

HELD AT MASERU

In the matter between:

PAUL NAKALEBE

APPLICANT

and

THABANG EDMUND KHOLOANE

RESPONDENT

JUDGMENT

DATE: 15/01/14

Workman's compensation claim - Applicant claiming compensation for injuries he allegedly sustained out of and in the course of employment - Matter proceeding by default - Import of Section 5 of the Workmen's Compensation Act - Court having considered all the surrounding circumstances of this case awarded the amount of compensation claimed.

INTRODUCTION

1. This judgment is granted by default as respondent's Counsel failed to attend an otherwise scheduled hearing. Having satisfied itself that the respondent had been duly served with the notice of hearing, the Court proceeded to hear the matter by default. The Court went all out to locate respondent's Counsel to the extent of calling him on his mobile phone. He promised to come. As the matter was part-heard we felt it would only be fair that it came to its logical conclusion, hence we took the trouble to call him, despite the effort, he still failed to attend. He instead sent in someone who indicated that he was not in a position to proceed as he had not been properly briefed. We considered this an abuse of the Court process.

2. This dispute has been brought in terms of the *Workmen's Compensation Act, 1977 (as amended)*. The applicant has approached this Court seeking an order for compensation in respect of an accident he sustained in the course of employment on or about 6th August, 2011. He sought:-

- a) Compensation for permanent total incapacity in the amount of Eighty Thousand Maloti (M80 000 00.00);
- b) Compensation for medical, surgical, hospital treatment and the supply of medication to the tune of One Thousand Maloti (M1 000.00);
- c) Compensation for transport charges to and from his home for treatment in the amount of One Thousand and One Hundred Maloti (M1 100.00);
- d) Costs of suit;
- e) Further and/or alternative relief.

BACKGROUND TO THE DISPUTE

3. It is common cause that the applicant was engaged by the respondent sometime in 2008 as a bus driver and generally transported passengers between Maseru and Thaba-Tseka. As aforementioned, he encountered an accident on or around 6th August, 2011 while conveying passengers from Paray in the Thaba-Tseka district to Mazenod on a special trip for music competitions wherein he sustained an accident culminating in the amputation of his left leg below the knee.

4. The applicant attributed the accident to snow which according to him rendered the road slippery and led to the bus overturning. An accident report was attached to the originating application and marked “***annexure PN 1.***” It emerged that following the accident the applicant was hospitalised in Thaba-Tseka for about one month. He pointed out that the respondent failed to pay him the salary for the month of August, 2011, despite having served him with a sick leave. He alleged in his papers and in evidence that the respondent showed no concern over his health and did not communicate with him.

5. According to the applicant following this impasse he approached the Labour Department for its intervention on or about 24th September, 2011. The respondent was apparently summoned to the Labour Department in the Workmen’s Compensation Section on 24th September, 2011 wherein he was informed that he was under an obligation to report the accident in terms of ***Section 14 of the Workmen’s Compensation Act, 1977*** read together with

Regulation 3 of the Workmen's Compensation Regulations, 1995. He duly complied and filed the said notice in **LD FORM W/C9**. The injury was classified by the Medical Practitioner who attended the applicant as a 100 % permanent incapacity. The Labour Department computed the amount of compensation due to the tune of Eighty Thousand Maloti (M80 000.00) but the respondent failed to pay, hence this application.

6. It is applicant's case that he sustained the said injury in the course of employment, for a trip the respondent was aware of and even authorised. He testified that the organiser of the trip was one Mapilikoane Phaila on behalf of the Paray Mission, who also corroborated applicant's evidence. He further averred that the respondent collected and kept the money for the said trip. He therefore submitted that he is entitled to compensation in terms of **Section 7 of the Workmen's Compensation Act, 1977** (as amended), medical as well as transport costs.

7. The respondent disputed this claim arguing, *inter alia*, that the applicant had been on a frolic of his own and that the weather had been unfavourable for travel on the day and the applicant took the risk of travelling, thereby negligently contributing to the accident. He, however, failed to attend a scheduled hearing to finalise the matter, prompting applicant's Counsel to lodge an application for judgment by default.

THE APPLICABLE LAW

8. Workmen's compensation claims are regulated by the **Workmen's Compensation Act, 1977 (as amended)** (hereinafter referred to as the Act). **Section 5 thereof** provides that;

(1) If in any employment personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall be liable to pay compensation in accordance with the provisions of this Act:

Provided that -

(a) ...

(b) *if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed;*

Provided that where the injury results in death or serious and permanent incapacity (emphasis mine), the court, on consideration of all the circumstances may award the compensation provided for by this Act or such part thereof as it shall think fit.

(2) For the purposes of this Act an accident resulting in the death or serious and permanent incapacity (emphasis mine) of a workman shall be deemed to arise out of and in the course of employment, notwithstanding that the workman was at the time when the accident happened, acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business.

9. It is common cause that applicant's injury was classified as a permanent incapacity. Considering the provisions of **Section 5(1) (b) of the Act**, even if the respondent were to prove that applicant's injury was as a result of his wilful misconduct or negligence, the fact that the applicant sustained "**serious and permanent incapacity**" confers a discretion on the Court to consider all the circumstances of the case in awarding the claimed compensation or any part thereof. Even assuming that the applicant acted without authorisation as pleaded by the respondent, he is still entitled to compensation under **Section 5 (2) of the Act**. Incidental to the payment of workman's compensation, the employer is also liable to pay medical as well as transport costs in terms of **Section 33 of the Act** which renders the employer liable for medical, surgical, hospital treatment, skilled nursing services and the supply of medicines. The Section further entitles the workman to reasonable transport charges in respect of travel for medical treatment. Medical expenses are also payable under **Section 15 (2)**.

10. The Court having taken into consideration the provisions of the Workmen's Compensation Act, 1977 particularly **Section 5 and 15 thereof**; that the workman sustained a permanent incapacity; that he was driving the bus to Mazenod for the purposes of and in connection with the employer's trade or business, finds the employer liable to compensation claimed by the applicant. It further finds him liable for payment of medical and transport costs.

THE ORDER

11. The Court therefore makes the following order that the applicant be paid:

- a) Compensation for permanent total incapacity in the amount of Eighty Thousand Maloti (M80 000 00.00);
- b) Compensation for medical, surgical, hospital treatment and the supply of medication to the tune of One Thousand Maloti (M1000.00);
- c) Compensation for transport charges to and from his home for treatment in the amount of One Thousand and One Hundred Maloti (M1 100.00);
- d) Costs of suit.

These monies are due and payable within thirty (30) days of the handing down of this judgment.

12. Generally costs are not awarded in this Court unless it is felt that the employer acted in an unreasonable manner. The Court feels that the employer acted in a very unreasonable and insensitive manner in handling this case regard being had to the serious nature of applicant's accident, and deciding not to attend the last hearing for no explanation at all. It therefore feels compelled to award costs in the circumstances of this case.

THUS DONE AND DATED AT MASERU THIS 15TH DAY OF JANUARY, 2014.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

L.MATELA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

For the applicant: Adv., T. Lesaoana of Lesaoana Chambers

The respondent and his legal representative failed to attend the hearing to finality.