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

(1) **Reportable** Yes
(2) **Of interest to other Judges** Yes
(3) **Revised: Yes**

Date: 12/01/2022

Signature:

CASE NO: A3047/2021

In the matter between:

AD KNOETZE Appellant

And

RAND MUTUAL ASSURANCE Respondent

Coram: Mudau J *et* Maier-Frawley J

Heard: 22 November 2021 - the virtual hearing of the Full Bench Appeal was conducted as a videoconference on *Microsoft Teams*.

Delivered: 12 January 2022 - This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 12 January 2022.

Summary: Appeal in terms of s 91(5)(a)(i) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA') against the decision of the tribunal dismissing appellant's objection to the rejection of his claim for compensation by the respondent. Appellant, who had been

exposed to loud noise in his work on the mines, sustained bilateral sensorineural hearing loss, resulting in his medical boarding some 6 years earlier than his retirement age. The respondent rejected the appellant's claim for compensation under COIDA on the basis that he was suffering from *atypical* 'noise induced hearing loss', evidenced by a rapid deterioration (as opposed to a gradual deterioration) in his hearing during the period 2016 to 2019. The appeal concerned the proper interpretation of s 66 read with s 65(1)(a) of COIDA. A entitlement to compensation arises in terms of s 65(1)(a) if the worker provides proof to the satisfaction of the Director General that: (i) the worker contracted a listed disease (i.e., an occupational disease mentioned in schedule 3); and (ii) such disease arose out of and in the course and scope of his or her employment.

Held: On a purposive interpretation, a causal connection between the listed disease contracted by the employee and his employment is required to be shown in terms of s 65(1)(a) of the Act. S 66 of COIDA creates a rebuttable presumption in favour of the employee for purposes of proving that the contracted disease arose out of and in the course of his or her employment, if he or she establishes by evidence that he or she performed listed work, being work mentioned in schedule 3 to the Act (in *casu*, work involving exposure to noise) in respect of a listed occupational disease (in *casu*, hearing impairment). The presumption in s 66 is an evidentiary aid to assist a worker in proving causation. i.e. that the disease was sustained as a result of the worker's employment.

Held: Once the presumption in s 66 is triggered, the respondent bears an evidentiary burden to prove that the appellant's hearing loss did not arise out of and in the course of his employment, i.e., that it was caused by an agent or event unrelated the employee's work. Such a burden is not discharged by the mere proffering of suggestions as to other possible causes of the employee's hearing loss during questioning the employee or his or her witnesses.

Held: Whilst an appeal court cannot interfere with the tribunal's evidentiary assessments on appeal, this obviously does not apply in

circumstances where the necessary evidentiary assessment did not occur, as *in casu*.

ORDER

On appeal from: The tribunal appointed in terms section 91(2) of COIDA

(i) The appeal succeeds with costs.

(ii) The order of the tribunal dismissing the appellant's objection to the respondent's rejection of his claim for compensation is set aside and is replaced with the following order:

"Mr Knoetzs is entitled to compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993."

(iii) The matter is referred back to the tribunal to determine the compensation payable to the appellant in accordance with ch 7 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

J U D G M E N T

MAIER-FRAWLEY J (Mudau J concurring):

Introduction

1. The appellant lodged a claim with the respondent for compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereinafter 'COIDA' or 'the Act') on account of a hearing impairment sustained by him whilst working in and on the gold mines of the Orange Free State.

2. The respondent is the entity licensed in terms of s 30 of COIDA for purposes of assessing and making payment of claims for compensation in relation to occupational injuries or diseases arising out of employment in the mining sector.

3. The respondent repudiated the appellant's claim on the basis that *'there is a 40% deterioration from July 2016 with dB of 87.2. The rapid deterioration in hearing is not indicative of noise induced hearing loss.'*

4. Following the repudiation, the appellant lodged an objection in terms of s 91(1) of COIDA against that decision, which objection was heard by a tribunal appointed in terms section 91(2) of COIDA.

5. The appellant now appeals, in terms of s 91(5)(a)(i) of COIDA, against the decision of the tribunal on 23 December 2020 dismissing his objection to the rejection of his claim for compensation.

Background

6. The appellant spent a period of 39 years working on the gold mines of the Free State. He started his mining career in 1980 as an apprentice fitter and turner, later qualifying as such, working as a qualified fitter and turner until 2006 when he was promoted to foreman. Throughout his mining career, he worked with and around noisy heavy machinery, both above and below ground, in the respective positions held by him.

7. In early 2019, at the age of 59, the appellant underwent a hearing assessment, as mandated by his employer. He was diagnosed as suffering from moderate bilateral sensorineural hearing loss. He was referred to his employer's Occupational Health Medical Officer, who determined that he was permanently unfit for his normal duties due to a condition that was 'occupational specific', namely, noise-induced hearing loss (NIHL).

8. It was determined that the appellant was not to be employed in any environment with a noise level of 50dB or higher. This, as was determined, rendered him unfit to work in his existing work environments (whether underground or on the surface) where he would be exposed to noisy machinery generally exceeding that threshold. As the appellant could not be accommodated in a suitable alternative position, he was forced to retire prematurely, that is, before the age of 65.

9. It was not in dispute that the appellant experienced hearing loss or impairment even prior to 2016, so much so, that in 2016 he was forced to procure hearing aids to enable him to hear and participate in ordinary conversations with people, both outside of work and whilst executing his duties in the workplace.

10. As a result of his medical boarding, during 2019, the appellant submitted a claim for compensation for disablement caused by an occupational disease to the respondent in terms of s 43(1)(a) of COIDA. On 4 September 2019, the respondent informed him of its decision to reject his claim. The appellant thereupon lodged a notice of objection with the respondent in terms of s 91(1) Of COIDA.

11. The appellant's objection was heard by a tribunal consisting of a presiding officer, assisted by two assessors, one of whom was a medical assessor. A hearing took place over five days, where evidence was led. On 23 December 2020, the Presiding Officer, with the concurrence of the assessors, made his ruling dismissing the appellant's objection with no order as to costs.

12. The appellant now appeals that ruling in terms of s 91(5)(a)(i) of COIDA, which provides, in relevant part, as follows:

"Any person affected by a decision referred to in subsection (3)(a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding –

(i) The interpretation of this Act or any other law;

(ii) ...

....."

13. Whether or not the tribunal correctly interpreted s 65 read with s 66 of COIDA, is what principally informs the present appeal.

Evidence led at Tribunal

14. The appellant testified about the fact that his occupation, both in the position of fitter and turner, and subsequently as foreman, exposed him to very loud, even excessive noise on a daily basis, be it underground or on the surface, due to the fact that he was required to maintain and repair heavy duty machinery, amongst others, winders, pumps, mechanical rollers, locomotives, conveyor belts, crushers, all of which generated high volumes of noise. The noise of the machines was so loud that it was impossible to even hear what a person standing right next to him was saying, making it impossible to conduct a conversation with anybody in such environment. This evidence was corroborated by the mine safety inspector, Mr Janse Van Rensburg, who also testified that various machines had labels indicating their noise level to be above 85 decibels.

15. The appellant was questioned about the presence of comorbidities that could possibly have contributed to his case of NIHL. His evidence was unequivocal and consistent in this regard: there were no events in his life, apart from his work, where he had been exposed to noise; he suffered no noise induced trauma or other trauma whilst performing military service after school; he had not previously suffered from nor was he presently suffering from any comorbidities, other than hypertension and diabetes,

both of which conditions were being properly controlled by medication. To his knowledge, no-one in his family had experienced any form of hearing impairment either.

16. Two medical experts (Dr Grobbler and Dr Mohamed), both specialist Ear, Throat and Nose surgeons, prepared expert reports and testified for the appellant at the tribunal hearing. Both doctors opined that the appellant's symptoms were consistent with NIHL, given that the appellant had been exposed to loud noise throughout his working career on the mines. In particular, Dr Mohamed ruled out comorbidities as a factor that could diagnostically have contributed to the appellant's hearing loss, given the appellant's prior and existing medical history, including his genitival and life-event history obtained during his examination of the appellant. Dr Mohamed conceded during cross-examination that the appellant's rapid deterioration in hearing loss from 2016 was indicative of *atypical* NIHL, however, opining that this in itself did not *per se* exclude the onset or existence of NIHL prior to 2016, nor did it mean that it was necessarily inconsistent with NIHL after 2016. The appellant's audiograms since 2003, when a baseline test was conducted, showed a measure of hearing impairment, which worsened over the ensuing years. Dr Mohamed admitted not having performed additional clinical tests in support of his conclusion, for example, MRI scans and blood tests, given the cost invasive repercussions involved,[1] in order to definitively exclude any or all other pathologies as possible causes of the appellant's hearing impairment.

17. Dr Grobbler's opinion was rejected by the tribunal, *inter alia,* because of what the tribunal perceived and described as his 'combative' and 'recalcitrant' attitude and/or demeanour in the witness box. The tribunal found that he *'deliberately evaded to answer* [sic] *questions where an answer*

[1] Dr Mohamed testified that tests could cost anywhere between R100,000.00 and R150,000.00.

was inconsistent with his medical findings'[2] and ultimately ruled that his evidence was of limited probative value.

18. Dr Dzonga, a medical doctor by qualification and employed by the respondent, testified for the respondent. In his opinion, the appellant was suffering from *atypical* NIHL, evidenced by a rapid deterioration in the appellant's hearing, as reflected in the appellant's audiograms between the period 2016 to 2019. Dr Dzinga conceded that workers on mines (such as the appellant) are ordinarily exposed to excessive noise when working underground. Dr Dzinga further conceded that generally when people work in the mines, over a period of time they will present with noise induced hearing loss.

Relevant legal principles and statutory framework

Legal principles applicable to statutory interpretation

19. The relevant principles applicable to the interpretation of statutory provisions were conveniently summarised in the appellant's heads of argument, as follows:

19.1. Statutory provisions must be interpreted in a manner that gives effect to the spirit, purport and object of the Bill of Rights.[3] Courts must prefer an interpretation that is consistent with the rights in the Bill of Rights over one that is not, provided that such an interpretation can be reasonably ascribed to the section.[4] When faced with two interpretations of a provision, both of which are

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[2] It is not clear what was intended to be conveyed by the tribunal. If no answer was given, one wonders how any 'answer' would have been inconsistent with Dr Grobbler's medical findings.

[3] Section 39(2) of the Constitution, which states:
"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport or objects of the Bill of Rights".

[4] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001(1) SA 545 (CC) at paras 22-23

consistent with the Constitution, the court must prefer the interpretation that 'best promotes' the rights in the Bill of Rights.[5] If one interpretation avoids limiting a right and one promotes the right, the court must prefer that interpretation which promotes the right.[6]

19.2. A statutory provision must be interpreted in light of its context and purpose.[7] This includes the purpose and context of the statute as a whole.

19.3. Statutory provisions must be generously interpreted. In *Goedgelegen*, [8] the Constitutional Court stated that "We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees."

20. The provisions of COIDA ought therefore to be interpreted in the context of the purpose of COIDA, as stated in the Preamble of the Act, being:

"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."

21. COIDA is essentially concerned with providing appropriate social security to employees who have suffered disablement as a result of an occupational disease.[9] The provisions of COIDA should be interpreted generously to promote this purpose.

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[5] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

[6] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 89.

[7] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.

[8] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para 53.

[9] See: *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24, para 20.

22. Section 27(1)(c) of the Constitution provides that everyone has the right to have access to social security. Section 27(2) obliges the State to take reasonable legislative steps to achieve the progressive realisation of that right. In *Mahlangu,* [10] the Constitutional Court confirmed that *'COIDA must now be read and understood within the constitutional framework of section 27 and its objective to achieve substantive equality.'*

23. In *Davis,* [11] the following was said:

"The policy of the Act is to assist workmen as far as possible. See Williams v Workmen's Compensation Commissioner 1952 (3) SA 105 (C) at 109C. 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."

Statutory framework

24. Section 1 of COIDA defines *'occupational disease'* to mean *'any disease contemplated in section 65(1)(a) or (b)'.*

25. Section 65(1) contemplates two types of diseases. Sub-section 65(1)(a) provides for a disease mentioned in the first column of Schedule 3 (a listed occupational disease), whilst sub-section 65(1)(b) provides for a disease other than a disease contemplated in (a), that is, a disease that has not been mentioned in Schedule 3 (a non-listed disease).

26. Section 65(1)(a) finds application in the present case. It reads:

"Compensation for occupational diseases

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[10] *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC), para 52. At par 60, the court stated that:
"*an example of the very type of legislation that the Constitution envisages as a 'reasonable legislative measure, within its available resources, to achieve the progressive realization of [the] right'. The fact that COIDA predates the Constitution does not take it outside of the state's obligation to enact legislation to be immune from the section 27(2) requirement of reasonableness.*"

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

Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General-

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment."

27. Section 66 reads as follows:

"Presumption regarding cause of occupational disease

If an employee who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of an in the course of his employment."

28. Schedule 3 lists the occupational diseases which are compensable under COIDA, which are categorized by reference to the listed causes of such diseases.

29. Only the category in which diseases are listed as being caused by 'physical' agents is relevant for present purposes, being: *'Hearing impairment'* [listed disease] caused by *'noise'* [the listed physical agent].

30. Work is defined in paragraph 5 of Schedule 3 as: *"All work involving the handling of and/or exposure to any agent(s) mentioned in the List of Occupational diseases and/or any occupation involving the handling of and/or exposure to specified agent/work processes mentioned in the List of occupational diseases."*

31. Prior to the amendment of COIDA in 2004, schedule 3 had a different format. It contained two columns, one headed 'Diseases' and the other headed 'Work'. Work was defined therein as *'any work involving the handling of or exposure to any of the following substances emanating from the workplace concerned: '*. Various compensable diseases were listed in the first column,

whilst the second column listed the substance emanating from the workplace which the worker handled or was exposed to in relation to that disease. One of listed diseases in the first column was *'hearing impairment'* in respect of exposure to *'excessive noise'*.

32. The amended Schedule 3 contains the following general provisions:

"1. Schedule 3 deals with the List of Occupational Diseases which depicts diseases that are occupational and compensable on the benefits of an explicit presumption referred to in terms of section 66 of the Compensation for Occupational Injuries and Diseases Act, 1993.

2. The amended Schedule 3 is issued to align the list of diseases mentioned in the first column of Schedule 3 of the Compensation for Occupational Injuries and Diseases Act, 1993 with the list of occupational diseases appended to International Labour Organization R194 List of Occupational Diseases Recommendation, 2002.

3. The amended Schedule 3 is issued in conformity with section 65 *(a)* and 66 of the Occupational Injuries and Diseases Act, 1993.

4. The List of Occupational Diseases appended to this amended Schedule 3 shall supersede the list of diseases mentioned in the first column of Schedule 3 in terms of 65 *(a)* of the Occupational Injuries and Diseases Act, 1993.

5. Work shall be defined as:

- All work involving the handling of and/or exposure to any agent(s) mentioned in the List of Occupational Diseases; and/or
- Any occupation involving the handling of and/or exposure to specified agent/work processes mentioned in the List of Occupational Diseases.

6. Work as defined in the amended Schedule 3 shall supersede all previous work(s) mentioned in Schedule 3 and in section 66 of the Compensation for Occupational Injuries and Diseases Act, 1993." (emphasis added)

33. It is against the backdrop of the abovementioned legal principles and statutory framework that I now turn to consider whether or not the tribunal misinterpreted and thus misapplied the provisions of s 65(1)(a) read with s 66 of COIDA, as the appellant submits it did.

Discussion

34. The parties are in agreement as to the requirements for compensation in terms of s 65(1)(a) of COIDA. Its clear wording reflects that an employee will be entitled to compensation if he or she proves to the satisfaction of the Director General that:

(i) the employee contracted a disease mentioned in the first column of schedule 3; and

(ii) such disease arose out of and in the course and scope of his or her employment.

35. As regards the second requirement (mentioned in (ii) above), the parties are also in agreement that s 66 of COIDA creates a presumption in favour of the employee for purposes of proving that the contracted disease arose out of and in the course of the employment.

36. In terms of s 66, *'If an employee who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of and in the course of his employment.'* (emphasis added)

37. Section 65(1)(a) still makes reference to column one of schedule 3, being the format in which schedule 3 appeared prior to its amendment in 2004. In the pre-amended format, the *occupational disease* listed in the first column of Schedule 3, was *'hearing impairment'*, whilst the *work in relation to that disease* was listed in the second column as, *'handling of or exposure to excessive noise emanating from the workplace'*. In the amended format of schedule 3, the occupational diseases mentioned therein and the work in respect of such diseases are no longer listed in separate columns. Work is defined in paragraph 5 of the general provisions as 'all work involving the

handling of or exposure to any agent(s) mentioned in the List of occupational diseases'.

38. All the occupational diseases listed in schedule 3 in its amended format are characterised by reference to different agents that are listed as the source or cause of the respective diseases. Stated differently, different diseases caused by different agents are listed in separate categories. Hearing impairment is one of the diseases under the category of diseases listed as being caused by 'physical' agents. The present schedule 3 still mentions *'hearing impairment'* as a listed *occupational disease*, whilst the *work* mentioned in respect of such disease, is listed as *all work* involving handling or exposure to one of the listed agents, which in this case, is a physical agent listed as *'noise'*.

39. In its interpretation of sections 65 and 66, the tribunal ruled that:

"It is our considered view that reliance on section 66 of the Act is flawed for the following reasons. The employee must 'contract' the disease whilst employed in any work mentioned in schedule 3 according to the preceding section 65. The objector has not provided the panel with evidence of how the disease was contracted whilst working in the mines.

In other words, before we even interrogate section 66 there is a duty on the part of the employee in terms of section 65 to prove to the satisfaction of the Director-General in this case a Mutual Association that the employee contracted the disease mentioned in schedule 3 and that such disease has arisen out of and in the course of his or her employment.[12]*...It is our considered view that the presumption in section 66 was not triggered as the objector failed to prove the causal connection..."* [13] (emphasis added)

Appellant's argument

40. The appellant submits as follows:

40.1. firstly, on a proper construction of s 66, if an employee contracts an occupational disease (e.g. a hearing impairment) while engaged in work mentioned in schedule 3 in respect of that disease (e.g. work in

[12] Ruling, par 13.
[13] Ruling, par 13.3

an environment with excessive noise) it shall be presumed that such disease arose from [or in] the course and scope of the employee's work, unless the contrary is proved. In other words, causation is presumed. The burden then shifts to the respondent to prove otherwise, i.e., that the contracted disease was caused by some other agent or event[14] un-associated with the employee's work, which burden the respondent failed to rebut on a balance of probabilities at the hearing conducted before the tribunal.

40.2. Secondly, the tribunal misinterpreted and misapplied s 66 by holding that the appellant was first required to demonstrate that the listed disease he suffers from arose from or was caused by his employment (which entailed performing work by virtue of which the appellant was exposed to excessive *noise*- being the physical agent listed in schedule 3) and not any other possible causes (some other agent or event) before the presumption in s 66 - that the disease arose out of and in the course of his employment - would be triggered, thus rendering the presumption as to causation in s 66 superfluous or meaningless.

40.3. Thirdly, the tribunal erred in invoking Circular Instruction 171 in reaching its conclusion that the appellant failed to prove to its satisfaction that his hearing impairment arose out of and in the course of his employment.

Respondent's argument

41. The respondent submits as follows:

[14] I.e., not by the physical agent of noise to which the employee was exposed whilst performing his duties in the workplace.

41.1. The tribunal correctly required of the appellant to first place himself within the remit of section 66 to benefit from the presumption contained therein.

41.2. The appellant's construction suggests that all a claimant must do is 'allege but not prove' that he: (i) contracted NIHL, and (ii) worked in an excessively noisy environment. The mere allegation, without more, of hearing loss and a noisy environment is insufficient.

41.3. There must be a *prima facie* correlative (not causative) *nexus* between the work, the hearing loss, and the work environment. This requires proof by evidence that the appellant contracted a listed disease in respect of listed work, being work that exposed him to 'excessive' noise.

41.4. Requiring the employee to prove, with evidence, that his work involved exposure to excessive noise does not eviscerate the s 66 presumption. The fact that an employee who has hearing loss is required to prove that he worked in an environment with excessive noise merely shows a correlation (or nexus) between the work environment and the hearing loss. It does not show that the excessive noise caused the hearing loss.

42. As is readily apparent from a reading of the relevant provisions, s 65(1)(a) requires proof, in the first instance, of the fact that the employee contracted a listed schedule 3 disease, and in the second instance, that the contracted listed disease arose out of or in the course of his employment. It is implicit from the requirements of s 65(1)(a) that a causal connection between the listed disease contracted by the employee and his employment be shown: In other words, did the employee sustain a listed disease as a result of his

employment, having regard to the nature of the work performed by him (as listed in schedule 3)? To assist the employee in proving such causal connection, the legislature saw it fit to enact a deeming provision in s 66 as to the cause of the listed disease sustained by the employee. Section 66 stipulates that if the employee who contracted a listed disease was employed in any listed work in respect of that disease (which, for present purposes, includes work that exposed him to noise), it shall be presumed, unless the contrary is proved, that such disease arose out of or in the course of his employment.

43. The respondent contends that the presumption in s 66 does not operate automatically. A claimant must prove that he contracted a listed disease in respect of listed work, which includes work that exposed him to excessive noise. I do not understand the appellant to disagree with such submission. The respondent further submits that the tribunal merely required the appellant to prove a correlative nexus (not a causative one) between the listed work he performed and the occupational disease he sustained by means of proof that he performed listed work in respect of a listed occupational disease. Whilst I agree that s 66 provides for certain facts to be established before the presumption therein is triggered, I am not persuaded that the tribunal did not err in its interpretation and application of the relevant sections. It is evident from the plain wording of the ruling that the tribunal considered that the presumption was not triggered because the appellant failed to prove a causal connection between his occupational disease and his employment, in the sense discussed in paragraph 42 above. At the risk of repetition, the tribunal plainly stated that *"**before we even interrogate section 66** there is a duty on the part of the employee in terms of section 65 to prove to the satisfaction of the Director-General in this case a Mutual Association that the employee contracted the disease mentioned in schedule 3 and that such disease has arisen out of and in the course of his or her employment. ...It is our considered view that the*

presumption in section 66 was not triggered as the objector failed to prove the causal connection..." It is clear from this extract read with sub-paragraphs 13.1 and 13.2 of the ruling that the tribunal was considering whether the provisions of s 66 were triggered *at all* in the absence of proof that the occupational disease contracted by the appellant arose out of and in the course of his employment.

44. By suggesting that the ruling of the tribunal merely required the appellant to prove a correlative (not causative) nexus between the listed occupational disease he contracted and his work involving exposure to noise is akin to embarking on an interpretative exercise based on sophisticated semantic analysis that higher courts have cautioned against.[15] The tribunal did not consider or apply the provisions of s 66 at all in relation to the common cause facts established in the evidence, which facts are mentioned in paragraph 46 below. By its own admission, the tribunal required proof of the causal connection envisaged in s 65(1)(a) without considering the purpose of the presumption in s 66 or the result the legislature sought to achieve therewith. The purpose of the presumption is to provide an evidentiary aid to the employee to establish a causal connection between the listed occupational disease sustained by him and his employment, having regard to the listed work performed by the employee in his employment, which in this case, involved exposure to noise.

45. The presumption as to causation in s 66 operates in favour of the employee if he establishes that he (i) contracted a listed disease; and (ii) performed work mentioned in schedule 3 in respect of that disease, i.e., work that exposed him to noise. If so, it is presumed that the disease arose out of or in the course of the employee's employment for purposes of entitling him to

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[15] See for example, *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) at para. [14], referred to with approval in *Commissioner, South African Revenue Service v Short & another* 2018 (3) SA 492 (WCC) at para 14.

compensation, unless the contrary is proved. S 66 does not require the employee to show *how* he contracted the listed disease, rather *that* he contracted it and that his work entailed exposure to noise.

46. It was common cause between the parties that the appellant sustained a hearing impairment during his long working career on the mines. The factual evidence presented by the appellant was that he performed work listed in schedule 3[16] and that his work ordinarily involved his exposure to very loud, even excessive noise. His evidence as to the loud and disruptive noise generated by the operation or utilisation of heavy machinery in the workplace was corroborated by the mine inspector. Such evidence remained undisputed and unrefuted by the respondent.[17] The tribunal made no adverse credibility findings against either of the factual witnesses, nor did the tribunal have regard to such evidence, as appears from the written ruling. Stated plainly, the tribunal failed to assess the undisputed and unrefuted but relevant factual evidence at all, as it ought properly to have done. The factual evidence presented was supported by medical opinion that the appellant's hearing loss, despite presenting as atypical in certain years, was compatible with NIHL. This was sufficient, in my view, to trigger the presumption in s 66 with the consequence that the respondent attracted the burden to prove that the appellant's hearing loss did not arise out of and in

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[16] The appellant's evidence was unequivocal: He performed work which involved him being exposed to loud noise, such that he could not hear someone speaking to him. *Noise* is not defined in schedule 3 of the Act. The Merriam-Webster dictionary defines 'noise' *inter alia*, as a sound that is unpleasant or loud; any sound that interferes with one's hearing of something. See: https://www.merriam-webster.com/dictionary/noise . The Lexico UK dictionary defines noise as 'a sound, especially one that is loud or unpleasant, or that causes disturbance –see: https://www.lexico.com/definition/noise .

[17] The respondent would have had access to the employer's records depicting the exact levels of noise that are generated by each machine that the appellant worked on or that operated in his working environment. Yet it presented no evidence to challenge the appellant's prima facie evidence, which, in the absence of gainsaying evidence, became conclusive proof of the issue. See: *Ex parte Minister of Justice: In re V V Jacobson and Levy* 1931 AD 466 at 478, where the following was said: "*Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.*"

the course of his employment. As submitted by the respondent, this is notoriously difficult to prove.[18] In so far as the tribunal ruled that the presumption was not triggered, it erred in its interpretation and hence in its application of ss 65 and 66, entitling this court to interfere on appeal.

47. The word 'noise' is not defined in Schedule 3 of the Act. The respondent submitted in its heads of argument that the ordinary meaning of 'noise' connotes 'excessive' sound. No authorities or references were provided for this proposition, nor could I find any such definition in the course of my research. Dictionary meanings indicate rather that the ordinary meaning of 'noise' is a loud or harsh or unpleasant sound. [19] Even if I were to accept that the appellant was required to prove that his work exposed him to 'excessive' noise, in my view, the evidence overwhelmingly supported such conclusion.[20]

48. The respondent accepted in its heads of argument that in order to rebut the presumption, the respondent would have been required to show that the disease did not arise -

    48.1. 'In the course of' the appellant's employment. That is, that the appellant's basic duties did not involve exposure to 'excessive noise'.[21] Or that they were of such a nature that they did not involve sustained exposure to excessive noise sufficient to cause hearing loss; and

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[18] See for example: *Churchill v Premier Mpumalanga and Another* 2021 (4) SA 422 (SCA).

[19] See fn 16 above.

[20] See paras 14 and 18 above.

[21] I have already indicated that schedule 3 does not require exposure to 'excessive' noise. Although both parties argued the matter on the basis that exposure to 'excessive' noise is required to be shown, this was presumably by virtue of the contents of the un-amended schedule 3, where a reference to 'excessive' noise is found.

48.2. 'out of the course of' the appellant's employment. This is the more difficult element to prove, and courts have declined to establish a decisive test.[22]

49. It was not suggested by the respondent that it presented evidence of the nature alluded to in paragraph 48 above. It did not. Dr Dzinga's evidence did nothing to refute the factual evidence concerning the level or amount of noise to which a worker such as the appellant was exposed for a period of 39 years in executing his work duties at the mine, nor did he put up or refer to literature to support the notion that NHIL is *only* a result of *gradual* hearing impairment, although this is *usually* the case. In fact, no expert medical report was filed by the respondent at the tribunal hearing. As such, points of disagreement between the parties' experts and the reasons for their dissent could not be identified in joint minutes, as would have been appropriate and desirable in a matter of this nature.

50. The respondent submitted in its heads that *'NIHL is permanent hearing loss occasioned by exposure to excessive noise. There are two forms of NIHL. Typical NIHL results from long-term exposure to noise and usually manifests in a slow deterioration of hearing. Atypical NIHL manifests in a rapid deterioration of hearing."* The respondent repudiated the appellant's claim because his hearing had deteriorated rapidly at a given point in time. In its heads of argument, the respondent submitted that this was suggestive of the fact that the appellant's NIHL was not attributable to his work. The submission is, however, based on speculation. It was not supported by primary facts or objective expert conclusions reached on established facts. No evidence was led by the respondent's witness to support the notion that

[22] In *Minister of Justice v Khoza* 1966 (1) SA 401 (A) at 419 H-I, the court held that "*The decision is in essence in each case one of fact, related only to the particular facts in issue. The enquiry on the particular issue is whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the action causing injury. If it was, the action arose out of the employment.*

atypical NIHL cannot be noise induced, nor that an exception to the typical case of NIHL or the usual presentation of NIHL could not occur medically. Had the presumption in s 66 been applied by the tribunal, as it ought to have been, the burden would have fallen on the respondent to establish, through credible medical expertise, that the appellant's hearing impairment was caused by other agents or events (unrelated to work involving exposure to noise) and hence not as a result of the appellant's employment. There was no onus on the appellant to rule out all other possible causes of hearing impairment (unrelated to noise) before the presumption in s 66 could be invoked in his favour. Such an approach would render the presumption in s 66 nugatory. Suggested possibilities of other causes, as put to the appellant's experts in cross-examination, did not meet the required threshold of proof required for the respondent to rebut the presumption in s 66.

51. It ought by now to be plain that I agree with the appellant's interpretation of s 66. Such interpretation best promotes the employee's constitutional right to social security and the purpose of COIDA, which is to provide social security to workers who contract diseases on the job. It also effectively alleviates the imbalance of power between large employer organisations and individual employees who more often than not lack the resources or the knowledge to prove that their occupational disease was caused by their employment at a particular time and place. This would generally require further costly expert testimony and specific information in the hands of the employer, who may not always willingly part therewith. I therefore agree with the appellant that the presumption in s 66 removes this barrier and shifts the evidentiary burden to the respondent, being the better resourced party. This moreover promotes the employee's ability to vindicate his or her right to social security.

52. The fact that Dr Mohamed conceded that the appellant presented with atypical NIHL at a certain stage, does not derogate from the fact that he remained resolute in his opinion that the appellant's hearing impairment was consistent with noise induced hearing loss. The evidence overwhelmingly established that the appellant's hearing loss was, on a balance, likely noise induced - more so, in the absence of proof of other causes of the occupational disease unrelated to the appellant's work. The respondent did not lead evidence to show that the appellant was not exposed to noise or excessive noise. Nor did it provide evidence to show that the appellant's hearing impairment was caused by an event or agent other than his employment where he was exposed daily to out of the ordinary loud noise. Moreover, it did not avail itself of its right in terms of s 42 of COIDA to cause the appellant to submit himself to an examination by a medical practitioner designated by the respondent, and it also chose not to obtain further medical reports in respect of the appellant's occupational disease. But perhaps the most significant factor is that the respondent failed to obtain the evidence of an independent expert witness to rebut the evidence of the appellant's specialists or to opine that a rapid deterioration of hearing loss is *always* i.e., without exception, inconsistent with noise induced hearing loss.

53. Given that the tribunal ignored relevant factual evidence in arriving at its ruling, it cannot be said that this appeal is moot on the basis that 'the tribunal decided the matter on the facts' in concluding that the appellant had failed to prove that his NIHL arose from or in the course of his employment, as contended by the respondent. Accepting that this court cannot interfere with the tribunal's evidentiary assessments on appeal, this obviously does not apply in circumstances where the necessary evidentiary assessment did not occur.

54. Finally, the appellant submits that the tribunal mistakenly relied on circular instruction 171 in reaching its conclusion. The tribunal found as follows:

"...if one reads instruction 171 on medical opinion it is clear that in atypical cases an appropriate explanation must be provided[23]...

On page 33 of the objector's heads under the heading EVIDENCE ESTABLISHED on (sic) paragraph 96.4 there is a concession made that the objector suffers from atypical NIHL and that there is a need to exclude other possible causes of impairment based on clinical history, examination and other investigations before the RMA can accept liability. **We will be remiss in our duty if we were to ignore such an admission made by the objector...**" [24] (emphasis added)

55. The underlined portion within the above quote from the tribunal's ruling is, at best, a misinterpretation, and at worst, a misrepresentation, of what was actually articulated in the appellant's (objector's) heads. What was in fact stated, is the following: "The objector at the worst suffers from what is regarded as atypical NIHL, which, according to the defendant's medical expert and assessor, requires the objector to exclude other possible causes of impairment based on clinical history, examination and other investigations before the defendant may provide compensation under COIDA." (emphasis added)

56. The appellant submits that the tribunal interpreted what the circular requires to mean that in atypical cases, the onus does not shift to the respondent. Rather, the claimant must rule out all other possible causes of the disease, in order to show that the disease arose from his or her employment.' The respondent submits, on the other hand, that the tribunal's reference to the circular was 'to show the inadequacies in Mr Knoetze's expert reports. Simply put, they failed to exclude possible comorbidities, as

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[23] This is a reference to para 4 of the circular which stipulates what documents must accompany a claim for compensation for NIHL. Para 4.3 reads: "*Medical opinion – this should state that the hearing loss is compatible with noise induced hearing impairment. In atypical cases an appropriate explanation should be provided*" presumably to justify why, in an atypical case, the hearing impairment is still consistent with noise induced hearing loss.

[24] Ruling, para 13.2

basic diagnostics require.' The respondent's submission, however, fails to account for the express reliance by the tribunal on a purported admission that was said to have been made by the appellant, but which was never in fact made.[25] The tribunal expressly relied on its mistaken interpretation of what was purportedly conceded by the appellant. In so doing, it's reasoning concerning the appellant's failure to discharge the onus of proof was legally flawed. This is because reference was made by the tribunal to a non-existent admission in order to give meaning to the contents of s 65(1)(a) concerning its conclusion that the appellant failed to discharge the onus of proving that his disease was causally connected to his employment, by implicitly ascribing an onus to the appellant to prove that no other causes existed for his hearing impairment. In my view, the tribunal erroneously sought to elevate the provisions of circular 171 (quoted above) as a requisite for proof of the causal connection envisaged in s 65(1)(a).

57. It is by now well established that the provisions of the circular are not binding. They do not trump or supersede COIDA. At best they are guidelines which cannot be used to interpret the provisions of COIDA.[26]

58. In my view, the evidence established that the appellant's occupational disease, namely, hearing impairment caused by noise, arose as a result of and in the course and scope of his employment. There was nothing to gainsay the evidence of the appellant and his witnesses.

59. The general rule is that costs follow the result. I see no reason to depart therefrom.

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[25] See the last line of the tribunal's ruling in para 54 above, highlighted in **bold** for convenience.

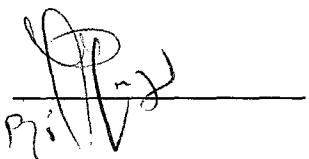
[26] See: *Odayar v Compensation Commissioner* 2006 (6) SA 202 (N), para16; Unreported decision of *Colin Urquhart v The Compensation Commisioner* ECJ No: 072/2005; *J L v Rand Mutual Assurance* (113062/19) [2019] ZAGPJHC 392 (15 October 2019) at paras 46, 48 & 50.

60. Accordingly, the following order is granted:

ORDER

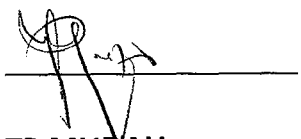
1. The appeal succeeds with costs.
2. The order of the tribunal dismissing the appellant's objection to the respondent's rejection of his claim for compensation is set aside and is replaced with the following order:

   "Mr Knoetzs is entitled to compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993."
3. The matter is referred back to the tribunal to determine the compensation payable to the appellant in accordance with ch 7 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.



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

I agree and it is so ordered



TP MUDAU
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	22 November 2021
Judgment delivered	12 January 2022

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