REPUBLIC OF SOUTH AFRICA

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

CASE NO: A3004/20016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

13/7/2016
DATE

Klightley
SIGNATURE

In the matter between:

JGW LIGHTFOOT	Appellant
and	
RAND MUTUAL ASSURANCE COMPANY LIMITED	First Respondent
MURRAY & ROBERTS LIMITED	Second Respondent
THE MINISTER OF LABOUR	Third Respondent
THE DIRECTOR GENERAL OF THE DEPARTMENT OF LABOUR	Fourth Respondent

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J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

[1] The appellant, Mr Lightfoot, was employed by Murray & Roberts Limited as an underground onsetter at the Impala Platinum Mine. While he was on duty in April 2009 he stepped backwards into an open mine shaft. Although he was able to arrest his fall by holding onto a ledge, a descending lift cage struck his right foot and ankle, causing severe injuries. Various complications beset the surgical treatment of his injuries.

[2] Mr Lightfoot lodged a claim for compensation under the Compensation of Occupational Injuries and Diseases Act 130 of 1993 ("COIDA" or "the Act")).

[3] In terms of section 30 of COIDA the Minister of Labour ("the Minister") may issue a licence under specified conditions to a mutual association to carry on the business of insuring an employer against the employer's liability to employees under the Act. The Minister issued a licence to Rand Mutual Assurance Limited ("RMA") to act as the insurer to Murray & Roberts under section 30, subject to conditions specified by the Minister ("the licence conditions").

[4] In terms of section 62(1) the Director General of the Department of Labour ("the DG") may:

> "... subject to such conditions as he may determine, authorise a ... mutual association to provisionally settle claims by employees for compensation ... .

[5] Section 62(2) provides further that:

> "An ... association ... shall report provisional settlements to the Director-General at such intervals and with such particulars as the Director-General may determine, and the Director-General may confirm, amend or repudiate any such provisional settlement ... ."

[6] The DG prescribed conditions for the provisional settlement by RMA of claims for compensation in terms of this section ("the settlement conditions").

[7] The effect of the license issued to RMA, read together with the settlement conditions prescribed by the DG, is that compensation claims under COIDA by employees of Murray & Roberts are dealt with by RMA rather than by the compensation commissioner through the compensation fund established under that Act ("the fund"). This was the scheme governing Mr Lightfoot's claim for compensation.

[8] Following a process that I will detail more extensively in due course, Mr Lightfoot was assessed by RMA as having suffered a 15% permanent disability as a result of his accident. This was subsequently reviewed, and he was reassessed at having suffered a 31% permanent disability. This was in February 2012. The record before this court did not contain proof of the DG's confirmation of RMA's assessments, but the parties proceeded on the assumption that this had taken place.

[9] In June 2015 Mr Lightfoot applied for a review and an increase of his assessment in terms of section 90 of COIDA. I set out later the specific applicable provisions of this section. When RMA refused this application Mr Lightfoot lodged an objection in terms of section 91. In terms of clause 17 of

the settlement conditions prescribed by the DG, RMA is directed to deal with section 91 objections and appeals by convening an independent tribunal. In doing so it must make use of the applicable independent tribunal database to select the presiding officer of the tribunal. RMA proceeded to convene a tribunal ("the tribunal") to consider Mr Lightfoot's objection.

[10] Mr Lightfoot's attorney, Mr Spoor, appeared before the tribunal and made submissions on his behalf. The tribunal delivered a judgment dismissing the objection. Mr Lightfoot now appeals to this court against the tribunal's decision. The appeal is brought under section 91(5)(a) of COIDA, read with the settlement conditions.

[11] Section 91 reads, in relevant part, as follows:

> "**Objections and appeals against decisions of Director-General**
>
> (1) Any person affected by a decision of the Director-General ... may, within 180 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner.
>
> (2) (a) An objection lodged in terms of this section shall be considered and decided by the presiding officer assisted by two assessors designated by him, of whom one shall be an assessor representing employees and one an assessor representing employers.
>
> (b) If the presiding officer considers it expedient, he may, notwithstanding paragraph (a) call in the assistance of a medical assessor.
>
> (c) The provisions of sections 6, 7, 45 and 46 shall apply mutatis mutandis in respect of the consideration of an objection.
>
> (3) (a) After considering an objection the presiding officer shall, provided that at least one of the assessors, excluding any medical assessor, agrees with him, confirm the decision in

respect of which the objection was lodged or give such other decision as he may deem equitable. …

(4) …

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

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

(ii) …;

(iii) the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;

(iv) ….

(b) Subject to the provisions of this subsection, such an appeal shall be noted and prosecuted as if it were an appeal against a judgment of a magistrate's court in a civil case, and all rules applicable to such an appeal shall mutatis mutandis apply to an appeal in terms of this subsection.

….."

[12] It is common cause that the only parties in the proceedings before the tribunal were Mr Lightfoot and RMA. Despite this, the appellant cites a number of other parties as respondents in the appeal before this court. The citation of parties varies for no apparent reason in the different documents filed by Mr Lightfoot. The full range of respondents cited includes (in addition to RMA) Murray & Roberts Limited, the Minister and the DG.

[13] Save for RMA, none of these cited respondents were formally joined in the appeal proceedings although the papers filed in support of the appeal were served on them. Only RMA has played an active role in the appeal.

GROUNDS OF APPEAL

[14] There are two legs to Mr Lightfoot's appeal:

[14.1] The first leg of appeal is based expressly on section 91(5)(i) ("the *ultra vires* ground of appeal"). It is described in Mr Lightfoot's notice of appeal as follows:

> "The Presiding Officer (of the tribunal) erred in failing to hold that the licence conditions prescribed by the Minister of Labour on (RMA), under section 62 of (COIDA), in terms of which (RMA) was empowered to convene a tribunal to adjudicate objections and appeals against decisions of the Director General under section 91 of the Act, was *ultra vires* the powers afforded to the Minister under section 30 read with section 62 of the Act."

[14.2] The second leg of the appeal is expressly based on section 91(5)(iii). Essentially, Mr Lightfoot contends that the tribunal erred in confirming RMA's decision not to award him an increased assessment following his review of the 31% permanent disability assessment. This leg of the appeal comprises no less than 18 identified separate grounds. For simplicity's sake, I will refer to this leg (and its composite parts) as "the merits grounds of appeal".

POINTS *IN LIMINE*

[15] Before considering each of the legs of Mr Lightfoot's appeal it is necessary to refer to two points *in limine* raised by RMA. The first of these is the submission that COIDA simply does not provide for an appeal in terms of section 91(5) against a decision made by a tribunal convened by RMA under

clause 17 of the settlement conditions. Accordingly, it is submitted that this court has no jurisdiction to consider the present appeal.

[16] The second point *in limine* is that the *ultra vires* ground of appeal relied on by Mr Lightfoot is an impermissible attempt to judicially review the RMA licence conditions, and the exercise of the tribunal's powers thereunder. RMA submits that COIDA does not make provision for a review of this nature, and that Mr Lightfoot cannot use the guise of a section 91(5) appeal to achieve what is effectively a judicial review of the Minster's powers under the Act.

[17] The latter point *in limine* is directly related to the *ultra vires* ground of appeal. I will deal with it more fully when considering that ground.

JURISDICTION TO CONSIDER THE APPEAL

[18] In contending that the court has no jurisdiction to consider this appeal RMA relies on the express wording and definitions of key provisions of COIDA, read with the relevant settlement conditions prescribed by the DG.

[19] RMA points out that in terms of sections 91(2) and 91(3)(a), a "*presiding officer*" is required to consider and to make a decision in respect of an objection lodged under that section. Furthermore, section 91(5) specifies that an appeal to the High Court lies in respect of a decision "*referred to in subsection 3(a)*". In other words, a decision made by a "*presiding officer*".

[20] A "*presiding officer*" is defined under section 1 of COIDA as "*any officer appointed in terms of section 2(1)(a) or (b) and designated as such by the Director-General*". Section 2(1)(a) and (b) provide for the Minister to appoint

a compensation commissioner, and other officers or employees to assist the DG. The point made by RMA in this regard is that a "*presiding officer*" is defined as someone appointed and designated by the Minister or other delegated officer. It does not include persons appointed by RMA to preside over objection tribunals.

[21] Clause 17 of the settlement conditions prescribed by the DG makes provision for RMA to convene objection tribunals and to appoint presiding officers from the independent tribunal database to preside over them. Clause 17 reads as follows:

> "**Objections and appeals against decisions of the Director-General**
>
> 17.1 In cases where an objection is lodged against a decision made by the Mutual Association, the following process will be followed:
>
> (i) The Mutual Association shall be advised and an independent tribunal shall be convened in terms of section 91. The tribunal shall be convened by the Mutual Association making use of the independent tribunal database which will be established and maintained by agreement between the Compensation Fund and the Mutual Association.
>
> (ii) The written opinion, and where deemed necessary by the presiding officer in terms of section 91(2)(b), oral evidence from the independent panel and or any other expert accepted by the tribunal as necessary to decide the matter in a fair and equitable manner, will be presented to the presiding officer which evidence may be used by the presiding officer and assessors in reaching a decision.
>
> (iii) The decision shall be communicated to the Mutual Association and the complainant." (emphasis added)

[22] The purpose of clause 17 would appear to be to provide a parallel process for the hearing of objections to decisions made by RMA under its licence. In other words, to put these objections on a par with the objection process outlined in section 91. This appears from the specific cross-references made

in clause 17 to section 91, and to the common use in both the section and clause to a "*presiding officer*". Thus, clause 17 appears to be intended to mirror the section 91 process for claims dealt with by RMA as a licenced mutual association under COIDA, with such practical changes as are necessary (such as the use of the independent tribunal database from which to appoint presiding officers).

[23] RMA does not contend that it is not authorised to convene a tribunal to hear objections under section 91. As I will indicate shortly, that is an argument made by Mr Spoor in support of Mr Lightfoot's *ultra vires* ground of appeal. Of course, if Mr Spoor is correct in his contention, then the entire platform for the appeal falls away for that reason. I shall refer to this point again later.

[24] However, RMA makes a different point. It says that assuming clause 17 gives the mutual association the power to convene a tribunal to consider and decide an objection, it does not include a provision permitting an appeal from that decision to the High Court. RMA points out that no reference is made in clause 17 to the right of an objector to appeal against a tribunal's decision to the High Court. Section 91(5) of COIDA only provides for an appeal against the decision of a "*presiding officer*" as defined under that Act. That definition does not include a presiding officer appointed under Clause 17.

[25] Consequently, contends RMA, from a reading of COIDA together with clause 17 of the settlement conditions it must be concluded that a High Court has no jurisdiction to consider an appeal from an RMA-convened objection tribunal.

[26] If RMA's contention is correct, it means that an appeal to the High Court is not available to that class of employees whose claims for compensation under the Act lie to RMA as a mutual association licensed by the Minister. The right of appeal is only open to employees whose employers have elected not to embark on the mutual association insurance route, and therefore whose claims are dealt with by the compensation commissioner and fund.

[27] This state of affairs seems to me to be at odds with the fundamental rights of employees like Mr Lightfoot to equality under section 9, access to courts under section 34, and fair labour practices under section 23 of the Constitution. In addition, section 22(1) of COIDA specifically gives all employees the entitlement to the benefits provided for in the Act.[1]

[28] I can see no rational reason for depriving this particular class of employees of the right of an appeal to the High Court simply because the impugned decision was made by a tribunal convened by a licensed mutual association in accordance with its licensing conditions, rather than by a tribunal convened directly under the auspices of the commissioner.

[29] Similarly, I can see no rational reason for depriving RMA of the right to appeal to the High Court under section 91(5) in circumstances where it is not satisfied with the decision reached by a tribunal convened under clause 17.

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1 Section 22(1) reads as follows:

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

[30] The question is whether the failure of the DG to specify in clause 17 that the right of appeal under section 91(5) applies is indicative of an intention to exclude that right in respect of decisions made by tribunals appointed under that clause. I think not. What clause 17 deals with is the parallel process that RMA must follow when section 91 objections are filed in the mutual association setting. Clause 17 prescribes RMA's obligations in this regard, and broadly outlines the procedure to be followed by a tribunal under that clause. Once the tribunal has made its decision, its function is completed. The appeal process outlined in section 91 lies directly to the High Court. For that reason, there was no need for clause 17 to deal with the appeal stage of proceedings. The natural course for a claimant unhappy with an objection decision by a tribunal appointed under clause 17 would be to appeal to the High Court in terms of section 91(5).

[31] Statutory provisions must be interpreted in a manner consistent with constitutional rights and with the purpose of the legislative scheme in question. In my view, the constitutionally compatible interpretation of clause 17 is that it was not intended to exclude the right of appeal. Instead, it was intended to operate in conjunction with the right of appeal provided in section 91(5) of COIDA. On this approach, employees who are covered by a mutual association enjoy the same benefit of a right of appeal to the High Court as those whose claims fall under the auspices of the fund. This is consistent with the guarantee afforded all employees under section 22(1), and with the constitutional guarantees of equality and access to courts.

[32] In circumstances where a mutual association has been licensed under section 30, the reference in section 91(5) to "*any person affected by a decision referred to in section (3)(a)*" must be taken to include a person affected by the decision of a presiding officer appointed in accordance with clause 17 of the settlement conditions prescribed by the DG. If this were not so, it would mean that employees covered by Rand Mutual would be limited to an objection process to a tribunal only. Their parallel right of recourse would be cut short. Unlike other employees, they would not enjoy a right of appeal to the High Court. As I have already indicated, that consequence is constitutionally unacceptable and is contrary to the objectives sought to be achieved by COIDA.

[33] Accordingly, I cannot endorse RMA's interpretation of clause 17 read with section 91. I find that on a proper, constitutionally compatible interpretation of these provisions, the High Court has jurisdiction to consider Mr Lightfoot's appeal against the decision of the tribunal constituted under clause 17.

THE *ULTRA VIRES* GROUND

[34] The *ultra vires* ground of appeal rests on the contention that clause 17 of the settlement conditions constitutes an *ultra vires* delegation by the DG to RMA of his powers to convene a section 91 objection tribunal. This was the argument advanced at the hearing of the appeal, based on the written heads of argument submitted by Mr Spoor. The argument is somewhat different to that described in the relevant ground of appeal in Mr Lightfoot's notice of appeal. There it was contended that the Minister (not the DG) had acted

ultra vires in empowering RMA to convene an objection tribunal. Be that as it may, I will proceed on the basis of the argument developed more fully in the written and oral submissions made by Mr Spoor on behalf of Mr Lightfoot.

[35] In advancing this ground on behalf of his client, Mr Spoor relies on section 3(1) of COIDA. That section provides that:

> "The Director-General may, subject to such conditions as he or she may determine, delegate any of his or her powers or assign any of his or her duties to the commissioner, or an officer or employee referred to in section 2(1)(b), and may at any time cancel any such delegation or assignment."

[36] Mr Spoor argues that what this means is that the DG may only delegate his powers to an officer or employee referred to in section 2(1)(b) who are employees of the state. He has no power to delegate any of his powers to a mutual association, like RMA.

[37] Mr Spoor says that the restricted scope of the DG's powers of delegation finds support in the express provisions of clause 15 of the licence conditions prescribed by the Minister. These provide that:

> "The functions and powers vested in the Director-General in terms of the Act are not delegated to the Mutual Association and all matters falling within the scope of the powers of the Director-General shall, except when otherwise authorised by the Director-General in an

agreement in terms of section 62 of the Act, be referred by the Mutual Association to the Director-General for decision. ..." (emphasis added)

[38] Mr Spoor relies on the *first* of the underlined parts of clause 15.

[39] As far as section 62 is concerned, Mr Spoor contends that this does not extend the scope of the DG's powers of delegation. All that it does, he submits, is to permit the DG to authorise RMA to settle claims provisionally. Section 62 does not give the DG the authority to delegate his responsibilities under section 91 to RMA, i.e. to ensure that an objection tribunal is constituted. Mr Spoor also makes the same point as that made by RMA in its first point *in limine*, viz. that COIDA requires that a "*presiding officer*" of an objection tribunal under section 91 must be an appointee under section 2(1)(a), and not someone appointed by RMA.

[40] For these reasons, Mr Spoor submits that the DG acted outside of his statutory powers in enacting clause 17 of the settlement conditions: he purported to delegate his powers under section 91 to RMA in circumstances where he was not empowered under COIDA to effect such a delegation. It follows that the tribunal convened by RMA was not lawfully authorised to deal with Mr Lightfoot's objection.

[41] Mr Lightfoot seeks specific relief in the event of his *ultra vires* ground of appeal succeeding. He requests an order declaring that clause 17 of the settlement conditions falls outside of the DG's powers and is of no force and

effect, and a further order declaring the objection hearing before the tribunal to be a nullity.

[42] It is common cause that Mr Spoor did not raise the *ultra vires* point before the tribunal when it considered Mr Lighthouse's objection. However, Mr Spoor submits that he is entitled to raise the point on appeal. This is because it involves "*the interpretation of the Act or any other law*". Accordingly, Mr Spoor contends that it falls within the ambit of appeals envisaged in section 91(5)(a)(i)

[43] Alternatively, Mr Spoor submits that this court is obliged *mero motu*, and in the course of this appeal, to have regard to the principle of legality and to consider and rule on the *ultra vires* nature of the tribunal's purported authority under clause 17. He relies in this regard on *Cape Dairy and General Livestock Auctioneers v Sim.*[2] In that case it was held that a court has a duty not to enforce any contract that is in violation of the law, whether or not the parties raise the issue, and regardless of whether the court is one of first instance or an appeal court.

[44] RMA's response is that the *ultra vires* ground is not a permissible ground of appeal under section 95(1). In reality it is an attempt to seek the judicial review of the DG's powers under the guise of a section 91(5) appeal. RMA says that the correct basis for a judicial review of this nature is the Promotion of Administrative Justice Act, 2000 ("PAJA"), implemented through the procedure set out in Uniform Rule 53. Mr Lightfoot has ignored both PAJA

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and Rule 53 in his ostensible reliance on an appeal under section 91(5). Neither the Minister nor the DG have been joined in these proceedings, notwithstanding that they are the public functionaries most directly implicated in, and affected by, the relief that is sought.

[45] Consequently RMA submits that the *ultra vires* ground of appeal falls to be dismissed on this basis alone, and that there is no need to consider the substance of this ground.

[46] In my view there is merit in RMA's submissions. Mr Lighfoot's complaint is that the DG acted outside of the power accorded to him under the Act by authorising RMA to establish a complaint tribunal in clause 17 of the settlement conditions. He seeks to have clause 17, as well as the proceedings before the tribunal and it's finding, to be declared to be of no force and effect. In other words, he requests this court to set aside clause 17 of the settlement conditions, and to set aside the decision of the tribunal on the basis that the tribunal proceedings are to be treated as if they never took place.

[47] The first difficulty for Mr Lightfoot is that his argument is inherently self-destructive. If the argument is correct, i.e. if the tribunal proceedings were a legal nullity, then this court has no jurisdiction to consider the appeal in the first place.

[48] The second difficulty for Mr Lightfoot is that his case on *ultra vires* bears all the hallmarks of a judicial review. In essence, he is seeking to review the

exercise by the DG of his powers under section 62 of COIDA by authorising RMA to establish an objection tribunal in terms of clause 17 of the settlement conditions. In prescribing clause 17 as part of the settlement conditions the DG undoubtedly was engaging in administrative action within the meaning of PAJA.[3] Furthermore, the relief Mr Lighthouse requests in respect of the *ultra vires* ground is precisely that provided for in section 8(1)(c) of PAJA.[4]

[49] Although the *ultra vires* ground is presented as a ground of appeal, its true legal character is that of a review of the DG's powers. It is not concerned with whether the tribunal came to a wrong conclusion on the facts or the law, which is the usual basis for an appeal.[5] In the notice of appeal there is an attempt to couch the *ultra vires* ground in the language of an appeal. As I indicated earlier, the notice of appeal states that:

> "The presiding officer erred in failing to hold that the licence conditions ..... was (sic) ultra vires the powers afforded to the Minister under section 30 read with section 62 of the Act".

However, what this overlooks is the fact that the tribunal could not have made a determination on the *ultra vires* point for the simple reason that it had

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[3] In relevant part, section 1(a)(ii) of PAJA defines "administrative action" as meaning:

> "any decision taken ... by an organ of state, when ... exercising a public power or performing a public function in terms of any legislation".

[4] Section 8(1)(c) gives courts the power to set aside the impugned administrative action.

[5] See, for example, the discussion by Prof Hoexter in Administrative Law in South Africa (2ed) at 108 on the difference between appeals and review.

no jurisdiction to review the DG's exercise of his powers. Thus, it could not have erred, as is alleged in the notice of appeal.

[50] What this demonstrates is that there is an inherent misalignment between the *ultra vires* point and the path elected by Mr Lightfoot to pursue it, viz. as a basis for an appeal in terms of section 91(5). This misalignment arises from the fact that the *ultra vires* ground is fundamentally a basis for a review and not an appeal under section 91(5).

[51] More specifically, it is a review that fits squarely within the ambit of PAJA. As such, it is PAJA, and not section 91(5) that establishes the appropriate cause of action for Mr Lightfoot's *ultra vires* complaint.[6] PAJA has been described as the primary or default pathway for the review of administrative action.[7] The Constitutional Court has warned of the impermissibility of litigants electing an alternative pathway for the review of administrative action in circumstances where PAJA would be the appropriate path.[8]

[52] In my view, Mr Lightfoot's proper remedy insofar as the *ultra vires* point is concerned was to institute a judicial review under PAJA by following the procedure laid down in Rule 53. What he cannot do is to bypass PAJA under the guise that his appeal involves "*the interpretation of (COIDA)*" within the meaning of section 91(5)(a)(i). It is axiomatic that every judicial review will involve the interpretation of legislation or other empowering law. To interpret

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6 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), para 25

7 Hoexter, above, pg 118

8 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at paras 118 and 143

section 91(5)(a)(i) as permitting an objector to review administrative action through an appeal would be to undermine the constitutional scheme in terms of which PAJA (or in limited circumstances, section 33 of the Constitution itself) is the appropriate mechanism for that form of review.

[53] For similar reasons, it is not permissible for Mr Lightfoot to rely on the general principle of legality to establish a basis for an appeal on the *ultra vires* ground. Once it is established that this ground is essentially in the nature of a review of administrative action, then it is incumbent on Mr Lightfoot to pursue his remedy under PAJA. He does not have a free election to resort to an appeal based on the principle of legality. The case Mr Spoor relies on to support his reliance on legality[9] did not deal with the exercise of public power. In my view it does not assist Mr Lightfoot's case, which is steeped in the intricacies of administrative law and judicial review.

[54] For all of these reasons, I conclude that Mr Lightfoot's *ultra vires* point falls to be dismissed on the basis that it is not properly before the court. I decline to consider the substance of the point. Should Mr Lightfoot wish to pursue it, he will have to do so through the appropriate channels under PAJA.

THE MERITS GROUNDS

[55] For purposes of considering the merits grounds of the appeal it is important to draw a distinction between two decisions of RMA. The first of these is the decision made by RMA in February 2012 to increase Mr Lightfoot's

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9 *Cape Dairy and General Livestock Auctioneers v Sim*, above

permanent disability assessment from 15% to 31%. I will refer to this as the "*February 2012 decision*". The second is the decision made by RMA to refuse Mr Lightfoot's request under section 90 of COIDA, in June 2015, to review his 31% disability assessment. I shall refer to this as the "*2015 review decision*".

[56] This distinction is important because this court is sitting as a court of appeal against the decision of the tribunal to refuse to uphold Mr Lightfoot's objection to an RMA decision in terms of section 91(1) of COIDA. This exercise necessarily requires the court to be clear on the question of which of the two RMA decisions formed the subject matter of Mr Lightfoot's objection to the tribunal. Was it the February 2012 decision, or the subsequent 2015 review decision?

[57] A number of grounds in the notice of appeal are expressly linked to the tribunal's alleged error in confirming RMA's February 2012 decision, and make no reference to the 2015 review decision. This suggests that the subject matter of the objection to the tribunal was the earlier decision. One of the difficulties with this is that in terms of section 91(1) of COIDA an objection must be lodged within 180 days of the decision under consideration. This requirement rules out the possibility that the subject matter of the objection was the February 2012 decision, as the time for such an objection had long lapsed by 30 September 2015 when Mr Lightfoot filed his objection.

[58] Mr Spoor clarified matters in his heads of argument and in his oral submissions at the hearing of the appeal. He confirmed that the subject

matter of Mr Lightfoot's objection was the 2015 review decision, and not the February 2012 decision. Therefore the question that arises for determination on appeal is whether the tribunal erred in not upholding Mr Lightfoot's objection to RMA's refusal to accede to his review request lodged in June 2015.

[59] Section 90(1) of COIDA gives the DG the power to review "*any decision in connection with a claim for compensation or the award of compensation*" on certain grounds. These include the power to review a decision on the ground:

> "(d) that the decision or award was based on an incorrect view or misrepresentation of the facts, or that the decision or award would have been otherwise in the light of evidence available at present but which was not available when the DG made the decision or award."

[60] Clause 16 of the settlement provisions makes section 90(1) applicable to the mutual association context by providing that:

> "The Mutual Association may after notice, if possible, to the party concerned and after giving him an opportunity to submit representations, at any time review any decision in connection with a claim for compensation or the award of compensation on the grounds as set out in the Act."

[61] The power of the DG, or the mutual association, as the case may be, to review previous awards of compensation on the grounds listed is not

restricted to any time period. So, for example, if a claimant's medical condition deteriorates after an award is made, section 90(1) read with clause 16 permits him or her to approach the mutual association for a review of the original assessment based on new medical evidence.

[62] In June 2015 Mr Lightfoot applied for the review of his 31% disability assessment. He completed the requisite application form issued by RMA for this purpose. The form stipulates that:

> "This application must be lodged with Rand Mutual Assurance at anytime (sic) if the claimant's condition deteriorates based on new medical evidence. The consultation and associated medical costs to acquire additional or new medical evidence will be at applicant's own costs. Rand Mutual Assurance will only refund the medical costs if the new medical evidence submitted results in an increase of the Permanent Disability awarded previously by RMA, or where the new medical evidence will result in rescinding its previous decision not to award a Permanent Disability." (emphasis added)

[63] Mr Lightfoot's application for a review of his previous award was supported by Dr M M van Dyk, who noted in the application form that Mr Lightfoot: "*recently had a myocardial infarction and had a coronary artery bypass. He is 100% disable (sic) to work underground as well as on surface.*" (emphasis added)

[64] When Mr Lightfoot subsequently filed an objection against RMA's refusal to entertain his review application positively, he recorded in the objection form that the reasons for his objection were that:

> "*Rand Mutual does not want to increase my pension. Due to the accident and results thereof I will never be able to work again*";
>
> and
>
> "*I have applied for increased pension, but does not hear from Rand Mutual. Please let me know what is going on*."

[65] As documentary evidence in support of his objection, he attached a letter from Dr Van Dyk. The letter is dated 20 August 2015. It records that Mr Lighfoot developed hypertension as a result of ongoing financial stress. He had suffered a heart attack resulting in him being 100% unsuitable for any work.

[66] By the time that the tribunal set a date for Mr Lightfoot's objection hearing Mr Spoor had come on board as his legal representative on a *pro bono* basis. The tribunal hearing was set for 28 October 2015. On 26 October 2015 Mr Spoor wrote to RMA in which he indicated that:

> "On the face of it it appears there is merit in the objection. Mr Lightfoot has been assessed by RMA as 31% permanently disabled. It appears that this assessment does not take into account a number of important *sequelae* including: post traumatic stress disorder; kidney failure

associated with painkilling medication taken in respect of the injury; a heart condition that may be associated with the injury and its *sequelae*.

[67] Mr Spoor went on to state that:

> "We were however not involved in the preparation and filing of the objection. On perusal however it is clear that the medical evidence has not been properly prepared and that several of the medical reports are poorly motivated and do not address the important issues."

[68] On this basis, Mr Spoor sought a postponement of the objection hearing. His request was not granted. Instead, he was invited to seek a postponement from the tribunal at the hearing itself.

[69] By the time the hearing commenced, Mr Spoor had adopted a different view. He indicated to the tribunal that although his original view was that Mr Lightfoot required new reports to support the objection, he had reconsidered this position. He told the tribunal that he thought there was enough documentation before it to support an increase in Mr Lightfoot's disability assessment. Alternatively, he requested that if the tribunal did not share this view, Mr Lightfoot should be given an opportunity to supplement the documentation in support of his objection. However, Mr Spoor made it clear that he wanted to proceed with the hearing. Moreover, he told the tribunal that:

> "I'm placing all my reliance on the medical reports and the documentation that is before you. So I don't intend to lead any evidence

from the complainant. We stand or fall on what is in these documents, and all I will be doing is taking you through these documents and making the argument why the 31% should be revised." (emphasis added)

[70] In clarifying the basis for Mr Lightfoot's objection, Mr Spoor stated to the tribunal that the "*main grounds*" on which he was seeking an increase was the PTSD. He submitted that *ex facie* the available documents, RMA had ignored Mr Lighthouse's PTSD.

[71] It is common cause that the tribunal had before it the documents forming part of the tribunal record. These documents included the medical reports documenting Mr Lightfoot's condition over the years from the time of his accident. The documents included the final reports upon which the 15% and 31% assessments were originally made. The latest reports in the bundle were those of the orthopedic surgeon, Dr SG Wouters, dated June 2015. The only new medical evidence was Dr Van Dyk's letter that had been attached to Mr Lightfoot's objection.

[72] There was only one witness called to give evidence before the tribunal. This was Dr Van der Merwe. She commenced working for RMA in 2011, and was directly involved in the recommendations that led to the February 2012 decision in terms of which Mr Lightfoot's assessment was increased to 31%. She explained to the tribunal that this decision was based on the fact that after the initial 15% assessment it appeared that Mr Lightfoot had developed Complex Regional Pain Syndrome associated with his original ankle injury.

This placed him in a similar position to someone who had lost a leg. On this basis his disability assessment was increased to 31%, falling just short of the 35% recommended for a person who has suffered an amputation below the knee.

[73] Dr Van der Merwe confirmed that PTSD had not been taken into account in that assessment leading to the February 2012 decision.

[74] On the basis of this, Mr Spoor submitted to the tribunal that RMA had erred in failing to take Mr Lightfoot's PTSD into account in making its February 2012 assessment. He pointed to various reports in the bundle of documents before the tribunal that made reference to Mr Lightfoot suffering from PTSD. He submitted that RMA had known about this condition but had ignored it when it assessed Mr Lightfoot in February 2012. Accordingly, he submitted to the tribunal that it should uphold the objection on this ground.

[75] In refusing to uphold the objection the tribunal pointed out that Mr Lightfoot had made no reference to PTSD in his notice of objection. Mr Lightfoot had not lodged a claim based on PTSD, nor was there a final medical report submitted in respect of PTSD. Instead, Mr Lightfoot's grounds of objection changed during the course of the argument submitted by Mr Spoor.

[76] The tribunal took the view that in the absence of a claim for PTSD being lodged by Mr Lightfoot, it was not in a position to rule that the PTSD that Mr Lightfoot is alleged to suffer was the result of his original injury.

[77] The tribunal held that it was bound to consider the objection on the basis of the grounds identified in the notice of objection. It held in this regard that: "*It may be so that the Objector suffered from PTSD when the assessment of his degree of permanent disablement was made, but that is not what (the) Objector objected against in his Notice of Objection.*"

[78] Before this court Mr Spoor submits that the tribunal erred in its approach. He refers to section 91(3)(a) of COIDA which gives the presiding officer of an objection tribunal the power to "*confirm the decision in respect of which the objection was lodged or give such other decision as he may deem equitable*". Mr Spoor submits that this gives an objection tribunal a wide equitable discretion. He submits further that this discretion must be exercised in a manner consistent with the underlying policy of the Act. In *Davis v Workmen's Compensation Commissioner*,[10] it was held that this policy was "*to assist workmen as far as possible*". The court further held that it should "*not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.*" This position was endorsed in *Urquhart v Compensation Commissioner*.[11]

[79] Mr Spoor submits that in holding that it was bound by the grounds of objection stated in Mr Lightfoot's notice of objection the tribunal erred. It interpreted its jurisdiction too restrictively. This was contrary to the dictates of the tribunal's wide equitable discretion as expressed in section 91(3)(b). It was also contrary to the tribunal's obligation to act in accordance with the

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10 1995 (3) SA 689 (C), with reference to COIDA's predecessor

11 2006 (1) SA 75 (E), with reference to COIDA

policy underlying COIDA. Mr Spoor submits that the tribunal ought to have accepted that RMA has a duty to follow up on all medical reports in support of an applicant's claim for compensation. It failed to follow up on the reports indicating that Mr Lightfoot suffered from PTSD.

[80] In the circumstances, Mr Spoor submits that the tribunal ought to have accepted that the 31% assessment of Mr Lightfoot's disability was too low in that it failed to take account of his PTSD. The tribunal ought to have increased Mr Lightfoot's compensation. Alternatively, it ought at least to have ordered a further inquiry into Mr Lightfoot's PTSD so that a proper assessment could be made.

[81] One of the problems with Mr Spoor's submissions is that it is based on an assumption that an objection tribunal has an equitable jurisdiction that permits it to overlook obvious shortcomings in both the substance of, and the process followed by an objector in filing an objection under section 91.

[82] In my view, the mere reference to a tribunal having the power to "*give such other decision as (it) may deem equitable*" is not sufficient to warrant the conclusion that an objection tribunal has free rein to act in accordance with what it considers to be equitable in a particular case, regardless of how the objection is couched and whether or not it is supported in the documents upon which it is founded.

[83] Objections must be filed in the prescribed form. Rule 9 of the Rules, Forms and Particulars Which Shall be Furnished in Terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993[12] provides that:

> "An objection against a decision of the Commissioner shall be submitted on Form WG 29 (Annexure 3) with the particulars required therein." (emphasis added)

[84] The regulation expressly cross-refers to objections in terms of section 91 of COIDA. Form WG 29 is a prescribed objection form. It requires an objector to: *"Give your reasons in full for lodging the objection"* (emphasis added), and it also requires the objector to attach any documentary evidence that he or she wishes to submit in support of his or her reasons for the objection.

[85] RMA's objection form mirrors both of these requirements exactly.

[86] In terms of this scheme, the reasons for the objection and the documents submitted in support of them are critical to the objection process. A tribunal cannot simply ignore the objection as framed by an objector and embark on a different inquiry altogether. That would not be a rational exercise of its powers. Nor would it be consistent with the principle of *audi alteram partem*. The decision-maker whose decision forms the subject matter of the objection is entitled to know what the basis of the objection is and what documents will be used to support it.

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12 *GG* 15758 of 27 May 1994

[87] In the present case the basis for the objection presented orally at the hearing before the tribunal was poles apart from that couched in the documents giving rise to the objection.

[88] To begin with, the objection was against the 2015 review decision of RMA, not the February 2012 decision. As I indicated earlier, the review was based on Dr Van Dyk's confirmation that Mr Lightfoot had suffered a recent myocardial infarction requiring bypass surgery. It was on this basis that he indicated that in his view Mr Lightfoot was now being 100% permanently disabled.

[89] The objection was also supported by Dr Van Dyk's assessment of Mr Lightfoot's current disability state as a result of his heart attack and hypertension. Although Dr Van Dyk referred to the hypertension arising from financial stress, he did not refer to PTSD.

[90] It is apparent from this that the basis of both the section 90(1) review and the objection to the decision flowing from it were predicated on Mr Lightfoot's heart problems, not PTSD. However, the objection argued by Mr Spoor at the hearing before the tribunal was entirely different. That objection was based solely on Mr Lightfoot's alleged PTSD. Mr Spoor avowedly placed no reliance on Mr Lightfoot's heart condition.

[91] Similarly, Mr Spoor did not rely on the document attached to the Mr Lightfoot's notice in support of his objection as required. That document was

Dr Van Dyk's letter confirming Mr Lighthouse's heart condition. As I have already noted, it made no reference to PTSD.

[92] Instead, in support of the oral case for upholding the objection as presented to the tribunal, Mr Spoor relied on historic medical reports in respect of Mr Lightfoot that referred to PTSD. The only report by a qualified psychiatrist diagnosing Mr Lightfoot with PTSD emanated from September 2009. This was a substantial period before the very first assessment in 2011 in terms of which Mr Lightfoot was assessed at 15% disability. The psychiatrist, Dr Moloto, recommended treatment for Mr Lightfoot's PTSD and depression in the form of medication and psychotherapy.

[93] In November 2009, following an overdose of medication (which Mr Lightfoot denied was intentional), a psychologist, Ms Van der Berg filed a report for the purpose of motivating for the authorisation of psychological treatment. She reported that: "*currently the patient displays with symptoms of (PTSD), which is an Anxiety disorder.*" She recommended that Mr Lightfoot should remain in hospital to receive medication and both group and individual psychotherapy. She indicated that: "*the psychiatric section has a specific programme for the patients to effectively help them to recover.*"

[94] Once again, this assessment was made approximately 18 months prior to the first assessment of 15% disability. It was made more than two years before the February 2012 decision, and more than five years before the review decision and the lodging of Mr Lightfoot's objection. Thereafter, there were

no medical reports confirming a continued diagnosis of PTSD on the part of Mr Lightfoot.

[95] The only other report of any relevance is that of an occupational therapist, Ms Stirrat, dated 26 November 2012. As an occupational therapist, Ms Stirrat is not qualified to make a professional diagnosis of PTSD. She did not attempt to do so in her report. What she records is that on a General Health Questionnaire, which is a "*self-reporting measure*", Mr Lighthouse gave responses that indicated he had a well-above abnormal psychosocial profile. The questionnaire included measures for somatic symptoms, anxiety and insomnia, social dysfunction and severe depression. However, it is important to note that Ms Stirrat concluded in this regard that:

> "Based on his reports, collateral information received from his wife and documentation to hand, he experienced psychosocial complaints following the injury on duty. He is no longer on treatment for this. There were no updated specialist reports pertaining to this. His wife was of the opinion that this has improved substantially."

[96] Mr Lightfoot did not present any new evidence to suggest that he continued to suffer from PTSD. He had the option of appearing before the tribunal to support Mr Spoor's submissions on this score. However, Mr Spoor expressly declined to call Mr Lightfoot. He also elected not to proceed with an application for a postponement so as to follow up on his first assessment of the case, viz. that additional medical evidence was needed to support the objection. On the contrary, as noted earlier, Mr Spoor conveyed to the

tribunal that they would "stand or fall" on the documents already forming part of the record.

[97] It was on this basis that the tribunal was required to consider and make a finding on the merits of the objection.

[98] In my view, the tribunal cannot be faulted for its decision to dismiss the objection. The objection was saddled with patent shortcomings. These included the chasm between the objection as formulated in the notice, and that argued before the tribunal; and the absence of any evidence to the effect that Mr Lighthouse continued to suffer from PTSD and that it this had led to a permanent disability.

[99] As RMA submitted before the tribunal, a permanent disability on the basis of PTSD is only permitted once a person has reached maximum improvement. Until then, it would have been premature for RMA to make an award. Dr Moloto's diagnosis of PTSD was made at an early stage, whereafter Mr Lightfoot had received treatment many years before. In these circumstances, any review and objection based on existing PTSD would have to have been supported by current evidence indicating that the condition persisted and had resulted in permanent disability. There was no evidence of this kind before the tribunal.

[100] Mr Spoor's reliance on the historical medical reports suffered from a further shortcoming. Save for Ms Stirrat's report, they all preceded the February 2012 decision. At best for Mr Lighfoot, they may have had implications for

that decision. Indeed, this was the line taken by Mr Spoor in many of his submissions to the tribunal. It was also the line taken in the grounds of appeal described in the notice of appeal. Mr Spoor's dominant line of attack was that RMA failed to take into account Mr Lightfoot's PTSD in making the February 2012 assessment of a 31% permanent disability. However, the problem with this is that we now have clarity that the objection was not leveled against the February 2012 decision, but rather the 2015 review decision. In the circumstances, Mr Spoor's line of attack, and his reliance on the historical medical records was misdirected.

[101] When the case is properly analysed it is difficult to find any fault with the tribunal's decision to dismiss the objection. I accept that there may be cases where a tribunal is entitled to extend its inquiry more broadly than the precise terms of the reasons stated for the objection in the objection form. There may also be cases where a tribunal may be entitled to order a further inquiry on particular aspects of an objection before making a final decision. However, this is not one of those cases for all of the reasons I have cited above.

[102] I take into account the fact that Mr Lightfoot is a layperson. However, he was legally represented at the tribunal hearing. His legal representative could have persisted with an application for a postponement to supplement the record but he elected not to do so. To expect the tribunal to step into the breach in these circumstances and to make up for obvious shortcomings in

the case as it was presented would be to stretch too far the tribunal's duty to uphold the underlying purpose of the Act.

[103] In any event, the door is not closed on Mr Lightfoot. He is entitled under section 90(1) to seek a fresh section 90 review on the basis of all of the medical conditions identified by Mr Spoor in his letter of 26 October 2015, based on recent, supporting medical evidence. As noted in RMA's review form, if Mr Lightfoot succeeds in a review of that nature, RMA will reimburse him for the costs associated with obtaining the necessary medical reports.

[104] In the result, the merits grounds of appeal must also fail.

[105] RMA did not seek a costs order against Mr Lightfoot in the event of the appeal being dismissed.

[106] I make the following order.

1. The appeal is dismissed.

R KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

M MBONGWE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard:	10 May 2016
Date of Judgment:	13 July 2016
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