THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 448/11

In the matter between:

CHAMBER OF MINES OF SOUTH AFRICA	**Appellant**

and

THE COMPENSATION COMMISSIONER FOR OCCUPATIONAL DISEASES	**First Respondent**
THE MINISTER OF HEALTH	**Second Respondent**
THE DIRECTOR-GENERAL: DEPARTMENT OF HEALTH	**Third Respondent**
NATIONAL UNION OF MINEWORKERS	**Fourth Respondent**
UNITED ASSOCIATION OF SOUTH AFRICA	**Fifth Respondent**
SOLIDARITY	**Sixth Respondent**

Neutral citation:	*Chamber of Mines of SA v The Compensation Commissioner for Occupational Diseases* (448/11) [2012] ZASCA 87 (31 MAY 2012)
Coram:	NUGENT, PONNAN, SNYDERS and TSHIQI JJA and KROON AJA
Heard:	**22 MAY 2012**
Delivered:	**31 MAY 2012**
Summary:	**Mines and Works Compensation Fund – deficit in fund – whether owners of mines and works may be levied for recovery of deficit.**

ORDER

On appeal from: North Gauteng High Court (Zondo J sitting as court of first instance):

The appeal is dismissed. The appellant is to pay the costs of the first and fourth respondents, including the costs of two counsel.

JUDGMENT

NUGENT JA (PONNAN, SNYDERS and TSHIQI JJA and KROON AJA CONCURRING)

[1] The Occupational Diseases in Mines and Works Act 78 of 1973 came into effect on 1 October 1973. Amongst other things it established the Mines and Works Compensation Fund. The purpose of the fund is to enable the Compensation Commissioner for Occupational Diseases (the first respondent) to compensate workers in certain sectors of the mines and works industry if they contract various specified diseases in consequence of their work. It is financed principally from levies that are imposed by the commissioner upon owners of the relevant mines and works.

[2] The fund is required to be actuarially valued periodically.[1] The

1Section 77A.

objective of the valuation is to establish whether the fund has sufficient assets at the time of valuation to pay all liabilities that have accrued. Those liabilities would comprise claims that have been reported and accepted but have not yet been paid, as well as claims that have accrued but have not yet been reported or assessed and accepted. Needless to say, the amount of those latter liabilities can never be established with certainty, and will always be no more than a predictive estimate.

[3] An actuarial valuation of the state of the fund at 31 December 2003 revealed a deficit of approximately R610 million – that is, that the estimate of its accrued liabilities at that date exceeded its assets by that amount. Adopting a recommendation to that effect by the actuary the commissioner notified the contributing owners that he intended increasing the levies annually in amounts that would eliminate the deficit at the end of 15 years.

[4] In discussions with the commissioner through the Advisory Committee established under s 59 of the Act members of the Chamber of Mines (the appellant) who were subject to the payment of levies accepted liability for portion of the deficit,[2] but disputed the commissioner's right to recover the full deficit from them. Impasse was reached and the Chamber applied on behalf of its members to the North Gauteng High Court for declaratory orders, the terms of which I deal with later in this judgment. The application was dismissed (Zondo J) and the Chamber now appeals with the leave of that court.

[5] The Minister of Health and the Director-General of that department were cited in the application but they have taken no active part in the

2The deficit so far as it related to workers who were then working in the industry, which was estimated to be about R196 million.

proceedings. After the application had been launched three trade unions – the National Union of Mineworkers, the United Association of South Africa, and Solidarity (the fourth, fifth and sixth respondents respectively) – were joined in the proceedings and affidavits were filed on behalf of each of them. Their affidavits do not add materially to the evidence but amount largely to argument advanced by each of the unions. The National Union of Mineworkers and the United Association of South Africa supported the approach of the commissioner – on the basis that without a full contribution being made by the owners to finance the deficit they feared that workers might be deprived of their claims. Solidarity supported the approach of the Chamber – submitting that the financial strain that would be placed upon owners if they are required to fund the full deficit was likely to lead to job losses. Only the National Union of Mineworkers appeared before us at the hearing of the appeal.

[6] It is convenient at this point to outline certain features of the fund before turning to the issues that arise in this appeal.

[7] The fund is not constituted as a legal person. Claims for compensation lie against the commissioner, who must compensate workers or their dependants where the worker has contracted a 'compensatable disease' in consequence of performing 'risk work' at a 'controlled mine' or a 'controlled works'. The fund exists as the source from which the commissioner must pay those claims.

[8] 'Controlled mines' and 'controlled works' are mines and works that were controlled under the repealed Pneumoconiosis Compensation Act 64 of 1962,[3] and mines and works that are declared to be such by the

3Repealed by the Act that is now under consideration.

Minister. The Minister must make such a declaration whenever it comes to his notice that 'risk work' is performed at a mine or works. What constitutes 'risk work' is dealt with by the Act in considerable detail but for present purposes I need only say that it is essentially work that exposes workers to dust or to gases, vapours or chemical substances that are harmful or potentially harmful.

[9] The Act establishes a certification committee to which various functions are assigned, in particular to determine whether a worker has contracted a 'compensatable disease'. Those diseases are pneumoconiosis and various pulmonary or other diseases that, in the opinion of the certification committee, are attributable to the performance of risk work. If the certification committee finds that a person is suffering from a compensatable disease that was contracted as a result of risk work at or in connection with a controlled mine or a controlled works, the commissioner must compensate the worker from the fund according to a specified formula. Compensation is also payable to dependants of a worker who was suffering such a disease at the time of his or her death.

[10] Upon the establishment of the fund the assets and liabilities of the former General Council for Pneumoconiosis Compensation, and of the former Pneumoconiosis Compensation Fund, both of which had been established under the repealed Act, were transferred to the fund. Its further funding is by way of levies imposed by the Commissioner upon owners of controlled mines and controlled works. The levy that is payable by the owners is expressed in the papers as an amount that is payable per worker for each 'risk-shift' worked by that worker and for convenience I will continue to express it in those terms.

[11] The commissioner is required to keep four separate accounts for the fund, namely, the State Account, the Mines Account, the Works Account and the Research Account. The Research Account is the recipient of a separate levy and need not concern us.

[12] The State Account must be debited with payments that are made by the commissioner to persons who were suffering from pneumoconiosis or tuberculosis before the Act commenced, and to persons found to be suffering from a compensatable disease contracted as a result of work performed in the service of the state, and to payments made under the Act in respect of service performed at a mine or works that ceased to be a controlled mine or controlled works before the Act commenced. The assets that were transferred from the bodies that had existed under the repealed Pneumoconiosis Act were required to be credited at inception to the State Account. The account was thereafter to be financed by moneys to be appropriated by parliament for that purpose from time to time.

[13] The Mines Account and the Works Account must each be credited with the levies that are paid by the owners of controlled mines and controlled works respectively. The commissioner is required to debit to the Mines Account payments that are made

'to or in respect of any person who, after the commencement of this Act, was found for the first time to be suffering or to have suffered from a compensatable disease which, in the opinion of the certification committee, he or she contracted as a result of work at or in connection with a controlled mine'.[4]

Similarly, he must debit the Works Account with payments that are made

'to or in respect of any person who, after the commencement of this Act, was found for the first time to be suffering or to have suffered from a compensatable disease which, in the opinion of the certification committee, he or she contracted as a result of

4Section 70(2).

work at or in connection with a controlled works'.[5]

[14] The effect of those provisions is to ring-fence each account so that each operates as a separate fund dedicated to its particular purpose. That being so there might be a deficit in an account notwithstanding that the fund overall is not in deficit – implying that there is a surplus in one or both of the other accounts. That is illustrated by earlier actuarial valuations that evaluated each account separately. A valuation as at 1 April 1999 revealed a deficit in the State Account of approximately R66 million, a surplus in the Mines Account of R223 million, and a surplus in the Works Account of R42 million – thus an overall surplus of R199 million. A valuation at 1 December 1999 revealed a State Account deficit of R74 million, while the Mines Account and the Works Accounts had surpluses of R645 million and R97 million respectively – an overall surplus of R668 million.

[15] State Account deficits exist because there is no reason for a reserve to be held in that account. The state can be expected always to be in a position to pay claims as and when they arise and in practice the account is operated in that way, with annual appropriations being made by parliament to meet current claims. Indeed, in view of the manner in which that account is financed it can be expected that there will almost always be an actuarial deficit.

[16] We do not have the full actuarial report before us but those portions that we have reflect a valuation of the fund overall and not of the individual accounts. It seems that the Chamber feared, at one time at least, that mine-owners and works-owners were being expected to fund

5Section 71(2).

such deficit as might exist in the State Account, because in its amended notice of motion it claimed, as an alternative to its principal claims, an order declaring that

'in determining a levy payable by the owner of each controlled mine or controlled works … the [commissioner] may not include in such levy any amount that will be used to fund amounts that were/are payable by the State' [ie amounts that fall to be paid from the State Account].

[17] It emerged in the hearing before us that it is not disputed by the commissioner and, according to his counsel, it has never been disputed, that mine-owners and works-owners may not be levied to make good a deficit in the State Account. There being no dispute on that issue a declaratory order to that effect is not called for and I need say no more of the alternative claim.

[18] There is also no dispute that mine-owners may not be levied to make good a deficit in the Works Account, and vice versa, and that must indeed be so. The dispute between the parties is thus whether mine-owners may be required to make good a deficit in the Mines Account, and works-owners required to make good a deficit in the Works Account. For convenience I deal with the matter hereafter with reference only to mine-owners and deficits in the Mines Account, though the same principles apply to works-owners and deficits in the Works Account.

[19] The first claim in the amended notice of motion, summarized, was for an order declaring that any determination of levies by the commissioner in accordance with the recommendations of the actuary – that is, a determination of levies that aims at eliminating the full deficit – was inconsistent with the provisions of the Act. The second claim was for

two declarations that are more specific, which I set out later in this judgment. If the claim to those latter orders fails then equally the first claim must fail, and it is thus convenient to deal with those orders first.

[20] The first of those orders is directed at the responsibility for financing the fund as between the contributing owners, which has an impact on responsibility for the deficit.

[21] The commissioner has determined levies with reference to the mineral that is mined by each mine. Thus the amount of the levy imposed on platinum mines is the same for each mine, and is lower than the levy imposed on asbestos mines, and so on. It was submitted on behalf of the Chamber that when determining the levy payable by a mine-owner the commissioner must do so with reference only to the risk of disease that attaches to that mine specifically. In that way an owner who has taken steps to reduce the risk of disease at its mine will not find itself unfairly subsidising an owner who has not taken equivalent steps.

[22] It was on that submission that an order was sought declaring that in determining a levy payable by the owner of each controlled mine the commissioner may not

'include in such levy any amount that is not intended to be used solely for funding benefits payable to persons who performed risk work at that controlled mine …'.

[23] The form in which the order is expressed might lead to confusion and I need to make it clear that it was not suggested by the Chamber that levies paid in respect of workers at a mine must be used only to pay claims made by those who worked at that mine. Its submission was only that the levy payable by the owner of a mine must be determined by the

risk of contracting a disease that attaches to that mine specifically. Once levies have been paid to the fund the moneys may be used to pay all claims irrespective of the mine from which the claim emanates.

[24] The submission on behalf of the Chamber was founded on the language of s 62 and in particular subsection (1). That subsection – with emphasis added to the words to which particular significance was given – reads as follows:

'The commissioner shall determine in respect of *each* controlled mine or controlled works, in such manner and on such basis as may be prescribed, an amount payable by the owner of *that* mine or works to the commissioner, for the benefit of the compensation fund, *in respect of each shift worked by any person at or in connection with that mine or works* during which such person performed risk work, in order to enable the commissioner to pay to or in respect of *every person who performs* risk work at or in connection with *that* mine or works and who is after the commencement of this Act found to be suffering from a compensatable disease, *such amounts as may or are likely to become payable* under this Act.'

[25] Other subsections that were said to support the Chamber's construction – again with emphasis on the words that were said to be particularly significant – were the following:

Subsection (3), which requires the commissioner, when he has made a determination under subsection (1) to

'notify the owner of *the mine ... in question* …'.

Subsection (4), which requires the mine-owner to pay to the commissioner within a stipulated time

'the amounts which, by virtue of a determination under subsection (1), *such owner owes* in respect of persons *who performed risk work at or in connection with his mine ... in the preceding month ... '*.

Subsection (5), which provides that when the commissioner has

'determined the amount which *the owner of a controlled mine ... is to pay* … may, of his own motion or on application by *that owner*, and the commissioner shall when *the risk of the mine or works in question* has been altered by the risk committee under section 21, review and, if he or she deems it necessary, alter the amount so determined, and if the commissioner has altered such amount he or she shall forthwith in writing notify *the owner concerned*'.

[26] Support for the submission was also sought to be found in the functions of the Risk Committee for Mines and Works established under s 18 (which is the risk committee referred to in s 62(5)). The function of that committee is to 'determine the risk' at '*every controlled mine or controlled works*'[6] – that risk being a reference to the 'risk of contracting a compensatable disease, to which persons who perform risk work in or at or in connection with that mine or works are exposed'. [7]

[27] Those provisions read together, it was submitted, make it clear that the levy determined by the commissioner must be determined with reference to the risk of disease that attaches to each particular mine.

[28] The submission overlooks the provisions of s 62(2) and s 20(3)*(a)*. When determining a levy the commissioner is permitted by s 62(2) to

'determine different amounts' in respect of, [amongst others], different categories, groups or classes of controlled mines or controlled works'.

And while the risk committee must determine the risk of each mine s 20(3)*(a)* allows it to

'determine, different risks in respect of … kinds or groups of mines'.

[29] While the commissioner must indeed determine a levy 'in respect

6 Section 20(1).
7Relevant definition of 'risk' in s 1.

of each … mine', and he may determine the levy with reference to the risk attaching to the particular mine, so too may he categorise the mine and determine the levy with reference to the risk attaching to that category of mines. So, too, the risk committee may determine the risk of a particular mine with reference to a category of mines. Thus the commissioner is entitled to categorise mines by the mineral that they mine, as he has done, and determine the amount of the levy that the owner of each mine must pay with reference to the risk of disease that attaches to a mine that mines that mineral. In my view there is no merit in the argument advanced by the Chamber on this part of the case and the order that it sought was rightly dismissed.

[30] The second of the two declarations sought by the Chamber goes directly to the deficit in the fund. Section s 62(1) requires the levy determined by the commissioner to be one that is payable in respect of each worker at a mine. That means, so it was submitted, that the levy payable in respect of a particular worker is payable only for so long as that worker is working at the mine, and that must indeed be correct, but the submission goes further.

[31] The subsection goes on to provide that the purpose of the levy must be to enable compensation to be paid, where appropriate, to 'every person who performs [the present tense] risk work at or in connection with that mine …'. What that requires, the submission continued, is that the levy must be determined 'with reference to' amounts intended to be used to pay compensation to workers performing risk work at the time the levy is determined.[8] On that basis the second of the two orders sought was a declaration that in determining a levy the commissioner may not

8The submission in those rather vague terms is taken from the heads of argument filed by counsel for the Chamber.

'include in such levy any amount intended to be used to pay compensation to persons who previously performed risk work at that controlled mine … but who no longer perform such work at that controlled mine …'.

[32] What is meant by that order, it was explained in argument before us, is that the levy must be determined in an amount that is required to cover the risk of disease to workers then in employment, and not the risk of disease to workers who had already left employment, the implication being that a deficit brought about by claims of former employees may not be recovered by levies imposed in respect of current workers.

[33] It is true that the levy determined by the commissioner must be one that is payable only in respect of each current worker, but I do not think the section means that it must be designed to cover the risk only of current employees contracting a disease. I do not think the words 'every person who performs risk work' as used in s 62(1) is confined to persons who are performing such work at the time the levy is determined (nor even at the time the levy is paid) – in my view it refers to every person who performs risk work at any time.

[34] Indeed, the construction advanced on behalf of the Chamber would be inconsistent with other provisions of Chapter V. In a fund of this nature there is always the prospect that there might be a deficit. The question, then, is how is that deficit to be financed if not by the contributing owners? The response of counsel for the Chamber was that the shortfall must be financed by the state. It was argued that claims lie against, and must be met by, the commissioner, who is a state official. If there are insufficient moneys in the fund, so the argument went, then his employer, the state, must necessarily make up the shortfall.

[35] It seems to me that the reverse is the true meaning of the statute. The responsibility of the state towards the fund is expressly circumscribed by s 74. It requires the Minister to pay to the commissioner, from moneys appropriated by parliament for that purpose, for the credit of the relevant account of the compensation fund –

'*(a)* any amount which is due to the commissioner by an owner of a controlled mine or a controlled works … which the commissioner is unable to recover from that owner …;

(b) any amount paid from the compensation fund to any person who was not entitled to receive such amount, and which the commissioner is unable to recover from such person;

(c) any loss suffered by the compensation fund through the negligence, dishonesty or other act or omission of any person in the service of the State, or any person, institution, organization or authority who or which has acted on behalf of the commissioner in terms of any provision of this Act, and which the commissioner is unable to recover from the person, institution, organization or authority concerned;

(d) any amount paid from the compensation fund under a provision of this Act to or in respect of a person who contracted a compensatable disease wholly or partly as a result of his duties at or in connection with mines or works while he or she was in the service of the State or while he or she performed a service on behalf of the State;

(e) any amount paid from the compensation fund under a provision of this Act to or in respect of a person in connection with work performed at a mine or works which has ceased operations and at the time of such cessation was not a controlled mine or a controlled works'.

[36] If the Chamber's construction of the Act were to be correct that detailed circumscription of the responsibility of the state is entirely superfluous. The state is obliged to finance a shortfall no matter what brought it about – so the argument went. If that is so it would be unnecessary to express the circumstances in which the state must

contribute to the fund.

[37] That construction is also inconsistent with the requirement of the Act that the fund must be actuarially valued. Actuarial valuation is required only where reserves are required to be held for future claims. If the state were to be the guarantor of all claims that are payable from the Mines Account then the account might just as well be run on a current-cost basis – as with the State Account – which requires no reserves to be held and thus no actuarial valuation.

[38] I find nothing in the Act that requires – or even allows – the state to fund a deficit in the Mines Account no matter what brings it about. That being so the only inference is that it was intended that a deficit should be made good by additional levies. In my view there is no basis for the second of the two orders that were sought and it, too, was rightly dismissed.

[39] I pointed out earlier that those parts of the actuarial report that are before us – which form the basis of the recommendations made to the commissioner – do not deal with the various constituents of the deficit, but that there is no dispute that it may not be recovered across the various accounts. That having been said, and the Chamber not being entitled to the orders I have already dealt with, I can see no other grounds justifying the grant of the first order claimed in the notice of motion.

[40] There remains the question of costs. There is no reason why the costs of the commissioner should not follow the result. The question remains whether the Chamber should be held liable for the costs on appeal of the National Union of Mineworkers. The Union was not

brought into the proceedings by the Chamber but chose independently to intervene. Nonetheless, in my view the union indeed had an interest in the proceedings that it was entitled to advance and I find it just and equitable that it should recover its costs.

[41] For those reasons the appeal is dismissed. The appellant is to pay the costs of the first and fourth respondents, including the costs of two counsel.

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R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

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