Reportable
Case No 391/2002

In the matter between:

ROAD ACCIDENT FUND **Appellant**

and

BETHWELL MAPHIRI **Respondent**

Coram: HARMS, MARAIS, MTHIYANE, CONRADIE JJA and SHONGWE AJA
Heard: 14 MAY 2003
Delivered: 30 SEPTEMBER 2003

Subject: Interpretation and application of s 36 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993

J U D G M E N T

HARMS JA/

HARMS JA:

[1] The plaintiff (the respondent on appeal) was involved in a motor collision on 6 September 1996, in which he suffered damages for which the defendant, the Road Accident Fund (the 'RAF') is by statute liable. Since the plaintiff was also negligent, his claim has to be apportioned and the agreed apportionment is 50:50. The plaintiff was at the time of the accident an 'employee' as defined in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (herein referred to as 'the Act') and was injured in an 'accident'

'arising out of and in the course of an employee's employment and resulting in a personal injury'.

(Section 1 sv 'accident'.) This meant that he was entitled to 'compensation' as defined from the Compensation Commissioner in terms of the Act which he received.

[2] This table sets out the detail of his actual loss, his loss as apportioned and the compensation received from the Commissioner under the different heads:

	Actual Loss	50%	Compensation
Hospital (past):	36 367,51	18 183,75	33 872,30
Loss of income	5 965,16	2 982,58	
Total disablement			4 473,87
Generals	60 000	30 000	
	102 332,67	51 166,33	38 346,17

[3] Future medical costs have, by agreement, been the subject of an undertaking by the RAF to pay 50% thereof and need not detain us.[1] The plaintiff was totally disabled for the period 6 September to 24 November 1996, and that gave rise to payment of compensation for total disablement for that period. It also gave rise to the loss of income. The Commissioner

[1] Art 43(a) of the agreement contained in the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.

does not pay compensation for general damages such as pain and suffering.

[4] The appeal raises the question of the effect of s 36 of the Act on the amount of the plaintiff's claim against the RAF. At the time the section read as follows:[2]

'Recovery of damages and compensation paid from third parties

(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the 'third party') being liable for damages in respect of such injury or disease-

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) the Compensation Commissioner[3] or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

[2] The amendments introduced by Act 61 of 1997 are indicated in the footnotes that follow.
[3] 'Compensation Commissioner' was replaced with 'Director General'.

(2) In awarding damages in an action referred to in subsection (1) (a) the court shall have regard to the amount to which the employee is entitled in terms of this Act.[4]

(3) In an action referred to in subsection (1) (b) the amount recoverable shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for this Act.

(4) For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54 (2) or 72 (2) and, in the case of a pension, the capitalized value as determined by the Compensation Commissioner[5] of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be.'

[5] The section replaced a similar section contained in the repealed Workmen's Compensation Act 30 of 1941, namely s 8. These sections have been the subject of a number of decisions, also of this Court, all

[4] It now reads: 'In awarding damages in an action referred to in subsection (1) (a) the court shall have regard to the compensation paid in terms of this Act.'
[5] Now: 'Director General'.

culminating in an encyclopaedic judgment in the Court below[6] in which all or nearly all of them were subjected to a detailed analysis. Instead of interpreting prior judgments I prefer to begin with the meaning of the section and then, if necessary, to turn to some of them. Particularly unhelpful, I find, are the recalculations done by the learned Judge in order to determine what some of them meant, simply because these recalculations raise issues that may not have been considered by those courts.

[6] In *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) Yacoob J, speaking on behalf of the Court, gave this useful exposition of the general effect of the COIA:

'[13] The purpose of the Compensation Act, as appears from its long title, is to provide compensation for disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. The Compensation Act provides for a system of compensation which differs substantially

[6] *Maphiri v Road Accident Fund* 2002 (6) SA 383 (W).

from the rights of an employee to claim damages at common law. Only a brief summary of this common-law position is necessary for the purposes of this case. In the absence of any legislation, an employee could claim damages only if it could be established that the employer was negligent. The worker would also face the prospect of a proportional reduction of damages based on contributory negligence and would have to resort to expensive and time-consuming litigation to pursue a claim. In addition, there would be no guarantee that an award would be recoverable because there would be no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were lost. On the other hand, an employee could, if successful, be awarded general damages, including damages for past and future pain and suffering, loss of amenities of life and estimated 'lump sum' awards for future loss of earnings and future medical expenses, apart from special damages including loss of earnings and past medical expenses.

[14] By way of contrast, the effect of the Compensation Act may be summarised as follows. An employee who is disabled in the course of employment has the right to claim pecuniary loss only through an administrative process which

requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled. The procedure provides for speedy adjudication and for payment of the amount due out of a fund established by the Compensation Act to which the employer is obliged to contribute on pain of criminal sanction. Payment of compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee's contributory negligence. The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant's actual pecuniary loss. An employee who is dissatisfied with an award of the Commissioner has recourse to a Court of law which is, however, bound by the provisions of the Compensation Act. That then is the context in which s 35(1) deprives the employee of the right to a common-law claim for damages.

[15] The Compensation Act supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute. Compensation is payable even if the employer was not

negligent. Though the institution of the regime contemplates a differentiation between employees and others, it is very much an open question whether the scheme is to the disadvantage of employees.'

[7] The first and axiomatic principle, therefore, is that the object of the Act is to provide 'compensation' for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. 'Compensation' is not the same as 'damages', a distinction drawn clearly by s 36. There may be a complete overlap, as in the case of hospital and medical expenses (although for the general purposes of the Act medical costs are not regarded as 'compensation'). There may also be a partial overlap, as in the case of loss of income (as a head of damages) and compensation for disablement under the Act. But then there may be no congruent relief such as in the case of general damages for pain and suffering, which are claimable under the *lex*

Aquilia, and for which there is no corresponding head of compensation in the Act.

[8] The second point, which tends to be overlooked, is that the Act is not for the benefit of third parties, such as the RAF, who are liable in delict; it is for the benefit of the employee and the employer, and 'premiums' have to be paid for this 'insurance'. This means that the starting point of any litigation under s 36 is a determination of the third party's liability. Some cases have referred to it as 'common law liability', a concept that gave the Court below some trouble. All it means is 'delictual liability' and what the courts have attempted to do by using the phrase was to distinguish between 'compensation' and 'damages'. Once this is understood, an apportionment of damages under the Apportionment of Damages Act 34 of 1956 does not give rise to any

problems or to another method of calculation.[7] In this case the starting point is then the RAF's liability for 50% of the plaintiff's damages which is R51 166,33.

[9] The converse point has often been made and that is that s 36 does not increase the liability of a third party. Consequently, the full amount of its liability (in this case 50% of the plaintiff's loss) has to be divided between the employee and the Commissioner. The division of the RAF's liability appears to be the nub of the appeal and that is why the RAF contends that the total of the Commissioner's award should be deducted from its liability. On this basis it would be liable for R12 820,17 (R 51 166,33 minus R 38 346,17). The plaintiff, on the other hand, argues that a court should only have regard to the amounts paid by the Commissioner in relation to specific heads of damage to which these amounts relate and should therefore not be deducted from heads of damage to which they do

[7] *Botha v Miodownik & Co (Pty) Ltd* 1966 (3) SA 82 (W).

not relate. This means that, in this case, the Court should only 'have regard to' or deduct the amount of R19 173,09 – 50% of the amount awarded by the Commissioner (which was R38 346,17) – as 'the amount to which the employee is entitled in terms of this Act' (s 36(1)(b)) from the delictual liability of the RAF of R51 166.33. The difference of R31 993,26 would then represent the RAF's liability to the plaintiff.

[10] To simplify the plaintiff's contention: Since the Commissioner did not award compensation for general damages, those cannot be taken into account in determining the plaintiff's entitlement from the RAF. Medical expenses, on the other hand, may be taken into account (the Commissioner pays for them under s 73) as may be loss of income since the latter can be equated to a payment for disability (which is calculated with reference to the employee's earnings: Schedule 4).

[11] Can one read this limitation into the section? I believe not. Those who believe differently, rely on the fact that the Legislature requires of a

court 'to have regard to' the amount receivable from the Commissioner and point out that the court is not told to 'deduct' that amount. It is too late now to raise this argument, I believe, because this Court has held that 'to have regard to' means, in this context, 'to deduct'.[8] Schutz JA also mentioned two further principles underlying the section. They are:

'The second is that in a case where a "third party" is involved the workman may be entitled, in the form of compensation plus damages, to the amount of his full common-law damages, but no more. The third is that the "third party" may be liable to the workman and the employer or commissioner taken together for the full amount of common-law damages, but no more.'[9]

[12] The section requires a court to deduct ('have regard to') the 'compensation' to which the employee 'is entitled' under the Act – not part of the compensation or certain heads of compensation only – in determining the employee's entitlement vis-à-vis the third party. This is

[8] *Sasol Synthetic Fuels (Pty) Ltd and Others v Lambert v Others* 2002 (2) SA 21 (SCA) para 10.
[9] *Sasol Synthetic Fuels (Pty) Ltd and Others v Lambert v Others* 2002 (2) SA 21 (SCA) para 10.

made abundantly clear by ss (4), which defines by way of extension the meaning of 'compensation' for purposes of the section.[10] That 'compensation' must be deducted from the award of 'damages' ('skadevergoeding' has always been the Afrikaans rendition), and not from certain heads of damages.

[13] Milne J came to the same conclusion in *Wille and Another v Yorkshire Insurance Co Ltd* 1962 (1) SA 183 (D) 186D-187B, a passage worth quoting:

'To my mind nothing was said in that case[11] nor in *South British Insurance Co. Ltd v Harley*, 1957 (3) SA 368 (AD), nor in *Natal Provincial Administration v Buys,* 1957 (4) SA 646 (AD), to which Mr. *Harcourt* also referred, which can possibly support the view that the "compensation" which the Commissioner "is obliged to pay" within the meaning of sec. 8 (1) (b) must be limited, with respect either to category or to amount, to items claimable both against the Commissioner and at common law. The

[10] Chapter VI deals with the different types of compensation.
[11] *Workmen's Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (A).

provisions of sub-paras. (a) and (b) of sec. 8 (1) are interlocked and must be read together. They are designed to ensure, firstly, that there should be deducted from the amount of the workman's common law claim against the third party, if he makes one, the amount which it appears that the Commissioner is obliged to pay the workman under the Act; secondly, that the latter amount should be recovered in full by the Commissioner subject only to the third party's not having to pay more, in all, than the total amount of damages which the workman could have recovered from such third party if the Workmen's Compensation Act had not been passed . . .. Mr. *Harcourt* argued that where a workman had suffered, say, R2,000 damages for pain and suffering which he was *prima facie* entitled to recover from the third party, but nothing for estimated loss of future earnings, and was, at the same time, entitled to compensation under the Act in an amount of R2,000 for the loss of two legs, but still able to earn his living as before because his work did not require the use of his legs, it would be anomalous and unfair and, therefore, not contemplated by the Legislature, to hold, in effect, that the workman would be entitled to receive nothing for his pain and suffering. I find myself unable to agree that this result is anomalous or unfair. I cannot see any reason why the Legislature should have intended that a person, wholly

innocent of fault himself, having a valid and available cause of action against a third party for damages so as to be entitled to claim from that third party for all the damage whatsoever that he has suffered and will suffer in future in consequence of his injuries, should receive more than the sum which represents that damage merely because he is a workman who, as such, is entitled to claim a sum of money from the Commissioner in respect of such injuries.'

[14] The second submission in support of the plaintiff's argument is based upon the so-called 'like from like' principle which is said to have been derived from two judgments of this Court, namely *Klaas v Union & South West Africa Insurance Co Ltd* 1981 (4) SA 562 (A); *Senator Versekeringsmaatskappy Bpk v Bezuidenhout* 1987 (2) SA 361 (A). The 'principle' is said to have arisen in the following context: an employee is compensated by the Commissioner for medical expenses. In claiming damages from the third party he does not include a claim for them. In this event, it said, it would be unfair to deduct the amount paid by the

Commissioner for medical costs from the damages claimed. In order to solve the conundrum, 'like' (medical costs paid by the Commissioner) is to be deducted from 'like' (a claim for medical costs by the plaintiff) and not from unlike (such as generals). The Court below applied the principle by deducting the compensation paid for past hospital expenses from the plaintiff's claim under that head, which gave a minus figure; it deducted the compensation for disablement from the plaintiff's claim for loss of income, which also gave a minus figure; and since no compensation was awarded for generals, there was nothing to deduct from the R30 000. The plaintiff was, accordingly, awarded that sum.

[15] The practical answer to this type of case is not to be found in a 'like from like' principle but in the point made earlier, namely that the starting point of any litigation under s 36 is a determination of the third party's liability, i.e. its gross liability. The calculation is to be taken from

there and not from the claimed amount. This is in accordance with the concluding statement of Van Heerden AJA in *Klaas*[12] where he said:

'There is accordingly much to be said for the view that the compensation falls to be deducted from the total amount of the workman's common law damages even if he actually chose to claim a lesser sum.'

(Underlining added.) In other words, in determining the plaintiff's award, a court has first to establish the defendant's full liability, including the unclaimed medical costs. It then deducts from that amount the full compensation (including the medical costs) payable. Were it otherwise, the other principle mentioned earlier, namely that the Act is not intended to reduce the third party's liability, would be violated.

[16] I believe that I have indicated that the like from like principle cannot be reconciled with the wording of the section and that it is wrong. The judgment of the Court below proves that it leads to confusion and

[12] *Klaas v Union South West Africa Ins Co Ltd* 1981 (4) SA 562 (A) 587B-C.

inconsistent results and should no longer be used. If one postulates the case where the Commissioner has paid compensation of, say, R10 000 and the employee suffered damages in a like amount, the Commissioner who, on a reading of the section, is entitled to recover 'compensation that he is obliged to pay' and not only some of it, would be entitled to recover the R10 000 and not only those amounts for which there are congruent heads. The employee would have no claim unless the damages suffered are more that R10 000.

[17] In any event, *Klaas*[13] did not hold that there is a 'like from like' principle. On the facts of the case the principle as understood by the plaintiff did not arise not was it applied. The term was used in the following context by Van Heerden AJA (at 580H-581B):

'It is clear that the Legislature did not intend the benefits received by a workman under the Act to be regarded *as res inter alios acta*. A Court is enjoined to have

[13] *Klaas v Union South West Africa Ins Co Ltd* 1981 (4) SA 562 (A).

regard to such benefits, ie the compensation (including medical aid) that the Commissioner is obliged to pay and entitled to recover under s 8 (1) (b). In *Bonheim v South British Insurance Co Ltd* 1962 (3) SA 259 (A) at 266 OGILVIE THOMPSON JA pointed out that the precise meaning of the words 'shall have regard to' in s 8 (1) (a) is not entirely clear, but assumed that they mean 'deduct'. However, there may be a good reason why the Legislature used the above words. If a workman received free medical and hospital treatment he may decide not to claim from the wrongdoer any amount in respect of such treatment. In such a case it would be inequitable to deduct from the damages established by him the amount relating to medical aid which the Commissioner is entitled to claim under s 8 (1) (b). It therefore appears to me that only like should be deducted from like. However, in order to obviate repetition, I shall henceforth merely refer to a deduction to be made in terms of the proviso to s 8 (1) (a).'

I understand this to mean what has been explained above: if the workman does not claim for a head of damages suffered, that head, nevertheless, has to be included in the computation. The deduction is made, not from

the other damages established, but from the gross damages. This interpretation is consistent with the statement from the judgment quoted earlier and the learned Judge's preceding discussion relating to the question of whether one may claim damages from a wrongdoer in respect of free medical or hospital treatment received (at 576A-580H).

[18] The judgment in *Senator*[14] did also not underwrite or apply the principle. This Court found, on an interpretation of the pleadings and the common cause facts (at 367I) that the plaintiff had suffered, over and above the amount of the compensation paid, an amount of R15 950,00 (at 367I-J). This amount the plaintiff claimed. The argument of the third party, namely that the compensation paid by the Commissioner should be deducted from the claimed amount was rightly rejected. The reference (at 368A-D) to the fact that the Act does not provide for compensation for general damages was simply made to underscore the Court's

[14] *Senator Versekeringsmaatskappy Bpk v Bezuidenhout* 1987 (2) SA 361 (A).

interpretation of the pleadings and the common cause facts, namely that it had been agreed that the plaintiff's 'common-law damages' – and the third party's gross liability – amounted to the claimed amount plus the amount of the compensation paid.

[19] It follows from this that I agree with the RAF's contentions and would uphold the appeal accordingly. It also follows that I do not agree with the approach of the Court below, which was neither that of the plaintiff nor the RAF (at 402A-F) – it granted judgment for R30 000 as explained earlier. This means that the judgment in favour of the plaintiff has to be reduced to R12 820,36 as calculated above. The reader may wonder why the RAF is so concerned to protect the interests of the Commissioner. The answer is that it is not – it is here to protect its own interests because the Commissioner has failed to claim from it under s 36 (1)(b) and any claim by the Commissioner may have become prescribed. Because of the interest of the present Director General in the outcome of

the case, after oral argument, we invited the Director General to file written representations, which was done and in which the Director General sided with the plaintiff.

[20] The RAF did not ask for an order for costs on appeal against the plaintiff since this is a matter of principle for the RAF. Consequently no such order is called for. The intervention of the Director General, who should probably have been joined, was at the request of the Court and should not have any further costs implications.

[21] Last, it should be pointed out that s 36 in 1997[15] underwent some amendments which may either be substantive or merely cosmetic. In the past the amount which the Commissioner would have been liable for had to be deducted from the employee's claim; now it is the amount actually paid – at least that is what is said. The future obligations, such as future pension payments cannot be deducted. But then ss (4) conveys a contrary

[15] By Act 61 of 1997. The detail appears from fn 4 above.

intention. The same applies to ss (1)(b) which entitles the Director General to claim, not only for moneys actually paid but for those 'that he is obliged to pay'. Something appears to have gone wrong.

[22] I concur with the order proposed by Mthiyane JA.

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L T C HARMS
JUDGE OF APPEAL

AGREE:

CONRADIE JA

MTHIYANE JA:

[23] This appeal concerns the interpretation and application of s 36 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('the Compensation Act'), in particular the question of how compensation paid in terms of the Act is to be dealt with where there is an apportionment. The appeal is from a judgment of Gautschi AJ reported as *Maphiri v Road Accident Fund* 2002 (6) SA 383 (W).

[24] The respondent (the plaintiff) sued the appellant (the defendant) for damages arising out of injuries sustained in a motor vehicle collision which occurred on 6 September 1996. The parties agreed that an apportionment of 50% would apply. The matter came before the court *a quo* by way of a stated case in terms of Rule 33 of the Uniform Rules of Court. The stated case read as follows:

'1. The following amounts were paid by the Compensation Commissioner in terms of the Compensation Act:

1.1 Compensation in respect of the plaintiff's total disablement from 6 September 1996 to 24 November 1996

4 473,87

1.2 Past medical, hospital and transport expenses

33 872,30

1.3 Total award by Compensation Commissioner

38 346,17

2. The plaintiff's claim set out in its particulars of claim consists of the following:

2.1 Past hospital and medical expenses

26 169,11

2.2 Estimated future medical expenses

50 000,00

2.3 Past loss of income

5 645,00

2.4 Estimated future loss of income

75 000,00

2.5 General damages 50

000,00

206

814,11

3. The parties have agreed that for purposes of the stated case, the plaintiff's common law damages are assessed in the following amounts:

3.1 Past hospital and medical expenses

36 367,51

3.2 Past loss of income

5 965,16

3.3 General damages

60 000,00

102 332,67

3.4 An undertaking as envisaged in art 43(a) of Act 93 of 1989 of the costs of the future accommodation of the plaintiff in a hospital or nursing home and such treatment, services or goods as the plaintiff may require as a result of the accident, limited to 50% of such costs.

4. The parties agreed that the quantum of the plaintiff's claim be settled as set out in para 3 above.

5. The parties agreed that the only issue in dispute shall be the method of calculating the award to be made to the plaintiff, having regard to:

5.1 the apportionment of 50%; and

5.2 the award by the Compensation Commissioner.

6. The parties agreed that the Court in awarding damages shall have regard to the Compensation Commissioner's award set out in para 1 *supra*.

7. The plaintiff has not been compensated for general damages by the Compensation Commissioner.

8. The plaintiff contends that:

8.1 the above Honourable Court should only have regard to the amounts paid by the Compensation Commissioner in relation to specific heads of damage to which these amounts relate and which should therefore not be deducted from heads of damage to which they do not relate;

8.2 the above Honourable Court shall only have regard to the amount likely to become payable to the Compensation Commissioner in terms of the provisions of s 36 of the Act which

amount the plaintiff contends is 50% of R38 346,17, ie R19 173,09;

8.3 on the aforestated basis, the defendant is liable in the sum of R31 993,26 and an undertaking limited to 50%.

9. The defendant contends that:

9.1 the whole amount of the plaintiff's claim should firstly be reduced by 50%;

9.2 thereafter, and secondly, the total of the Compensation Commissioner's award should be deducted from the apportioned remainder;

9.3 on the aforesaid basis, the defendant is liable in the sum of R12 820,17 and an undertaking limited to 50%.'

[25] The court *a quo* gave judgment for the plaintiff and ordered the defendant to pay damages in the sum of R30 000 and costs of suit, and to

furnish the plaintiff with an undertaking[16] in respect of future medical expenses limited to 50%. Relying on the so called 'like from like' principle (about which more later) referred to in *Klaas v Union and South West Africa Insurance Co Ltd*[17] and *Senator Versekeringsmaatskappy Bpk v Bezuidenhout*[18] the judge *a quo* held that the compensation paid by the Commissioner in respect of one head of damage had to be deducted from the equivalent head of damage in the plaintiff's claim against the defendant. The appeal is before this Court with leave of the court *a quo*.

[26] The right to recover compensation and damages is governed by s 36 of the Compensation Act. At the time, it read:

'**Recovery of damages and compensation paid from third parties**.

(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section

[16] in terms of Article 43 (a) of Act 93 of 1989.
[17] 1981 (4) SA 562 (A).
[18] 1987 (2) SA 361 (A) at 366I-J.

referred to as the "third party") being liable for damages in respect of such injury or disease –

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) the Compensation Commissioner[19] or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2) In awarding damages in an action referred to in sub-section (1) (a) the court shall have regard to the amount which the employee is entitled in terms of this Act.

[19] Now 'Director General'

(3) In an action referred to in sub-section (1) (b) the amount recoverable shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for this Act.

(4) For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalized value as determined by the Compensation Commissioner of the pension, irrespective of whether a lump sum is, at any time paid in *lieu* of the whole or portion of such pension in terms of section 52 or 60; and periodical payments or allowances, as the case may be.'

[27] The position was previously governed by s 8 of the Workmen's Compensation Act 30 of 1941[20] (the Workmen's Compensation Act). It read:

[20] The Workmen's Compensation Act 30 of 1941 was repealed and replaced by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 with effect from 1 March 1994.

‘**Recovery from third party by workman of damages and by Commissioner or employer of compensation paid.**

(1) Where an accident in respect of which compensation is payable was caused in circumstances creating legal liability in some person other than the employer (hereinafter referred to as the third party) to pay damages to the workman in respect thereof –

(a) the workman may both claim compensation under this Act and take proceedings in a court of law against the third party to recover damages: Provided that where any such proceedings are instituted the court shall in awarding damages, have regard to the amount which, by virtue of the provisions of para (b), is likely to become payable to the Commissioner or the employer, individually liable (hereinafter referred to as the employer), as the case may be, by the third party; and

(b) the Commissioner or the employer by whom compensation is payable shall

have a right of action against the third party for the recovery of the

compensation he is obliged to pay under this Act as a result of the accident,

and may exercise such right either by intervening in proceedings instituted

by the workman against the third party or by instituting separate

proceedings: Provided that the amount recoverable in terms of this

paragraph shall not exceed the amount of damages, if any, which in the

opinion of the court would have been awarded to the workman but for the provisions of this Act.'

[28] Sections 36 and 8 referred to above are more or less to the same effect. So are the objects of the two Acts which are:

(a) To provide compensation from the Commissioner for the injured employee (workman) irrespective of fault;

(b) To allow the employee (workman) both to claim that compensation and to claim damages from a third party;

(c) To oblige a court considering an employee's (a workman's) claim for damages against a third party to 'have regard to' (deduct) the compensation which the Commissioner may have paid or will be liable to pay the employee (workman).

(d) Where the Commissioner has already paid and seeks to recover what he has paid or will be liable to pay (whether by intervention in the

workman's or employee's case against the third party or by separate action) the Commissioner cannot get more than what the employee is entitled to recover from the third party.

In my view the construction which the courts have previously placed on the meaning and effect of s 8 of the Workmen's Compensation Act remains valid and instructive in interpreting and applying the provisions of s 36 of the Compensation Act.

[29] Section 36 (2)[21] provides that when a court considers the damages to be awarded to a plaintiff (employee) it is obliged to 'have regard to' the compensation paid in terms of the Act. In *Bonheim v South British Insurance Co Ltd*[22] Ogilvie Thompson JA assumed (without deciding) that the words 'shall have regard to' in s 8 of the Workmen's Compensation Act meant 'deduct'. That approach has ever since been

[21] as did s 8(1)(a) of the Workmen's Compensation Act.
[22] 1962 (3) SA 259 (A).

followed in this Court[23] and in many decisions of the provincial and local divisions. The main issue in this case is whether the compensation paid by the Commissioner (R38 346,17) should be deducted from the plaintiff's total damages (R51 166,33) or only from the equivalent heads of damage. In *Bonheim* it was held that such compensation had to be deducted from the plaintiff's total claim or 'aggregate damages'.[24] Two principles were laid down in *Bonheim*. The first was that 'the legislature did not intend to increase the third party's liability beyond the aggregate amount of his common law liability to the workman' and the second was that 'the injured workman should [not] obtain recompense for his injuries in any sum, which when added to the compensation receivable by him under the [Workmen's Compensation] Act, would exceed the aggregate

[23] *Klaas* and *Bezidenhout, supra* and more recently, *Sasol Synthetic Fuels (Pty) Ltd and Others v Lambert v Others* 2002 (2) SA 21 (SCA).
[24] *Bonheim* at 269; *Botha v Miodownik and Co (Pty) Ltd* 1996 (3) SA 82 (W); *Ngcobo v Santam Insurance Co Ltd* 1994 (2) SA 478 (T).

of his common law damages'. In *Maasberg v Springs Mines Ltd*[25] it was said that the legislature did not intend that the workman 'should be paid twice over for the same injury'.

[30] In *Wille and Another v Yorkshire Insurance Co Ltd*[26] and *Botha v Miodownik and Co (Pty) Ltd*[27] it was held that the amount paid under the Workman's Compensation Act had to be deducted from the total amount found to be payable to the workman[28] as common law damages after apportionment. In *Nqcobo*[29] *supra* Stafford J came to the same conclusion. This approach is fiercely contested by the plaintiff. The plaintiff argues that the compensation (R38 346,17) should be deducted from the special damages and not from the total agreed claim (R51 166,53). For this, as previously stated, reliance was placed on the *obiter dictum* in *Klaas* where Van Heerden AJA remarked that 'only like should

[25] 1944 TPD 1 at pp 6 et sec; *Bonheim* at 267 H.
[26] 1962 (1) SA 183 (D) at 187D.
[27] 1966 (3) SA 82 (W) at 89D.
[28] Now 'employee' under the Compensation Act
[29] at 485D and 486C.

be deducted from like'[30] and on *Bezuidenhout* where reference was made to the *Klaas* case. In *Klaas* the court was concerned with the interpretation of the word 'compensation' in s 8 of the Workmen's Compensation Act and the 'like from like' principle was never applied. In *Bezuidenhout* the workman had been awarded R21 375,69 as compensation by the Commissioner. The only issue was whether this amount should be deducted from the injured workman's determined future medical costs and agreed general damages, which totalled R15 950. The court rejected the defendant's argument that such deduction should be made. On the facts it appeared that the plaintiff had incurred further medical expenses which were claimed from the third party and for which compensation had not been paid. Those medical expenses formed a component of the claim for R15 950. On a proper reading of the judgment the main reason for rejecting the defendant's argument was not that the

[30] at 580i.

facts favoured the matching of heads of damages. It seems to me that one of the reasons for the decision is to be found in the following passage in the judgment:

'Al wat blykens die notule in geskil was, is of die totale toekenning van R21 375,69 deur die Kommissaris afgetrek moes word van die bedrae genoem in (6) wat dan sou meebring dat verweerder hoegenaamd nie vir betaling van skadevergoeding aanspreeklik sou wees nie'.[31] [Emphasis added]

[31] The 'like from like' principle must be understood in the context of the facts of the case that Van Heerden JA was dealing with. All he was saying, it seems to me, was that one cannot deduct from the plaintiff's claim the amount which the Commissioner has paid for medical treatment where the plaintiff has made no claim for damages for the cost of such treatment. It would be otherwise if the plaintiff had also claimed damages

[31] *Bezuidenhout* at 366C.

for the costs of such medical treatment. The court would then have deducted from the total amount of damages to be awarded, the amount which the Commissioner had paid. If the Commissioner's claim was in fact larger (and provided it was correctly quantified in terms of the Act) then the whole amount of the claim would fall to be deducted, even if that meant that the award for general damages would be reduced *pro tanto*. The case was one to which the Commissioner was not a party and the defendant sought to exploit the Commissioner's liability in respect of medical treatment in order to reduce its own liability for general damages. There was no investigation of that issue and therefore no basis for reducing the award to be made to the plaintiff for general damages.

[32] I do not see why a deduction of the compensation from the plaintiff's total claim in terms of *Bonheim* should give rise to problems. Take as an example a case where the plaintiff is awarded R30 000 by the Commissioner (made up of R15 000 for past medical and hospital

expenses and R15 000 for temporary total disability). The plaintiff sues the defendant for R80 000 (R30 000 for special damages and R50 000 for general damages). Where there is no apportionment the court would deduct R30 000 and the plaintiff would receive R50 000. The plaintiff gets nothing more and nothing less than the full common law damages to which the plaintiff is entitled, if account is taken of the fact that R30 000 had already been paid as compensation by the Commissioner. The defendant does not pay anything more than its full common law liability. The Commissioner recovers what he is entitled to in terms of the Act.

[33] Turning now to where there is a 50% apportionment, the court would deduct R30 000 from the apportioned sum of R40 000 and the plaintiff would receive R10 000. The plaintiff is not getting anything less than the full common law damages, if regard is had to the fact that payment of R30 000 as compensation has already been made by the Commissioner. The defendant does not get off scot-free because it is liable for the full

amount of R40 000, even though R30 000 goes to the Commissioner and R10 000 to the plaintiff.

[34] As to the facts of this case the position is exactly the same. The Commissioner paid R38 346,17 as compensation (R33 872,32 for past medical and hospital expenses and R4 473,87 for temporary total disability). The plaintiff's apportioned claim is R30 000 for general damages, R18 183,75 for past medical and hospital expenses and R2 982,58 for loss of income. In total the plaintiff's claim was (after apportionment) agreed at R51 166,53. If the compensation (R38 346,17) is deducted from it the plaintiff would receive R12 820,36. The Commissioner would recover full compensation paid in terms of the Act and the defendant would not pay more than what it is liable to pay at common law (R51 166,53). Although the plaintiff gets R12 820,36 nothing less than his common law damages has been awarded if account is taken of the amount paid by the Commissioner (R38 346,17).

[35] On the other hand if the 'like from like' principle as understood and construed by the plaintiff is applied the following would occur. The compensation (R38 346,17) will have to be deducted only from the special damages (made up of R18 183,75 and R2 982,58) and not from the plaintiff's total damages (R51 166,3) as this would reduce the general damages (R30 000). So, on this basis then, the plaintiff would receive the R30 000 for general damages plus the excess of special damages over the amount already paid as compensation. The Commissioner would not get back what was paid by way of compensation as provided for in terms of s 36 (2) of the Compensation Act. The judge *a quo* says it does not matter, as the Commissioner would in any event have got nothing if the employee had been 100% at fault.

[36] I have not been able to find anything in s 36 (or the old s 8) justifying this approach. If there is anything to be said for the point, there is still no convincing explanation in the judgment as to why the plaintiff

should be allowed to recover more than his [or her] aggregate damages. The judge *a quo* attempts to get past this hurdle by saying that the expression 'full common law damages' refers to the assessed damages (R102 332,67) rather than the apportioned damages (R51 166,33). This is a construction which in my view is not justified by the plain wording of s 36(2). It seems to me that at the point at which a court considers the amount to be deducted, it is then concerned with the amount 'recoverable' by the plaintiff rather than the full damages claim. It therefore follows that the relevant amount from which a deduction had to be made was R51 166,33 and not R102 332,67.

[37] In my view the whole amount of the compensation (R38 346,17) is to be deducted from the plaintiff's total award irrespective of the fact that it exceeded what the plaintiff has been held to be entitled to in respect of the heads of damage to which the compensation related (if it can be related!). It is true that the plaintiff's general damages are being reduced

by the amount of the excess. But does the Compensation Act prevent the court from deducting the excess merely because it exceeds the amount to which the plaintiff would be entitled under the particular head of damage to which the Commissioner's payment relates? That would only be so, if one interprets the 'like from like' *dictum* in the *Klaas* case as requiring a **qualitative** correlation between the particular amounts being considered. There is nothing in the Act or in the *Klaas* judgment itself to suggest that the Act was to be interpreted in that way. The judge *a quo* in a detailed judgment has not pointed to such correlation. As a matter of law the contrary is true. The form in which compensation is awarded does not mirror the heads of damage to be found at common law. It has been said that compensation paid under the Act is not the same as damages.[32] Nor is there room to compare 'compensation' received under the Compensation Act to a benefit under a policy of insurance. An attempt to do so was

[32] See *SAR and H v SA Stevedores Services* 1983 (1) SA 1066 (A) at 1088F-H.

rejected by Schreiner J in the *Maasberg* case *supra*, where the learned judge said 'compensation received by the workman should [not] be approximated to, and treated on the same basis as, insurance monies, sick-fund benefits and the like'.[33]

[38] It does not matter under which head of damage the Commissioner has paid or will be liable to pay compensation nor that the amount exceeds the amount to which the plaintiff has been found entitled under that head by the court. It is sufficient that it is an amount which the Commissioner was obliged to pay and that the notional **total sum of damages** to which the plaintiff would be entitled is equivalent to or exceeds that sum. In short, if it means that the award for general damages is reduced or wiped out, that simply is the consequence of the application of the Compensation Act or as Viljoen J put it in the *Botha* case *supra* '

[33] See *Bonheim* at 267H-268A.

the impact of the provisions of an Act of Parliament upon the common law'.[34]

[39] For the above reasons the appeal is upheld with costs.

[40] Marais JA, who was a member of the Court which heard the appeal, was as a result of indisposition unable to participate in the finalisation of this judgment and the matter was accordingly proceeded with in terms of s 12 (3) of the Supreme Court Act 59 of 1959.

[41] Accordingly the order of the court *a quo* is set aside and the following is substituted:

'1. The defendant is ordered to pay to the plaintiff the sum of R12 820,36 and

costs of suit.

[34] at 90A

2. The defendant is ordered to furnish the plaintiff with an undertaking in terms of article 43 (a) of Act 93 of 1989 in the terms set out in para 3.4 of the stated case.'

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KK MTHIYANE

JUDGE OF APPEAL

CONCUR:

SHONGWE AJA