IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR118/2024

In the matter between:

ARUNACHELLAM NARAYANASAMY **APPELLANT**

and

DEPARTMENT OF LABOUR: COMPENSATION COMMISSIONER **RESPONDENT**

ORDER

On appeal from: the Tribunal constituted in terms of section 91(2) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (comprising of Presiding Officer SZ Zungu with assessors):

1. The appeal is upheld.

2. The decision of the Tribunal, dated 12 October 2023, is set aside and substituted with the following order:

‘(a) The Compensation Commissioner is ordered to accept liability for the Objector’s occupational diseases, Post-traumatic Stress Disorder and Major Depressive Disorder, contracted in the course and scope of his employment;

(a) The Compensation Commissioner is ordered to issue, in favour of the Objector, a written Award of Compensation, stating the following particulars:

i. The Objector's earning per month for compensation purposes is R6 650.85;

ii. The diagnosis of disability is Post Traumatic Stress Disorder and Major Depressive Disorder;

iii. The date of the accident is 6 May 1993;

iv. The percentage of permanent disablement is 100%;

v. Compensation in the form of a monthly pension shall commence on 6 May 1993;

vi. All increases in monthly pensions, as prescribed from time to time in terms of section 57(1) of COIDA, shall accrue from 6 May 1993 onwards.

(c) The Compensation Commissioner is ordered to publish the aforesaid Award of Compensation to the Objector's attorneys of record and the Objector's employer within 20 (twenty) days of this order;

(d) The Compensation Commissioner shall bear the costs in the objection on a scale as between attorney and own client.'

3. The respondent shall pay interest on the amount of the arrear pension at 15,5% per annum from 6 May 1993.

4. The respondent shall pay the costs of the appeal, such costs to be taxed on scale C.

JUDGMENT

Henriques J (R Singh J concurring):

Introduction

[1] This is an appeal in terms of the provisions of s 91(5) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) against the ruling of a tribunal convened in terms of s 91(3) of COIDA on 12 October 2023 (the Tribunal). The appellant appeals only against two aspects of the ruling, namely the decision that:

(a) the effective date of liability of the respondent is 3 May 2007; and

(b) the appellant is entitled to only 20% permanent disablement.

[2] The grounds of appeal, as stated in the notice of appeal, are the following, namely:

'2.1 that the ruling or judgment is based on a fundamental misconstruction and/or misinterpretation of the facts and evidence adduced at the hearing of the appellant's objection;

2.2 that the ruling of judgment is predicated on the incorrect interpretation of the COID Act and/or other laws;

2.3 the ruling/judgment has the effect that the extent of compensation awarded to the appellant, is so inadequate that the award thereof could not reasonably have been made.'

[3] The appeal is opposed by the respondent on both grounds advanced and the respondent submits that the effective date of liability, being 3 May 2007, and the allocated 20% permanent disability, were correctly determined by the Tribunal. The respondent, however, submits that the order for costs on an attorney and own client scale granted by the Tribunal was unreasonable and has no basis. It submits that the order for costs is only warranted in exceptional circumstances and that the facts of this matter do not justify such a finding and that an award of costs on a party and party scale is more appropriate. In addition, the further submissions advanced relate to the applicable interest rate.

[4] There is, however, no cross-appeal on these points by the respondent, and these challenges cannot be raised absent a cross-appeal. Considering the ambit of s 91(5) of COIDA, it is doubtful that an appeal can be brought against the costs order awarded by the Tribunal, but no finding is made in this regard. In either event, the complaint by the respondent to the costs order is not properly before this court nor is the issue relating to the applicable interest rate and consequently will not be dealt with further.

Ruling of the Tribunal

[5] In its ruling of 12 October 2023, the Tribunal ruled in favour of the appellant (who was the objector in those proceedings) and found that his objection succeeded with costs on an attorney and own client scale. In respect of costs, it found that the basis for a

punitive costs order was that 'the objector was entitled to costs given the unfair and unjustified decision by the Fund. The objector had to employ the services of a specialist legal practitioner'. The presiding officer of the Tribunal was assisted by a medical assessor, as well as an assessor for the employer and one for the employee.

[6] The respondent, by way of a letter dated 24 February 2013, had repudiated the appellant's claim on the basis that, firstly, the diagnosis of post-traumatic stress disorder (PTSD) could not be accepted in terms of COIDA, as conflict and stress were not grounds to claim for PTSD, and secondly, the case was reported long before the accident. Pursuant to such letter of repudiation, the appellant lodged an objection against this decision on 9 April 2013. Despite the objection being lodged in 2013, the objection was only heard and decided upon in 2023 by the Tribunal in terms of s 91 of COIDA.

[7] The Tribunal was of the view that the issues which it had to decide were:

(a) Firstly, whether the decision by the respondent to repudiate the claim by the appellant was fair and justified;

(b) Secondly, whether the incident arose in the course or out of the employment of the appellant and whether the claim had to be accepted; and

(c) Thirdly, the effective date of liability and the percentage for which the respondent was liable.

[8] In determining these issues, the Tribunal found that the decision by the respondent was 'unfair and unjustified on factual and medical evidence' and that it was liable for the appellant's claim, as it arose in the course or out of his employment. It determined the effective date of liability of the respondent to be 3 May 2007, which was the date on which Dr Mansoor first diagnosed the appellant with suffering from PTSD. In addition, it determined that according to the *AMA Guides to the Evaluation of Permanent Impairment*,[1] it was in the interests of justice to allocate a permanent disability and proceeded to allocate a permanent disability of 20%.

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[1] *AMA Guides to the Evaluation of Permanent Impairment* 6 ed (2023).

[9] Regrettably, the ruling is silent on how the Tribunal arrived at these findings.

[10] It is perhaps apposite at this point to deal with the factual matrix which was presented before the Tribunal. It is also important to mention that the respondent did not lead any evidence, and was content with merely cross-examining the appellant. In addition, the documentary evidence presented, specifically in relation to the various medical reports filed in support of the application was not challenged and right at the outset of the hearing, the respondent agreed to the content of these reports.

Factual matrix

[11] The appellant, a former employee of the Department of Education (the employer), was medically boarded due to ill health, effective from 1 February 1997. At the time of his application for medical boarding, he was the principal at Victoria Primary School. The application for medical boarding was supported by medical reports from various medical professionals and experts, which were accepted by the employer. The medical reports were completed by Dr DP Moodley, a psychiatrist; Dr L Moodley, a specialist physician; Dr TGR Govender, a general practitioner; as well as Dr DK Meeran, a specialist psychiatrist. There was no dispute that the appellant consulted with and was treated by the various medical professionals on the dates indicated in their medical reports and these reports were submitted by consent.

[12] What precipitated the application for medical boarding due to ill health, were the following common cause facts:

(a) On 6 May 1993, whilst acting principal at Grandmore Primary School, educators went on a ‘chalk down’ strike. It is common cause that: most of these educators were members of the South African Democratic Teachers Union (SADTU); the appellant was not a member of SADTU and did not support the strike; and as a consequence of the strike on the day of the incident, the appellant was threatened with assault by various educators and forced to lock himself in the HOD’s office. He was protected from assault and physical injury by the parents who had attended at the school on the day in question.

(b) As a result of the strike, the appellant was asked to take special leave in an attempt to calm down the situation at the school which had culminated in the strike. At this stage, the strike had extended to other schools in the area.

(c) After the incident and during the same year, the appellant assumed duties as an acting principal at Palmcroft Primary School. This was precipitated by him engaging the services of an attorney to enforce his return to his post, as he was not allowed to return to the school and his special leave was extended.

(d) Subsequently, on 1 January 1994, he was appointed to the post of principal at Victoria Primary School. Whilst at such post in 1996, the cleaners embarked on a strike and this is what prompted the appellant to come to his decision to request medical boarding. He indicated that the reason for doing so was that during the time of the cleaners' strike, he experienced flashbacks regarding the incident in May 1993. As a consequence of the incident in May 1993, he was threatened with assault by teachers and whilst on special leave, he received threatening phone calls and death threats. All the while the employer was aware of what was transpiring at the school. The appellant indicated that he had no intention to leave Grandmore Primary School but was forced to do so as a consequence of the chalk down strike and the threats which he endured.

(e) Given the situation which prevailed at Victoria Primary School and the nature of the treatment and diagnosis, the appellant applied for a discharge from service due to ill health, which was made effective on 1 February 1997.

Documentary evidence

[13] As already alluded to, at the hearing before the Tribunal, the parties by agreement adduced a joint trial bundle which was received into evidence. There was no challenge to the content of any of the documents, exhibits, or medical reports contained therein. These were the same documents which had served before the respondent when it repudiated the appellant's claim.

[14] In terms of the documentary evidence, which was accepted at the time of his application for medical boarding due to ill health, the conclusions of the medical experts were that the appellant was permanently disabled and unable to return to his normal work.

Most interestingly and noteworthy, was the fact that given the status of this joint bundle and the fact that it had been adduced by agreement, neither party called any experts to controvert the documentary evidence. Instead, the respondent's representative at the hearing before the Tribunal indicated that the medical reports were sufficient for a ruling to be made. This is evident from the record of proceedings where Mr Chetty, who was the legal representative for the respondent, placed the following on record 'They are sufficient for a decision to be made'.[2]

[15] That the respondent was not disputing the content of the medical reports in the bundle was pertinently questioned by the chairperson and there was no objection from the respondent when the appellant's representative confirmed that it was not disputed. This is evident from the transcript where the following question is posed:[3]

'CHAIRPERSON: The Respondent is not disputing the medical reports contained in the bundle?

MR. BOSHOFF: No.'

[16] The respondent had also made various factual admissions which were recorded at the hearing, and which remain relevant in the appeal. These include the following statements of fact:

(a) 'Objector has no family history of psychological illness, and was of good psychological health at the commencement of employment with the Employer';

(b) 'Objector was exposed to various incidences of trauma by way of intimidation, harassment, violence, threats of assault against his person, threatening telephone calls, death-threats against his person – during the "chalkdown" by educators during 1993-05-06 to 1993-05-14';

(c) 'Objector reported such exposures to the Employer in writing on 1993-05-14'';

(d) 'As a result, Objector developed and was diagnosed with "Major Depression / Major Depressive Episode and Post-Traumatic Stress Disorder';

(e) 'On 1 February 1997, Objector's employment was terminated on account of

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[2] Record of proceedings, bundle 1, at page 75.

[3] Record of proceedings, bundle 1, at page 34, lines 11 and 12.

Continued Ill-health';

(f) 'Objector has been incapable, due to such ill-health, to perform work, since at least 1 February 1997';

(g) 'Objector's psychiatric disabilities are chronic and permanent';

(h) 'The decision to repudiate Objector's claim was posted on 2013-02-24'.

[17] At the hearing, the chairperson questioned the necessity of the appellant having to testify given the fact that the medical reports were not disputed and the various factual admissions which had been made. The only reason for requesting the appellant to testify emanated from the minutes of the pre-trial conference, which were handed in by consent, in terms of which the respondent disputed that the appellant had been exposed to incidences of trauma by way of intimidation, harassment, violence, and threats. The representative for the respondent confirmed that because the employer's report of the accident only mentioned one date when the incident occurred, it required the appellant to testify on the issues. This is despite the fact that the affidavit filed by the appellant indicated that the incidences of trauma occurred over a week (which affidavit was not disputed), and the aforementioned factual admissions that were recorded.

[18] The appellant testified during the course of the Tribunal hearing in detail in relation to the first incident which occurred in May 1993 and what transpired during that week. He confirmed that he made a report to the employer on 14 May 1993 of what occurred during the course of the week. None of this was disputed by the respondent. At most, the representative for the respondent challenged why it was that only one incident was mentioned in the Employer's Report of the Accident and why none of the incidents which occurred on the individual days were reported.

[19] The appellant confirmed, and this was not disputed, that the chalk down commenced on 6 May 1993, and a series of events followed over the course of the next week, culminating in the recorded incident of 14 May 1993. The recorded incident was when the appellant was required to lock himself in the HOD's office, as the strike had escalated, resulting in some of the teachers attending at the school with firearms and

threatening to assault and shoot him. On this day, there was a demonstration by teachers and parents from other schools who had attended and assembled on the school grounds. He was threatened with assault, and it was only due to the intervention by some of the parents of pupils at the school, which is how he was able to lock himself in the office.

[20] The appellant confirmed, and this was once again not challenged, that during that week, he received threatening telephone calls at night that he would be killed. Cars would be parked in his driveway and the acts of intimidation were an ongoing event. He did not sleep at his home because of the fear of being violently assaulted. He confirmed that he had a meeting with parents after the chalk down. His resignation was demanded and it was reported that he must resign as he was an alcoholic.

[21] After the incident of 14 May 1993, the appellant was forced to take special leave for a period of three months. During this period, threats to his person and threats of assault continued. On 26 May 1993, a SADTU meeting was held to deal with the allegations. An investigation was conducted and the allegations were found to be without merit.

The medical evidence

[22] After the incident, the appellant attended at his general practitioner, Dr TGR Govender, who confirmed that apart from minor illnesses, the appellant had chronic peptic ulcers, and the appellant suffered from major depression due to the problems he experienced at the school. Dr Govender confirmed that he had referred the appellant to Dr Moodley, a psychiatrist, who then saw the appellant on 14 September 1993.

[23] The appellant had reported what transpired in May 1993 and Dr Moodley thereafter, as a consequence, diagnosed the appellant with 'acute situational crisis together with stress reaction and elements of depression'. The appellant was counselled and prescribed medication and was to be reviewed in a fortnight.

[24] Subsequently, in May 1996, Dr Moodley once again consulted with the appellant and diagnosed that the appellant was depressed, displayed poor concentration, and was

easily distracted. These events were precipitated by what had transpired in 1993. Subsequently, on 29 May 1996, a specialist psychiatrist, Dr DK Meeran, filed a report after consulting with the appellant on 29 January 1996, 2 May 1996, and 9 May 1996. He found the appellant to be depressed and such depression was long-standing, dating from 1993 when the appellant had problems at the school. The present crisis which prompted the appellant to see Dr Meeran was precipitated by a cleaners' strike at his school.

[25] Dr Meeran indicated that the depression had worsened, as the appellant had not overcome the trauma and depression of the 1993 episode. Dr Meeran supported the appellant's request for medical boarding. On 9 January 1997, Dr Meeran repeated his diagnosis of 1996. He was of the view that the appellant was still depressed as a consequence of the 1993 episode and this was despite him seeing the appellant in December 1996 and twice in January 1997. He once again reiterated the recommendation that the appellant be medically boarded.

[26] On 24 January 1997, the employer informed the appellant that he would be discharged on account of continued ill health with effect from 1 February 1997. The appellant had explained the events that led to his illness which had occurred in May 1993. The employer had also completed a report in terms of COIDA, dated 26 March 2007, which recorded the date of the incident as being 6 May 1993 at the Grandmore Primary School. It specifically records at paragraph 36 that the incident occurred at work during the course of his employment and that the 'educators embarked on a strike action and occupied Mr Narainsamy's office and intimidated him'. It records the nature of the injury sustained at paragraph 40 as being major depression. At paragraph 41, the employer confirms that it is satisfied that the employee was injured in the manner as alleged by him.

[27] On 31 March 2007, an educational psychologist and clinical hypnotherapist, Dr RM Naidoo, completed a report in respect of the appellant. The appellant was diagnosed with major depression and post-traumatic stress. As part of the treatment, he had noted that the prognosis of the appellant was guarded and that the appellant would require long-term psychotherapy and psychiatric consultations. This report was followed up by a report

of Dr FB Mansoor, a specialist psychiatrist, dated 3 May 2007. She confirmed that she was treating the appellant for PTSD and major depression on an ongoing basis. The treatment was for continued psychotherapy and medication.

[28] A number of reports were thereafter completed by Dr RM Naidoo, the psychologist, dated May, June, and August 2007. Such reports record that the appellant reported symptoms of post-traumatic stress, irritability, and insomnia. These reports were submitted in terms of COIDA to the respondent.

[29] During the course of the submission of these various reports, the appellant was hospitalised on a number of occasions for treatment of PTSD as well as depression. On 4 September 2007, Dr Mansoor once again reported that the appellant had been medically boarded since 1 February 1997 by Dr Meeran (who has in the meantime passed away) on the basis of PTSD and major depression emanating from work-related issues. According to her assessment, the appellant had residual features of PTSD and chronic depression.

[30] Despite medication and continuous psychotherapy, the appellant’s prognosis for full functioning was poor.

[31] Dr Naidoo prepared a similar report, dated 9 September 2008, in which he recorded that the appellant had been hospitalised. Dr Mansoor further confirmed the diagnosis of chronic depression and the prognosis as being poor on 4 September 2008, 18 September 2009, 2 June 2011, 21 November 2011, and 24 May 2012. Dr Naidoo, on 20 November 2009, confirmed that the appellant had been hospitalised on a number of occasions in April 2010, August 2010, and September 2010 and that he required ongoing psychotherapy, counselling, and medication. A psychologist, Ms J Ramsoorooj, on 3 May 2011, confirmed the appellant's diagnosis of PTSD and a major depressive episode. The appellant's prognosis was poor.

[32] Such diagnosis was repeated on 17 November 2011 and 24 May 2012. After the repudiation of the appellant's claim, both Dr Mansoor and Ms Ramsoorooj confirmed the appellant's diagnosis of PTSD, and that his prognosis was poor.

[33] Despite this extensive history, the respondent in February 2013 repudiated the appellant's claim. The appellant thereafter lodged an objection to such repudiation on 22 April 2013.

[34] Prior to the objection serving before the Tribunal, Dr SL Reddy, a psychiatrist, on 30 May 2015 reported on the condition of the appellant and stated that the appellant's illness has followed a chronic relapsing course, despite being on a combination of psychotropic medication and receiving ongoing psychotherapy. He still requires hospitalisation almost 20 years after the precipitating factors and therefore has a poor prognosis. A combination of these reports indicated that the appellant has very little chance of recovery.

Analysis

[35] At this juncture, it is perhaps useful to remind ourselves of the purpose for which COIDA was enacted. Having regard to its long title, it was enacted 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.'

[36] In *Davis v Workmen's Compensation Commissioner*,[4] it was held

'The policy of the Act is to assist workmen as far as possible … 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.'

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[4] *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C) at 694F-G.

[37] A psychiatric disorder or psychological trauma has been recognised as constituting an occupational injury, even though COIDA, in the definitions for 'accident' and 'occupational injury' does not specifically mention this. That the appellant is entitled to be compensated has been acknowledged in *Urquhart v Compensation Commissioner,*[5] where the court held the following:

'The law has long recognised that for purposes of compensation or damages a psychiatric disorder or psychological trauma is as much a personal injury as a cracked skull, and there is nothing in the definitions of "accident" and "occupational injury" in the Act to indicate that this legislation has a contrary intention. Indeed, the definitions in the Act are not so much definitions as a broad classification to make provision for different kinds of compensation for different kinds of disorder. This is quite apparent from the wording of the definitions in s 1 which say nothing about the nature of the accident or the occupational injury envisaged other than to confine them to an event within the sphere of employment. The section says that "accident" means "an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee" and "occupational injury" means "a personal injury sustained as a result of an accident". Section 22 says that if an employee meets with an accident resulting in his disablement he shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in the Act. The benefit provided for and prescribed in the Act is the right to compensation for personal injuries in terms of ch 4.'

[38] The appellant's final diagnosis was that of major depressive disorder and PTSD. Although amendments were tabled in 2012 to amend schedule 3 of COIDA to include mental and behavioural disorder, these were never proceeded with. A circular was issued in June 2003 regarding PTSD, which was an instruction regarding compensation for PTSD.[6]

[39] The first major point of contention in the appeal does not relate to whether compensation is payable to the appellant, but relates to the date from when the compensable injury should be calculated. COIDA provides the answer as to how this date is to be determined.

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[5] *Urquhart v Compensation Commissioner* 2006 (1) SA 75 (E) para 14.
[6] Circular Instruction Regarding Compensation for Post Traumatic Stress Disorder (PTSD), GN 936, *GG* 25132, 27 June 2003.

[40] As was correctly emphasised by Mr Boschoff, for the appellant, s 65(5) of COIDA provides as follows:

'For the purposes of this Act the commencement of a disease referred to in subsection (1) shall be deemed to be the date on which a medical practitioner diagnosed that disease for the first time *or such earlier date as the Director-General may determine if it is more favourable to the employee*.'[7] (Own emphasis.)

[41] Section 67(1) of COIDA is of further assistance, and under the heading of 'Calculation of Compensation', states:

'(1) Compensation for a disease referred to in section 65(1) shall be calculated on the basis of the earnings of the employee calculated *mutatis mutandis* in accordance with the provisions of section 63 and the disablement of the employee at the time of the commencement of the disease *or such earlier date as the Director-General may determine, if it is proved to his satisfaction that the employee was suffering from the disease at an earlier date, whichever earnings are more favourable to the employee*.' (Own emphasis.)

[42] While the appellant's formal diagnosis may have been made by Dr Naidoo on 31 March 2007, the undisputed evidence and expert reports lead solely to the conclusion that the events that led to his depression and PTSD were the events of the chalk down in May 1993.

[43] In terms of the facts agreed upon between the parties, the appellant has been unemployable 'since at least 1 February 1997'. The diagnosis of depression from 1997 accords with the subsequent diagnosis of a major depressive disorder on 31 March 2007, and no evidence was led by the respondent to suggest another trigger event for this depression or the PTSD, other than the chalk down protests of May 1993.

[44] In the circumstances of the agreed facts and the undisputed medical evidence, there can be no doubt that the appellant's condition, while only being given the additional label of PTSD in 2007, commenced in May 1993.

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[7] An amendment to this section was passed in terms of the Compensation for Occupational Injuries and Diseases Amendment Act 10 of 2022, though it is not yet operative and nothing turns on this.

[45] This should have been considered in the assessment under ss 65(5) and 67(1), and it is clearly to the advantage of the appellant that the date of compensation be set 12 years earlier to the date when the injury was actually sustained.

[46] The failure to set the date of compensation is a misdirection which this court is enjoined to correct.

[47] Compensation was calculated on the basis of the injuries constituting a permanent disability. Permanent disablement under COIDA is defined in s 1 as meaning 'the permanent inability of such employee to perform any work as a result of an accident or occupational disease for which compensation is payable'.

[48] That the injury is permanent was a necessary conclusion from the agreed facts, partly from the admission that the '[o]bjector has been incapable, due to such ill-health, to perform work, since at least 1 February 1997', which definitively meets the definition of permanent disability under COIDA, and is also in accordance with the undisputed medical evidence that was presented. Although the medical reports might not specifically state that the appellant may not be able to work again, they do repeatedly confirm his inability to work at the stage of the assessment and record the appellant's prognosis as 'poor'.

[49] The first challenge by the respondent on appeal to the apportionment was an attempt to argue that this court should not find that the appellant was permanently disabled.

[50] Agreements reached in the pre-hearing stage are binding between the parties, including agreements on facts that a court or other quasi-judicial forum may receive as being common cause. This principle has long been established in our law, including in *Price NO v Allied-JBS Building Society*, where the following was held:[8]

'It seems to me that in any event the parties are at this stage bound by their pleadings and the admissions made therein. The pre-trial conference conducted under the terms of Rule of Court

[8] *Price NO v Allied-JBS Building Society* 1980 (3) SA 874 (A) at 882D-H.

37 is designed to afford an opportunity to the parties, amongst other matters, to endeavour to find ways of curtailing the duration of the trial by redefining the issues to be tried. One of the methods of doing so is by way of admissions of fact which could lead to the elimination of one or more of the issues raised in the pleadings. The results of an agreement between the parties' legal advisers come to at a pre-trial conference to amend pleadings is not comparable to the circumstances appertaining in the case of *R v Papangelis* 1960 (2) SA 309 (O) to which appellant's counsel referred us. In that case the accused's representative made an admission during the course of argument after the cases for the State and the accused had been closed. The question arose whether for the purposes of s 284 (1) of Act 56 of 1955 - then operative - this admission could be treated as being one of fact which when made would constitute sufficient proof of such fact. The Court held that the accused's representative did not make the admission with the intention that it should substitute for evidence of the fact required to be proved by the State. Moreover the admission was held to be in truth not one of fact but one relative to the legal consequences flowing from facts proved during the trial. The judgment would appear to be of no assistance to appellant in this case. I conclude, therefore, that appellant cannot in this Court revert to and seek to rely on the claim founded on the contract and I proceed to consider counsel's remaining arguments.'

[51] A party wishing to resile from such an agreement requires special circumstances to be demonstrated, usually in the form of a challenge vitiating the actual consensus said to be reached.[9]

[52] Accordingly, and while it generally remains open to a party making a factual admission to argue the legal consequences of that fact in the context of the particular case, the fact itself remains binding without further proof, unless compelling circumstances attacking the basis of such an agreement of fact are presented.

[53] In the present matter, the agreed fact that the appellant has been unable to work since he left work in 1997 is binding on the respondent, and further meets the definition of permanent disability under s 1 of COIDA. Attempts by the respondent to argue that evidence of the appellant's permanent disability was not presented, ignores that, in the circumstances of the agreed facts, no such evidence was required. Accordingly, the

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[9] *Filta-Matix (Pty) Ltd v Freudenberg and others* 1998 (1) SA 606 (SCA) at 614C-D.

argument that the appellant should not be regarded as permanently disabled cannot be upheld.

[54] Having found that the injuries constitute a permanent disability, s 49 must be referenced, which determines the basis for the calculation of the percentage of the compensation which an employee is entitled to. In particular, s 49(2) provides:

'*(a)* If an employee has sustained an injury set out in Schedule 2, he shall for the purposes of this Act be deemed to be permanently disabled to the degree set out in the second column of the said Schedule.

(b) If an employee has sustained an injury or serious mutilation not mentioned in Schedule 2 which leads to permanent disablement, the Director-General shall determine such percentage of disablement in respect thereof as in his opinion will not lead to a result contrary to the guidelines of Schedule 2.

(c) If an injury or serious mutilation contemplated in paragraph (a) or (b) has unusually serious consequences for an employee as a result of the special nature of the employee's occupation, the Director-General may determine such higher percentage as he or she deems equitable.'

[55] The respondent's contention is that the injuries sustained by the appellant do not fall under Schedule 2 to COIDA. Accordingly, and emphasising the caution given by the Supreme Court of Appeal in *Department of Labour: Compensation Commissioner v Botha,*[10] the injuries are not automatically to be regarded as entitling a claimant to a 100% disablement.

[56] Item 6 of Schedule 2 to COIDA provides that the percentage of permanent disablement should be regarded as 100% for '[a]y other injury causing permanent total disablement'. While 'permanent total disablement' is not a defined term, I am in full agreement with the *ratio* of this court in *Ramanand v Department of Labour: Compensation Commissioner,*[11] where it was held:

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[10] *Department of Labour: Compensation Commissioner v Botha* [2022] ZASCA 38; (2022) 43 ILJ 1066 (SCA) para 18.

[11] *Ramanand v Department of Labour: Compensation Commissioner* [2023] ZAKZPHC 41; [2023] 7 BLLR 702 (KZP) (*Ramanand*).

'[51] The appellant contends that it is not disputed that a medical expert in the form of Dr Agambaram has determined him to be totally permanently disabled and that such disablement falls within the last category of classification referred to in the table above (the sixth classification).

[52] Schedule 2 to the Act specifically identifies those injuries that entitle a claimant to claim total disablement. The sixth classification does not specify the nature of the injury, unlike the five classifications that appear before it. The sixth classification is dependent for its applicability not on the nature of the injury, but on the effect of that injury, whatever it may be. It stands to reason that the Legislature could not have thought of every type of injury that would lead to 100 percent disablement. The range of human activity is vast and the possibility for misfortune is virtually limitless. Any injury that results in 100 percent disablement thus falls within the sixth classification, irrespective of the physical nature of the injury. It must be assumed that the sixth classification was inserted in the schedule for a purpose. It seems to me that that purpose is to cater for injuries that were not initially thought of or capable of description when the Act was conceived but which result in 100 percent disablement. An excessive exposure to nuclear radiation may be one such example of this.

[53] It is so that schedule 2 was considered in *Department of Labour: Compensation Commissioner v Botha*, and, in particular, the provisions of the sixth classification. Nicholls JA stated the following:

> "It is inconceivable that any injury not listed in Schedule 2 should attract an award of 100% permanent disablement, irrespective of the nature of the injury. There are countless injuries which an employee may suffer in the workplace which are not listed in the Schedule. As pointed out by this Court, almost anything which unexpectedly causes illness, injury to, or death of, an employee falls within the concept of an accident. Should an injury, which is not listed in Schedule 2, befall an employee as a result of such an accident, this does not axiomatically mean that he or she is 100% disabled. The extent of the disability must be determined in light of the facts of the specific case and according to medical evidence." (Footnote omitted.)

[54] In my view, this does not create an impediment to the success of the appeal. The appellant's case is not that because his injury is not listed in schedule 2 he is automatically 100 percent disabled, as alluded to in *Botha*. *Botha* makes it plain that the extent of the disablement must be determined with reference to the facts of the case, which facts would include the opinions of the medical experts who have ventured an opinion in the matter. In this case, only the appellant presented evidence, none of which was disputed by the respondent. His injury, whilst not

mentioned in schedule 2, nonetheless thus falls within the sixth category mentioned in schedule 2 by virtue of the fact that he is totally permanently disabled.
[55] I must thus find that the appellant's contention regarding the classification of his injury as falling within the sixth classification is correct.' (Footnotes omitted.)

[57] *Ramanand* also relates to a diagnosis of PTSD leading to unemployability.

[58] While it is true that the medical reports in *Ramanand* appear to be more assertive in leading to the conclusion of permanent disablement, the plethora of medical reports confirming the appellant's inability to work and that his prognosis is poor, combined with the agreed facts, including that of an inability to work, lead overwhelmingly to the conclusion that the injuries sustained by the appellant constitute 100% permanent disablement.

[59] The decision to apportion the appellant's entitlement to compensation to 20% is not explained by the Tribunal. The finding is not supported by any facts or medical evidence and appears to be arbitrary. It is not in accordance with s 49(2) of COIDA and falls to be set aside and replaced with an award calculated at 100% disablement.

[60] Accordingly, both the date from which compensation was to be calculated and the percentage apportionment applicable to such compensation were incorrectly decided and fall to be set aside. The appeal must therefore succeed.

Costs

[61] The usual rule is that an award of costs should follow the result. There is no reason to deviate from this in the present matter. This court, however, has been requested to award costs in favour of the appellant on the punitive scale of attorney and client. The request is predicated on the submissions that there is a higher duty on an organ of state to respect the law,[12] and the opposition by the respondent in the appeal should be

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[12] See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC) para 60.

regarded as vexatious.

[62] In *White Rock Property Trading (Pty) Limited v Khaka and another,*[13] the court held:

'An attorney client costs order may issue where the other party has been guilty of dishonesty, fraud or that his motives and conduct may have been vexatious, reckless, malicious or frivolous, or that he has been guilty of some form of misconduct in connection with the matter investigated or in the conduct of the case. The intention to delay the matter and to prolong the first respondent's occupation of the property, is readily discernible in this matter.[14]'

[63] The delay from the time of the injury until the Tribunal hearing has already been compensated for in the form of a punitive costs order in favour of the appellant in those proceedings. Accordingly, the consideration of whether the respondent's conduct is worthy of censure by way of a punitive costs order is limited to considerations of the appeal.

[64] In this appeal, and while the arguments raised by the respondent in the appeal should have been more carefully considered before they were raised, the respondent's conduct is not so egregious that it can be regarded as vexatious and meriting an attorney and client costs order.

[65] The matter is, however, of a sufficiently complicated nature that costs should be taxed on scale C.

Order

[66] Accordingly, the following order is made:

1. The appeal is upheld.

2. The decision of the Tribunal, dated 12 October 2023, is set aside and substituted with the following order:

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[13] *White Rock Property Trading (Pty) Limited v Khaka and another* [2017] ZAGPJHC 175 para 48.

[14] Referencing *Van Dyk v Conradie and another* 1963 (2) SA 413 (C); *De Goede v Venter* 1959 (3) SA 959 (O); and *Ward v Sulzer* 1973 (3) SA 701 (A).

‘(a) The Compensation Commissioner is ordered to accept liability for the Objector’s occupational diseases, Post-traumatic Stress Disorder and Major Depressive Disorder, contracted in the course and scope of his employment;

(b) The Compensation Commissioner is ordered to issue, in favour of the Objector, a written Award of Compensation, stating the following particulars:

i. The Objector’s earning per month for compensation purposes is R6 650.85;

ii. The diagnosis of disability is Post Traumatic Stress Disorder and Major Depressive Disorder;

iii. The date of the accident is 6 May 1993;

iv. The percentage of permanent disablement is 100%;

v. Compensation in the form of a monthly pension shall commence on 6 May 1993;

vi. All increases in monthly pensions, as prescribed from time to time in terms of section 57(1) of COIDA, shall accrue from 6 May 1993 onwards.

(c) The Compensation Commissioner is ordered to publish the aforesaid Award of Compensation to the Objector’s attorneys of record and the Objector’s employer within 20 (twenty) days of this order;

(d) The Compensation Commissioner shall bear the costs in the objection on a scale as between attorney and own client.’

3. The respondent shall pay interest on the amount of the arrear pension at 15,5% per annum from 6 May 1993.

4. The respondent shall pay the costs of the appeal, such costs to be taxed on scale C.

HENRIQUES J

CASE INFORMATION

Date of Hearing:	24 January 2025
Further written submissions:	01 February 2025
Date of Judgment:	07 May 2025

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 9h30 on 7 May 2025.