



ORIGINAL

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no.: 4083/2020

In the matter between:

FELICITY KHUMALO

Applicant

and

THE COMPENSATION COMMISSIONER

First Respondent

CHAIRPERSON: MR MOEKETSI

Second Respondent

Coram: Opperman J *et* Van Rhyn J

Heard: 17 February 2025

Delivered: 21 February 2025. This judgment was handed down in court and electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be on 21 February 2025 at 15h00.

Summary: Review of irregular proceedings at objection hearing in terms of s 91 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

ORDER

1. Condonation is granted for the late filing of the review application.
 2. The objection hearing and subsequent decision on 13 September 2018 whereby the second respondent upheld the first respondent's decision to dismiss the objection lodged by the applicant in terms of s 91 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, are reviewed and set aside.
 3. The matter is remitted for a re-hearing in terms of s 91(2) and/or 91(3) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.
 4. The first respondent is ordered to pay the costs of the review as on party and party scale A.
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JUDGMENT

Opperman J

Introduction

[1] This is a review that was brought before the court in terms of rule 53 of the Uniform Rules of Court. The review targets the hearing and the outcome of an objection that was lodged in terms of s 91 of the Compensation for Occupational injuries and Diseases Act 130 of 1993 (COIDA).¹ The review application was brought more than two years after the objection ruling and the condonation application of the applicant is opposed.

[2] The applicant is an unemployed 51-year-old lady. The incident that caused her claim occurred during her employment at Foodzone, Bloemfontein on 2 November 2012. She was employed as a general worker at said Foodzone for approximately four to five years at the time.

¹ Further amended notice of motion, 'Bundle B' at 71 to 72.

[3] The first respondent is the compensation commissioner appointed in terms of, and deriving its authority from, the COIDA. The second respondent is one Mr. Moeketsi cited in his capacity as the chairperson of the hearing conducted in terms of s 91.

The issue

[4] The crux of the review is that on 29 November 2017, the compensation commissioner addressed a letter to the applicant. It states, *inter alia*, that:

'On available information compensation and medical aid expenses are not payable in terms of the above-mentioned Act, as you were not injured in an accident arising out of and in the course of your employment as the employer says the journey that you took was not authorised.'² (Accentuation added.)

[5] It is common cause that the applicant never took any journey and the reason is bizarre since she only walked to the ladies' room where she fell. It is on this basis that the applicant lodged an objection in terms of s 91 of the COIDA. This is what the applicant prepared for and the case that she objected to.

[6] The matter did not proceed on the 12th of September 2018 as scheduled. The applicant was verbally informed on this day by the employer's representative that the above reason from the commissioner that caused the rejection of the applicant's claim, was an error.

[7] In the objection hearing that proceeded on the 13th of September 2018, initiated by the applicant, the respondents went forth and introduced new crucial medical evidence to bolster the case for the respondents. The medical evidence was disclosed to the applicant, who was unrepresented, on the day the hearing started.

[8] The applicant now submits that the new grounds of rejection was irregular and renders the process reviewable because it amounts to, among others, a 'trial by ambush'.³ There are also peripheral complaints such as that the commissioner admitted hearsay evidence. I will only deal with the fairness of the hearing on the first

² 'Bundle A' at 45.

³ Applicant's supplementary heads of argument, at 3 para 7.

issue since it disposes of the matter. It is also not prudent to venture into the merits of the evidence adduced if the initial process does not pass constitutional standard.

[9] Context demands, however, that the dispute of facts that prevails be depicted. It is the case for the respondents that on the day of the incident the applicant allegedly suffered a 'left sided posterior communicating artery aneurysm'.⁴ The aneurism was caused by a pre-existing condition and is the reason that she fell. The applicant maintains that she went to the ladies' room on the day of the incident where she slipped, fell and sustained the injury that caused her to lose consciousness and subsequent 'head operations'.⁵

[10] The respondents argued that the process followed by the commissioner to *mero moto*, on the day of the hearing, inform the applicant of the amendment to their findings and to introduce the new evidence promptly and without notice to the applicant, was accepted by the applicant and cannot be faulted.

[11] It is glaringly obvious that she did not receive notice of the change in the findings and the new evidence adduced in order to prepare.

[12] The fact that an unrepresented person completely ignorant of the law and the resultant process yielded to the hearing does not prove in any way whatsoever that her conduct was legally informed and with proper understanding of the consequences. The mere fact that she immediately started to look for resources to assist her to object to the findings and process that was embarked upon by the commissioner, speaks volumes.

[13] The core issue must not be deflected by the medical evidence that was adduced. It remains that the process to get to the evidence was flagrantly flawed and that the applicant had to be given access to justice in the least in terms of ss 33 and 34 of the Constitution of the Republic of South Africa of 1996.⁶

⁴ 'Bundle A', at 53. This is a report dated 12 September 2018 compiled by one Dr F van Niekerk; neurosurgeon.

⁵ 'Bundle B' at 14 to 15, para 5.4.

⁶ *Venter v Compensation Commissioner* 2001 (4) SA 753 (T).

[14] It is worth noting that the probability that a person properly represented would have submitted to the process is naught. The law on conduct such as what the commissioner embarked upon is clear.

The law

[15] Section 33 of the Constitution demands that:

‘33. Just administrative action.—(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’

[16] Section 34 of the Constitution decrees that:

‘34 Access to courts.—Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

[17] In *MEC for Public Works and Infrastructure, Free State Provincial Government v Mofomo Construction CC*⁷ it was concluded that:

‘[50] Kirland supra was taken on appeal to the Constitutional Court and in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) at para [65] Cameron J held as follows:

“When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take short cuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what has been done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.” (Accentuation added.)

[51] The effect of the last two sentences of the quotation in the previous paragraph is that the enquiry does not stop simply at whether the appointment was unlawful. The court must upon a declaration of invalidity make an order in terms of s 8 of PAJA, according to what justice and equity dictate. See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) (the second Allpay judgment) at para [61] and further. In *casu* the Department’s simple allegation that no valid tender process was followed is in itself insufficient and it was not even

⁷ *MEC for Public Works and Infrastructure, Free State Provincial Government v Mofomo Construction CC* (A138/2016) [2016] ZAFSHC 196 (24 November 2016).

necessary to consider a just and equitable remedy consequent upon a finding of unlawfulness. See Kwa Sani supra.'

Conclusion

[18] In conclusion, the decision by the commissioner as per their notice to the applicant and whereupon she lodged her objection, is constrained by the doctrine of legality that they may exercise no power and perform no function beyond those conferred upon them by law. The subject affected by a decision taken in error is entitled to proper notice and to be afforded a proper hearing on whether such a decision should be set aside.

[19] Section 90 of the COIDA confirms the intention of the lawgiver on the subject in that:

'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 grounds...' (Accentuation added)

[20] In *casu*, the applicant was not even informed of what caused the error or the reason for the finding in the first instance and why it was without warning or notice and suddenly necessary to adduce expert medical evidence to bolster the case for the respondents. In essence, the respondents embarked on a new hearing without following proper and constitutional process; they caused an unconstitutional and illegal hearing. The conduct of the commissioner was and is the cause of gross irregularity and misdeed.

[21] The finding of the first respondent that was made in apparent error does not lie for review here; it is only the s 91-objection hearing. The application in prayer 3 is a contradiction as it applies for remittance to the first respondent for reconsideration without an application for the finding to be reviewed and set aside. The re-hearing of the s 91-objection may however be ordered after it was reviewed and set aside. The 'erroneous order' conveyed in the correspondence dated 29 November 2017 remains in effect.

Condonation and costs

[22] The applicant took her time to bring the matter to court. Her explanations of the delay were often vague and undetailed. The dictum in *Grootboom v National Prosecuting Authority and Another*⁸ that condonation cannot be had for the mere asking is trite. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. In *casu* the court would have hesitated to grant condonation if it was not for the significant facts of this case. The effective administration of justice demands that condonation be granted.

[23] It was agreed during the hearing by counsel for the parties that costs on party and party scale A will suffice given the circumstances of the case and that costs should follow the cause.

Order

[24] The following order is made:

1. Condonation is granted for the late filing of the review application.
2. The objection hearing and subsequent decision on 13 September 2018 whereby the second respondent upheld the first respondent's decision to dismiss the objection lodged by the applicant in terms of s 91 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, are reviewed and set aside.
3. The matter is remitted for a re-hearing in terms of s 91(2) and/or 91(3) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.
4. The first respondent is ordered to pay the costs of the review as on party and party scale A.


Opperman J

⁸ *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013) para 23.

I concur,



Van Rhyn J

Appearances

For applicant:	Q. J. Moletsane Bloemfontein
Instructed by:	Gcsamba Inc. Attorneys Bloemfontein
For respondents:	A.I.B. Lechwano
Instructed by:	State Attorney: Free State Bloemfontein