

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A5045/2022

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
..... SIGNATURE	 DATE

In the matter between:

RAND MUTUAL ASSURANCE COMPANY LIMITED

Applicant

and

GORE VINCENT CHARLES

Respondent

In re:

GORE VINCENT CHARLES

Appellant

and

RAND MUTUAL ASSURANCE COMPANY LIMITED

Respondent

JUDGMENT ON LEAVE TO APPEAL

Manoim J (Maier-Frawley J and Allen AJ concurring):

Introduction

- [1] This is an application for leave to appeal a decision a full court has made in this matter.
- [2] The matter had come to the full court as an appeal from a decision of a tribunal constituted in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (“COIDA”), COIDA Act. Briefly put, the employee, Vincent Charles Gore, had appealed to the Tribunal against a decision made by the respondent, Rand Mutual Assurance Limited (“RMA”), reducing his compensation.
- [3] The reason why RMA is the respondent is that it is the entity licensed in terms of section 30 of COIDA to assess and make claims in respect of compensation. It was thus the licensed entity relevant to the claim made by Gore whose accident occurred in July 1996.
- [4] RMA made three assessments in relation to Gore. The first, what we have termed the “original award”, was made in August 1997. Years later, at the instance of Gore, RMA reviewed the original award and made a new award which we have referred to as the ‘revised award’. The revised award increased the compensation to Gore from that in the original award. But Gore again approached RMA because he queried the computation of the revised award. But instead of doing so, RMA concluded that the revised award was based on erroneous information and decided not only to refuse him increased compensation but overturned the revised award with one providing for much

lower compensation. This has been referred to as the “reduced award” (or “deprivation decision”) and was made in December 2014.

[5] Gore then decided to object to this award. In terms of COIDA an ‘affected person’ may object to an award made by the Director-General, or in this case, the relevant mutual association, the RMA. The objection is then heard by a tribunal constituted in terms of COIDA. There is no dispute between the parties that this is the correct process to be followed. What is in dispute is whether Gore, as the affected person, brought his objection timeously. This point was raised by RMA before the tribunal which dismissed it. Nevertheless, the tribunal also dismissed Gore’s objection on the merits. He then appealed in terms of COIDA to the full court. RMA then cross-appealed the tribunal’s decision to dismiss its argument that the objection was lodged out of time.

[6] The full court upheld Gore’s appeal and dismissed RMA’s cross appeal. The material terms of the order were:

- a. 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.*
- b. The cross-appeal is dismissed with costs, including the costs of two counsel.*

[7] RMA now seeks leave to appeal both the full courts’ decision to uphold the appeal and to dismiss its cross-appeal. Gore opposes leave being granted in respect of both.

Is leave to appeal required from a full court?

- [8] The first issue the full court had to decide is whether it was necessary to get leave to appeal a full court decision from the full court. Such leave is not required when the full court has determined an appeal from a single judge in the High Court. In such an instance, the party seeking to appeal does not seek leave from the full court but must instead, by way of special leave, petition the Supreme Court of Appeal. (“SCA”) This is in terms of section 16(1)(b) of the Superior Courts Act 10 of 2013, (“the ‘Act’”). However, the Act is silent on whether the full court is required to hear an application for leave to appeal, when the original appeal came to it from a statutory tribunal, as it did in the present case, or whether such leave is also by way of petition to the SCA.
- [9] The situation was clarified recently, in *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* 2020 (3) SA 390 SCA, where Wallis JA held that section 16(1)(b) of the Act, does not apply to appeals to the full court from statutory tribunals. Hence in such an instance, he held, leave of the full court is required.
- [10] Although that decision dealt with a different statutory tribunal, it was common cause that this court is bound by this decision and hence it is competent for RMA to approach this full court for leave to appeal.

Basis of the appeal

- [11] Although the notice of appeal is lengthy – sixteen pages - Mr Hulley, who appeared for RMA, succinctly reduced the issues to three points. Two relate to the upholding of the appeal and the third relates to the dismissal of the cross-

appeal. Since the cross-appeal point, if successful, would dispose of the matter, I deal with it first.

Cross- appeal

[12] In terms of the cross-appeal, RMA contended that the objection that served before the tribunal was lodged out of time. RMA argues that the objection should have been lodged within 180 days of the decision by RMA to reduce Gore's compensation. Since the decision objected to was made on 12 December 2014, the objection should have been lodged by 8 June 2015, but it was only lodged on 29 September 2017.

[13] It is common cause that the objection was not lodged within 180 days. This point was argued by RMA before the tribunal, but it nevertheless granted condonation for the late filing. On appeal to the full court, this court upheld the tribunal's decision on this point, and dismissed the cross-appeal.

[14] Two issues are raised in the leave to appeal on this aspect. First RMA argues that the 180-day period is mandatory and cannot be condoned. Second, that even if there is a power to condone, on the facts, no condonation should have been granted.

[15] The relevant provision in COIDA is section 91(1), which states:

“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.”

- [16] RMA argues that the “*may*” in this section only applies to the right to lodge an objection. It argues that it is drafted in this way because a person with a right to object is not obliged to object. Hence the use of the permissive ‘*may*’. However, RMA argues, the 180-day period is peremptory. On its reading of the section, it must be interpreted as follows: an affected person may object, but if they do, they must do so in 180 days.
- [17] Of course, the section has not been drafted in this way. RMA’s response has been to argue against the contrary interpretation - that if there was a power to condone the late filing of the objection - the legislature would have catered for this specifically, but it has not done so. Absent such a clear indication, so the argument goes, the period of 180 days is peremptory and cannot be condoned.
- [18] The full court in its main decision has dealt with this issue and explained why this section must be interpreted to allow a discretion to a court to condone a late filing. This interpretation is one consistent with protecting an objector’s right of access to the court. But even, if at best for RMA, there is some ambiguity, as the Constitutional Court held in *Pickfords*, where there are two possible interpretations of a statute, both of which limit the right of access to the courts, one “...*must consider which of these two interpretations would better promote the spirit, purport and objects of the Bill of Rights and constitute a lesser infringement on the right in s 34 of the Constitution.*”¹ Whilst in *Pickfords* the

¹ *Competition Commission v Pickfords Removals SA (Pty) Ltd 2021 (3) SA 1 (CC)* at paragraph 47.

Court was dealing with a provision in the Competition Act that limited the time period in which a complaint for anticompetitive conduct could be lodged, the principle enunciated is of general application. The court there distinguished between absolute substantive time bars and procedural time bars, preferring the latter as it was more constitutionally compliant than the former. (Having decided that the provision could be interpreted as a procedural time bar, the court went on to consider condonation.)

[19] Applying that principle to the current matter, the interpretation least limiting of access to the courts is the one adopted in the main decision. For this reason, the reading offered, that the section affords a power to condone, is not a decision that another court would decide otherwise.

[20] As far as the facts on condonation are concerned, I do not consider that another court would overturn the finding of the full court on this point. There is no dispute that for the purposes of section 91(1), the reference to a decision by the director-general can be understood to be the decision made by RMA. The decision in this case that was the subject of the objection was what we have termed the reduced award. Within one month of being notified of this award, Gore wrote a letter to the chairperson of the RMA asking for it to be reconsidered.² Granted, this letter probably did not comply with the formalities of COIDA, and hence was arguably not in the prescribed manner. But as a

² This letter was dated 11 January 2015. It is not in the record, however we know about it because of a letter in the record from RMA, which confirms the date, and the content of the letter from Gore's attorney.

factor in considering condonation, it is relevant to show that Gore acted timeously and diligently to vindicate his right to appeal.

[21] Thereafter, in response to this letter, the process was diverted at the suggestion of RMA, to a possible arbitration, in January 2015. For reasons that are common cause the arbitration process was never concluded, and Gore then, whilst the arbitration process was pending, filed his notice of objection with the tribunal. This notice was only filed on 29 September 2017. Yet in response, RMA, in a letter to Gore's representative', dated 3 October 2017, still urged that the arbitration process be continued. Various delays plagued this process until in late 2019, the arbitrator concluded that he lacked jurisdiction to determine the dispute.

[22] RMA correctly concedes that this time period – the interregnum caused by the arbitration diversion - should not be taken into account in assessing the time period. But it says Gore is still unreasonably late, even subtracting this period from the time that had elapsed. However, this ignores the following facts: his attempt to commence the process earlier (within one month of being notified of the deprivation decision); that the period of delay was not unreasonable once the arbitration diversion period is subtracted, and that his prospects of success were strong. Gore after all was appealing a deprivation decision that had taken away benefits that the RMA had agreed to give him two years earlier. It was not simply a decision not to increase his benefit – its real sting was to remove a previous benefit. All this is relevant to condonation. I do not consider that another court would decide otherwise.

The court erred in finding that the appeal to it had been brought in terms of section 91(5)(a)(iii) of COIDA

[23] The full court found that the appeal had been brought in terms of two sections of COIDA, being subsections 91(5) (i) and (iii). These state:

“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 reasonably have been made;

[24] RMA seeks to make two points here. First that the notice of appeal to this full court did not refer to sub-section 91(5)(a) (iii) , which was the sub-section the full court relied on to order the relief. The argument was that the appeal was confined to 91(5)(i) which meant the full court did not have the power to substitute. It argues that the matter should have been referred back to the tribunal. However, the notice of appeal refers to section 91(5)(a) – i.e. the entire section. The fact that it did not in a piecemeal fashion itemise the relief sought

by citing each sub-section is an argument based on pure formalism.³ There could have been no confusion as to what was being sought. RMA was well aware of this and came prepared to meet this argument. Indeed, express reference was made to both sub-sections at the outset of the argument presented by Mr Pearce (representing Mr Gore) at the hearing of the appeal.

[25] Once it is clear that the full court could act in terms of subsection 91(5)(a)(iii) the question then is whether it was correct to substitute its decision for that of the Tribunal. This is explained in the judgment. There was little point in sending the matter back to the tribunal. The full court relied on an amount set out in a letter from Gore's employer Goldfields to RMA, not its own calculations.⁴ Moreover, RMA had itself applied the same amount to arrive at what we termed the revised award. It then implemented the revised award for some time, until it made the deprivation decision that led to it adopting the reduced award. It is now twelve years since the revised award was made, and twenty eight years since Gore's accident. The letter relied on was submitted at the time by Goldfields, who were by then the new owner of the mine. It is wholly unlikely that if the matter was referred back any new evidence could be produced by Goldfields. Moreover, after waiting for 12 years only to go through a further round of hearings would be substantial injustice to Gore. Given this background

³ There is no place for formalism in the application of law within the current constitutional dispensation and more so, where the interests of justice dictate otherwise. In *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC), par 18, the Constitutional Court emphasized that "*The kind of justice that our constitutional dispensation holds out to all our people is substantive justice... We cannot emphasise enough, that form should never be allowed to triumph over substance.*"

⁴ At this time the erstwhile employer had been sold to Goldfields which had written the letter.

the full courts' decision to substitute, was entirely appropriate and accords with the principles for substitution set out by the Constitutional Court in *Trencon*.⁵

Incorrect interpretation of section 51 of COIDA

- [26] This third argument goes to heart of the appeal. Gore's compensation was based on him being permanently disabled. The relevant section which deals with this is section 51 of COIDA. RMA seeks to found its leave to appeal on the basis that the full court erred in its interpretation of section 51, and alternatively, erred as a matter of fact in relying on a figure provided by Goldfields which was itself based on an error of fact.
- [27] Section 51 of COIDA deals with compensation for permanent disablement for persons who are either an employee in training (51(1)(a)) or were under 26 at the time of the accident (51(1)(b)).
- [28] Each of these two subsections then provides for a further option based on whether the person had a further five years' experience. Put differently, section 51 provides for four paths to compensation. Since because of the accident, the employee never follows these paths, compensation is derived by considering the position of someone who is a proxy for the employee if he/she had followed one of the four paths. The argument advanced by RMA is that these paths are to be understood as distinctive. It argues that contrary to this approach the full

⁵ See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC), paragraphs 47 to 55.

court's decision has read the one sub-section conjunctively and not disjunctively. But the full court has not done so.

- [29] The court appreciated the distinction between the four paths to compensation and discusses them at length. As noted in the decision:

“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.”

- [30] There is thus no interpretive difference between what the full court found is the correct interpretation of the section and what RMA contends. As Mr Pearce for Gore pointed out, this argument on the law is moot.

- [31] The next argument advanced by RMA was that regardless of its interpretation the full court had erred in its choice of proxy. RMA argues for two possible errors. The first error is what I call the ‘qualification error’. The proxy chosen, it argues, was on the facts a person more qualified than someone who is recently qualified. The second error is that even if that was not the case, the proxy chosen was someone who was both recently qualified and with five years more experience in that position. Since this resulted from an elision of two distinct paths in section 51(2)(a) (you had to be either, not both) I will refer to this as the elision error.

- [32] I briefly reprise the key facts on this before I discuss the criticism further.
- [33] At the time of the accident Gore was a 25-year-old engineer. He had still to complete a professional exam, but had he done so and thus become a recently qualified person, he would have been classified as a sectional engineer. RMA accepts that he would have been a sectional engineer.
- [34] Granted there was some debate in the hearings over whether he would have qualified to be a resident engineer, a more senior position and hence one better remunerated than that of a sectional engineer. But the full court did not find that he would have become a resident engineer. Nevertheless, the notice of appeal says this is what the full court did, but there is no basis for this assertion. The full court based its decision on the lower figure in the Goldfields letter which states clearly that this was the compensation for a 'sectional engineer'. The relevant sentence in the letter, which is quoted in the full court's decision, and which I quote again makes this clear:

*"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" (Emphasis provided)*

- [35] In oral argument Mr Hulley did not press the point that the full court had concluded that Gore would have been a resident engineer. Despite this his argument was that the full court had read the sub-section conjunctively not disjunctively. The court, he argued, found that Gore was both recently qualified and with five years more experience. Since these are two separate paths Gore

had to qualify under one or the other, not both. Put more simply his proxy could not be someone who is both a sectional engineer (recently qualified – the first path) and one also with five-years' experience (the second path). Hence, he argued that there had been an error of law and fact, what I referred to earlier as the 'elision error'.

[36] But this is not what Goldfields' letter states – it makes no mention of him reaching R 11 118.65 only after five more years as a sectional engineer. To get around this difficulty RMA has tried to argue that Goldfields had based its decision on the wrong proxy.

[37] RMA sought to rely on a payslip in the record for a Mr Swanepoel, a resident engineer, who it alleged had been used as the proxy for Gore's compensation. But this is not correct on the facts. Swanepoel's remuneration only became a factor when RMA had requested his payslip at the time it made the later reduced order. It was not relied on, nor did Gore furnish it, when it made the earlier revised order – the decision the full court has given effect to. RMA during argument at the appeal suggested that Gore had misled the tribunal by relying on Swanepoel's earnings. In the leave to appeal, RMA no longer points the finger at Gore for this reliance on Swanepoel, but now argues that it was Goldfields that was in error, and hence the award of compensation was based on its erroneous understanding.

[38] But RMA has no evidence for this argument. The sum total of evidence for this is based on a payslip for Swanepoel in February 1996 which describes him as "resident engineer" and appears to show a payslip evidencing an amount

R12 346.00 as his 'normal salary'. Since this figure is close to the R 11 118.65 proxy used by Goldfields in its letter, RMA deduces that Swanepoel is the proxy and because he was a resident engineer as indicated on the payslip, he is the wrong proxy.

[39] But this is not correct on the facts. As Gore's counsel points out, the accident took place in July 1996, not February 1996. The relevant payslip for comparison from Swanepoel must then be what he received in July 1996. In July 1996 he by then received a 'normal salary' of R13 087. But this was not the figure that the full court has relied on. The court relied on the lower figure of R 11 118.65. To repeat, this figure is the earning of a sectional not a resident engineer.

[40] This leaves as the last issue, regardless of Swanepoel, whether this figure represents the earnings of a sectional engineer who additionally had five years' experience. The Goldfields' letter is the best evidence in the record and makes no mention that this was the earnings of a sectional engineer with five years' experience. On the contrary the language suggests it is the salary of a recently qualified sectional engineer. RMA did not lead any contrary evidence on this point. Its sole witness during the tribunal hearing was someone from its claims department. But as the full court noted, he had no knowledge as to "*how the revised award had been computed or how the reduced award was calculated*".

[41] There is no reasonable prospect that another court would decide differently on the facts before the full court. The law was correctly applied to the facts.

Conclusion

[42] The three grounds for leave to appeal do not meet the threshold required for leave to appeal to be granted in terms of the Act.⁶ The court was not referred to any case law not previously considered or any new facts from the record. The application falls to be dismissed. As far as costs are concerned, even though Gore's counsel have disclosed to the court that they have acted *pro amico* for him throughout these proceedings, this is no bar to him being awarded costs. Since both sides relied on two counsel, costs of both are appropriate.

ORDER:-

[43] In the result the following order is made:

- a. The application for leave to appeal is dismissed with costs including the costs of two counsel.


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

⁶ The Supreme Court of Appeal has on more than one occasion reiterated that an applicant for leave to appeal 'must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal'. See *MEC Health, Eastern Cape v Mkhitha* (1221/2015) [2016] ZASCA 176 (25 November 2016), paras 16 & 17 (with reference to *S v Smith* 2012 (1) SACR 567 (SCA), para 7); *Four Wheel Drive Accessory Distributors CC v Rattan* 2019 (3) SA 451 SCA, par 34; *Kruger v S* 2014 (1) SACR 647 (SCA) paras 2 & 3.

I agree

pp. _____

A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

I agree

pp. _____

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

Date of hearing: 8 October 2024

Judgment delivered 22 October 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 22 October 2024.

APPEARANCES:

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