REPORTABLE

CASE NO: SA 43/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SOCIAL SECURITY COMMISSION	**FIRST APPELLANT**
EXECUTIVE OFFICER OF THE SOCIAL SECURITY COMMISSION	**SECOND APPELLANT**

and

JAN JACOBUS COETZEE	**RESPONDENT**

Coram: SHIVUTE CJ, STRYDOM AJA and LANGA AJA

Heard: **12 July 2011**

Delivered: **19 February 2016**

APPEAL JUDGMENT

SHIVUTE CJ (STRYDOM AJA concurring):

[1] One of the issues that should be dealt with at the outset is that of a *quorum*. Our late colleague Langa AJA to whom the responsibility of preparing the draft judgment was given regretfully passed away before he was able to do so. The court is thus now composed of two judges of appeal as opposed to three as required by s 13(1) of the Supreme Court Act 15 of 1990. However, s 13(4) of that Act authorises

the finalisation of the appeal by the remaining two judges if they agree on judgment. This legal position has already been traversed by this court in cases including *Wirtz v Orford & another* 2005 NR 175 (SC) and it is not necessary to belabour the point. Given that Strydom AJA and myself are inclined to agree on the outcome, I proceed with the judgment.

[2] The facts giving rise to the case, as well as the outline of the parties' arguments, are simply stated. It is worth examining them first by way of introduction before proceeding to the detailed statutory framework.

[3] The background to the case is as follows. The respondent, Mr Coetzee, was an artisan employed in the Ministry of Works, Transport and Communication (as it was then known). He suffered a fall during the course of his employment in April 1996, tumbling from a ladder while repairing a roof in Possession Island, in the district of Lüderitz. He alleges that there is conclusive medical evidence that demonstrates this fall was the cause of his resulting disability. He claimed compensation for this injury from the first appellant, the Social Security Commission (the Commission).

[4] The relevant provisions governing such claims are to be found in the Employee's Compensation Act 30 of 1941 (the ECA) and the Social Security Act 34 of 1994 (the SSA). The former will be the subject of extensive analysis in this judgment. For now it suffices to note that the applicable legislation empowers the Commission to adjudicate on claims falling under the ECA. The Commission, more specifically a Mr

Richard Edwin Coomer, dismissed the claim in April 2005 on the basis that he was not satisfied that Mr Coetzee's present degenerative condition was the result of an accident arising out of and in the course of his employment as required by s 27 of the ECA. Aggrieved by this decision, Mr Coetzee continued sending further medical evidence up and until 16 May 2008. After this he launched an appeal to the Labour Court against the decision. Section 25(1) of the ECA confers on the Labour Court jurisdiction to hear such appeals. Only one of the four grounds of appeal in that Court is presently material, and it turns on the failure of Mr Coomer to refer the matter to a formal hearing as contemplated in s 56 of the ECA.

[5] The Commission opposed the appeal for five reasons, which fall neatly into two overall bases. The first was that the application was brought out of time. It was argued that the application for compensation had been brought eight and a half years too late; did not meet the requirements of s 54 of the ECA; that the accident in question did not come to the notice of Mr Coetzee's employer within 12 months of the date of the accident as required by s 51 of the ECA, and the appeal was not lodged within 60 days of the decision appealed against as s 25 of the ECA prescribes. The second related to the medical evidence. It was argued that the medical reports in question did not establish that the medical condition arose in the course of his employment and that in any case the Medical Board that subsequently examined Mr Coetzee when he applied for a discharge from employment on medical grounds did not find that the alleged accident conclusively caused his disability.

[6] There was a further issue of delegation. It was argued on behalf of Mr Coetzee that Mr Coomer could not place himself in the shoes of the Commission and that the matter should be referred back to the Commission for that body to hear the matter. On the other hand, it was argued that the issue of delegation was not properly raised in the heads of argument, and that, in any case, the Commission had powers to delegate and Mr Coomer was a valid recipient of such delegation.

[7] The Labour Court held, on the issue of delegation, that the objection that the point had not been raised was without substance. The court found that Mr Coomer should have voluntarily provided information as to his authority to substantiate his claim that he was a lawful delegate of power. The crucial finding was at para 9 of that court's judgment where it was stated that:

> 'Inasmuch as I would want to believe that Coomer was delegated to act on behalf of the first respondent, except for Coomer's say so, the facts before Court do not sustain that belief.'

[8] In relation to the need to refer the matter under s 56 of the ECA to the Commission, it was held that the nature of the case warranted the latter's attention such that it was an 'abdication' rather than a 'delegation' of its powers to allow Mr Coomer to dispose of the claim for compensation. The decision was, therefore, unlawful and had to be set aside. The court ordered the matter to be reconsidered by the Commission as contemplated by s 56 of the ECA. The Commission and the Executive Officer felt aggrieved by this decision and so they sought leave to appeal to

this court. Their application was refused by the Labour Court. They are here with leave of this court.

Legislative framework

[9] It is now necessary to turn to the detailed consideration of the legislative framework in this area. Under the ECA, an employee or his or her dependant is deprived of their common law right of action for damages against the employer in respect of an injury due to an accident while in the employ resulting in disability or death. Section 7 of that Act replaces this right of action with a statutory redress mechanism in the form of compensation under the ECA. The section provides as follows:

> '**7 Substitution of compensation for other legal remedy**
>
> (a) No action at law shall lie by an employee or any dependant of an employee against such employee's employer to recover any damages in respect of an injury due to an accident resulting in the disablement or the death of such employee.
>
> (b) No liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of any such disablement or death.'

[10] Sections 38 and 39 provide detail as to how the quantum awarded under the Act is computed. The Act also creates and confers powers on the Commission, in respect of compensation for disability caused by accidents to workmen in the course of their employment (ss 3 and 9). Section 14 of the ECA catalogues the Commission's

powers in respect of the employee's compensation which include the power to adjudicate upon all claims (s 14(1)*(c))* and stipulates that the Commission must decide any question relating to, amongst other things, the right to compensation, the degree of disablement of any employee and the amount and method of payment of any compensation.

[11] Section 48(3) provides that the Commission may delegate powers to the Executive Officer or any other employee. The terms of the delegation are specified as follows in s 108:

'**108 Delegation**

(1) . . .

(2) . . .

(3) The Commission may, on such conditions as it considers appropriate delegate to any committee established in terms of section 11 of the Social Security Act, 1994, the executive officer or any other employee of the Commission or any authorized person referred to in section 17, if he or she is not such an employee, any power conferred upon or delegated to it.

(4) The executive officer may, on such conditions as he or she considers appropriate and with the approval of the Commission, delegate to any employee of the Commission, any power conferred upon or delegated to the executive officer.

(5) . . . .'

[12] Sections 50 and 51 stipulate notice requirements. In respect of the employee, written notice must be provided of the accident in the prescribed manner as soon as reasonably possible after the accident. There are three pertinent exceptions in s 50(1)*(a)* and *(b)*. The first is where it is proved that the employer had knowledge of the accident from any other source at or about the time of the accident. The second is where there is, in the opinion of the Commission, no chance of serious prejudice occasioned by the failure to give notice, or, thirdly, that the failure was occasioned by mistake, absence from the Republic or other reasonable cause. An employer must report accidents upon being notified thereof to the Commission. Failure to do so is an offence. (See s 51(1).)

[13] Section 54 provides that no claim for compensation under the Act shall be allowed unless lodged by the employee within six months after the date of the accident. It further provides for the same three exceptions in s 50, discussed above. There is, however, a backstop of 12 months. In other words, the right to benefits under the Act lapses if the accident does not come to the notice of the employer within 12 months of the date of the accident.

[14] Section 56 of the ECA states that the Commission must make such enquiries as it deems necessary after receipt of the claim. If it deems a formal hearing necessary, it must conduct such a hearing in accordance with the specific requirements of the Act.

<u>Counsel's argument on appeal</u>

[15] The argument of counsel may be summarised as follows.

[16] On behalf of Mr Coetzee, it is argued that discretionary power cannot be delegated. As such it was not possible for the Commission to delegate its power to Mr Coomer to decide whether to hold an oral hearing or not. It is further submitted that there is a presumption against an implied power to delegate such that a public authority must show that its empowering legislation allows a particular delegation. It is contended that the delegation in question was therefore not lawful, absent clear legislative basis. Counsel relies for this proposition on the work of Baxter *Administrative Law* (Juta & Co. Ltd: 1984) and the decision of the Eastern Cape Division of the High Court of South Africa in *Nelson Mandela Metropolitan Municipality & others v Greyvenouw CC & others* 2004 (2) SA 81 (SE) para 50. That Mr Coomer was in charge of a complex evaluative process of assessing medical evidence, it is argued, is further support against the court finding a valid delegation. Factually, so it is argued, the above position is supported in that Mr Coomer never signed any correspondence in his own name but always sought the signature of the second appellant, the Executive Officer of the Commission.

[17] Finally, it is contended that because Mr Coomer also decided on behalf of the Commission that there was no need to hold a hearing, it was in conflict with Art 18 of

the Constitution which requires administrative bodies to act fairly and reasonably in respect of administrative action.

[18] As to the time delays, it is contended that Mr Coomer acted in a manner that was 'fundamentally unfair'. He continued to correspond with Mr Coetzee, giving the latter the impression that the only bar to his compensation was the lack of medical evidence, and, as such, should be prevented from relying on the delay as a bar to his compensation. This alleged misleading conduct, too, was said to be in breach of Art 18 of the Constitution.

[19] In the alternative, it is argued that there was knowledge of the accident on the employer's behalf as contemplated under s 50(1)*(a)*, and, further, there would in any case be no prejudice as envisaged by s 50(1)*(b)* if the claim for compensation would be heard at this late date. Accordingly, it was submitted that the dispute should be referred to the Commission for a full inquiry as contemplated under s 56 of the ECA.

[20] For the appellants, it is first stressed that the authority of the decision-maker was not challenged in the founding papers. Nor did the respondent adduce any evidence in the Labour Court to address this issue. Further objections are made that the claim for compensation cannot be heard because it is time-barred by the ECA.

[21] In terms of the substance of the delegation point, it was argued that it is not outside the powers of the person considering the claim not to refer a matter for a formal hearing. This is a decision which lies within the discretion of the official.

[22] It was further argued that the conduct of Mr Coomer in correspondence cannot be used to thwart the legislative scheme. It is not possible on the facts for the time-limit to be subverted simply because it was not raised in correspondence.

[23] Finally, it is put that the court should not have referred the dispute for a full hearing. Such a determination is for the Commission and not the court to make. The court should not usurp the former's role. In any case, counsel draws attention to the fact that Mr Coomer was at no stage provided with evidence tending to prove a nexus between the injury allegedly sustained when falling from a ladder and the degenerative condition he is claiming for, and further elements that cast doubt on the strength of the medical evidence such that his refusal to exercise his discretion under s 56 was entirely reasonable.

[24] Based on these submissions, the court must decide (a) whether there was a valid delegation to Mr Coomer in terms of s 108 of the ECA and (b) if not, whether to remit the issue to the Commission as per s 56. The first question requires consideration of the contours of the doctrine of delegation, as well as its application to the facts of this case. The second requires the court to also consider the relevant time-frames set out in the legislative schemes of the ECA.

Delegation

[25] Whether expressed through the Latin label of *delegata potestas non potest delegare,* or in the form of a presumption against delegation, the fundamental principle is that power is to be exercised by the body that the legislature has intended it to be wielded by.[1] It is, however, not an absolute principle. As was recognised already long ago, it is a rule whose rigour hinges on the context in question. The point was well-expressed by the Canadian author Willis in 1943:

> ‘A discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this presumption may be rebutted by any contrary indications found in the language, scope or object of the statute.’[2]

[26] At the heart of the court’s assessment of whether a given delegation is lawful lies a tension between two ideas. There is, on the one hand, recognition that there is a clear practical need for delegation – especially so in the modern administrative state where many decisions must be taken and institutions need the autonomy to create expedient machinery to make them. There is, on the other, the need for decisions in our administrative landscape to be taken by the proper and suitably qualified decision-maker. A wanton condonation of all forms of delegation would risk substituting institutionally and democratically illegitimate actors in lieu of those specifically appointed for that task. The point was well-recognised in *Baxter* at 433:

[1] H. Woolf, J. Jowell and others, *De Smith’s Judicial Review* (Sweet and Maxwell, 7 ed, 2014) Chapter Five, Section Nine.
[2] J. Willis, ‘Delegatus non potest delegare’ (1943) 21 Can. B.R. 257, 259.

> 'While the practical need for delegation must be recognized, there is a danger that power which the legislature has chosen to be exercised by a specific officer-holder or body might in fact be exercised by someone who is neither as well qualified nor as responsible (politically or otherwise) as the chosen repository of the power.'

[27] It is at this point that we must note the important distinction between provisions that explicitly contemplate delegation, and those that impliedly authorise it. Given the presumption against delegation, the approach to the two forms of delegation differs. This is a distinction that is well-recognised in many common law jurisdictions, and one that is also present in our own.[3]

[28] Accordingly, when interpreting a legislative provision that explicitly anticipates delegation, it is important for the court to bear the above tensions in mind. Whilst the courts should read the explicit delegation provision strictly, with the presumption against delegation as a starting point of analysis, it should nonetheless construe the provision with administrative practicality in mind.

[29] Here we are presented with a provision that explicitly contemplates delegation, and grants the broadest of discretions to the Commission to effect that delegation. Returning to the language of s 54, the delegation is to be done on 'such conditions as [the executive officer] considers appropriate' and in respect of '<u>any power</u> conferred

[3] Baxter at 433; *De Smith's Judicial Review* (fn. 2) at 5-155 (England); Matthew Groves, H P Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP: 2007), 260-261 (Australia).

upon or delegated to' the Executive Officer of the Commission. (Emphases supplied.) This clearly would encompass the power to delegate to Mr Coomer the question of whether to refer a matter to full hearing as per s 56.

[30] This is also supported by another point. If it is to be accepted that it is not possible to delegate the power to refer disputes under s 56 to another, then the legislative scheme of delegation would be thwarted. The Executive Officer could not delegate any decision-making power in respect of the adjudication of employment accidents, as the person who would enjoy that power would not be able to refer a dispute to full hearing under s 56. The Executive Officer would therefore have to take all decisions personally, which may undermine the expeditious resolution of such disputes. The latter is a crucial element of the compensation scheme, and the court should be very slow to reach a construction of the legislation that would saddle the scheme with delay and inconvenience.

[31] It being accepted that, in principle, the power of referral under s 56 can be delegated; it remains to be examined whether Mr Coomer was indeed a valid delegee of that power. The court *a quo* did not think so, on the basis that the only evidence that was proffered was Mr Coomer's say-so. With respect, the court *a quo* erred when it overlooked the fact that this assertion was made under oath. In his affidavit, Mr Coomer clearly stipulated that he assessed and considered the acceptance of liability in respect of claims made to the Commission under the ECA and that he was

authorised to do so by delegation. He further asserted that he was duly authorised to make the impugned decision on 22 June 2005.

[32] It must be further borne in mind that in Mr Coetzee's affidavit, there was no mention of a challenge to the delegation of power to Mr Coomer. It is therefore untenable for the court *a quo* to have reasoned that it behoves the Commission to adduce evidence of the legality of its delegation in the form of a document that would attest to the authority of Mr Coomer. It is the then appellant who must prove his case on the papers. What is more is that in the correspondence preceding the hearing of the appeal, Mr Coetzee's lawyers readily accepted that the decision was taken by the Executive Officer of the Commission. In particular, an e-mail correspondence of 23 March 2007 stated that the 'claim was rejected by the CEO of the Commission on 22 June 2005'. Finally, there is a long series of correspondence documenting decisions taken by Mr Coomer that have been ratified through the appellant's signature. That this ground was raised for the first time at the hearing of the appeal and in light of the admission above, such approach is highly opportunistic and carries little weight. Accordingly, it is the opinion of this court that the court *a quo* erred in finding to the contrary.

Delay

[33] The next question is that of delay. I pause and note that the entirety of the claim has been punctured with inexplicable delays. The accident was only reported by the employer on 20 January 2005, nine years after the incident in question. The medical evidence that was in any case obtained two months after the accident was

only brought to the attention of the Commission on 11 April 2007, 11 years after the incident. It is of little surprise that when the Commission requested to see the medical evidence of the chiropractor who treated Mr Coetzee – a certain Doctor McClean – they were informed by Mr Coetzee's lawyers that he could not be located as he no longer practised. It is precisely for this reason that it is in the interest of the Commission and those individuals in Mr Coetzee's shoes to prosecute their claims timeously.

[34] Mr Coetzee's response was that there was fundamental unfairness in that Mr Coomer, to use the expression, led Mr Coetzee down the garden path, instilling a false hope that he would receive compensation as long as he offered medical evidence. In effect, this is a disguised estoppel argument; the implication being that the Commission should be estopped from relying on the statutory scheme given the representations in correspondence. This argument is bound to fail. First, there is a conspicuous absence of any evidence to the effect that a person in Mr Coetzee's shoes would have understood that if he were to submit further medical evidence, Mr Coomer would somehow ignore the statutory regime and process the claim.[4] Second, it is highly questionable as a matter of law whether this would be possible. The statutory limits are essential mechanisms to ensure the rapid settlement of claims. They, as a matter of principle, should not be able to be dispensed with or overridden in such a manner. So much agrees with the tenor of this court's decision in *Executive Properties CC & another v Oshakati Tower & another* 2013 (1) NR 157 (SC) para 55.

[4]As noted by O'Linn AJA in *Eysselinck v Standard Bank Namibia (Stannic Division) & others* 2004 NR 246 (SC) at 252, it is necessary that the 'representee can show that he reasonably understood the representation in the sense contended for by him'.

In that case, whose facts are not pertinent, the court agreed with the argument that the defence of estoppel could not succeed inasmuch as it would have 'negated the protection' afforded by s 228 of the Companies Act 28 of 2004 to shareholders. By analogy, the seeming estoppel argument here should not allow the flouting of the statutory time restrictions in the ECA.

[35] I am fortified in this regard by the observations of other courts which have emphasised that such estoppel arguments do not allow the circumvention of clear statutory provisions.[5] Equity does justice as between the parties. It is not a gimmick that can make legislation disappear. With respect to counsel for the respondent, that is in effect, her argument on this point. Accordingly, it fails and one must have regard to the time limits in the provisions of the Act to determine whether it is possible to hear the claim after this lengthy delay.

[36] As stated above, it is clear that Mr Coetzee is outside the six months provided for in s 54(1). Nor can it be said that the saving provisions in s 51, applied by s 54(3) to s 54 *mutatis mutandis*, are of use here as there is still a definitive longstop of 12 months. There is no evidence to suggest that the employer had knowledge of the accident from any other source at or about the time of the accident within those 12 months. The report was filed by the employer in 2005, eight years after the incident. Moreover, it is of note that in this report, there is no record of when the employee

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[5] *Keen & another v Holland* [1984] 1 WLR 251, 261 (EWCA) 'Once there is in fact an actual tenancy to which the Act applies, the protection of the Act follows and we do not see how . . . the parties can effectively oust the protective provisions of the Act by agreeing that they shall be treated as inapplicable. If an express agreement to this effect would be avoided, as it plainly would, then it seems to us to follow that the statutory inability to contract out cannot be avoided by appealing to an estoppel.'

reported the incident to the employer. Given the lateness of this application, and that the other two exceptions of, first, no prejudice in the opinion of the Commission or, second, reasonable cause are still subject to the 12 month longstop, it is not possible for the Commission to re-consider the application under s 56.

[37] I furthermore question whether it would have been appropriate in any case for the Labour Court to remit the issue to the Commission for consideration as if Mr Coomer had deemed the case ripe for formal hearing. With respect to the learned judge below, it is abundantly clear from the statutory scheme that the determination of which claims are to proceed to formal hearing is a decision-making process that is to be entrusted to the Commission, or a valid *delegee* of its power. It is therefore not the court's position to usurp that function, unless the failure to exercise the power under s 56 is subject to an administrative law challenge. These proceedings, however, are not a challenge to this exercise of discretion under the Act but rather a challenge to the failure to award compensation. Specifically, it is argued that there was evidence that rendered Mr Coomer's assessment that the disability in question was not a result of the accident untenable. This is clearly distinct from a challenge to Mr Coomer's failure to refer the question for full hearing – an issue which is not to be found in the founding affidavit.

[38] It seems to me important to observe that in any case the medical evidence was doubtful at the very best as to whether Mr Coetzee was entitled to compensation under the ECA.

[39] First, it is clear that there was no contemporaneous medical assessment of Mr Coetzee after his fall in 1996. This is explained on the basis that there were no doctors on Possession Island. However, Mr Coetzee, at the very earliest, only consulted with a doctor – a certain Dr van Wyk – two months later. From the first medical report and account prepared by a certain Dr Skinner on 6 March 2005, it is evident that X-rays were only obtained in July 1999, more than three years later. So much would be confirmed by a letter from Mr Coetzee's lawyers of 22 April 2008 that stated that the initial doctor who treated Mr Coetzee never took X-rays of his patient. In addition, the same first medical report also reveals that Mr Coetzee returned to work immediately. These facts are highly significant in light of the degenerative nature of his affliction. The nature of his back problem combined with the failure to obtain contemporaneous medical evidence means that it is very difficult to show that it was the result of an accident suffered in the course of employment. In all likelihood, Mr Coetzee did indeed fall from a ladder in 1996, but the condition he suffers from now, as was documented in medical reports eight years later, was never shown to be an injury suffered in the course of employment.

[40] So much would be confirmed by the medical reports by Dr Skinner and Dr Solomon. Doctor Skinner's opinion of 30 May 2007 is, amongst others, that 'as no special investigations were done after his accident it is difficult to prove that his condition is purely as a result of the accident' and furthermore the accident was only a contributing factor to his present injury. This uncertainty is repeated in

correspondence of 3 April 2008 after Mr Coetzee was seen by specialist radiologist, Dr Le Roux. In any case, some of Dr Skinner's other statements should be viewed with circumspection. He concludes on 2 June 2006 that 'As this patient was symptom free before the accident his spinal problem must be from the injury on duty'. First, Dr Skinner was not Mr Coetzee's doctor at the time of the accident, and he is not in a position of knowledge in respect of Mr Coetzee's condition prior to the fall. Second, it does not take into account the legal prerequisites for compensation. The question is whether the condition for which compensation is being sought was the result of an accident arising out of and in the course of employment. There are complicating factors such as the delay in seeking prompt medical attention, as well as the possibility of a pre-existing degenerative disease, that could very well mean that his present state is not the result of an accident arising out of the course of employment. Taken together, the mere fact that condition A exists after event B does not mean the terms of the Act are satisfied.

[41] In respect of Dr Solomon, again, we note that he only started treating Mr Coetzee on the 4 December 1998 – two years after the incident. His statements show that he treated Mr Coetzee 23 times since 1998 for problems with his back. However, none of this establishes that the present condition arose out of an accident at work. Again, Mr Coomer's assessment that there was a lack of nexus between the degenerative condition Mr Coetzee suffers from and the fall from the ladder in 1996 must be taken as correct. Similar observations can be made concerning the Medical Board's opinion in 2004 as to Mr Coetzee's fitness to work when he applied for

discharge on the grounds of disability as already noted. None of this documentation considers the cause of the disability. It limits itself to an assessment of the actual condition of the applicant.

None of it can realistically be taken to establish the required nexus between the accident and the condition presently suffered. Indeed, on page 2 of its report it is evident that the Medical Board considered that the disability was neither occasioned in the course of his official duties nor by circumstances arising out of the performance of his official duties.

[42] As a final observation, I also note that Mr Coetzee entertained the idea of applying for a discharge from public service on the grounds of disability in 2000. Dr Aldrich who saw him then opined that there were 'no grounds for his disability status at work'. Moreover, in 2004 when Mr Coetzee's application for a discharge from public service ultimately succeeded there was no reference to the accident in the Medical Board's report. The relevant disability relied on there was a degenerative sickness. I find it difficult to conclude in light of all these that Mr Coetzee's condition arose out of the incident in 1996. Surely it would have been documented in this boarding application. Furthermore, I find little guidance from the fact that Mr Coetzee received payments in respect of disability from the Maternity Leave, Sick Leave and Death Benefit Fund under the Commission. The criteria for award of compensation are very different. Section 28 of the Social Security Act, 1994 stipulates that an individual is entitled to benefits if 'absent from work through incapacity' for longer than thirty consecutive days. This requires no proof that the disability arose out of an accident at

work, which is the precise question in issue in respect of the compensation Mr Coetzee seeks under the ECA.

[43] In light of all of this evidence, I have no doubt that Mr Coetzee suffers from problems associated with the degenerative injury in his spine. However, this condition cannot be attributed to an accident suffered in the course of employment. There is a paucity of medical evidence to this effect, and an inordinate delay in seeking timeous treatment after the accident. Therefore, in any case, his claim for compensation was rightly refused.

Costs

[44] Counsel on each side has asked for costs in the event of the appeal succeeding. Although the appellants were represented in this court by two instructed counsel, quite properly lead counsel has asked for a costs order of one instructed counsel only. There is no plausible reason why the costs should not follow the result. As the appeal in the Labour Court was deemed to have been brought under the applicable Labour Act at the time which permitted – as the current Labour Act does - costs to be awarded only if proceedings were frivolous or vexatious and given that the appeal cannot be so characterised, the Labour Court correctly did not make a costs order. The position in this court is entirely different. The then applicable Labour Act did not preclude the awarding of costs in the Supreme Court in labour cases or in cases such as the present appeal.

Order

[45] The following order is accordingly made:

1. The appeal succeeds with costs, such costs to include the costs of one instructed and one instructing counsel.

2. The court *a quo*'s order that the matter is referred back to the first respondent to hold an inquiry in terms of s 56 of the ECA is set aside and substituted for the following order:

   'The appeal is dismissed'.

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SHIVUTE CJ

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STRYDOM AJA

APPEARANCES

APPELLANTS:	T J Frank SC (with him G Dicks)
	Instructed by Kangueehi & Kavendjii Inc
RESPONDENT:	S Prollius
	Instructed by Du Pisani Legal Practitioners