more experience than the appellant – in the case of the disabled employee who was younger than age 26 at the time of the accident - the proxy would be the same as in (ii) above, save that I have assumed, without finding, that the relevant proxy's earnings as at the date of the accident, are to be employed.

78. During the tribunal hearing, evidence was provided as to the earnings of the envisaged proxies mentioned in paragraph 77 (i) and (ii) above. It was incumbent upon the tribunal to assess whether the respondent had correctly applied the provisions of s 51, having regard to the various bases of calculation of earnings provided in the section, and whether the most favourable outcome was applied in favour of the appellant when computing the reduced award.
79. In reviewing the revised award, it was incumbent upon the respondent to determine the earnings of the different proxies contemplated in s 51(2) in order to determine the most favourable basis on which to compute the amount of compensation payable to the appellant, rather than look for ways to reduce the compensation payable, as seemingly occurred when the reduced award was made. I say this for reasons that follow.
80. It is impossible to determine from the contents of the letter that informed the revised award (referred to in par 15 above), the basis upon which the respondent had computed the revised award, save that the respondent appears to have factored certain benefits that the appellant was receiving (as envisaged in s 63 of the Act) into its calculations, including a constant care allowance as provided for in the Act. For purposes of the revised award, the respondent took account of information provided by the successor employer, Goldfields. The employer had, in the letter referred to in par 14 above, ostensibly provided the earnings of a recently qualified engineer, namely, that of a sectional engineer (R11 118.65), as well as the earnings of a person with five years more experience than the appellant, namely, that of a resident engineer (R16 929.62). *Ex facie* the revised award, it is not clear which of the two figures were in fact employed in calculating the revised award, an aspect which resulted in some controversy both at the hearing of

this appeal and in further written argument presented on behalf of the parties in regard thereto after the hearing of the matter.

81. What is clear, however, is that the respondent took account of the information, as provided by Goldfields, for purposes of determining the revised award. As the chronology of events (outlined earlier in the judgment) clearly shows, the payslips of Swanepoel were only provided some 14 months after the revised award was made and took effect. That means that the respondent was in error when stating, in its letter referred to in par 21 above that *'The benefit which you are currently receiving [in terms of the revised award] in terms of our Augmentation Policy was based on Mr Swanepoel's 1997 earnings, as supplied by yourself'*, and in stating in its letter 9 December 2014 (referred to in par 22 above) that the revised award had been *based on a mistake and/or misrepresentation of facts made by the appellant* in submitting the 1997 payslips of Swanepoel, resulting in the revised award being premised on earnings of a person holding a senior position 'with more than the stipulated five years working experience'. It will be recalled that the payslips of Swanepoel were provided by the appellant at the request of the respondent.
82. In computing the reduced award, as is apparent from the respondent's letter of 12 December 2014 (referred to in par 23 above) that the respondent utilised the earnings 'of R11 118.65 received from your former employer', being the *lower* of the two figures that had been provided by Goldfields. Its justification for doing so was allegedly that *"The benefit which you are currently receiving in terms of our Augmentation Policy was based on Mr Swanepoel's 1997 earnings... as opposed to his 1996 earnings."* Which particular 1997 payslip of Swanepoel was referenced, was not indicated in the letter.

83. But, as I have been at pains to point out, the revised award could not have been based on Swanepoel's payslips (whether at the time of the accident in 1996 or thereafter in 1997) and could also not have been premised on a misrepresentation of facts attributable to the appellant.²⁵ The appellant was in my view, perfectly justified in seeking clarity on the respondent's calculations regarding the revised award and not least of all, in objecting to the reduced award thereafter.
84. It should be noted that the relevant chronology of facts - established from the documentary evidence in question - had been placed before the tribunal in evidence during the s 91 objection hearing. The tribunal was therefore placed in possession of facts from which to determine whether or not the reduced reward fell to be confirmed, or if not, what equitable award fell to be made.
85. One of the grounds of appeal relied upon by the appellant in these proceedings is that the presiding officer misconstrued his powers, as envisaged in s 91(3) of the Act, in simply dismissing the objection. Section 91(3) requires of a presiding officer to either confirm the decision in respect of which the objection was lodged or to give an equitable decision. In simply dismissing the objection, the proper s 51 determination of the appellant's compensation in terms of the reduced award, which constituted the crux of the objection to be considered by the tribunal, remained unresolved by virtue of the dismissal order.
86. In par 10 of the judgment, the presiding officer recorded that *'RMA argued that Mr. Vincent Gore submitted a pay slip of a Resident Engineer when he queried his compensation award and that resulted in overpayment when Gore's pension was reviewed internally and recalculated [i.e., in terms of the*

²⁵ The ground of review relied upon by the respondent for purposes of the reduced award.

revised award]. *That has resulted 'in suspension of monthly pension'* [i.e., in terms of the reduced award]. As has been demonstrated above, in accepting the respondent's argument aforesaid, the tribunal perpetuated the error that had been made by the respondent when seeking to justify its deprivation decision for purposes of the reduced award.

87. In paras 11 and 12 of the judgment, the presiding officer attributed an onus upon the appellant to prove the amount of compensation that was payable to him in terms of s 51 of the Act, stating that *"The Objector is Dominus Litis in this matter and he needs to prove his case on the balance of probabilities. The Objector failed to prove that he submitted the correct pay slip of the Sectional Engineer or the salary of the Sectional Engineer with 5 years' experience in 1996, in terms of Section 51 of COIDA."* This conclusion was wrong, both in fact and in law. Section 51(2), properly construed, refers to the earnings (salary) in 1996 (the date of the accident) of one type of proxy (a person with five years more experience than the disabled employee), which s 51(2)(a) of the Act requires be considered. Put differently, the reference in s 51(2)(a) to the time of the accident is a reference to the envisaged proxy's earnings at such date, as opposed to the proxy's amount of experience in years, at such date. The person with 'five years more experience' is determinable with reference to either the generic career trajectory of those permanently disabled employees who achieved a graduate level of education (university degree), the proxy *in casu* in such category being a resident engineer, or with reference to the generic career trajectory of those permanently disabled employees who achieved a diploma level of education, the proxy *in casu* in such category being a section engineer.
88. By attributing an onus to the appellant under the provisions of COIDA, as it did, the tribunal wholly misconceived or misinterpreted the provisions of

COIDA, more particularly, those set out in s 49, read with ss 51 and 63. Sections 6,7,45 and 46 of COIDA impose a duty upon the respondent to investigate and procure factual information in support of the various bases of calculation provided for in s 51 (2)(a) & (b), including the disabled employee's earnings under s 63, for purposes of determining the amount of compensation payable to the disabled employee on the most favourable basis. The Act casts no onus on the permanently disabled employee to prove the amount of compensation payable to him in terms of the Act, nor to prove that the award objected to, was incorrectly calculated. In terms of s 91(1)(c), the tribunal is vested with the same wide investigative powers as the respondent to determine whether or not the award objected to was correctly calculated in terms of s 51 of the Act, for purposes of determining, in terms of s91(1)(3) of the Act, whether or not the award should be confirmed, and if not, for purposes of reaching some other equitable decision vis-à-vis the objection. The process is by its nature inquisitorial as opposed to adversarial.

89. The judgment concludes, in par 14, with the following: " *The wording of Section 51 is very clear and it does mention career projection, trajectory and/or career promotion as it was argued by the Objector*"(emphasis added). On a proper reading of the judgment, it appears that, in relation to the underlined portion of the above quote, the presiding officer meant to say that s 51 does *not* mention career projection. In so finding, the tribunal misinterpreted what s 51 envisages.
90. In the light of the foregoing, the outcome of the tribunal hearing cannot stand and the tribunal's decision properly falls to be reconsidered on appeal.
91. Returning to the question concerning what deemed earnings the respondent employed for purposes of its revised award, i.e., that of section engineer or

resident engineer, suffice it to say that the appellant contends that the earnings of a section engineer were likely employed, whilst the respondent contends that the earnings of a resident engineer were likely employed. Evidence provided at the tribunal hearing was referred to by the parties' in their respective heads of argument, and formed the basis of certain inferences sought to be drawn therefrom.

92. In the respondent's letter, dated 12 December 2014, in which it informed the appellant that '*your current Augmentation monthly pension benefit [i.e. that which had been paid pursuant to the revised award] is R3 720.16, which is based on the revised earnings of R11 118.65 received from your former employer.*' This was a direct recordal by the respondent of the earnings utilised by it in calculating the revised award. In so advising, the respondent could not have been mistaken, for on 17 December 2014, it advised the Compensation Commissioner that the revised award had been based on '*the revised earnings of R11 118.65 received from [appellant's] employer.*' There is no reason to doubt the correctness of what the respondent had itself established and conveyed in its official correspondence of December 2014, contemporaneous with the reduced award.
93. Suffice it to say that the respondent, being the party who had exclusive intimate knowledge of its own calculations and of the basis upon which it arrived at the revised award, presented no oral evidence before the tribunal. What remains indisputable, however, is the fact that the reduced award appears *not* to have included the constant care allowance and s63 regular benefits, which ought to have been included in the computation of the reduced award and which had also previously been included in the computation of the revised award.²⁶ Interestingly, no misrepresentation of

²⁶ Albeit that it is difficult to understand how the appellant's s 63 benefits and constant care allowance had been computed in the revised award.

facts was (or is) relied on by the respondent for its exclusion of the amount of these benefits in calculating the reduced award.²⁷

94. It may be recalled that the reduced award not only diminished the monthly augmentation benefit found to be payable to the appellant, but the recalculated augmentation benefit was withheld and set off against a debt erroneously considered by the respondent to be due to it by the appellant.
95. In so far as the earnings of a section engineer (appellant's deemed earnings) were employed in the computation of the revised award (being the lower of the two figures provided by the employer), the appellant indicated at the hearing of the matter that he is content to abide by the calculations employed by the respondent in the revised award, which he seeks be reinstated in order to bring finality to the proceedings between the parties. Given the long history of protracted litigation between the parties, the obvious prejudice to the appellant in receiving the reduced award, and the fact that, based on the evidence at hand, this court is in as good a position as anyone to assess the award payable to the appellant, it is in the interests of justice that finality be reached, and that the revised award be reinstated.

Cross-appeal

96. Section 91(1) of COIDA provides that objections against the decision of a commissioner may be lodged within 180 days after the decision. The respondent contends that s 91(1) of COIDA does not permit any form of condonation and neither a court nor a tribunal established to consider an

²⁷ In terms of section 63(1), the respondent was obliged, in determining the compensation payable, to calculate the employee's earnings in the manner that it considers best to determine the monthly rate to which the employee was being remunerated at the time of the accident, which remuneration would include the value of any food or accommodation or both supplied by the employer at the date of the accident and any overtime payment or other special remuneration in cash or in kind of a regular nature or for work ordinarily employed. In terms of s63(5), *'If in the opinion of the Director-General it is not practicable to calculate the earnings of an employee in accordance with the preceding provisions, the Director-General may calculate those earnings in such manner as he may deem equitable, but with due regard to the principles laid down in those provisions.'*

objection may condone non-compliance with a statutory period 'unless the legislation has expressly or by necessary implication conferred such power'. In this regard, reliance was placed on *Shield*,²⁸ a case that is, however, distinguishable on its facts.

97. The issue to be decided on appeal in *Shield*, was whether, in an urgent application brought in terms of sec. 24 (2) of Act 56 of 1972 for extension of time within which to serve summons in a third party action, the Court or a Judge may, by virtue of the provisions of Supreme Court Rule 6 (12), condone short service of the papers on a respondent outside the area of jurisdiction of that Court or Judge, despite the provisions of sec. 27 of the Supreme Court Act, 59 of 1959. The court was not seized with the consideration of a constitutional right, as implicated in the present case, let alone the provisions of COIDA. In the circumstances, the case has no application to the present matter.
98. In the alternative, the respondent submits that even if the tribunal had the power to condone non-compliance with the time period provided for lodging an objection, the appellant failed to establish that good cause existed for the

²⁸ *Shield Ins Co Ltd v Van Wyk* 1976 (1) SA 770 (NC) at 772E- H, where the following was said: "It is unnecessary to enquire into the status of the Uniform Rules framed under sec. 43 of the Supreme Court Act in relation to the Act itself as regards determination of *dies induciae*, since there is for present purposes no conflict between the two. Sec. 27 of the Act deals only with service outside the area of jurisdiction of a Court. Rules 6 (5)(b) and 19 and Circuit Rule 6 provide periods differing from those set out in sec. 27 of the Act, but by employment of the phrase 'subject to the provisions of sec. 27 of the Act' make it clear that those differing periods relate only to intra-jurisdictional service. Cf. *Rosslee v. Rosslee*, 1971 (4) SA 48 (O).

Rule 6 (12)(a) states that:

'In urgent applications the Court or a Judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure... as to it seems meet.'

It does not purport to give the Court or a Judge any discretion to dispense with the statutory provisions of the Act.

The Court *a quo* therefore erred in accepting that it had a discretion in terms of Rule 6 (12); since the *induciae* to which the company, in Cape Town, was entitled in terms of sec. 27 of the Supreme Court Act was 21 days, and Rule 6 (12) only applies to a period laid down by the Rules themselves, i.e. in respect of intra-jurisdictional service. Plaintiff's notice of motion gave the company not quite two days' notice instead of 21..."

late noting of the objection and the tribunal ought therefore to have upheld the respondent's point *in limine* at the tribunal hearing.

99. It may be recalled that the reduced award or deprivation decision was made in December 2014. On the respondent's own version, the 180-day period would have expired during June 2015. During January 2015, the appellant informed the respondent of his objection against the decision, albeit not on the prescribed form. A formal objection on the prescribed form was lodged in September 2017. But, as is apparent from the factual chronology set out earlier in the judgment, the delay in lodging the formal objection on the prescribed form was caused by the pursuit, at the instigation of the respondent, of a private arbitration process, which the appellant in good faith agreed to submit to. Given that the alternate dispute resolution process is aimed at the expeditious resolution of a dispute, it cannot be said that the appellant could have contemplated the stalling of such process for a period in excess of a year. Nor could the appellant be penalised for participating therein, given that he had been informed by the respondent that the dispute (premised on his objection) did not fall within the ambit of s91, which advice later proved to be erroneous.
100. In the application of COIDA, a formalistic and legalistic approach is to be eschewed. Seen through the prism of the Constitution, COIDA is not predisposed to a rigorous adherence to form over substance.²⁹

²⁹ In *Minister of Police v Molokwane* (730/2021) [2022] ZASCA 111 (15 July 2022), the Supreme Court of Appeal explained what had been held in *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at para 25, as follows:

"There it was held that the adoption of the purposive approach in our law has rendered obsolete all the previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision. The question was thus 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. A narrowly textual and legalistic approach is to be avoided."

101. The respondent adopts a legalistic and mechanical approach in relation to the 180-day requirement in s91(1), which it argues is mandatory, and makes no provision for condonation for non-compliance with the time period prescribed.
102. In *Allpay*,³⁰ the Constitutional Court put it thus:
 “Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O’Regan J succinctly put the question in *ACDP v Electoral Commission* as being “whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose”. This is not the same as asking whether compliance with the provisions will lead to a different result.” (footnotes omitted)
103. The interpretation propounded on behalf of the respondent is incompatible with the injunction in s 39(2) of the Constitution, which enjoins courts, when

The Supreme Court of Appeal pointed out what had been observed in *Ex Parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1132F, namely, that there was a ‘...trend in interpretation away from the strict legalistic to the substantive, and endorsed that which had been said in *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434A about the categorisation of statutory requirements as ‘peremptory’ or ‘directory’:

‘...They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular...’.

³⁰ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC), par 30.

interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Consistent with this injunction, the interpretation of s 91(1) must be one which promotes this right, by considering the underlying purpose of the section, rather than merely its text. As the Supreme Court of Appeal put it in *Molokwane*,³¹ *'Thus, where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted. ... This purposive approach is far more consistent with our constitutional values, than reading the section narrowly and strictly, as preferred by the appellants.'*

104. The respondent's propounded interpretation would serve to deny the appellant his right to have the s 91(1) objection considered by the tribunal in terms of ss 91(2)(a) and 91(3)(a) of COIDA. The constitutional right implicated in this case is the right to social security, and, for purposes of considering whether the reduced award was to be confirmed or not, the correctness of the amount payable to the appellant as compensation in terms of the reduced award ultimately fell to be considered by the tribunal. I agree with the appellant that in essence, the cross-appeal seeks to penalise the appellant for participating in an arbitral process that was proposed and driven by the respondent. It was only after the appellant objected to the reduced award in January 2015, that the respondent adopted the resolute view that the dispute fell outside the scope of s 91 and that it should rather be resolved through an arbitration process. It ill-behaved the respondent to thereafter raise a technical objection at the tribunal hearing, based on a narrow and legalistic interpretation of s91(1), being one which (i) served to undermine the purpose of COIDA (discussed above), and (ii) failed to promote the spirit, purport and objects of the Bill of Rights and (iii) which

³¹ Id, par 16.

would inevitably inure to the prejudice of the appellant, with no demonstrable prejudice being (or having been) suffered by the respondent.

105. In my view, the wording of s 91(1) does not preclude a consideration of an objection lodged after the lapse of 180 days. The tribunal retains a discretion to condone non-compliance with the statutory period on good cause shown. The use of the word 'may within 180 days', is permissive in nature. When looking at s 91 through the prism of the Constitution, an interpretation that promotes the right of access to a tribunal hearing for purposes of considering a social security right, is to be preferred over a legalistic interpretation that precludes access to a hearing to resolve a dispute.
106. When considering the section in the broader context of the statute, s4(1) of COIDA sets out the functions of the Director General (DG). S4(1)(k) empowers the DG to decide on *any other question* falling within his functions in connection with the administration of the Act.³² The appellant submits that it is conceivable that an employee may be injured in the workplace and be unable to lodge a claim within the prescribed period to the severity of his injuries. Granting condonation for non-compliance with a time period stipulated in COIDA is incidental to fulfilling the DG's functions in connection with the administration of the Act. It is either a primary implied power of an

³² "**Functions of Director-General** –(1) Subject to the provisions of this Act, the Director-General shall—

- (f) decide any question relating to –
 - (i) a right to compensation;
 - (ii) the submission, consideration and adjudication of claims for compensation;
 - (iii) the calculation of earnings;
 - (iv) the degree of disablement of any employee;
 - (v) the amount and manner of payment of compensation;
 - (vi) the award, withholding, review, discontinuance, suspension, increase or reduction of compensation;
 - (vii) the liability for payment of compensation as contemplated in section 29;

- ...
- (k) decide upon any other question falling within his functions in connection with the administration of this Act."

ancillary implied power in the hands of the DG,³³ and it is the DG who would be well-placed to condone any non-compliance on a consideration of the facts of each case. I am inclined to agree. S91 deals with objections and appeal against the decision of the DG. As a tribunal is obliged to give effect to the purpose and objects of COIDA, the incidental power to consider any question that falls within the administration of COIDA (including non-compliance with any time period and condonation in respect thereof) must be implicit in its functions. The incidental power would include the power to regulate its procedures for purposes of promoting the right of access to justice.

107. The tribunal applied its mind to the facts at hand and ruled that the respondent's point *in limine* fell to be dismissed. In so doing, it correctly interpreted its powers under s 91(1) to consider and condone non-compliance with the stipulated 180-day period stated therein.
108. In *Van Wyk*,³⁴ the Constitutional Court affirmed that the standard for an application for condonation is the interests of justice, which depend on the facts and circumstances of each case. Factors relevant to such enquiry include the nature of the relief sought, the extent and cause of delay, the effect of the delay on the administration of justice and other litigants, the importance of the issues to be raised in the matter and the prospects of success. As a reading of the record reveals, the tribunal had regard to the fact that the appellant had participated in the arbitration and had been dissuaded by the respondent to pursue a s 91 objection; the importance of

³³ See *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* 2021 (4) BCLR 349 (CC) at paras 63-72, for a discussion of these types of powers.

³⁴ *Van Wyk v Unital Hospital and another (Open Democratic Advice Centre as Amicus Curiae* 2008 (2) SA 472 (CC)

the implicated constitutional right; and the interests of finality in the administration of justice.

109. For all the reasons given, the cross-appeal falls to be dismissed.
 110. As regards costs, there are no circumstances that warrant a deviation from the general principle that costs should follow the result. The complexity of this case warranted the use of two counsel by both parties.
 111. As indicated earlier in the judgment, the appellant indicated at the hearing of the appeal that he would be content to abide by the revised award, which ought, in the interests of finality, to be reinstated. That appears to me to be an appropriate order, given the long history of the litigation. It is in the interests of justice for this matter to reach finality.
1. Accordingly, the following order is granted:

ORDER

1. The appeal succeeds with costs, including the costs of two counsel.
2. The order of the tribunal dismissing the appellant's objection to the respondent's rejection of his claim for compensation is set aside and is replaced with the following order:
"The respondent's revised award, evidenced by its letter of 30 April 2013, is reinstated with retrospective effect."
3. The cross-appeal is dismissed with costs, including the costs of two counsel.

I agree


N. MANOIM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

I agree


J. ALLEN
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 8 May 2024
Judgment delivered 13 August 2024

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 August 2024.

APPEARANCES:

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