FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 072/2005

PARTIES: COLIN URQUHART
AND
COMPENSATION COMMISIONER

REFERENCE NUMBERS –

- Registrar: **CA 272 04**

DATE HEARD: 26TH JUNE 2005
DATE DELIVERED: 9TH SEPTEMBER 2005

JUDGE(S): JONES and ERASMUS JJ

LEGAL REPRESENTATIVES –
Appearances:

- for the State/Applicant(s)Appellant(s): **A BEYLEVELD**
- for the accused/respondent(s): **S RUGUNANAN**

Instructing attorneys:

- Applicant(s)/Appellant(s): **NEVILLE BORMAN & BOTHA**
- Respondent(s): **WHITESIDES ATTORNEY'S**

Reportable

In the High Court of South Africa
(Eastern Cape Division)

Case No CA 272/2004
Delivered:

In the matter between

COLIN URQUHART Appellant

and

THE COMPENSATION COMMISSIONER Respondent

SUMMARY: Compensation under the Compensation for Occupational Injuries Act No 130 of 1993 – post traumatic stress disorder following upon a series of stress-inducing events – whether or not an accident or occupational disease within the meaning of the Act.

JUDGMENT

JONES J:

[1] The appellant was a press photographer for a daily newspaper. As a result of witnessing and photographing a number of stress-inducing events over many years he suffered a breakdown on 28 May 1995. A psychiatrist, Dr Crafford, to whom he was referred by his general practitioner, diagnosed post traumatic stress disorder which precluded him from continuing in his employment. In due course he lodged a claim for compensation in terms of the Compensation for Occupational Injuries Act No 130 of 1993. On 17 September 2002 the compensation commissioner rejected his claim. The commissioner's reasons are on record. He was not satisfied that the condition

for which the appellant received medical treatment was the result of an accident arising out of and in the course of his employment. He considered furthermore that the appellant was not injured in an accident as contemplated by the Act.

[2] The appellant then lodged an objection to the rejection of his claim in terms of section 91(1) of the Act. Some preliminary skirmishing followed, which appears to have relevance only to the special costs order referred to later, and then, on 17 October 2003, a presiding officer and two assessors, advised by a medical assessor, considered his objection at a hearing held in terms of section 91(2). The court unanimously dismissed the objection in terms of section 91(3)(a) on the ground (a) that the appellant's condition – post traumatic stress disorder – was not caused by an accident as contemplated by the Act, and (b) that it was not an occupational disease within the meaning of the Act. He now appeals in terms of section 91(5)(a). That section provides that any person affected by a decision referred to in section 91(3)(a) may appeal to any provincial or local division of the High Court having jurisdiction against a decision on certain specified grounds, one involving the interpretation of the Act. In terms of section 91(5)(b), 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.

[3] The grounds of appeal are directed at the meaning given by the court *a quo* to the terms 'accident', 'occupational injury' and 'occupational disease' as used in the Act. They are that the presiding officer and his assessors erred in upholding the compensation commissioner's rejection of the appellant's claim, and, in doing so, they erred

- 'in limiting the claim for compensation under the Act to a single event;
- in not finding that the appellant, as a result of cumulative stress related incidents during the course and scope of his employment, had an accident as defined in terms of the Compensation for Occupational Injuries and Diseases Act, No 130 0f 1993;
- accordingly, in not upholding the appellant's objection against the compensation commissioner's decision of 17 September 2002;
- accordingly, in not finding . . . that as a result of an accident and concomitant disability [the appellant] was entitled to benefits provided for and prescribed by the Act;
- in addition, in not finding that the appellant, pursuant to the provisions of section 65(1) (and particularly 65(1)(b) of the Act), was entitled to compensation as a result of the appellant having contracted an occupational disease, alternatively . . . a disease other than an occupational disease where such disease arose out of and in the course of the appellant's employment'.

[4] The appellant was an employee within the meaning of the Act. Section 22(1) provides that if an employee meets with an accident resulting in his disablement he or she shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act. 'Accident' is defined in section 1 as 'an accident arising out of and in the course of an employee's

employment and resulting in a personal injury, illness or the death of the employee'. The benefits to which section 22 entitles him are, in terms of Chapter IV, compensation for an occupational injury which is defined as 'a personal injury sustained as a result of an accident'.

[5] The other kind of compensation for which the Act provides is compensation for 'an occupational disease', which means 'any disease contemplated in section 65(1)(a) or (b)'. Section 65(1)(a) refers to the diseases in the first part of schedule 3, which does not include post traumatic stress disorder and therefore does not apply. In terms of section 65(1)(b) an employee is entitled to compensation as provided for in the Act if he or she has contracted a disease other than a disease contemplated in section 65(1)(a) and such disease has arisen out of and in the course of his or her employment. On the face of it, it may be thought to apply to cases of post traumatic stress disorder, but the court *a quo* held that it did not.

[6] The case presented on behalf of the appellant was that he suffered from chronic post traumatic stress disorder complicated by a depressive mood disorder which manifested acutely on 28 or 29 May 1995 when he broke down and could not continue in his employment. The only evidence was that of the appellant and the psychiatrist who treated him, Dr Crafford. Their evidence proved on a balance of probability that during his career as a press photographer he was exposed to a large and varied number of highly stressful

incidents over many years, which included horrible scenes of death, violence, social unrest and political riot, and conflict between citizens and armed police. He has been attacked physically. His presence at occasions of crowd violence in the townships of Port Elizabeth and its surrounds has at times exposed him to considerable personal danger. He published photographs of police brutality which brought him into conflict with the police authorities and resulted in threats from certain quarters in the police with the use, and indeed abuse, of their emergency powers to his detriment and that of his wife and children. After his breakdown he was given psychiatric treatment by Dr Crafford, and psychotherapy by a clinical psychologist, Mr Meyer. Dr Crafford diagnosed that he had developed a post traumatic stress disorder which arose directly out of his employment, which manifested acutely on 28 May 2002, which has now become chronic, and which precludes his further employment. This condition was evidenced by fear, agoraphobia, depression, and flashbacks of the various stressful events which led to his condition and which arouse severe emotional instability and distress. This was indeed evident to the court when he gave evidence about some of these events.

[7] The last major stressful incident prior to the breakdown was on 3 June 1994 when the appellant was attacked and assaulted at the New Law Courts in Port Elizabeth while photographing a fraud suspect outside the court building. The appellant said that after this he lost his nerve completely. In Dr Crafford's view this was 'the precipitating event, the straw that broke the

camel's back'. In summary, Dr Crafford's opinion was that this incident, on top of the many previous stressful experiences, gave rise to the post traumatic stress disorder, though it did not manifest itself in an acute form until May 1995. Thus for example, his cross-examination:

> 'Dr Crafford, how would you classify his condition, is it a cumulative effect or is it just one incident? --- I think it is cumulative. I think the last incident that I have mentioned outside the New Law Courts was the final, the final stressor, but I think having been in four days of battle in the northern areas [of Port Elizabeth], certainly I am sure that that had also contributed and raised his level [of] activation, even if he did not then develop post traumatic stress disorder at that stage, raised his level of activation to a degree and sensitised him to the later onset of post traumatic stress disorder.'

According to Dr Crafford, he was tense and extremely irritable during the intervening period between the incident at the New Law Courts and May 1995. He would lose his temper. He became depressed. He worried a lot about his work, wanted to stand down from his job, placed his wife and his marriage under strain, and lost sexual desire. The evidence is that the appellant found things particularly stressful on the weekend of Friday 26, Saturday 27 and Sunday 28 May 1995. He was on duty that weekend and was busy. At about that time he was covering an ugly, well-publicized murder of a teenage girl who had been killed by her teenage sister. He found the case disturbing. He had also been busy with the visit of Queen Elizabeth of Great Britain to Port Elizabeth. On the Friday night he attended a world cup rugby match when the lights went out. On Saturday he photographed a mock helicopter rescue, but by that time he was beginning to go to pieces. He could

not account for jobs which he had apparently not attended to, and could not remember what he had done. On Sunday he had to be sent home. On the Monday morning he went to work but was quite incapable. He became reduced to tears for the first time in 20 years, his wife was called in, and he was referred for medical attention. He was then put into hospital. He has not been able to return to work since.

[8] There is no doubt on the evidence that the appellant's symptoms are genuine. Dr Crafford's formal diagnosis was that the appellant suffers from post traumatic stress disorder, a panic disorder with agoraphobia (in remission), and a recurrent major depressive disorder (in remission). He remains severely impaired in occupational and stress areas of functioning, significantly at family and social areas, and he will never again be fit for gainful employment. The evidence shows beyond question that the disorder is work related.

[9] The commissioner rejected his claim, and this was upheld by the court *a quo*. It does not appear that the claim was rejected because the appellant did not suffer from post traumatic stress disorder, or because his condition did not arise out of his employment. The claim was rejected because the appellant was not able to show that the cause of the post traumatic stress disorder was a single stressful event arising out of his employment which amounted to an accident within the meaning of the Act. In his reasons for the

findings of the court *a quo* the presiding officer said:

> 2.6 As far as the cause for the condition is concerned, Dr Crafford was not able to limit it to a single event but was only prepared to state that it was the result of cumulative incidents. As far as the murder incident is concerned Dr Crafford did not make any specific remark to that effect except that he was aware of it because he was treating one of the family members. On the assault case, he opined that it did not precipitate the onset of PTSD. His opinion was supported [by] the objector under cross examination when he stated that immediately after this incident he started to avoid people, yet continued to do his work for almost a year. Dr Crafford also stated that the employee must have already had symptoms of PTSD of that stage.
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> 2.7 The objector's own evidence as to his condition confirmed that he was suffering from flashbacks (recollections) but that they are not of one specific incident. His flashbacks are vivid and in detail.
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> 2.8 Post traumatic Stress Disorder is a mental disorder following exposure to an extreme, traumatic event or stressor. It is therefore the result of trauma to which a person is subjected and it therefore has a sudden and unforeseen element to it. The Diagnostic and Statistical Manual or [of] Mental Disorders, also referred to as the DSM IV, also refers to life-threatening situations as a cause of PTSD. The onset of symptoms of PTSD is within one month after the traumatic event or stressor.
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> 2.9 The Act provides for two types of claims, i.e. an occupational injury or an occupational disease. As far as occupational injuries are concerned, the Act defines an "accident" as "an accident arising out of and in the course of employment and resulting in personal injury, illness or death of the employee". An occupational disease is defined as "any disease contemplated in section 65(19)(a) or (b).
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> PTSD is regarded as an "accident" for the purposes of the Act because it is the result of a traumatic event of which time, date and place, the basic elements of an accident that distinguishes it from occupational disease, are present. As with any physical injury there is

a direct casual [causal] link between the incident and the injury or illness. In this case the objector did not prove to the court that there was a direct link between his condition and a specific incident.

2.10 It was the unanimous decision of the court that the objection against the Compensation Commissioner's decision of 17 September 2002 did not succeed. The court made a split decision as far as costs were concerned. No order was made as to the hearing on 17 October 2003. An order for wasted costs for the postponement of 23 July 2003 was made against the attorneys for the objector.

[10] I have considerable difficulty with these reasons. In the first place the description of post traumatic stress disorder contained in paragraph 2.8 does not appear anywhere in the evidence. I assume that the court was really quoting portion of the contents of the Diagnostic and Statistical Manual for Mental Disorders IV because it mentions that work in paragraph 2.8. But it did so without seeking a proper medical opinion of its meaning and acceptability from Dr Crafford. A court is not entitled to refer to material of this nature unless and until it becomes part of the evidence, usually by agreement or by adoption through the evidence of an expert. Otherwise, the parties are treated unfairly because they do not know what material the court may possibly refer to and use, or whether it is properly understood, and they do not have an opportunity to challenge it. As it is, Dr Crafford's uncontradicted opinion was that the appellant suffers from post traumatic stress disorder as defined in the Diagnostic and Statistical Manual for Mental Disorders IV. He referred to DSM IV in his report and evidence, without however quoting or being referred to the definition quoted by the presiding officer in his reasons. That DSM IV

contains definitions and criteria for post traumatic stress disorder other than the one referred to by the court *a quo* (if in fact it comes from that source) is apparent from the as yet unreported judgment of the Supreme Court of Appeal in *Media 24 Ltd and Samuels* v *Grobler* (1 June 2005 Case No 301/04) where a different definition of post traumatic stress disorder, quoted by Farlam JA in paragraph 56, had been accepted by expert witnesses, which made it admissible evidence in that case (though not, of course, authority in this). The extract from the *Media 24 Ltd judgment* illustrates the serious prejudicial effect of the irregularity committed by the court *a quo*. There is, furthermore, no evidence of what was in the eyes of the court *a quo* an important diagnostic feature which disqualified the appellant, namely that the onset of symptoms of post traumatic stress disorder must be shown to have been within one month of the traumatic event or stressor. Here there is no expert evidence of the onset of symptoms *within a month* of the New Law Courts incident, and no evidence that this is a medical requirement for a diagnosis. On the contrary, Dr Crafford made his diagnosis without reference to a time limit. The result is that the appellant's objection was rejected by reason of material which was not properly before the court and which should not have been considered by it.

[11] Another serious misdirection is the finding of the court *a quo* that post traumatic stress disorder

> 'is regarded as an accident and not an occupational disease for the purposes of the Act because it is the result of a traumatic event of

> which time, date and place, the basic elements of an accident that distinguished it from an occupational disease, are present'.

While it is quite proper to interpret the Act without reference to evidence, a court cannot properly and without evidence use an arbitrarily chosen medical definition of post traumatic stress disorder to hold that it is not an occupational disease within the meaning of the Act. There was no evidence whatever to justify a finding that, medically speaking, post traumatic stress disorder cannot amount to an occupational disease. The prejudicial effect of such a finding without evidence is once again illustrated by the *Media 24 Ltd* judgment where Farlam JA, in an *obiter dictum, gives* expression to contrary thinking of high persuasive value on the point (paragraph 77):

> 'It may well be that employees who contract a psychiatric disorder as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim compensation under section 65 [i.e. for an occupational disease] but those are not the facts of this case and I need express no opinion thereon'.

[12] It is quite clear from paragraph 2.9 of the reasons that the court required proof of a direct link between the appellant's condition and a specific event. It held that there was none. In this, I believe it was wrong on the facts and wrong on the law.

[13] In the first place, there is acceptable evidence that although the condition was brought about by the cumulative effect of a number of stressful events which rendered him vulnerable and susceptible to post traumatic

stress disorder and which therefore contributed to his condition, the precipitating cause of his condition was the New Law Courts incident. This was a specific event. The time lapse between the condition having been caused and it first manifesting itself in an acute form nearly a year later does not on the evidence detract from this conclusion. Dr Crafford describes the symptoms which the appellant displayed in between and he was satisfied that the appellant suffered from post traumatic stress disorder before something sparked off the final breakdown in May 1995.

[14] The law has long recognized that for purposes of compensation or damages a psychiatric disorder or psychological trauma is as much a personal injury as a cracked skull, and there is nothing in the definitions of ‘accident’ and ‘occupational injury’ in the Act to indicate that this legislation has a contrary intention. Indeed, the definitions in the Act are not so much definitions as a broad classification to make provision for different kinds of compensation for different kinds of disorder. This is quite apparent from the wording of the definitions in section 1 which say nothing about the nature of the accident or the occupational injury envisaged other than to confine them to an event within the sphere of employment. The section says that 'accident' means ‘an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee’ and 'occupational injury' means a personal injury sustained as a result of an accident’. Section 22 says that if an employee meets with an

accident resulting in his disablement he shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in the Act. The benefit provided for and prescribed in the Act is the right to compensation for personal injuries in terms of chapter IV.

[15] The second paragraph of paragraph 2.9 of the court *a quo*'s reasons emphasises that 'an accident' for the purposes of the Act 'is the result of a traumatic event of which time, date and place, the basic elements of an accident that distinguishes it from occupational disease, are present'. The conclusion in that paragraph was that

> As with any physical injury there is a direct casual [causal] link between the incident and the injury or illness. In this case the objector did not prove to the court that there was a direct link between his condition and a specific incident.

This approach is no doubt appropriate in the conventional kind of case, particularly where there is physical injury following a specific accident. But in my view the court *a quo* incorrectly interpreted the Act to require that as an inflexible rule there must in every case be proof that the condition for which compensation is sought is related to a specific event in the same way as this can be done in most cases of physical injury. This rigidity is not supported by the wording of the Act, or by the ordinary dictionary meaning of the word 'accident'[1], or by the spirit and purpose of the Act. A more flexible

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1 The SOED (1955) gives the primary meaning of accident as '[a]nything that happens; an event; esp. an unforeseen contingency; a disaster'; '[c]hance, fortune'. The COED (2001) gives the following: 'an unfortunate incident that happens unexpectedly and unintentionally;

interpretation is not only possible but appropriate. To borrow the words of Scott JA who was called upon to interpret the word ‘accident’ in same Act but in an entirely different context:[2]

> ‘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’.

[16] The concept of a series of events amounting to an accident within the meaning of the Act is not new. In *Nicosia* v *Workmen’s Compensation Commissioner*[3] 1954 (3) SA 987 (T) the court interpreted the word ‘accident’ in much the same way in the case of a physical injury following upon a workman lifting a heavy object in the course of his employment. In the course of his judgment Roper J said:

> ' Mr. *Kirk-Cohen*, for the respondent, has contended that the evidence shows nothing more than that the appellant was suffering from a disease in the form of a pre-existing weak condition of the displaced disc and that what took place is nothing but a manifestation of the disease. He referred to certain decisions which show that where that is the position then what occurred to the workman could not be regarded as an accident within the terms of the Statute. It does not seem to me that that line of argument is open to the respondent in view of the finding, to which I have already referred, that the symptom of displacement was causally connected with the workman's actions. This case seems to be in no way different in its essentials from a number of cases which have come up in the English Courts, and which were quoted to us in argument by Mr. Schwartz, for the appellant, in which the facts have been

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something that happens by chance or without apparent cause’.

2 *Workmen’s Compensation Commissioner* v *Van Zyl* 1993 (3) SA 757 (AD) 764 J – 765 A. While the case is clearly distinguishable, the approach of the learned judge of appeal to the interpretation of the Act should be followed. And see the judgment of the court *a quo* reported at 1995 (1) SA 708 (N).

3 1954 (3) SA 987 (T) per Roper J, 900 H – 901 C

> that a workman has been suffering from a hernia, or a predisposition to a hernia, or from a heart condition such as an aneurism in the heart or one of the organs connected with the heart and serious injury or even death has resulted from his having carried out an ordinary movement in the course of his employment. At one time the view was taken in England that in such cases the injury or death could not be said to be due to an accident in terms of the Statute, but that view has long been abandoned by the Courts.

The learned judge thereafter discusses a number of English authorities and then says:[4]

> Although there are very few decisions under the Workmen's Compensation Acts in our Courts this very point, or a point similar to it, came up for decision in *Briesch* v *Geduld Proprietary Mines, Ltd.,* 1911 T.P.D. 707. In that case SMITH, J., referred to the case of *Fenton* v *Thorley*, and in particular to the remarks of LORD LINDLEY in that case. These remarks are as follows:
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> > "Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them."
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> The learned Judge points out, after referring to other English decisions, that although these decisions are not binding upon us they are decisions of the Courts of the highest authority upon Acts of Parliament which may be regarded as the source from which our Act is drawn, and that they are, therefore, entitled to the greatest weight. In that case, according to the head-note, the definition of 'accident' in *Fenton* v *Thorley* was adopted by the learned Judge. The head-note reads as follows:
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> > "To constitute an accident within the meaning of Act 36 of 1907, the injury must be caused by some untoward or unexpected event, capable of definite ascertainment as to nature, time and place, but

4 *Nicosia's* case *supra* at 901

> there need not necessarily be any agency external to the workman injured."

Then, omitting a portion, which does not appear to be material, the head-note continues:

> "A strain occasioned to a workman in the course of his employment which causes a complete rupture incapacitating him from employment is an accident within the meaning of Act 36 of 1907, even though previous strains in the course of his employment have started the protrusion leading to the rupture."

[17] In my view this line of reasoning applies with even greater force in a case such as the present where the court is called upon to consider the complicated issue of multiple causation in relation to psychological trauma suffered over many years. It accords with a constitutional interpretation which is appropriate when regard is had to the purpose of the Act. Thus in *Davis* v *Workmen's Compensation Commissioner*[5]

> '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.'

[18] I believe that the court *a quo* interpreted the Act too restrictively with resultant prejudice to the workman and that, if it had understood the concept of an accident to include the cumulative effect of a series of specific incidents giving rise to post traumatic stress disorder, it would have interpreted the Act properly and in a manner more favourable to the appellant. It would have concluded that the appellant's post traumatic stress disorder was the result of

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5 1995 (3) SA 689 (C) at 694F-G:

an accident which arose out of and in the scope of the appellant's employment, within the meaning of the Act.

[19] In view of this conclusion it is not necessary to deal with the issue of whether the post traumatic stress disorder in this case could or did amount to an occupational disease as envisaged by section 65(1)(b).

[20] There is also an appeal against a costs order in terms of which the appellant's attorney was ordered to pay the costs of a postponement *de bonis propriis*. It is my view however that because the Act gives only a restricted right of appeal which does not include an appeal against a special costs order of this nature, no appeal lies against this costs order.

[21] A right of appeal is conferred by section 91(5)(a) of the Act which reads:

> (5) (a) Any person affected by a decision referred to in subsection (3)(a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding-
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> (i) the interpretation of this Act or any other law;
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> (ii) the question whether an accident or occupational disease causing the disablement or death of an employee was attributable to his or her serious and wilful misconduct;
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> (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) the right to increased compensation in terms of section 56.

Mr *Beyleveld* has argued that an appeal is competent under section 91(5)(a)(i) because it involves a decision regarding 'the interpretation of any other law' within the meaning of that section. That argument cannot be right. There was no issue of interpretation here. The issue was whether or not the discretion given by s 91(4) to make a costs order was exercised properly and judicially in the light of the facts and circumstances giving rise to the application for the postponement.

[22] It seems to me therefore that while a costs order may be altered on appeal to provide that costs follow the event where a decision is overturned because this is necessarily incidental, the Act does not make specific provision for an appeal against a special discretionary costs order of the kind made in this case, and hence no appeal lies under the Act against that order. The proper remedy is judicial review at the instance of the appellant's attorney.

[23] A judicial review may give rise to an additional difficulty. There seems to me to be a conflict between the interests of the appellant and his attorney in respect of these costs. The purpose of the special costs order was to ensure that the appellant should not be mulcted in the wasted costs occasioned by the postponement because the court considered that those costs were caused by the attorney's lack of preparedness. If the costs order against the attorney is set aside, it will have to be replaced with a costs order against the

appellant because there does not appear to be any basis for an order that the Commissioner should bear those costs.

[24] In the result the appeal on the merits succeeds. There will be the following order:

1. The appeal is allowed with costs, which shall include the costs of the application for leave to appeal.
2. The order of the court *a quo* is altered to an order that the objection is allowed.
3. No order is made in respect of the court *a quo*'s order that the wasted costs of the postponement are for the account of the appellant's attorney.
4. The matter is remitted to the compensation commissioner for the determination of such compensation as is appropriate and permissible in terms of the Act.

RJW JONES
Judge of the High Court

ERASMUS J: I agree.

AR ERASMUS
Judge of the High Court