IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE: 2 June 2025
SIGNATURE: [redacted]

Case No. A 378/2023

In the matter between:

DON'T WASTE KZN 1 (PTY) LTD	**FIRST APPELLANT**
DON'T WASTE KZN 2 (PTY) LTD	**SECOND APPELLANT**
DON'T WASTE CTN 1 (PTY) LTD	**THIRD APPELLANT**
DON'T WASTE CTN 2 (PTY) LTD	**FOURTH APPELLANT**
DON'T WASTE EC 1 (PTY) LTD	**FIFTH APPELLANT**
DON'T WASTE GAU 1 (PTY) LTD	**SIXTH APPELLANT**
DON'T WASTE GAU 2 (PTY) LTD	**SEVENTH APPELLANT**

DON'T WASTE GAU 3 (PTY) LTD	**EIGHTH APPELLANT**
DON'T WASTE GAU 4 (PTY) LTD	**NINTH APPELLANT**
DON'T WASTE GAU 5 (PTY) LTD	**TENTH APPELLANT**
DON'T WASTE GAU 6 (PTY) LTD	**ELEVENTH APPELLANT**

and

THE COMPENSATION FUND	**FIRST RESPONDENT**
THE COMISSIONER OF THE COMPENSATION FUND	**SECOND RESPONDENT**
MINISTER OF EMPLOYMENT AND LABOUR: TW MXESI	**THIRD RESPONDENT**
DEPUTY MINISTER OF EMPLOYMENT AND LABOUR: BOITUMELO MOLOI	**FOURTH RESPONDENT**
THE DIRECTOR GENERAL, DEPARTMENT OF EMPLOYMENT AND LABOUR: THOBILE LAMATI	**FIFTH RESPONDENT**

Coram:	Khumalo J (Ms) *et* Millar J *et* Le Grange AJ
Heard on:	17 April 2025
Delivered:	2 June 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on ** May 2025.

JUDGMENT

LE GRANGE AJ (KHUMALO J (Ms) *et* MILLAR J CONCURRING)

INTRODUCTION

[1] The central issue in this appeal is the question whether the provisions of the Compensation for Occupational Injuries and Diseases Act[1] (COIDA), and more specifically section 91 thereof, constitute an internal remedy, as envisaged in section 7(2)(a) of the Promotion of Administrative Justice Act[2] (PAJA). This is a matter where the dispute relates to a decision taken to classify the appellants in terms of COIDA.

[2] In this regard, the court of first instance found that it does, and that the court has no jurisdiction to entertain the appellants' review of the impugned decision. The relevant portion of the judgment reads as follows:

> *'[26] Failure to initiate and or to initiate and failure to prosecute does not extinguish the existence of a remedy.*
>
> *[27] Sect 91 of COIDA is found in chapter X under heading legal procedures and states that any person who is affected by a decision of the Director General may within a prescribed time lodge an application with the Commissioner. A decision to classify according to assessment tariffs is such a decision. Applying parity of reason, a person affected by such a decision may raise an objection to such classification and as a consequence request such classification to*

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1 130 of 1993.
2 3 of 2000.

be reconsidered. If with success a reclassification results. The decision to classify remains the prerogative of the Respondents.

...

[31] Any internal remedy means just that, any, and thus does not exclude the procedures of sec 91. In flows that the 2-12 applicants must, as the First Applicant attempted, first have exhausted the internal remedy of sec 91 or perhaps more aptly in this case, having regard to the facts and duration, on application clearly set out exceptional circumstances in terms of sec 7(2)(c) upon which a Court could have exempted them from compliance in the interest of justice.' [Emphasis added]

[3] The court *a quo* granted the appellants leave to appeal this finding.

COIDA

[4] The sections relevant to this matter provide that:

'83 Assessment of employer

(1) Subject to the provisions of this section, an employer shall be assessed or provisionally assessed by the Director-General according to a tariff of assessment calculated on the basis of such percentage of the annual earning of his, her or its employees as the Director-General with due regard to the requirements of the compensation fund for the year of assessment may deem necessary.

...

91 Objections and appeal against decisions of Director-General

(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) If the presiding officer considers it expedient, he may, notwithstanding paragraph (a), call in the assistance of a medical assessor." [Empasis added]

[5] It is correct that section 83 bestows the power to assess or provisionally assess upon the Director-General, as the court of first instance found, but the act together with the Industry Classifications, Classes, Subclasses and Assessment Tariffs/Classification list/Table of Assessment Rates (TAR), and the facts should however further be considered.

[6] It is common cause that the business or operation, in which the appellants are engaged, is not specifically mentioned in the TAR, for which reason, *the Commissioner* invoked clause 4 thereof. To this end the respondents (collectively referred to as the **Fund**) themselves stated[3]:

"9.16 The [Commissioner] has invoked the above provision, which gives him the discretion, in classifying the [appellants]. It should be noted that the Industry Classification document does not specifically refers to the employers or business carrying out the activities similar to those of the [1st to 11th appellants].

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[3] Bundle p 213 paras 9.16 and 9.17.

9.17 The nearest classification available that the Compensation Fund could allocate the [1st to 11th appellants] is 1201."

[7] Clause 4 of the TAR provides, in relevant part, that:

> *"If the business or operations, in which an employer is engaged, is not specifically mentioned in the Table of Assessment Rates the Commissioner may apply such assessment rate to the employer's business or operations as he may under the circumstances consider equitable…"*

[8] Form the above it is clear that the duty to assess or provisionally assess, according to a tariff, lies with the Director-General, however if the business activity is not specifically mentioned in the TAR, the duty to *"apply such assessment rate to the employer's business or operations as he may under the circumstances consider equitable"* befalls the Commissioner.

[9] Two aspects emerge from the above: (i) Since section 91 only provides for an internal remedy against the Director-General's decisions, and since COIDA does not provide for a similar remedy against a decision of the Commissioner, that in my view disposes of the main issue, that the court *a quo* should have entertained the matter at least on this basis; and (ii) It is not sought of the Commissioner to classify a business into a specific classification, where no such classification exists. The Commissioner is to consider the risk of the business and apply an assessment rate to the employer which is fair and equitable. In the premises the classification in such an instance is ancillary and what is more important is that the assessment rate should be equitable.

180 DAYS LIMITATION PROVISION IN PAJA

[10] *In limine*, the Fund objected to the review, being brought in terms of the provisions of PAJA, on the basis that it was brought beyond the 180 days as provided for in section 7(1) of PAJA.

[11] The chronological facts, relating hereto, is common cause and as follows:

[12] Don't Waste Shared Services (Pty) Ltd (Shared Services) and the appellants (collectively referred to as Don't Waste Group) was initially classified under sub-classification 1711.[4]

[13] Following a re-assessment application and a physical visit and valuation by the Fund's inspectors, the Commissioner on 28 February 2020 reclassified the Don't Waste Group under sub-classification 1201.[5]

[14] It is the Fund's submission that the appellants had to apply for the rescission of this decision by no later than 180 days from this latter date.

[15] However, on 1 March 2020, Don't Waste Group sent a letter to the Commissioner stating that the re-classification was incorrect, requested its intervention, and proposed a meeting. Don't Waste Group were of the view that Shared Services should, due to its administrative business managing the group, be re-classified as under 2210[6] and the appellants (whose employees actively sorted the waste) under 1960[7] – which is the classification given to their 'direct competition, in the same industry, which is similarly responsible for the sorting of waste', an allegation which was not denied by the Fund. The latter classification which makes sense as it has a lesser risk and hence a lesser assessment tariff attached to it, to which I will return.

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4 CLASS XVII, AIR, ROAD TRANSPORT HAULIERS, etc., Sub-class 1711, The business of carriage, transport or sanitary service contractors; strewing of fertilizer as a business.

5 CLASS XII, GLASS, BRICK, TILES, CONCRETE, etc., Sub-class 1201, Leaded lights manufacturing; glazing; beveling and/or silvering, including the business of a glass merchant.

6 CLASS XXII, PROFESSIONAL SERVICES, etc., Sub-class 2210, The business of accountant; auditor; advocate; attorney; conveyancer; notary; law agent; quantity surveyor, editing and journalistic work provided no printing and/or publishing, other than distribution through the post, is undertaken; press agency; typing and roneo work as a separate business; and other profession not otherwise stated.

7 CLASS XIX, PERSONAL SERVICES, HOTELS, FLATS, etc., Sub-class 1960, Property managing, including service flats, township and/or estate managing in connection with which the functions of a local authority are not carried out and no agricultural operations are carried on (any agricultural operation carried on are subject to the rates for Class I), the business of the advertising agent (including bill posting) and/or contractor; commercial artist and/or designer; enquiry and/or collecting agent; labor recruiting agent; messenger agency.

[16] Following 8 months of silence from the Fund, and various complaints by Shared Services that its business suffer damages due to this lack of response, they on 20 July 2021, lodged a completely new re-assessment application.

[17] Due to a further lack of proper response, notwithstanding frequent follow-ups, the Commissioner ultimately, a year later, on 11 March 2022 requested further documents, which were provided on 4 April 2022 together with a completely new re-assessment application.

[18] On 11 April 2022, the Commissioner informed Don't Waste Group that the matter is escalated to the relevant department and a response should be awaited within 21 working days.

[19] Due to the Fund's failure to respond, Don't Waste Group filed motion proceedings on 23 August 2022.

[20] Part A of the application was instituted on an urgent basis during that month, the primary purpose being to compel the Fund to decide regarding the reclassification of the Don't Waste Group, i.e. to either allow or to disallow their re-classification as prayed for in the Notice of Motion.

[21] This relief was achieved on 8 September 2022 when the Fund, in a letter addressed by the State Attorney, communicated that they had made the decision to:

[21.1] allow the reclassification of Shared Services as sub-classification 2210 under CLASS XXII; and

[21.2] disallow the reclassification of the appellants as sub-classification 1960 as sought in the Notice of Motion.

[22] By entertaining a new re-classification application (dated 4 April 2022) and by making the above decision consequent to this new re-classification application, the Fund opened the door for the appellants to have *this* latter decision(s) be reviewed and set aside, the 180 days effectively being reset (to the date of this decision) and in this instance of no consequence.

[23] For this reason, the point *in limine* stands to be dismissed.

IMPUGNED DECISION

[24] According to the appellants, their *"businesses involves the sorting of waste (of which approximately 3% thereof consists of the sorting of glass) at the premises of their various clients, whereafter the removal of the waste is outsourced to third parties. This is a function that should usually be fulfilled by the local Municipality. Accordingly the business of the Second to Twelfth Applicants should fall squarely within sub-classification 1960, which is described in the Classification List as "property managing, including service flats, township and/or estate managing in connection with which the functions of a local authority are not carried out and no agricultural operations are carried on (any agricultural operations carried on are subject to the rates for Class I), the business of advertising agent (including bill posting) and/or contractor; commercial artist and/or designer; enquiry and/or collecting agent; labour recruiting agent; messenger agency."*

[25] As stated above, on or about 25 February 2020 the Commissioner made the administrative decision to classify Don't Waste Group under CLASS XII and more specifically under sub-classification 1201, which is described in the TAR as follows:

> *"GLASS, BRICK, TILES, CONCRETE, etc.*
>
> ...
>
> *1201 Leaded lights manufacturing; glazing; bevelling and/or silvering, including the business of a glass merchant".*

[26] The appellants are of the view that this classification is irrational as their respective business operations and the risks associated with their business activities (the nature of which is not disputed) clearly did not fall within the scope of this patently incorrect classification and more importantly that the assessment rates is not associated with the risk of the subclass and hence equitable. For this reason, they filed a new application for re-classification which ultimately culminated in the review before this Court.

[27] Considering whether the appellants' business should have been classified as 'manufacturing' or 'glass merchants' the Fund's own investigation into the nature of the appellants' business becomes relevant.

[28] In this regard, the Fund's investigators on 21 February 2020 stated, in relevant part, as follows:

> *"2. DISCUSSION*
>
> *2.1 Don't Waste Pty Ltd consists of 12 branches in which one branch named [Shared Services] is the head office responsible for the admin work for all other 11 branches …*
>
> *The nature of the business performed on the sites is waste sorting (papers, plastic, glasses and cans) at the back area of premises of the client refer to attached (page 14), then collection is outsourced to service providers (Waste Group, Remade recycling, Lothlorion wastepaper, Ace of waste cc and Skip waste) as agreements attached.*
>
> *3. RECOMMENDATION:*

3.1 We suggested that subclass 1550[8] (0.53%) to be applied as from start to all mentioned above reference numbers for Don't Waste PTY LTD."

[Emphasis added.]

[29] Considering the above, the classification of, or the application of the assessment rates to, the applicants as similar to 'manufacturers' or 'merchants' as well as the investigators' own recommendation to classify them as 'trade and commerce', is simply wrong as it nowhere indicated that manufacturing or selling (especially glass) took place – acts which would substantially increase the risk to any employee.

[30] In argument the Fund's counsel correctly conceded that the appellants do not manufacture, buy or sell the waste and never becomes owner thereof. The appellants simply sort waste into different categories of paper, plastic, glasses and cans, similar to, or an extension of, a hotel employee who takes out the waste and sort it before it is collected by the waste removals.

[31] It is further evident from the investigator's report that the applicants do not bring anything onto site or remove anything from site – something which would also increase the risk – and that the sorting is done at the back of the premises of the client.

[32] What is further lacking in the Fund's papers is their reasons why the respondents' decisionmakers decided to astray from their own inspectors' or the inspector's reasons why they made the recommendation they did, which makes the decision arbitrary and even more irrational.

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[8] CLASS XV, TRADE, COMMERCE, etc., Subclass 1550, The business of general retail dealer; chemist or herbalist; photographer; photographic appliance dealer; tobacconist; bookseller and/or stationer; type writer agent including office equipment shops, commercial traveler and/or manufacturer representative; whole sale leather merchant; wholesale soft furnishing merchant; wholesale merchant (not otherwise stated); hide, skin and wool merchant or broker, paper merchant not undertaking any manufacturing operations; tea, coffee or sugar merchant; with no roasting operations; feather dealer or maker of feather dusters; rubber merchant; tyre or motor accessory dealer.

[33] In the premises, I find that the impugned decision to be arbitrary and not to be rationally connected to the information before the Commissioner.

[34] I further find that to the extent that the Commissioner classified the appellants it be wrong in law as the Commissioner is not to classify but to apply the equitable assessment rate, and at the most regard for practical reasons a specific classification.

FURTHER AND/OR ALTERNATIVE RELIEF

[35] Save to seek the review and the setting aside of impugned decision, the appellants, in the second part of Part B of the notice of motion, request the Court to regard this matter as exceptional and to substitute, by virtue of section 8(1)(c)(ii)(aa) of PAJA, the decision the Commissioner by classifying them under sub-classification 1960.

[36] Whether there are indeed exceptional circumstances, the following must be considered:

[37] The Fund in their papers persist that their classification of the appellants is correct and that there is no need for the Court to interfere. They also blamed the appellants own failure to clarify that they do not transport the waste which was the cause for the first erroneous classification.

[38] The Fund alleged that: *"[t]he classification is always made on the information provided by the employees themselves although the Compensation Fund may visit the employer premises for investigation and certainty."* The allegation is correct, however, the Fund themselves, after obtaining their investigative report, failed to follow its recommendation, and more important failed to explain why they did so. In argument before this Court, it however became evident by concession that the classification (under 1201) is palpably wrong.

[39] I find that: (i) the lack of the Fund's proper response, which spans over a 4 year period; and more importantly (ii) the Fund's persistence with a clear and irrational decision in their papers; (iii) the investigator's wrong recommendation based upon its own information; and (iv) the fact that there is more than enough facts before court, the most important of which is the nature of the respondents' business which remains undisputed, that this matter is exceptional, which warrant this Court's intervention to the extent that the Commissioner's decision must be substituted.

[40] Considering that the risk under which the hotel employee conducts waste sorting, which is similar to what the appellants' employees do, this Court can with certainty find that the assessment rate applicable to the former would be equitable to the latter.

[41] Regarding costs, I find no reason why the costs should not follow suit albeit on scale C, due to the complexities of the arguments.

ORDER

[42] In the circumstances, I propose the following order:

[40.1] THAT the appeal is upheld.

[40.2] THAT the second respondent's decision to classify the appellants under sub-classification 1201 is reviewed and set aside and substituted by the follow:

> *"The assessment rates associated with sub-classification 1960 of the Industry Classifications, Classes, Subclasses and Assessment Tariffs is to be applied to each and every of the appellants from 28 January 2020".*

[40.3] THAT the respondents are ordered to apply the assessment rates associated with sub-classification 1960 to each and every appellant; and where practically necessary to regard the appellants as classified in terms of sub-classification 1960.

[40.4] THAT the first and second respondents are ordered to, within 10 days of this order, provide each of the appellants with an assessment, reflecting those amounts due to the first respondent as from 28 February 2020 in terms of the above assessment rate, for the purpose of enabling the appellants to make payment of any amount that may still be due to the first respondent in terms of the above assessment.

[40.5] THAT the first and second respondents are ordered to reverse any and all such charges and penalties that may have been levied against the applicants since 28 February 2020, as a result of their failure to correctly reclassify the appellants as set out above.

[40.6] THAT the first and second respondents are ordered to, immediately upon payment by the applicants of any outstanding amount due in terms of the aforementioned assessment, issue the appellants with the necessary Letters of Good Standing, provided all other prescribed requirement have been complied with.

[40.7] THAT the first and second respondents are ordered to pay the costs of the appeal, jointly and severally, to include the costs of counsel on Scale C.

A.J. LE GRANGE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

NV KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE,

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

GMENT DELIVERED ON: 2 JUNE 2025

RUCTED BY: COX YEATS INC

REFERENCE:	MS. C SEGER
COUNSEL FOR RESPONDENTS:	ADV. MC PHATHELA
INSTRUCTED BY:	OFFICE OF THE STATE ATTORNEY.
REFERENCE:	MR. M MATLALA