B.b 19/96

Case No 388/94
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

WORKMEN'S COMPENSATION COMMISSIONER APPELLANT

and

J A VAN ZYL RESPONDENT

CORAM: BOTHA, SMALBERGER, VIVIER, SCOTT JJA et PLEWMAN AJA

HEARD: 29 FEBRUARY 1996

DELIVERED: 25 MARCH 1996

JUDGMENT

SCOTT JA/...

SCOTT JA:

The respondent was employed from 25 April 1967 to April 1991 in a factory which manufactured tanning salts. One of the steps in the manufacturing process involves converting raw chrome to powder. This results in chrome dust being released into the air. Chrome dust is an industrial chemical which is an irritant to the respiratory system and causes ulceration and other well known clinical changes. The respondent began work in the factory as a plant operator. In due course he rose to the position of assistant foreman and then foreman. Finally in 1985 he was made plant superintendent. He was retrenched in 1991 together with other employees in his age group. By that time, however, the years of exposure to the dust had taken their toll and his upper respiratory tract was in a sorry state.

It appears that his exposure to chrome dust began to affect his

health as early as 1970. In 1972 he consulted his general practitioner who referred him to Dr Hackmann, an ear, nose and throat specialist. Dr Hackmann's clinical examination revealed that what would have begun as an ulcer had developed even at that stage into an anterior septal perforation, ie a perforation in the cartilaginous wall between the nostrils at the front of the nose. The damage was irreparable. There was also a thickening of the nasal mucosa and the respondent was found to be suffering from a chemical rhinitis (discharge from the nose) which was chronic and infective. A claim for compensation was lodged on the respondent's behalf in terms of the (now repealed) Workmen's Compensation Act 30 of 1941 ("the Act") in respect of a partial permanent disablement resulting from his exposure to chrome dust. It is common cause that he was a workman within the meaning of the Act and that the disease which was diagnosed was an industrial disease in terms of the Second Schedule of the Act. The

Commissioner, (who is the appellant), however, rejected the claim on the grounds that according to the medical reports at his disposal the respondent had suffered no permanent disablement for employment as a result of his condition.

In 1992, ie some twenty years later and after his retrenchment, the respondent again lodged a claim. By then the septal perforation had become large and central. In other words, it was no longer confined to the cartilaginous wall between the nostrils at the anterior part of the nose; it had progressed to include the posterior bony plate between the nostrils. The thickening and gross hypertrophy of the nasal tissue by this time was also of such a nature as to cause blockages and to severely affect the proper functioning of the nose as a filtration unit.

The respondent's second claim was more successful than the first, but only marginally so. The Commissioner assessed his disablement

for employment at 3%. Notwithstanding the rejection of the respondent's first claim, the Commissioner, somewhat ironically, and in terms of s 91(1) of the Act, fixed 28 September 1972 as the date of the "commencement of the disablement" and as such the "date of the accident" for the purposes of the Act. The significance of 28 September 1972 is that it was the date upon which the respondent was first diagnosed as suffering from the effects of chrome dust. Because in terms of the Act compensation is calculated with reference to the workman's remuneration at the time of the accident the compensation for disablement which was ultimately awarded to the respondent was no more than the sum of R208,00.

The respondent lodged an objection against the Commissioner's decision in terms of s 25(2) of the Act. Initially the objection was directed solely against the percentage of the disablement which had been determined by the Commissioner. At the hearing of the objection before the

Commissioner sitting with assessors, the respondent was permitted to argue a further ground of objection which was that the Commissioner had erred in fixing 28 September 1972 as "the date of the accident" rather than April 1991 when the respondent's employment had terminated. Dr Colvin who is attached to the industrial health unit at the University of Natal gave evidence on behalf of the respondent. He expressed the view that the deterioration in the respondent's condition between 1972 and 1992 was attributable to his further exposure to chrome dust during that period. He explained that once a person suffering from the effects of chrome dust ceases to be exposed to the dust his condition stabilizes and there is no further deterioration. In other words it was clear from his evidence that had the respondent ceased to be exposed to chrome dust in 1972 his condition would have stabilized and the deterioration observed in 1992 would not have occurred. This evidence was not disputed. At the conclusion of the

hearing the Commissioner upheld the objection that the percentage of disablement was too low and increased it to 15%, but confirmed his earlier decision fixing 28 September 1972 as "the date of the accident".

The respondent appealed in terms of s 25(7)(b)(i) and (iii) of the Act to the Natal Provincial Division against the decision confirming 28 September 1972 as the date of the accident. The appeal was upheld and 1 January 1985 substituted for 28 September 1972 as the date of the commencement of the respondent's disablement and as such, the date of the accident. The judgment of Thirion J (Magid J concurring) has since been reported. See Van Zyl v Workmen's Compensation Commissioner 1995(1) SA 708 (N). With the necessary leave the Commissioner in turn now appeals to this Court.

The main thrust of the argument advanced by counsel on behalf of the Commissioner in this Court was that in terms of s 25(7)(b) of the

Act an appeal lay to a Provincial Division of the Supreme Court from a decision of the Commissioner on limited grounds only; that all findings of fact had to be accepted as final and that the fixing of "the date of the accident" by the Commissioner as 28 September 1972 was a finding of fact which, right or wrong, was not appealable. Accordingly, so it was argued, the court a quo had erred in upsetting the finding of the Commissioner and substituting its own finding.

Section 25(4) deals with the powers of the Commissioner when considering an objection to a decision he may have made in terms of the powers vested in him by various subsections of s 14. The former section reads:

> "(4) After consideration of an objection, the commissioner shall, subject to the approval of not less than one half of the assessors referred to in sub-section (3), (excluding any medical assessors) confirm any decision in respect of which the objection was lodged or give such other decision

as in his opinion is equitable: Provided that if the commissioner and not less than one half of the assessors are unable to reach agreement, the commissioner shall submit the matter in dispute to the Minister."

Section 25(7) makes provision for a limited right of appeal and review in respect of the Commissioner's decision in terms of s 25(4). It provides:

"(7) (a) Any decision given by the commissioner in accordance with the provisions of sub-section (4), or by the Minister under sub-section (6) shall be final and not subject to review or appeal in any court of law on any grounds whatsoever, save review or appeal as provided in this sub-section.

(b) Any person affected by a decision referred to in paragraph (a) may appeal to the provincial or local division of the Supreme Court having jurisdiction on any question as to -

(i) the interpretation of this Act or any other law;
(ii) whether an accident causing the disablement or death of a workman was attributable to his own serious and wilful misconduct;
iii) whetherthe amount of any compensation awarded is so

excessive or so inadequate that the award could not reasonably be made;

or

(iv) the right to additional compensation in terms of section forty-three.

(c) Subject to the provisions of this sub-section, such appeal shall be noted and prosecuted as if it were an appeal from a judgment of a magistrate's court in a civil matter and all rules applicable to such last-mentioned appeal shall mutatis mutandis apply to an appeal under this sub-section.

(d) Any decision referred to in paragraph (a) may be reviewed by any provincial or local division of the Supreme Court having jurisdiction, on the petition of any person affected by such decision, if it appears to the court that the commissioner and assessors or the Minister in giving their decision exceeded their powers, or refused to exercise powers which they were bound to exercise, or exercised their powers in an arbitrary or mala fide or grossly unreasonable manner. Such petition for review shall be lodged within twenty-one days of such decision."

Counsel contended that the decision of the Commissioner in terms of s 25(4) did not involve "the interpretation of the Act or any other law" in terms of s 25(7)(b)(i) and that there was also no basis for

suggesting that it was reviewable in terms of s 25(7)(d).

It is necessary to refer to various provisions of the Act which were relevant for the purpose of the decision the Commissioner was called upon to make when considering the objection. Section 39 and 41 make it clear that in the event of a permanent disablement, whether total or partial, the compensation payable is to be calculated, except where the Act provides otherwise, with reference to the monthly earnings of the workman at the "time of the accident". "Accident" is defined in the definition section as meaning "accident arising out of and in the course of a workman's employment and resulting in a personal injury". What is contemplated in Sections 39 and 41, however, is clearly an accident in the conventional sense, ie some misadventure occurring on a particular day. Where, therefore, the disablement is the consequence of an industrial disease acquired over a period, the reference to the time or date of the accident is

inappropriate. The Act accordingly contains special provisions for fixing the date to which regard is to be had when determining the workman's wages for the purpose of calculating compensation in the event of the disablement occurring in this way.

Section 89 provides that where a workman suffers from a disease and is thereby disabled for employment "the workman shall be entitled to compensation as if such disablement ... had been caused by an accident, and the provisions of this Act shall, subject to the provisions of this Chapter, mutatis mutandis apply ..." Section 91(1), in turn, makes provision for the fixing of a date. It reads:

> "91(1) The commissioner may, in relation to any workman, fix a date which shall be regarded for the purposes of this Chapter as the date of the commencement of the disablement of such workman, and for the purposes of this Act as the date of the accident."

It is necessary to make two observations with regard to the section. The

first is that the "date of the commencement of the disablement" is equated with "the date of the accident" so that the date so fixed will be the date to which reference is to be had when determining the workman's wages for the purpose of calculating the compensation to which he is entitled. The second is that the section does not require the Commissioner to make a finding of fact as to the date of the commencement of the disablement. It affords him a discretion to fix a date "which shall be regarded" as the date of the commencement of the disablement. As was pointed out by Thirion J in the court a quo at 712 H, the obvious reason for the section being cast in this way is the difficulty that would be experienced in ascertaining objectively the date of the commencement of the disablement.

When regard is had to the reasons for the decision furnished by the Commissioner it becomes apparent that he did not appreciate that he was required to exercise a discretion. This much is clear from the

following passage:

> "It is clear that Mr van Zyl's condition started to deteriorate from a certain date and the only date of commencement that was put before the tribunal was 28 September 1972, the date the applicant required medical treatment for his nasal septal condition. In view of the above the tribunal has concurred that the Commissioner's decision was correct to determine the date of accident as 28 September 1972 ..."

There was no need for "a date of commencement" as such to be established in evidence. Nor would it have been practicable to do so. What the Commissioner was required by s 91(1) to do was to exercise a discretion in fixing a date which was to be regarded as the commencement of the disablement in the light of all the facts placed before him. His failure to do so necessarily involved a misunderstanding of the provisions of s 91(1). That alone, I think, entitled the respondent to appeal in terms of s 25(7)(b)(i) of the Act.

In order to fix a date the Commissioner would in any event

have had to give a meaning to and interpret the phrase "commencement of the disablement" in relation to the facts of the case which, it so happened, were common cause. There could accordingly have been no question of the Commissioner (and his assessors) simply making a finding of fact unrelated to any question involving the interpretation of the Act. (Cf Human v Workmen's Compensation Commissioner 1956(2) SA 461 (T); Grobbelaar v Workmen's Compensation Commissioner 1978(3) SA 62 (T).) Indeed, given the facts which were common cause and the manner in which I think the phrase "commencement of the disablement" must be construed in such circumstances, it is inconceivable that the Commissioner could have fixed the date at 28 September 1972 had he correctly interpreted the phrase.

It follows that in my view an appeal in relation to the fixing of a date in terms of s 91(1) lay to the Provincial Division and there is no merit in the contention to the contrary.

I turn now to the meaning of the phrase "commencement of the disablement" in the context of the facts of the present case. What must be emphasized is that this was not a case in which the deterioration in the respondent's condition between 1972 and 1992 was merely a consequence of his exposure to chrome dust prior to 1972. The cause of the deterioration was his continued exposure to the dust on a daily basis. As Dr Colvin expressed it, "the accident didn't stop happening". To construe the phrase as requiring a date to be fixed at some early stage, eg when there was a first manifestation of a disablement, involves therefore ignoring the further injury and consequent disablement which occurred subsequently. The consequence of such a construction in a case like the present is that for the purpose of determining compensation the workman's salary is pegged at some early date while for the purpose of determining the percentage of his disablement regard is had to its extent on some subsequent date when

he ceases to be subjected to the noxious environment. Indeed, it is clear that this is what happened in the present case. For the purpose of calculating compensation regard was had to the respondent's monthly earnings as at 28 September 1972 while the percentage of his disablement was determined with reference to his condition in 1992. Such a result, I think, is untenable.

The Act must be interpreted on the basis that the Legislature did not intend compensation payable to a workman for disablement to be calculated in a manner which is unfair and unreasonable. In Davis v Workmen's Compensation Commissioner 1995(3) SA 689 (C) Friedman JP expressed the approach to be adopted when interpreting the Act as follows at 694 F - G:

> "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."

Section 31(1) bis of the Act provides:

"Whenever a workman has received compensation for permanent disablement under this Act and subsequently meets with an accident resulting in further permanent disablement in respect of which compensation is payable under this Act, the commissioner may, if the workman shows, to the satisfaction of the commissioner, that it would be to his advantage to do so, calculate his compensation in respect of the further permanent disablement on the earnings which he was receiving when he met with any previous accident in respect of which compensation was paid."

This section not only recognises that a workman who suffers a permanent disablement may in a subsequent accident suffer further permanent disablement for which he is entitled to be compensated but, more importantly, evinces an intention on the part of the Legislature to favour the workman when it comes to the fixing of a date for the purpose of determining his compensation in respect of the second accident. In a case such as the present the workman's disablement is really the consequence of

what in effect amounts to a series of "accidents", to use the terminology of the Act. It is inconceivable, I think, that in these circumstances the Legislature could have intended the workman to be prejudiced by having his compensation fixed with reference to his earnings at a stage when the disablement first manifested itself and without regard to his increased earnings at the time of the later "accidents".

The conclusion to which the court a quo came was that the difficulty arising in a case such as the present was to be resolved by regarding the additional disablement caused by the continued exposure as "a new accident". After referring to s 31(1) bis Thirion J expressed himself as follows at 714 H - I:

> "By the same token where, as has happened in the present case, the initial disablement has been caused by an industrial disease and the degree of such disablement is afterwards increased in consequence of further exposure to the harmful substance which initially caused the disease, with the resultant disablement, such further exposure and aggravation of the

> disease with the resultant additional disablement should be seen as a new accident, giving rise to a new claim for compensation."

In my view such an approach is consistent with the intention of the Legislature.

As to the implementation of such an approach, the learned judge observed at 714 I:

> "It would, of course, be impracticable to make a separate award for each aggravation of the disease or each such 'accident'."

This is obviously so. But s 91(1) requires the Commissioner to do no more than fix a date "which shall be regarded" as the commencement of the disablement. However, in doing so he must bear in mind that in a case such as the present the disablement arises from what can be regarded as a series of "accidents", the latest of which would occur the day on which the workman ceased to be exposed to the noxious dust. With each notional

"accident" there would be a commencement of additional disablement and it is in the light of this that the reference to "the commencement of the disablement" in s 91(1) must be understood when exercising the discretion conferred in terms of the section.

As previously indicated the Commissioner did not construe s 91(1) in this way. On the contrary he purported simply to make a factual finding. The court a quo substituted 1 January 1985 for the date fixed by the Commissioner. It did so on the basis that on the later date the respondent was promoted to the position of plant superintendent and ceased to be constantly exposed to chrome dust. I cannot find fault with its decision to fix 1 January 1985 as the date of commencement of the respondent's disablement for the purposes of s 91(1) of the Act.

The appeal is dismissed with costs.

D G SCOTT

BOTHA JA
SMALBERGER JA - Concur
VIVIER JA
PLEWMAN AJA