



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG NORTH DIVISION, PRETORIA)

NOT REPORTABLE
NOT FOR THE ATTENTION OF OTHER JUDGES
REVISED: 12/3/2014

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CASE NO.: A.319/08

In the matter between:

VAN DER WESTHUIZEN S.J.

APPELLANT

and

THE COMPENSATION COMMISSIONER

RESPONDENT

CORAM: EBERSOHN ET CAMBANIS AJJ
DATE APPEAL HEARD 29 AUGUST 2013

DATE JUDGMENT HANDED DOWN: 13 MARCH 2014

JUDGMENT

EBERSOHN AJ:

- [1] In this matter the appellant appealed to this court against a decision of the Presiding Officer employed by the Compensation Commissioner after he heard evidence and argument in proceedings in terms of the provisions of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993.(the "Act").

[2] Section 22(1) of the Act provides that:

“If an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.”

[3] It is common cause that on the 12th January 2007 the appellant had an accident at work which resulted in him having to seek medical treatment. At the time the appellant was busy pushing a welding machine when he slipped and fell backwards and landed on his buttocks and lower back.

[4] It is also common cause that on seeking medical treatment it came to light that the appellant had pre-existing disc degenerative changes and narrowing as well as signs of previous epiphysis's and Schmorl nodes. (Report Dr. A.H. van den Bout, specialist orthopaedic and neuro surgeon on page 7 thereof).

[5] After the injury on the 12th January 2007, the appellant was seen by a Dr. Viljoen who referred him to Dr. Basson, an orthopaedic surgeon. From his report dated the 18th January 2007, it is clear that the appellant had a pre-existing condition, however, that the appellant had now also sustained a secondary disk injury in the L4/5 and L5/S1

area, together with a muscle spasm. Dr. Basson tried to treat the injuries conservatively. After a while Dr. Basson determined that the conservative treatment was not successful and that immediate surgical intervention was required. (Dr. Basson's report p. 7-9.1)

- [6] The patient was also referred to Dr. Louis J. Nel, an eminent spinal surgeon of Pretoria, and his report was also put before the Commissioner. The relevant portion of his report reads as follows:

"Hy het erge degeneratiewe spondilose van sy lae rug vanaf die L1/2 tot en met L4/5 vlakke, met spinale en foraminale stenose op die L2/3 op die L2/3 tot en met L4/5. Hierdie pasiënt gaan nie wegkom sonder sjirurgie nie. Hy het my kom sien omdat hy nie regkom met die Ongevallekommissaris nie. Die pasiënt het definitief probleme sekondêr tot die val. Dat hy onderliggende spondilose gehad het is so, maar enige trauma en hoe die pt. sy rug gebruik en misbruik kan die probleem vererger. Hy werk reeds 4 jaar by sy werkgewer en enige meganiese werk wat die pasiënt gedoen het, kon bydra tot die probleem. Die graad is onbepaalbaar, aangesien ons nie enige ondersoeke voor die 4 jaar periode het nie. Ek hoop die saak sal aandag geniet. Die pasiënt kan nie tans in die toestand werk nie, en wag vir die oopmaak van die saak om gehelp te word deur Dr. W.J. Basson en Dr. Daan de Klerk."

It is common cause that he did mechanical work for his employer.

- [7] The claim of the appellant to the Compensation Commissioner was rejected and the appellant appointed attorneys and the proceedings to have the matter heard by a Presiding Officer of the Fund commenced. The matter came before a Mr. Ndou and two assessors. The appellant gave evidence and detailed the circumstances of his fall and his previous work history. He was cross-examined by the chairperson, the two assessors, a Dr. Smith who was the medical advisor to the commissioner and by a Miss Mncanca, the representative of the Compensation Commissioner.
- [8] A Dr. Lekalala was called by the Compensation Commissioner as a witness. She never examined the appellant. She did not state her qualifications and is presumably a general practitioner. She is in the employ of the Fund as claims adjudicator and examiner checking that the Fund was not defrauded and was not overcharged. She did not state her experience in the field of orthopaedics. The reports of the medical experts were placed before the Commissioner as exhibits and the contents thereof were not in dispute.
- [9] She stated that she did not know what operation the experts Drs. Nel, Van den Bout and Basson had in mind. That is most surprising for a medical doctor not to deduce from the reports of the specialists being before the Presiding Officer, that they were to operate on certain of his

vertebrae. This court finds that her answer was untrue and intended to prejudice the appellant.

[10] It seemed to this court that once it was established by the Presiding Officer that there was a pre-existing condition he and his assessors closed their minds to the fact that the pre-existing condition found to be present in the appellant could have been caused by the work the appellant did at his place of employment as was stated by Dr. Nel and the other experts whose reports were before the Presiding Officer and that the further incident on the 12th January 2007 caused a further injury to an already affected back .

[11] It is clear that the Presiding Officer misdirected himself. The court must point out that it is not satisfied with the Presiding Officer and the medical adviser both being in the employ of the Fund. It gives rise to all sorts of suspicions and most likely it is a contravention of the Bill of Rights.

[12] The appellant raised six grounds of appeal.

[13] The first ground is to the effect that the Presiding Officer erred in finding that the issue at hand was whether the injuries sustained by the appellant entitled him to undergo surgery as recommended by his

doctors, the costs to be borne by the Respondent. (Findings and Reasons p.6). If an employee meets with an accident resulting in injury, subject to the provisions of the Act, he is entitled to the benefits of the Act (s. 22 of the Act). There accordingly were no grounds on which the Presiding Officer could have dismissed the claim.

[14] The second ground is that the Presiding Officer erred in his interpretation of s. 26. The special circumstances in s. 26(a) and (b) may give rise to a refusal but were not proven to exist where the clear evidence was that the appellant fell and landed on his buttocks and when, according to the reports of Drs. Nel, Van den Bout and Basson, were to the effect that the fall and the injury and damage caused by it was the cause of the proposed operation and despite all the attempts of Dr. Lekalala, who is not an expert, to play this down by stating that the shock would have gone into the appellant's legs, which off course, was absurd.

[15] The third ground is that the Presiding Officer erred in his interpretation of s. 22 of the Act. He found that the appellant duly met all the requirements of an "accident" but despite that dismissed the appellant's case whereas the appellant was entitled to the benefits of the Act.

[16] The fourth ground is that the Presiding Officer erred in his interpretation and applicability of s. 29 of the Act. This court is satisfied that he erred.

[17] The fifth ground is that the Presiding Officer erred in interpreting the facts of the case and the conclusions drawn. He stated that there was no evidence suggesting that the degenerative changes of the lumbar spine are as a result of a working condition. He should have found that no visible injuries were required according to the Act and the need for surgery was a result of an injury on duty. The Presiding Officer in par. 6.3 on p 9 of his findings harped on the note by Dr. Viljoen that the appellant received therapy for back pain "some years ago". This the appellant denied under oath. Dr. Viljoen was not called. The Presiding Officer then speculates as to where the note emanated from. The Presiding Officer on p 7 of his Findings tried to belittle the medical report drawn on the 26th August 2003 by the medical doctor of the employer The Lion Match Company. In that report the doctor stated

"I have examined Mr. S.J. vd Westhuizen and found him/her

1. Fit for employment.

Position employed for: Fitter."

He was dissatisfied as it was not stated what kind of medical examination was performed. Logic dictates that it would have been related to the whole body of the appellant including his back as the doctor could not certify that he was fit to be appointed a fitter if the appellant's back by that time already played up and gave problems.

Anybody conversant with the tasks of a fitter will know, and any medical doctor, including Dr. Lekalala, that a fitter's work entails working on his haunches, standing and bending his legs and all sorts of physical movements with a lot of strain imposed on the back of the fitter including his legs. It therefore was not strange that his vertebrae have deteriorated over the period of his employment with The Lion Match Co.. There is nothing sinister in the reports of the specialist to wit Drs. Nel, Van den Bout and Basson.

[18] Ground six is just a general ground wherein reliance is placed on the first five grounds of appeal.

[19] It is clear that the appellant's appeal must succeed with costs and in any case he has satisfied the requirements of s. 66 of the Act in so far as it is applicable.

[20] The notice of appeal was filed late as the transcription of the proceedings did not come to hand timeously. In view of the excellent prospects of success with the appeal the condonation is granted.

[21] The appellant asked for costs on an attorney and client scale against the respondent based on the fact that the appellant's original claim filed with the respondent was without good reason dismissed and the appellant was compelled to incur legal costs to obtain legal representation and to bring the matter by way of a formal hearing before the Presiding Officer. The appellant also asked for costs with regard to the appeal on the attorney and client scale. In view of the errors committed by the doctor of the Fund who originally refused the claim and the errors committed by the Presiding Officer during the hearing referred to *supra* the costs will be granted on the attorney and client scale.

[22] The following order is made:

1. Condonation is granted for the late filing of the appellant's notice of appeal.
2. The appeal is upheld and the order of the Presiding Officer is set aside and is replaced by the following order:
 - a) The appellant, Mr. S.J. van der Westhuizen, is found to have sustained an injury, as a result of an accident

whilst working for his employer, in terms of section 22(1) of the Occupational Injuries and Diseases Act, No. 130 of 1993 (the "Act"), and that the appellant is accordingly entitled to the full benefits provided for in the Act at the expense of the Compensation Commissioner.

- b) The Compensation Commissioner is ordered to pay the costs of the medical aid required by the appellant in the past and in the future, in relation to the injury so sustained, which costs will include the costs for any future surgical procedure or procedures thereafter, including hospital costs, and/or associated treatment, including physiotherapy treatment required, that may be required thereafter in accordance with the provisions of the said Act.
- c) The Compensation Commissioner is ordered to pay the costs incurred with regard to the hearing before the Presiding Officer, and any ancillary costs, on the scale of attorney and client.

- 3. The respondent is ordered to pay the appellant's costs of the Appeal on the scale of attorney and client.


P.Z. EBERSOHN A.J.

ACTING JUDGE OF THE HIGH COURT

I AGREE:



CAMBANIS A.J.

ACTING JUDGE OF THE HIGH COURT

Appellant's counsel

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Respondent's Counsel

No appearance noted.

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Mr. B E Mthimunye