



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A61/2026

[Reportable]

In the matter between:

ELIZABETH HARTZENBERG

Appellant

and

THE PRESIDING OFFICER OF THE TRIBUNAL

First Respondent

WORKMEN'S COMPENSATION COMMISSIONER

Second Respondent

THE DIRECTOR GENERAL:

Third Respondent

THE DEPARTMENT OF LABOUR

THE MINISTER OF LABOUR

Fourth Respondent

AND

Case No: A62/2026

In the matter between:

JONATON HERMANUS JONAS

Appellant

and

THE PRESIDING OFFICER OF THE TRIBUNAL

First Respondent

WORKMEN'S COMPENSATION COMMISSIONER

Second Respondent

THE DIRECTOR GENERAL:

Third Respondent

THE DEPARTMENT OF LABOUR

THE MINISTER OF LABOUR

Fourth Respondent

Coram: Henney J et Adams, AJ

Heard: 12 June 2026

Judgment: 9 September 2026

Summary: Claim under section 49(2) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) – Interpretation of 100% permanent disablement in terms of Schedule 2, under item 6 of COIDA. A purposive approach to COIDA, which includes consideration of an injured worker's right to dignity and physical integrity. This approach is in line with the concept that COIDA is regarded as social legislation for the benefit of the worker. It includes considering whether the loss of the use of an arm or hip, causing persistent pain and disability, constitutes a loss of such a limb, and whether such a finding disables a worker from performing any other work. The Tribunal's assessment of a claim ought not to have been, as has happened in these two cases, a robot-like, mechanical or tick-box exercise. It must exercise proper judicial discretion, taking into account all the evidence presented, especially the undisputed medical evidence. This aligns with the decision of the SCA in the *Department of Labour: The Compensation Commissioner v Botha*.

Costs: Whether the implementation of a costs regime that entitles a claimant only to costs on a Magistrate's Court scale under section 46(7) of COIDA has retrospective effect. The court applied the dictum in *Mashava v Enaex Africa (Pty) Ltd* and others to conclude that the new costs regime applies only from the date it came into operation, 23 January 2026. Costs incurred before that date in connection with the

hearing of the claim should be claimed under the previous regime. It therefore has no retrospective effect.

ORDER

It is ordered as follows:

In the case of Miss Elizabeth Hartzenberg under case no A61/2026:

1. The appeal succeeds.
2. The Tribunal's determination dated 6 February 2026 that the Appellant's permanent disablement is 17% (less 3% already paid) is set aside.
3. It is declared that the Appellant's total permanent disablement is 100%.
4. The Compensation Commissioner / Director General is directed to pay the legal costs of the Appellant involving the proceedings before the Tribunal at the scale applicable before 23 January 2026, including the costs of counsel where so employed.
5. The Compensation Commissioner / Director General shall pay the costs of the appeal, which shall include the costs of two counsel.

In the case of Mr Jonatan Hermanus Jonas under case no A62/2026:

1. The appeal succeeds.

2. The Tribunal's determination dated 6 February 2026, that the Appellant's permanent disablement is determined to be 13% (less 10% already paid), is set aside.
3. It is declared that the Appellant's total permanent disablement is 100%.
4. The Compensation Commissioner / Director General is directed to pay the legal costs of the Appellant involving the proceedings before the Tribunal, at the scale applicable before 23 January 2026, including the costs of counsel where so employed.
5. The Compensation Commissioner / Director General shall pay the costs of the appeal, which shall include the costs of two counsel.

JUDGMENT

HENNEY, J

[1] This judgment concerns the appeal in two matters. Each involves a decision made by the third respondent in that matter, namely the first respondents, as Presiding Officers of the Tribunals ('the tribunal'). The matters were dealt with in two separate appeal hearings, heard consecutively by Adams AJ and me on the same day, and are consolidated for this judgment, as will become apparent later. Both matters concern claims instituted under s 49(2) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA'). In the first matter, the claimant is Elizabeth Hartzenberg ('Miss Hartzenberg'), and in the second matter, the claimant is Mr Jonatan Jonas ('Mr Jonas').

[2] The material facts of the respective claims are unrelated to each other. The incidents that gave rise to the claims are unrelated in respect of the date, time, and injuries sustained by the two claimants. In both matters, the appeals lie against the decisions of the respective first respondents, although the matters were presided over by different presiding officers. Both Miss Hartzenberg and Mr Jonas were

represented by the same attorney, Mr KG Kemp, in the proceedings before the tribunal, and in each of the proceedings for the different claimants, Dr Oelofse, an orthopaedic surgeon, testified in respect of the injuries sustained by both Miss Hartzenberg and Mr Jonas. In the respective appeals, Mr KG Kemp is the instructing attorney and instructed Mr Rabie and Mr Coston to appear as counsel. Before us, the State Attorney in each case represented the respondents but appointed different counsel.

THE DECISION OF THE TRIBUNAL IN RESPECT OF MISS HARTZENBERG

[3] The tribunal found that, under s 49 of COIDA, the severity of the injury is determined by reference to Schedule 2, which attributes a percentage of disability to the injury. Schedule 2 also lists the injuries in the first column and the percentage of permanent disability allocated to each in the second column. These listed injuries primarily involve the loss of a body part, such as a limb, toe, finger, or eye, as well as the loss of sight or hearing. The schedule also provides for 100% permanent disability in cases of injuries such as total paralysis. The tribunal further concluded that it is common cause that in instances where the injury is not listed in the schedule, as is the case with the injury sustained by Miss Hartzenberg, the fund uses Circular Instruction 157 and the AMA guides to determine permanent disablement.

[4] The Tribunal declined to follow the decision in *Botha Workmen's Compensation Fund*¹, (*Botha High Court*) referred to by the legal representative of Miss Hartzenberg and disagreed with the approach taken by that court. The disagreement is premised primarily on the fact that the court's interpretation concerned the injured person's capacity to do the work they were doing at the time of the accident, which is contrary to section 1 of COIDA. In terms of this section permanent disablement which entitles an injured employee to compensation means the permanent inability of the employee to perform any work as a result of an accident. According to the tribunal, the assessment of permanent disablement is not

¹ [2022] JOL 57 047 GP.

limited to determining whether the employee can perform the duties he performed at the time of the incident.

[5] The tribunal found that while COIDA must be interpreted broadly in a manner that favours the employee, it does not apply to all injured employees who are unable to return to pre-accident duties within 3 months or an extended period, or who are 100% permanently disabled. It found that some employers can provide light duties to injured employees, and that some employees can be rehabilitated over time so they can resume pre-accident duties. The tribunal also found that, although Miss Hartzenberg had limited capacity to perform her previous duties, which required physical capacity, it could not find that she could not perform 'any other work' or job because her upper body is not affected. The tribunal further found that, in terms of Schedule 2, loss of the lower limbs, in particular the legs, attracts 100% physical disablement. This was not the case for Miss Hartzenberg, because she sustained no loss of limb. Schedule 2 prescribes the maximum physical disablement for one loss of limb at the hip to be 70%. Dr Oelofse confirmed that the right and left hips, knees, ankles, and metatarsal joints showed abnormal functioning, with normal muscular power, except that the left hip had a severely restricted range of movement. The tribunal further stated that, with the normal functioning of the knee joint and ankle joint, and those confirmed on the left limb, Miss Hartzenberg retains 57% of the 70% of the lower limbs' permanent disablement. On the right side, she retains 66% of the 70%.

[6] The tribunal assessed her permanent physical disablement under Schedule 2, first finding that one-third of each of the upper and lower limbs had lost normal function, resulting in a 17% permanent disablement. It further allocated 13% permanent disablement to the left hip for loss of hip movement and 4% to the right hip due to mild pain. Based on these facts and the medical evidence, together with Schedule 2 of the Act, the tribunal concluded that the evidence did not support the claim of 100% disablement. It further concluded that the loss of movement could not be equated to the loss of 2 limbs or even 1 limb. Notwithstanding these findings, it found that the 3% awarded by the fund was inadequate, taking into account the clinical records, radiological reports, social history, the provisions of the Act, and the expert evidence, and that the determination made by the fund was liable to be set

aside. It substituted that order and made an order that Miss Hartzenberg's injuries rendered her 17% permanently disabled.

DECISION OF THE TRIBUNAL IN RESPECT OF MR JONAS

[7] In the case of Mr Jonas, the tribunal took an almost identical approach in its reasoning regarding the applicability of the AMA Guides, Circular Instruction 157, and the judicial scrutiny due to their mechanical application by Workmen's Compensation Tribunals. It followed the same reasoning as in the case of Miss Hartzenberg, when it refused to follow the approach of *Botha*² (High Court) that a worker's inability to perform duties even after the extended period of temporary disablement should indicate reconsideration and the placing of the injuries in schedule 2, that is, 100% disablement for the work the injured was doing at the time the injury was sustained.

[8] In the case of Mr Jonas, the tribunal held that limiting an injured person's capacity to perform the work they were doing at the time of the accident is contrary to section 1 of the Act, which defines permanent disablement as the permanent inability of an employee to perform any work as a result of an accident. The tribunal also held that some employers could provide light duties to employees, and that some employees can be rehabilitated over time and return to pre-accident duties. Specifically, regarding Mr Jonas, the tribunal found that, according to the medical experts, Mr Jonas has a limited range of motion in the left shoulder, with normal muscles present at the elbow and the wrist, with no deformity. It found that Mr Jonas's disablement cannot be compared to someone who has lost a limb or part of the upper body

[9] According to the tribunal, under Schedule 2, the loss of 2 limbs (2 arms or 2 legs) attracts 100% permanent disablement, which is not applicable in Mr Jonas's case. Based on Dr Oelofse's report, the elbow, forearm, wrist, and fingers function normally, except for the left shoulder. With normal functioning, Mr Jonas has 55% of the 65% upper left limb permanent disablement. By applying Schedule 2, Mr Jonas

² Ibid.

would be awarded 10% permanent disablement, according to the tribunal. Dr Oelofse, by applying the AMA Guides, calculated the physical disablement to be 13%. The Fund (the second respondent) confirmed that it used Instruction 157 and the AMA Guides in calculating the 10% permanent disablement. Regarding the use of the AMA Guides, the tribunal found that they are an internationally recognised standard for the evaluation of permanent impairment and disablement, providing concepts, definitions and rules for evaluating patients with injuries or illnesses and for translating these evaluations into an impairment number to assist legal and other systems in calculating compensation. The tribunal found that only permanent impairment (disablement) may be rated in accordance with the AMA Guides. It further stated that the AMA Guides are used by Workmen's Compensation and other disability systems. In this regard, it also referred to the case of the *Law Society of South Africa and others v Minister of Transport and another*³.

[10] The tribunal stated that whilst COIDA does not explicitly refer to the AMA guides as a method of assessing permanent disablement, they are nonetheless used by the Fund when an injury is not regulated or on instructions. The use of the AMA guides will have to be considered on the merits of each case. This is in line with a commissioner's discretion to determine the percentage of disablement for an injury not listed in Schedule 2, provided it does not result in a finding contrary to the guidelines in Schedule 2.

[11] The tribunal held that the percentage of permanent disablement under the Schedule, at 10%, is lower than the percentage calculated under the AMA Guides. The tribunal found that 13% physical disablement, less the 10% ordered by the Fund, is a fair and reasonable compensation, having regard to the nature of the permanent disablement, namely restricted movement of the shoulder. It was further found that, in applying the AMA Guides in the circumstances of this case, an award of 13%, based on the medical evidence before it, is not contrary to the guidelines set out in Schedule 2. It further found no evidence to support the contention that Mr Jonas is 100% permanently disabled.

³ 10654/09 [2010] ZAGPPHC 2010(11) BCLR1140 (GNP)(31 March 2010).

[12] The Issues for consideration in both appeals

The issue for consideration in both matters concerns the proper interpretation of the definition of 'permanent disablement' in s 1 of COIDA, which states '... In relation to any employee, subject to section 49, means the permanent inability of such employee to perform any work as a result of an accident or occupational disease for which compensation is payable'. The crux of the dispute in this matter is whether an injured person's inability to perform the work they were doing at the time of the injury should be regarded as permanent disablement for COIDA. I shall return to this later in this judgment.

[13] The facts of Miss Hartzenberg's case

Miss Hartzenberg's highest educational qualification is Standard 8 (Grade 10). After leaving school, she briefly worked for another company before joining Geelhout Plein Timbers CC ('Geelhout'), where she was employed at the time she sustained her injuries. Her duties at Geelhout were physically demanding, including operating a heavy wood saw and lifting, placing and stacking timber. She confirmed that she had no training, qualifications or vocational skills in any other field of employment.

[14] On 23 September 2016, she fell from a truck and sustained injuries, initially diagnosed as bilateral femoral neck fractures. The fall resulted in fractures of both her left and right femoral necks, the areas of the thigh bone just below the hip joint. Although both legs were injured in the accident, specific surgical intervention was performed on the left leg.

[15] The injuries she sustained required surgical intervention and treatment at the George Mediclinic, where she underwent surgery to perform internal fixation of the neck of her left femur. During the surgery, the surgeons used pins or screws on the left side to stabilise the fracture. Following the surgery, she was off work from September until late December 2016.

[16] According to the testimony of Dr Oelofse, Miss Hartzenberg is currently in a state of ongoing physical impairment that has resulted in several permanent physical limitations. These are: a) chronic pain, which he classified as moderate to severe; b) mobility issues arising from a limping gait due to the hip injuries; and c) a reduced

range of motion due to restricted hip movement, which hindered her ability to perform the manual labour (sawing and stacking wood) required by her previous employer.

[17] Dr Oelofse's long-term prognosis is that the injuries are progressive and will require significant medical intervention in the future. These interventions would include further surgeries, with additional surgical intervention to both hips necessary at a later stage, as well as a hip replacement. There is a high probability that she will require a total hip replacement in approximately 15 to 20 years.

[18] After sustaining injuries and recovering, she attempted to resume work. However, she continued to experience severe pain and persistent discomfort while performing her duties until June 2018, when she was dismissed from Geelhout. She struggled greatly and was unable to perform the work she had previously done without difficulty. She was dismissed because she was unable to perform her duties as she had previously.

[19] She complains of pain to such an extent that she has not been employed since her dismissal in 2018 and that she struggles at home, with only her daughter helping her. She also visits the nearby clinic for pain medication. She is not registered with SASSA. Dr Oelofse diagnosed her as being clinically 100% functionally incapacitated from performing her previous work, but structurally 17% disabled under the WPI/AMA Guides. Initially, on 22 January 2025, the third respondent, the Director General and the Fund of the Department of Labour, decided that Miss Hartzenberg's claim for permanent disablement should be assessed at 3% according to the final medical report dated 10 March 2016, and awarded her a lump sum of R6599 for her hip loss of movement. Aggrieved by this decision, she appealed to the tribunal, which heard the appeal on 27 January 2026, where she and her expert witness, Dr Oelofse, presented viva voce evidence. On 6 February 2026, her objection was upheld, but instead of the 100% claim for permanent disability, it was increased only to 17% (minus 3% already paid). This appeal is for an increase of her permanent disability to 100%.

The facts of Mr Jonas's case

[20] Mr Jonas has a Standard 4 (Grade 6) education and holds a Code 14 driver's license. At the time of the incident, he was employed by Triton Express as a heavy-duty truck driver. The role involved physically demanding tasks, including loading cargo and securing heavy loads. On 29 September 2020, while on duty, Mr Jonas sustained an injury to his left upper arm.

[21] He was diagnosed with a left *superior labrum anterior-posterior* (SLAP) tear. As a result of the injuries he had sustained, he underwent surgery on three occasions between January and October 2021. The first was a biceps tenodesis, which was unsuccessful and led to the development of a carbuncle in his axilla, causing loss of arm power. The second, performed in April 2021, was a debridement and exploration to alleviate ongoing pain and stiffness in the arm. The third, performed in October 2021, was a bone graft to treat a large cyst in the humeral head.

[22] On 14 October 2021, following an incapacity inquiry, Mr Jonas was dismissed for incapacity due to his inability to perform his duties as a truck driver. Since then, he has remained unemployed. He subsequently filed a claim under COIDA. In October 2023, the Commissioner assessed his permanent disablement (PD) at 10%, awarding a lump sum of R84,750. Mr Jonas objected to the decision, and on 6 February 2026, a tribunal set aside the 10% award and increased his PD to 13%.

[23] His case before the tribunal was based primarily on the expert medical evidence of orthopaedic surgeon Dr Oelofse. Dr Oelofse concluded that Jonas is 100% functionally incapacitated from performing his previous work as a heavy-duty truck driver. Despite this, the tribunal, applying the American Medical Association ('AMA') Guides to the Evaluation of Impairment, assessed Mr Jonas's structural disablement at 13%. Jonas is appealing the tribunal's 13% determination to this Court, contending that he should be found 100% permanently disabled.

The Arguments

[24] Miss Hartzenberg and Mr Jonas advanced the same core legal arguments in both matters to challenge the tribunal's decisions. They first contend that the court should adopt a purposive approach to interpreting "permanent disablement". They

argue that "permanent disablement" under COIDA must be construed generously and benevolently in favour of the employee, rather than through "sterile literalism". They contend that the statutory term "any work" does not encompass any conceivable task. Instead, the legal test is whether the employee is disabled from performing the work they were doing at the time of injury or from performing work reasonably suited to their education, training, and experience.

[25] Secondly, both appellants argue that the tribunal committed a material error of law by relying on the AMA Guides to calculate permanent disablement. They emphasise that the AMA Guides measure "Whole Person Impairment" (WPI), a concept distinct from "disablement", which is applied in Road Accident Fund (RAF) claims for general damages but has no statutory application under COIDA. Both rely on *Botha v Fema*⁴ to support their submission that the use of RAF-style WPI models for COIDA claims is legally impermissible.

[26] Thirdly, both appellants contend that Circular Instruction 157 is merely an internal policy document or memorandum without legal force. They argue that it cannot override, amend, or dilute COIDA's statutory framework, that bureaucratic policy guidelines do not bind the courts. Ultimately, they submitted that regulations and rules are legislative instruments, whereas policy determinations are not.

[27] The fourth argument raised by both appellants in their respective appeals is that the tribunal is not merely an "impartial referee" in an adversarial context. It is mandated to play an active, inquisitorial role to ensure an equitable award. They argue that if the tribunal believed further expert evidence (such as an occupational therapist's assessment) was necessary to determine alternative employability, it was legally required to obtain that evidence itself under its statutory powers, rather than penalising the injured workers for its absence.

Respondents' arguments in both cases

[28] In Miss Hartzenberg's appeal, the respondents argue that the tribunal's decision to award 17% permanent disablement and costs under the Magistrate's

⁴ [2022] JOL 574047 (GP).

Court tariff is correct and should be upheld. To support this submission, they contend that she has failed to prove her general unemployability. In this regard, they argue that although Miss Hartzenberg can no longer perform the "hard manual labour" (sawing and stacking wood) for which she was employed, her clinical records contain no evidence that she is permanently unable to perform sedentary work. Her claim for 100% permanent disablement is legally flawed because it is based solely on her pre-injury role.

[29] They further rely on the SCA judgment in *Department of Labour: Compensation Commissioner v Botha*⁵, which held that Schedule 2 is not a rigid rule but an administrative guideline. For injuries not listed in Schedule 2 (such as femoral neck fractures), the extent of disability must be determined on a case-by-case basis from the medical facts, rather than automatically defaulting to a 100% rating.

[30] According to respondents, the tribunal's 17% award was not arbitrary because it matched the exact permanent disability rating set out in the written report of Miss Hartzenberg's orthopaedic surgeon, Dr Oelofse. In that report, Dr Oelofse used the AMA guides to calculate the 17% rating. During his oral testimony before the Tribunal, he suggested that these guidelines should be ignored because they cap disability at 40%. Respondents highlight that Dr Oelofse failed to explain why he chose to use the AMA guides in his report, given that he deemed them inapplicable. They submit that the use of the AMA guides is standard, recognised administrative practice.

[31] Dr Oelofse also agreed with the medical assessor at the tribunal hearing that there was no standardised orthopaedic tool for measuring functional occupational disability and that an occupational therapist's report would be required to assess functionality properly. Because no occupational therapist's report was produced, the respondents argue that the tribunal did not err in relying on the orthopaedic 17% rating.

⁵ [2022] ZASCA38; (2022)43 ELJ1060(SCA)(April 2022).

[32] They submit that, on the authority of *Pretorius v Compensation Commissioner & Another*⁶, compensation is awarded for disablement arising from pain, not for pain and suffering itself. Although Miss Hartzenberg suffers from "moderate to severe" chronic pain, it does not render her unable to perform sedentary work, distinguishing her from cases such as *Kirtley*, where the applicant was bedridden 80% of the time and unable to work at all.

[33] In Mr Jonas' appeal, the respondents contend that the tribunal's decision to set aside the Commissioner's 10% award and to increase Mr Jonas' permanent disablement to 13% is fair and reasonable, and that the claim for a 100% rating should be dismissed.

[34] They submit that, in applying the principles of *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*⁷, the phrase "any work" in the definition of permanent disablement must be given its ordinary grammatical meaning. The legislature explicitly chose "any work" rather than "previous work" or "all gainful occupation".

[35] To show that the legislature was deliberate in its wording, the respondents contrast the definition of "permanent disablement" with that of "temporary total disablement." The latter is expressly defined as the temporary inability to perform "the work at which he or she was employed at the time of such accident". They further submit that if the legislature intended permanent disablement to be tied to pre-accident employment, it would have used the same express language. Reading those words into Section 1 would constitute impermissible judicial legislation.

[36] They argued that if the interpretation advanced by Mr Jonas is accepted, it would lead to an absurd outcome in which an injured manual worker who is retrained and secures a sedentary job paying more than their previous salary would remain entitled to a 100% permanent disablement monthly pension for life.

⁶ [2007] ZAFSHC128; (2010) 31 ILJ 117 (O).

⁷ 2012(4) SA 593.

[37] Whilst Mr Jonas relies on Dr Oelofse's functional report stating that he is "functionally 100% incapacitated to do his previous work", the respondents submit that Dr Oelofse's clinical findings show that Mr Jonas has normal movement in his elbow, forearm, wrist, and fingers, and can perform work that does not require lifting medium-to-heavy objects. Therefore, he is not permanently disabled from all work.

[38] According to the respondents, Dr Oelofse testified that an occupational therapist would be the appropriate expert to assess Jonas' general employability in the open labour market. However, no occupational therapist's report was provided, and there is no evidence establishing Mr Jonas' unemployability. Dr Oelofse's structural assessment of 13% permanent disablement under the AMA Guides remains the only valid scientific measure before the court.

[39] They further point out that under Schedule 2, the total loss of an arm at the shoulder attracts a 65% rating. Mr Jonas has not lost his arm; he merely has restricted movement in his left shoulder. They argue that awarding a claimant 100% permanent disablement for a restricted shoulder joint is unreasonable. In comparison, a person who has had their entire arm amputated receives only 65%, which would create an administrative absurdity and violate the sliding scale established under COIDA.

[40] They argued that, to qualify for 100% permanent disablement under item 6 of Schedule 2 ("any other injury causing permanent total disablement"), the unlisted injury must be of extreme gravity, comparable to the physical losses (such as total paralysis or the loss of two limbs) listed in the first five items of Schedule 2. They submit that Mr Jonas' shoulder injury does not meet this threshold.

Discussion

[41] In both cases, this court is called upon to determine whether Miss Hartzenberg and Mr Jonas's injuries have rendered them "permanently disabled" under COIDA, meaning either the permanent inability to do "any work" whatsoever in the open market or the inability to return to the specific line of employment (hard physical labour) the worker was engaged in at the time of the accident. While Mr Jonas argues this question in the context of a heavy-vehicle truck driver with a severe shoulder injury, Miss Hartzenberg presents it as a female timber-saw

operator with bilateral hip fractures facing future total hip replacements. We are called upon to interpret the term or phrase 'permanent disablement' in this matter, as stated in COIDA. Our courts have embraced a unitary exercise of interpretation. This requires consideration of the text, the context and the purpose of the provision. This emphasises a contextual and purposive approach. The SCA in *Endumeni*⁸ stated that interpretation requires a holistic consideration of the text, context and purpose of legislation, with preference given to sensible and businesslike meanings over rigid formalism.

[42] The appellants submit that, under s 49(2)(a) of COIDA, which provides that '... 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.' In the case of both Miss Hartzenberg and Mr Jonas, it is contended that their injuries fall within item 6 of Schedule 2, which they say is '...Any other injury causing permanent total disablement.' For that category, the percentage of permanent disablement shall be 100%. Both submit that, in relation to their respective injuries, the extent of their disability is to be determined with reference to the facts and circumstances of their respective cases.

[43] To assist and guide us in this interpretive exercise, it is appropriate to begin by considering the purpose for which COIDA was enacted. The SCA in *Department of Labour: The Compensation Commissioner v Botha*⁹ at para 1 said the following: '...COIDA was introduced as social legislation to provide for compensation for disablement or death caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. It is a no-fault compensation system that relieves the employee of the need to prove negligence and, on payment of contributions to the Compensation Fund, relieves the employer of the risk of an expensive damages claim. COIDA has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large.'

⁸ Ibid at para 18.

⁹ [2022] ZASCA 38; (2022) 43 ILJ 1066 (SCA) (4 April 2022).

[44] A series of cases addressed the same issue, namely the proper interpretation of the definition of 'permanent disablement' and the term 'any work' under COIDA, to which both Miss Hartzenberg and Miss Jonas referred in their respective submissions. In *Davis v Workmen's Compensation Commissioner*¹⁰ this Court said the following regarding the interpretation of the Workmen's Compensation Act 30 of 1941, the predecessor of COIDA, stating '... The policy of the Act is to assist workmen as far as possible...[T]he Act should not be interpreted restrictively so as to prejudice a workman if it is not capable of being interpreted in a manner more favourable for all to him. In my judgment the Act does not lend itself merely to the restricted interpretation placed upon it by the respondent. It is equally capable of being interpreted as affording the respondent, in fact, such as those in the present case, a discretion to look beyond the amount the applicant happened to be earning at the time of the accident.'

[45] This approach to interpreting COIDA was followed in *Urquhart v Compensation Commissioner*¹¹ Where Jones J stated that this approach, as applied in Davis, 'accords with a constitutional interpretation when regard is had to the purpose of the Act'. The court further observed that the Act should not be 'interpreted too restrictively, with resultant prejudice to the workman'. This purposive approach to interpreting COIDA in favour of the workman was also applied in *Healy v Compensation Commissioner and Another*.¹² ('Healy').

[46] In *Healy*, the court specifically addressed whether Schedule 2, as in the case of Miss Hartzenberg and Mr Jonas, would apply to the appellant's circumstances in that case, to determine whether 'the total permanent loss of the use of a limb should be treated as a loss of a limb.' In this regard, the court held that the administrative guidelines should not apply and concluded that the starting point for determining the percentage of all permanent disablement is Schedule 2. It stated¹³, '... [L]ike the Compensation Act, of which it is part, must be interpreted generously so as to do

¹⁰ 1995(2) SA 689 (C) at 694b-g.

¹¹ 2005(1) SA 75 (E) at paras 17-18.

¹² 2010(2) SA 470 (E).

¹³ Ibid at para [18].

justice to the employee to the extent possible within the 'give and take framework' of the Compensation Act. It does not accord with such an interpretation to consider the provision that permanent loss of the use of a limb as being exclusive. This provision is simply an indication of one obvious instance of permanent disablement that must be treated in the same way as the loss of a limb. It does not affect the duty imposed on the Compensation Commissioner to interpret the Act generously, and, in the case of permanent disablement consistent with Schedule 2, to determine the percentage of disablement consistent with Schedule 2. In other words, in my view, a generous interpretation of Schedule 2 allows for other instances of loss of the use of a limb to be equated to the actual loss of a limb.'

[47] It is, however, important first to address the facts of each case and the respective findings of the tribunals that dealt with them, before this court can determine the extent of the disability in light of the facts and evidence, particularly the medical evidence presented. In both cases, the commissioner and the tribunal have impermissibly relied on the AMA Guides and circular instruction 157 to determine the impairment ratings of Miss Hartzenberg and Mr Jonas under COIDA. By doing so, they have misapplied and misinterpreted Schedule 2. They have failed, as instructed by *Botha* (SCA), to determine the extent of the disability in light of the facts and Dr Oelofse's medical evidence in the two cases. It is undisputed that the respondents have used the AMA Guides, the Whole Person Impairment (WPI), and the Circular Instruction 157 issued by the Director-General to assess the functionality of Miss Hartzenberg and Mr Jonas. Our courts have, on more than one occasion, ruled that the use of such functional impairment assessment tools is impermissible.

[48] In *Botha v Fema and others*¹⁴, the court stated that the AMA and WPI models are used in Road Accident Fund claims for damages arising from bodily injuries sustained in motor vehicle accidents. Regarding the respondents' reliance on Circular Instruction 157, the court also held that this assessment tool is arbitrary and contrary to the mechanisms put in place by, and for the determinations intended in, the provisions of COIDA. It further stated that '...A determination based thereon undermines the categorisation of injuries in terms of COIDA as a means to determine the

¹⁴ Supra at para 68.

level of permanent disablement of an injured employee.’ Notwithstanding what was stated in *Botha v FEMA*, the tribunal relied on the AMA Guides and, as authority for its view, on the decision of *Law Society of South Africa and Others v Minister of Transport and another*¹⁵(Law Society). In my view, the tribunal's reliance on this case to support the use of the AMA Guides as an assessment method for calculating a percentage of permanent disablement under COIDA is totally misplaced. In the *Law Society* case, there was an attack on regulation 3(1)(b) of the Road Accident Fund Regulations of 2008, which permitted, among others, the AMA Guides as a method of assessment purely in road accident claims. It was restricted to use in personal injury claims arising from motor vehicle accidents. This decision was also handed down by the same division of the High Court long before *Botha v Fema*, and remains binding authority on this point, which the tribunal chose to ignore.

[49] In *Healy*¹⁶, at paragraph 19, a similar sentiment was expressed, with the court stating ‘... On the evidence placed before the first respondent and his assessors, it appears to me that the administrative guidelines that were applied to arrive at a finding of an 18 percent permanent disablement were not appropriate in the circumstances: even if they could be regarded as being ordinarily appropriate, they were not appropriate in the special circumstances testified to by Dr Joubert. Applying the guidelines would, in this case, have resulted in a determination of the appellant's disablement that was not consistent with Schedule 2. Their mechanical application bore no rational connection to the objective seriousness of the appellant's disablement.’ (footnotes omitted). Similar sentiments were expressed in *Odayar v Compensation Commissioner*.¹⁷ which expressly stated that COIDA does not grant the Director-General such powers and the use of Circular Instruction 157 is contrary to the provisions of the COIDA. In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*¹⁸, the following was said regarding the effect of policy determinations of public officials on the public’... I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments,

¹⁵ 10654/09 [2010] ZAGPPHC 26 2010(11) BCLR(GNP) (31 March 2010).

¹⁶ *Infra* at para 19.

¹⁷ 2006(6) SA 202(N) paras 16 and 17.

¹⁸ 2001(4) SA 501 (SCA).

whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation).'

[50] From the above, it seems that, on more than one occasion, our courts have expressed the view that Circular Instruction 157 of the Director-General is undesirable in determinations of claims under COIDA, and that applying it would undermine the provisions of COIDA. This warning did not deter the tribunal from applying the Circular in both cases. In my view, this fact alone was a serious misdirection by both tribunals, and grounds for setting aside their decisions.

[51] Having regard to the text, purpose, scheme and overall context of COIDA, I agree with the sentiments expressed in these decisions. The tribunal's assessment in the cases of both Miss Hartzenberg and Mr Jonas was a mechanical, tick-box exercise to determine whether their injuries met certain criteria and to conclude whether they could be regarded as 100% permanently disabled. That approach was arbitrary. It blindly followed the permanent assessment figures in Schedule 2, together with the AMA Guides, and used Circular 157 to make its assessment. It ignored the hard evidence from Dr Oelofse about how the effects of their injuries, which caused them consistent and enduring pain, affected their quality of life and their ability to work. This conclusion was not based on flimsy or unsubstantiated evidence.

[52] The tribunal in both cases failed to consider the facts and the strong, undisputed medical evidence that Miss Hartzenberg and Mr Jonas are 100% permanently disabled as a result of their injuries. The compensation for a permanent disablement in terms of the provisions of s49 of COIDA shall be calculated on the basis as set out in Schedule 2. Items 2, 3, 4 and 5 make provision for 100% permanent disablement for the loss of two limbs, the loss of both hands or all fingers or both thumbs, the total loss of sight, total paralysis and injuries resulting in an employee being bed-ridden.

[53] The tribunal made a comparison of the injuries of Miss Hartzenberg with the percentage of disablement as listed in item 3 at between 45 and 70%. In the case of Mr Jonas, it compared the injuries with the percentage of disablement as set out in

items 7, 8, 9, 10 and 11 of Schedule 2, rather than "any other injury causing permanent disablement as set out in item 6 of Schedule 2 for which a person would be compensated as being 100% disabled.

[54] Regarding the proper interpretation of COIDA, the application of Schedule 2 under the items on which the tribunal assessed the percentage for both claimants should not be done in a tick-box, mechanical, robot-like fashion. Proper judicial discretion should be exercised, especially if a claim is made that the injury for 100% disablement should be made under item 6; whilst such a comparison may be useful, it was not appropriate in this case, especially where the tribunal also made use of the AMA Guides as well as Circular Instruction 157.

[55] The manner in which the tribunals calculated the permanent disability assessment level of the two claimants was nothing short of reducing these once non-disabled, hardworking ordinary workers to persons who may well have been injured, but not to the extent that their total value and worth as human beings was adversely affected. This was because the tribunals assigned a certain working percentage to body parts still of use to them and treated other parts of their bodies that had sustained very serious injuries as still usable. The human body cannot be divided into mathematical fractions to determine which parts are to be considered when ascertaining whether the person as a whole can be regarded as permanently disabled. By following this rigid and arbitrary approach in assessing their level of permanent disablement, the tribunals undermined the value and dignity of Miss Hartzenberg and Mr Jonas as human beings deserving respect and protection and further undermined their right to physical integrity. I find this approach and the manner in which the respective tribunals adjudicated these two cases highly objectionable, irrational, and not consistent with the manner in which the SCA in *Department of Labour: The Compensation Commissioner v Botha*¹⁹ has directed us to follow. It is also not consistent with the approach followed by many of the other decisions to which I referred in this judgment. The evidence presented did not permit the tribunals to follow such an approach, even if it were the correct one.

¹⁹ Referred to in para 42.

[56] In its overall assessment, the tribunal failed to consider that Miss Hartzenberg's highest level of education is Standard 8 (Grade 10). She has worked at Geelhout for most of her adult life and was 55 years old when she sustained the injuries. According to Dr Oelofse's prognosis, she is in a state of ongoing physical impairment, resulting in severe, continuous pain. She has not been employed since her dismissal in 2018 and struggles to cope without her daughter's assistance. Dr Oelofse has diagnosed her as being clinically 100% incapacitated from performing her previous work.

[57] She also suffers from moderate to severe pain as a result of her injuries. These injuries have affected her mobility, resulting in a limp. Her reduced hip range of motion further restricts her mobility, hindering her ability to perform manual labour. On Dr Oelofse's examination, he found that her hip could only move to 90 degrees. She experiences severe pain if she attempts to extend further, and she would need assistance from another person or to press her arm against something if she needs to move. This renders her 100% functionally disabled, which, according to Dr Oelofse, renders her 100% permanently disabled. Given these facts and her physical condition, accompanied by constant pain, it is difficult not to conclude that the injury has caused permanent disablement.

[58] On the objective facts and medical evidence, it is difficult to believe that any human being in her position could perform any other work, let alone work that could only have been assigned to her level of training and education, and that was physically demanding labour and nothing else. On the hard and undisputed facts of this case, which were not gainsaid, this is the condition she finds herself in. It is difficult not to find that she is 100% permanently disabled. Her total permanent loss of the use of her hips, which affects her mobility, should be treated as the loss of a limb, as stated in *Healy*. She is unable to use her hips, which severely restricts her movement and daily functioning as a human being. In my view, this can be characterised as an injury that causes her total and permanent disablement, as referred to in item 6 of Schedule 2.

[59] In the case of Mr Jonas, they also failed to consider that he has a modest level of formal education and has not even completed primary school, having left at Standard 4 (Grade 6). He grew up on a farm, and as a result of socio-economic

circumstances and poverty, he was prevented from attending secondary school and proceeding to high school. It is common cause that he sustained an injury to his upper arm, which caused him to lose power in his arm; this resulted in him losing his employment as a heavy-duty truck driver. Furthermore, as a result of his injury, he cannot perform any manual labour, including moving heavy items, which was the only work he was able to do. Since he sustained the injury, he has remained unemployed. Dr Oelofse diagnosed him as 100% functionally incapacitated from his previous work as a heavy-duty truck driver. According to Dr Oelofse, although Mr Jonas's injury cannot be equated with the loss of an arm, as he still has some forearm movement and some grip, his hand strength is limited.

[60] His assessment of 100% permanent disability is based on how Mr Jonas would function as a patient who needs two arms. Although he has a full arm and shoulder, the disablement lies in the shoulder joint. What disables him is his inability to move his shoulder. Mr Jonas's main problem is soft-tissue pain. Because of the chronic pain he suffers, Mr Jonas has functionally lost the use of his arm, although it is still there. Because of the pain, he cannot move his shoulder; he cannot sleep and cannot lie on his side because of the pain in the shoulder.

[61] On the evidence presented, it appears that the only work he was able to do was as a heavy-duty truck driver. Given his very modest level of education, any other work he could perform would be menial labour involving physical activity. Even if this were the case, he would be unable to use his left arm. There is no evidence before this Court that he can perform 'any other work' as suggested by the respondents. No case was put to gainsay this evidence. I am also satisfied that, even though Mr Jonas has not physically lost his arm, he has permanently lost the use of his left arm. His injury therefore falls within the definition of item 6 of Schedule 2 as an injury which caused total permanent disability.

[62] Regarding the complaint that Miss Hartzenberg and Mr Jonas failed to produce an occupational therapist's report, that failure cannot be laid at Mr Jonas's and Miss Hartzenberg's door. The tribunal was comfortable deciding their respective levels of permanent disability without such a report. The tribunal is not an impartial referee; the proceedings are inquisitorial, and it could never have been intended under COIDA that a burden should be placed on an ordinary worker to show that

they are unable to do any other work, especially in cases like this, where there is overwhelming medical evidence that they suffered a serious injury comparable to the loss of a limb. In both cases, despite the absence of such reports, unequivocal medical evidence shows that any occupational therapist's report would not have affected the finding that both Miss Hartzenberg and Mr Jonas sustained an injury under item 6 of Schedule 2, resulting in 100% total disablement in each case.

[63] For all of these reasons, I find that the respective tribunals in the cases of Miss Hartzenberg and Mr Jonas erred in determining the level of permanent disability of both claimants, and that the tribunals' determinations in each case fall to be set aside.

Costs

[64] Both Miss Hartzenberg and Mr Jonas challenge the tribunal's decision to award costs under the Magistrate's Court tariff. They submit that the amendment to section 46(7)²⁰ (limiting costs to the Magistrate's Court tariff) took effect only on 23 January 2026 and cannot be applied retrospectively to their cases, which were already pending. Furthermore, in each case, they seek attorney-client costs, submitting that they were compelled to litigate for years.

[65] In Miss Hartzenberg's case, it took nearly 10 years. In Mr Jonas's case, it took more than 5 years to correct "materially flawed" decisions that ignored uncontroverted medical evidence. They objected to the determination of their respective compensation awards, which were pending as at 23 January 2026. They argue that the amendment's retrospective application is unlawful.

[66] The respondents in the case of Miss Hartzenberg, on the other hand, submit that Section 91(5) of COIDA does not provide a legal basis for an appeal against a tribunal costs order, citing the judgment of Henriques J in *Narayanasamy v*

²⁰ Section 46(7) states "If an amount has been paid in excess of the amount allowed upon taxation, the excess shall be refunded to the person concerned, and any agreement in terms of which such an excess is otherwise payable shall be void as to that excess".

*Department of Labour: Compensation Commissioner KZN*²¹ at paragraph 4. In their heads of argument, the respondents in the case of Mr Jonas did not specifically address the retrospective application of s 46(7). In any event, the respondents' reliance on *Narayanasamy* in the case of Miss Hartzenberg is misplaced because, in that case, the respondent attempted to appeal against a punitive costs order; there was no cross-appeal against such an order, and the court did not entertain the attempted appeal against the costs order.

[67] The court's remarks were obiter, and it did not address whether the provisions of s 46(7) have retrospective effect. *Narayanasamy*, in my view, cannot be regarded as authority for the proposition that a particular costs order regime that was not in operation when a matter was pending would apply retrospectively if such a costs order regime comes into operation before the completion or finalisation of a pending matter.

[68] It is a well-established rule at common law that a statute has no retrospective effect, and that the presumption against retrospectivity is fundamentally rooted in considerations of fairness and the rule of law. The presumption against retrospectivity may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under construction. This was held in *Bareki NO v Glencore Limited and Others*²² with reference to *Workmen's Compensation Commissioner v Jooste*²³. In *Bellairs v Hodnett and Another*²⁴ the erstwhile Appellate Division emphasised that the rule against retrospectivity was particularly relevant in pending matters, stating '...In fact when the Act came into operation there was merely an appeal pending in this matter.'

[69] There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be

²¹ Case no AR118 (*Narayanasamy*), dated 24 January 2025, at paragraph 4.

²² 2006(1) SA 432 (T).

²³ 1997(4) SA 418(SCA).

²⁴ 1978(1) SA 1109 (A) at 1148.

retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation.' In *Mashava v Enaex Africa (Pty) Ltd and others*²⁵ about the retrospectivity of the fee regime under Rule 67(A) at paragraphs 12 and 13 '... It seems to me that the 12 April 2024 amendments can only apply prospectively. This means that a cost order under Rule 67A (3) should be made on cases instituted before 12 April 2024 but heard thereafter. The scale nominated in the order will only apply to work done on the matter after 12 April 2024. Take, for example, a motion instituted in 2023, in which written argument was filed in January 2024, and in which oral argument was presented on 15 April 2024. A party and party costs order on the "C" scale is made on 15 April 2024. The "C" scale will only apply to counsel's preparation and attendances (if they are otherwise recoverable) after 12 April 2024, to the appearance itself, and to any recoverable post-hearing attendances. Fees for work done before 12 April 2024 will be recoverable under the rules applicable to the taxation of counsel's costs as they were then. To hold otherwise would either fail to give effect to the rule, or retrospectively revalue legal services purchased under a different dispensation and structure of expectations. Neither of these alternatives is desirable.'

[70] When both Miss Hartzenberg and Mr Jonas instituted their respective proceedings for compensation, s 46(7) of COIDA was not yet in operation. In Miss Hartzenberg's case, the objection and appeal against the Director-General's decision were instituted on 22 January 2025 and finalised by the tribunal on 6 February 2026. In the case of Miss Hartzenberg, she is therefore entitled to all costs in connection with her formal hearing under the regime in operation before 23 January 2026.

[71] In Mr Jonas's case, his appeal was instituted on 24 November 2023 and finalised on 6 February 2026. Both appeals were therefore pending on 23 January 2026, when s 46(7) came into operation. He is therefore also entitled to his costs in connection with the formal hearing regime that existed before 23 January 2026. In Miss Hartzenberg's case, she is entitled to costs under the regime that operated from 22 January 2025 to 22 January 2026. In Mr Jonas's case, he is entitled to recover costs under the costs regime that operated from 24 November 2023 to 22 January 2026.

²⁵ 2025(1) SA 466 (GJ).

I am also of the view that, given the complexity of the issues raised in this case, costs consequent to the employment of two counsels are justified.

Punitive costs order

[72] In both cases, the tribunal failed to base its findings on well-established legal principles governing the use of certain guidelines and assessment tools. It simply ignored them. For this reason, Miss Hartzenberg and Jonas had to come to this court. However, these are very difficult cases, and the facts of each case are different. Both Miss Hartzenberg and Mr Jonas submit that the court should impose a costs order on an attorney-and-client scale. The respondents have not engaged in conduct warranting this court's displeasure, nor has this court imposed a punitive cost order in favour of the appellants. I therefore decline to grant a punitive costs order against the respondents.

[73] In the result, I make the following order:

In the case of Miss Elizabeth Hartzenberg under case no A61/2026:

1. The appeal succeeds.
2. The Tribunal's determination dated 6 February 2026 that the Appellant's permanent disablement is 17% (less 3% already paid) is set aside.
3. It is declared that the Appellant's total permanent disablement is 100%.
4. The Compensation Commissioner / Director General is directed to pay the legal costs of the Appellant involving the proceedings before the Tribunal at the scale applicable before 23 January 2026, including the costs of counsel where so employed.
5. The Compensation Commissioner / Director General shall pay the costs of the appeal, which shall include the costs of two counsel.

[74] In the result, I make the following order:

In the case of Mr Jonatan Hermanus Jonas under case no A62/2026:

1. The appeal succeeds.
2. The Tribunal's determination dated 6 February 2026 that the Appellant's permanent disablement is determined to be 13% (less 10% already paid) is set aside.
3. It is declared that the Appellant's total permanent disablement is 100%.
4. The Compensation Commissioner / Director General is directed to pay the legal costs of the Appellant involving the proceedings before the Tribunal at the scale applicable before 23 January 2026, including the costs of counsel where so employed.
5. The Compensation Commissioner / Director General shall pay the costs of the appeal, which shall include the costs of two counsel.

R.C.A. HENNEY

JUDGE OF THE HIGH COURT

I agree.

M. F. ADAMS

ACTING JUDGE OF THE HIGH COURT

Appearances

For Appellant: Adv P J Rabie and Adv P Coston

Instructed by: KG Kemp Attorneys

For Respondents: Adv P Van Wyk
Adv A Manqina

Instructed by: Office of the State Attorney, Cape Town