

/bh

IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 25579/05  
JUDGEMENT DELIVERED:

IN THE MATTER BETWEEN:

JOHN MOLEFE	APPLICANT
AND	
THE COMPENSATION COMMISSIONER	FIRST RESPONDENT
THE DIRECTOR OF LABOUR AND ANOTHER	SECOND RESPONDENT

---

JUDGMENT

---

SERITI, J

1. INTRODUCTION

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

25/9/2007

DATE

SIGNATURE

This matter came to court by way of a motion.

In the notice of Motion, the applicant is seeking an order:

1. Declaring that

- 1.1 The respondent's practice of limiting compensation for temporary total disablement in terms of section 47 of the Compensation for Occupational Injuries and Diseases Act

130 of 1993, to such periods as the claimant is receiving active medical treatment is unlawful.

1.2 The respondents failure to make monthly periodical payment of compensation for temporary total disablement to the applicant is unlawful.

2. Directing the respondents to forthwith implement such measures as are necessary to apply the terms of prayers 1.1 and 1.2 to all other claimants who qualify for compensation for temporary total disability.

3. Directing the respondent to pay costs of this application.

2. FOUNDING AFFIDAVIT

It was attested to by Mr John Molefe. He alleges that he is an adult male and brings this application in his private interest and as a member of and in the interest of a group or class of persons who

qualify for temporary disablement in terms of the compensation for Occupational Injuries and Disease Act no 130 of 1993. (“the COIDA”).

The first respondent is the Compensation Commissioner, who is cited as the delegate of the Director-General of the Department of Labour, who in terms of section 3 of “COIDA” has delegated to the first respondent the functions relating to the administration of the compensation of the compensation scheme in terms of “COIDA”.

The second respondent is the Director General of Labour, who is cited as the officer responsible for the payment and overall administration of the compensation scheme in terms of “COIDA”.

He was injured in an accident during the course and scope of his employment, and he can no longer work. He became entitled to compensation for both temporary and permanent disability. After a long delay, he was compensated by the respondents for permanent disability. Prior to being compensated for permanent disability, the respondents compensated him for temporary total disability for a brief period during which he was receiving

“active medical treatment”. He further alleges that this limitation of his right to compensation for temporary total disability is not lawful.

The second respondent is liable to pay compensation for temporary total disablement in terms of section 47(3) of “COIDA”. The said compensation is payable monthly in terms of section 47(4). In terms of section 48(1), it is payable until the termination of the disability or the employee resumes employment or compensation for permanent disability is awarded.

On 15 February 1996, whilst on duty he was shot on the upper right arm during an attempted hijacking of his employer’s truck he was driving. After the shooting, he was taken to hospital for treatment. He was discharged from hospital on 18 April 1996.

Whilst in hospital, he telephoned his employer. His employer paid his wife some money during the period of his hospitalisation.

The incident and the operations he underwent at the hospital left his right arm deformed.

Later he returned to work but he could not drive a truck because of his injury. He was given other types of work but he did not manage these other duties because of his injuries. He later left his employment and he was not paid for the few days he worked.

At a later stage, he lodged a claim with the first respondent. His claim was rejected because of the incorrect information his employer gave to the first respondent. When rejecting his claim, the first respondent accepted, without investigation, his employer's version that he was not injured on duty.

He was not paid compensation for temporary total disability monthly as his claim was unduly rejected.

He attempted to find employment without any success.

Later, he found out that his claim was rejected by the first respondent on 3 April 1997.

In 2001 he approached his current attorneys of record. They referred him to an orthopaedic surgeon, obtained a medical report and thereafter

addressed a letter to the first respondent. An affidavit about how the incident occurred was obtained from him and it was also sent to the first respondent.

On 25 September and 19 October 2001 letters were sent to the first respondent, requesting her to expedite the processing of his claim, as he is unable to work and he is destitute.

In a letter dated 15 October 2001 the first respondent accepted liability for compensating him. The first respondent also approved that he can undergo an operation as suggested by his orthopaedic surgeon.

At that time, the information before the first respondent indicated that he was totally disabled for a period of more than 24 months.

He was entitled to compensation for temporary total disability for the maximum period permissible in terms of section 47(4) of "COIDA".

He underwent an operation and on 20 December 2002, his orthopaedic surgeon sent a report to the first respondent indicating that there is some improvement in his condition but he remains permanently disabled.

His legal representatives wrote about two letters to the first respondent in an attempt to elicit a response from the first respondent regarding his claim.

In a letter dated 16 July 2005 first respondent requested further medical reports which were later sent to the first respondent after he was examined by his orthopaedic surgeon.

His legal advisors sent several letters to the first respondent requesting interim payments.

In a letter dated 20 August 2002, the first respondent replied and stated *inter alia*:

“I have to advise you that compensation in respect of temporary total disablement can only be considered and approved for the periods that an employee was off duty and were receiving active medical treatment. No compensation is payable for the periods that such treatment was not administered.”

He further alleges that after receiving various medical reports the first respondent, in a letter dated 10 September 2002 advised him that compensation for temporary total disablement was approved for the period 2

November 2001 until 2 January 2002, and that compensation for permanent disability would only be received once his orthopaedic surgeon has removed the pins that were inserted in his arm.

After his legal advisors wrote the first respondent several letters, in a letter dated 25 June 2003, the first respondent made him an award compensating him for permanent disability in an amount of R14 756-70. No compensation for temporary total disablement was made, except for the two months immediately after he was operated upon.

He was not compensated for the loss of earnings in the interim pending the payment of compensation for permanent disability.

He further alleges that the failure by first respondent to pay periodical payments and the limitation of compensation for temporary total disability to periods when the claimant is receiving active medical treatment are general policies that affect all who qualify for compensation for temporary total disablement. It is in the interest of justice that the orders in this case be applicable to all other people who are in a similar position.

The same issues of fact and law would arise if other claimants raise these issues in separate legal proceedings.

He further alleges that there is no possible prejudice to the other claimants and potential claimants to determine these questions for the class, and no notice to such other claimants is necessary as this application seeks to do no more than require the respondents to properly apply the "COIDA".

3. ANSWERING AFFIDAVIT

It was attested to by Mr SJP Kruger, Manager, Compensation Claims, Office of the Compensation Commissioner.

He alleges that they are prepared to settle the applicant's matter, on the terms contained in a letter addressed to applicant's legal advisors, which letter is dated 13 April 2006.

The said letter makes an offer of a certain amount and further states:

"If you are aware of any other cases that are similar to that of Mr Molefe, the applicant in this matter, you should disclose same to the

compensation commissioner so that he will be in a position to process them”

He further alleges that the applicant’s accident occurred during February 1996, and during that period, the Compensation for Occupational Injuries Act of 1993 was applicable.

The office of the Compensation Commissioner does not compensate for symptoms of disablement but seeks to address the cause of the symptoms. It is upon the foregoing basis that active medical treatment has to play a major role in this regard aimed at reducing disablement and not address the symptomatic cause of disablement.

On the papers, the applicant has failed to make a case for a class action, nor that he is acting in the public interest.

4. APPLICANT’S REPLYING AFFIDAVIT

He alleges that during a meeting between Acting Commissioner and her advisors on the one hand and his legal advisors on the other hand, the respondent accepted that the policy of excluding claimants from

temporary total disability unless undergoing active medical treatment was unlawful.

There are a big number of workers who were prejudiced by the manner in which the respondents interpret their function to compensate workers for temporary total or partial disability. Most of the said workers do not have the ability to enforce their rights, nor to compel the respondents to compensate them fairly through litigation.

Respondents failed to properly deal with his allegations that their policy to limit temporary total disability to periods when workers are receiving active medical treatment is illegal. Respondents are still continuing with their illegal policy which policy prejudices the workers.

The proposed settlement offer of the respondents does not deal with the illegal policy of the respondents.

He further alleges that his case is, *inter alia*, that the respondents' policy, which is incorrect, makes the payment of compensation dependent upon active steps to address the medical conditions, even where no active steps can be taken. There is no basis in logic, fact or law for the respondent to contend that

“active medical treatment has to play a major role” in determining compensation for disability.

The Legal Resources Centre, his current legal advisors are not in a position to identify claimants affected by the incorrect policy of the respondents and on the other hand, the respondents because of the records they keep, are able to identify the said claimants.

In addition to acting on his behalf in this matter, he is also acting in the public interest. There is no prejudice to the respondents if he is permitted to act in the public interest as that is a convenient manner of dealing with the incorrect manner of the respondents of dealing with temporary total disablement compensation.

5. FINDINGS

In his Heads of Argument and during oral argument, the respondents counsel submitted that the second respondent is enjoined by the relevant provisions to take into account the issue of whether medical aid reduces an employee’s disablement if the employee receives further medical aid. He further submitted that the respondents are entitled to consider

receipt of active medical treatment prior to making the payment for temporary total disablement.

Section 47 of the Compensation for Occupational Injuries and Diseases Act no 130 of 1993 makes provision for compensation for temporary total or partial disablement. Sub-section 5(a) and (b) thereof reads as follows:

“(a) Periodical payments shall take place for so long as the temporary total disablement continues, but not for a period exceeding 12 months.

(a) If such disablement continues for longer than 12 months the commissioner may order the continuation of those payments for such further period as he may determine.”

Section 48 stipulates that: “Expiry of compensation for temporary total or partial disablement –

(1) The right to compensation for temporary total or partial disablement shall expire –

- (a) upon the termination of such disablement or if the employee resumes the work upon which he was employed at the time of the accident or occupational disease, or resumes any other work at the same or greater earnings;
- (b) if the employee is awarded compensation for permanent disablement.”

Section 39(2) of the Constitution of the Republic of South Africa Act, 1996 provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Section 27(1)(c) of the Constitution *supra*, stipulates that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

The Compensation for Occupational Injuries and Diseases Act *supra*, is a social legislation and according to section 39(2) of the Constitution, it must be interpreted in such a manner that the said interpretation promotes the spirit,

purport and objects of the social security right as enshrined in section 27(1)© of the Constitution.

In the definition clause “disablement” is defined as disablement for employment, or permanent injury or serious disfigurement, and “periodical payment” is defined as periodical payment of compensation in respect of temporary disablement.

The purpose of the Compensation for Occupational Injuries and Diseases Act is to compensate workers during their period of temporary total disablement and in appropriate cases for permanent total disablement.

I could not find any provision of the Act which entitles the respondents to restrict the rights of workers to receive compensation during their temporary total disablement in the manner in which the respondents restricts such a right.

As enjoined by the Constitution, the interpretation of the said Act must be in such a way that it enhances the rights of workers to social security. The limitation introduced by the respondents undermines the rights of the workers to social security.

The submissions made by the respondents' counsel mentioned above cannot be sustained.

The compensation for total temporary disablement should be paid by the respondents, periodically, for as long as the disablement continues, but subject to the time limit provided for in section 47(a) and (b) of the Compensation for Occupational Injuries and Diseases Act supra.

In the context of this Act, my view is that the said periodic payments, as far as is possible, should be made at least monthly from the date the respondents accept liability. The above view is educated by the fact that the purpose of the Act is to compensate workers who are no longer earning an income from their employers because of injuries or diseases mentioned in the Act.

In the Heads of Argument, the respondents counsel submitted that the respondents have requested the Legal Resources Centre to provide details of other cases that are similar to those of the applicant, as the respondents are willing to process and deal with such cases with a view to address the so-called "class action". He further submitted that the applicant has failed to demonstrate that he is entitled to act on behalf of other workers.

Section 38 of the Constitution reads as follows:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights. The person who may approach a court are:

- (a) anyone acting in their own interest ...
- (b) anyone acting in the public interest ...

In *Nqoxuza v Permanent Secretary Department of Welfare, E Cape* 2001 (2) SA 609 ECDE at 618J-619C Froneman J said:

“Section 38 is new and introduces far-reaching changes to our common law of standing ... there is no cogent reason for restrictive interpretation of the provision of the section because of the narrow content given to standing under the common law (compare *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 894 (CC) 1996 (1) BCLR 1).

Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach.”

The applicant in this case, is acting in his own interest.

It is common cause between the parties that the respondents has utilised the same method of paying compensations for temporary total disablement, which method is incorrect, in as for as the applicant and other thousands of workers are concerned. It is safe to assume that the respondents are still using the same method.

In the papers before court, the applicant alleges that, unless he is allowed to act in the public interest, the workers who are entitled to receive compensation for temporary total disablement are affected negatively and will continue to be affected negatively by the wrong interpretations of the legal position by the respondents. There is no legal aid available to the majority of such workers to properly enforce their rights to social security.

The submission by respondents’ counsel that the applicant has failed to demonstrate that he is entitled to act in the public interest cannot be sustained.

During oral argument, the applicants counsel submitted that if prayer 2 of their notice of motion is restricted to matters finalised but not yet prescribed that will be sufficient for their purposes.

I am satisfied that the applicant has made a case for prayers contained in the notice of motion.

The court therefore makes the following order:

1. The respondents' practice of limiting compensation for temporary total disablement in terms of section 47 of the Compensation for Occupation Injuries and Diseases Act 130 of 1993, to such periods as the claimant is "receiving active medical treatment" is unlawful.
2. The respondents' failure to make monthly periodical payments of compensation for temporary total disablement to the applicant is unlawful.
3. The respondents should forthwith implement such measures as are necessary to apply the terms of prayers 1 and 2 above to all

other claimants who qualify for compensation for temporary total disability whose claims have not yet prescribed, even if the said claims have been finalised.

4. The respondents are ordered to pay the costs of the applicant on a party and party scale.

---

W L SERITI  
JUDGE OF THE HIGH COURT