

SOUTH AFRICA / JUDGMENT

Benade v Minister of Justice & Constitutional Development and Another (2438/2007) [2014] ZANWHC 45 (17 April 2014)

[2014] ZANWHC 45

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

2438/2007

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“IN
THE HIGH COURT OF SOUTH AFRICA”
NORTH
WEST HIGH COURT, MAHIKENG
CASE
NO. 2438/2007
In

the matter between:

SARA
JOHANNA BENADE
PLAINTIFF
and
MINISTER
OF JUSTICE & CONSTITUTIONAL DEVELOPMENT
1ST
DEFENDANT
MINISTER
OF PUBLIC WORKS
2ND
DEFENDANT

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] The plaintiff, a female Regional Magistrate, issued summons against the defendants for payment in the amount of R3 981 703.00 (Three Million Nine Hundred and Eighty One Thousand and Seven Hundred and Three Rand), arising out of injuries she sustained in the office at her Ga-Rankuwa Magistrates' Court on 19 January 2006, when she slipped and fell on a floor which was wet with polish.

B. PLEADINGS

[2] The plaintiff alleged, in her particulars of claim, that the employer and/or agents of the first and/or second defendant were negligent in one or more of the following respects:

"5.2.1) 'n Dik lag en/of lae politoer is op die vloer aangebring wat die vloer uiters glad gemaak het wat 'n inherente gevaar geskep het;

5.2.2) Gemelde politoer is nie van die vloer verwyder;

5.2.3) Gemelde vloer is foutiewelik gepoleer;

5.2.4) Gemelde politoer is foutiewelik op vloer aangewend;

5.2.5) Geen waarskuwing hoegenaamd is aangebring, nieteenstaande dat hy/sy/hulle geweet het, alternatiewelik redelikerwys moes geweet het dat die aanbring van die politoer die vloer uiters glad maak en dat 'n person daarop kan gly en val;

5.2.6) Geen stappe hoegenaamd is geneem ten einde die incident te voorkom nie."

[3] She further alleged that as result of the fall, she sustained the following:

3.1 L1 burst fracture;

3.2 an injury to her L5/S1 disc.

[4] The defendant raised a special plea of duplication of claims in terms of section 35(1) of the Compensation for Occupational Injuries and Diseases Act 30 of 1993 (as amended) ("COIDA").

[5] The defendants further pleaded that:

5.1 the plaintiff had lodged a claim with the Compensation Commissioner in Pretoria on 07 March 2006 as claim number A6/500014;

5.2 the employer (of the plaintiff) was informed that liability of the claim was accepted for the payment of compensation and reasonable medical expenses;

5.3 the plaintiff's attorneys of record were notified that liability for compensation was accepted by the Compensation Commissioner;

5.4 the plaintiff instituted the action against the defendants, despite the provisions of section 35 of COIDA, which bar her from so doing;

5.5 the plaintiff's claim is therefore bad in law and should be dismissed on this ground.

[6] On the merits, the defendants denied:

6.1 that the plaintiff on 19 January 2006, at Ga-Rankuwa Magistrates' Court, slipped and fell in the office;

6.2 that her fall was caused by the negligence of the defendants' employee and/or agents, who used polish on the floor.

[7] In the defendants' plea they stated the following:

"4.1 The Defendants deny each and every allegation herein contained and put the Plaintiff to the proof thereof.

4.2 The Defendants further admit that the premises of the Odi Magistrates' Courts in Ga-Rankuwa fall under the management and control of the Second Defendant.

4.3 The Defendants further aver the following:

4.3.1 One Miss Dikeledi Matlala was the cleaner who cleaned the Plaintiff's officer under the supervision of her senior colleague, Miss Dinah Phala on the 19th January 2006;

4.3.2 Every Magistrate keeps the key to his or her office, and the cleaner only gain [sic] access to the Magistrate's offices for cleaning purposes when the Magistrates permit her to gain access;

4.3.3 The aforesaid Miss Dikeledi Matlala cleaned the Plaintiff's officer in her presence by scrubbing the floor with a wet cloth whilst the Plaintiff was seated in her office and did not move her chair;

4.3.4 The cleaning of the floor is always done by scrubbing only and no polish was applied to the floor which is made up of tiles;

4.4 In the premises, the Defendants deny that wet polish was applied to the floor as alleged."

[8] The defendants further pleaded that:

"7.1 during December 2005, the Plaintiff already had a degenerative medical condition pertaining to her lumbar area;

7.2 the Plaintiff indicated to her supervisor, Mar [sic] Daniel Mogotsi that she needed leave during January 2006 in order to attend to the health problems regarding her lumbar area;

7.3 the Plaintiff was involved in a motor vehicle accident and had sustained bodily injuries prior to the 19th January 2006;

7.4 The Defendants further plead that:

7.4.1 the Plaintiff lodged a claim with the Compensation Commissioner for an injury allegedly sustained on the 15th May 2001 when she slipped and fell on her back whilst moving furniture in her office. The Honourable Court is referred to

paragraph 1 of Annexure “DOJ1” attached hereto;

7.4.2 the Plaintiff lodged another claim with the Compensation Commissioner for an injury allegedly sustained on the 7th May 2004 when she slipped and fell on her back on a staircase which was polished. The Honourable Court is referred to paragraph 2 of Annexure “DOJ1” attached hereto;

7.4.3 in the premises, the Defendants deny that the alleged injuries were caused by the alleged fall (which is not admitted), or any negligence on the part of the servants and/or agents of the Defendants and put the Plaintiff to the proof thereof.”

[9] The plaintiff’s replication to the special plea is a bare plea.

C. ISSUES THAT WERE COMMON CAUSE AT THE COMMENCEMENT OF THE PROCEEDINGS

[10] The following facts were common cause:

10.1 the citation of the plaintiff;

10.2 the citation of both first and second defendants and that all relevant parties were before Court;

10.3 the jurisdiction of this Court to hear and adjudicate the dispute;

10.4 that the Magistrates’ Court where the plaintiff allegedly fell falls under the management and control of the second defendant, and is in fact owned by the second defendant;

10.5 that on 19 January 2006, the plaintiff attended her office at Ga-Rankuwa Magistrates’ Court;

10.6 the injuries sustained by the plaintiff in so far as it is consistent with the doctors’ report;

10.7 that the retirement age for Magistrates is 65;

10.8 that proper demand was made in terms of the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, read with the Public Service Act 103 of 1948;

10.9 the reports of the plaintiff's orthopaedic surgeon, Dr Birrell, are accepted by the parties, except where the report of Dr Oelofse, the defendants' orthopaedic surgeon, is more to the defendants' benefit, which only relates to one future medical expense;

[11] With such agreements being concluded and the reports handed in, the following facts further became common cause:

11.1 the plaintiff injured her coccyx and sustained a fracture of L1;

11.2 the plaintiff was hospitalised for a period of two to three weeks;

11.3 the plaintiff, after her discharge from hospital up to her return to work on 01 May 2006, had to wear a soft back brace and was confined to her bed;

11.4 the plaintiff was admitted to Ferncrest Hospital for one day, for a back infiltration;

11.5 the plaintiff previously had a L5/S1 rhizotomy done in 2004;

11.6 the plaintiff suffered acute pain for a period of four to six days, thereafter moderate pain for three to four weeks and chronic pain thereafter;

11.7 although the plaintiff's back was not in pristine condition prior to the accident, the accident greatly worsened the plaintiff's problems and she has a new set of symptoms as a result of her fall;

11.8 solely as a result of her fall on 19 January 2006, the plaintiff would have to retire two years early. There is a 20% to 25% chance of a fusion in future at T12/L1 level, at a cost of R120 000.00. The capitalized value hereof is R27 000.00.

[12] The Defendants counsel in her closing argument admitted that the plaintiff slipped and fell in the office on 19 January 2006, thereby injuring her back.

D. SECTION 35 OF COIDA

[13] The first issue for consideration is whether the plaintiff is barred from instituting a claim against both the first and second defendants in terms of the provisions of section 35(1) of COIDA.

[14] The parties did not file an application in terms of Rule 33(4) for an order that the special plea raised questions of law which might conveniently be decided before any evidence was led. The parties in casu agreed that the special plea should not be decided separately as evidence was required for the issues raised in the special plea.

[15] The plaintiff, in its heads of argument and submissions to Court, relied on the following:

15.1 the second defendant is not the plaintiff's employer, hence, the defendants' contention regarding the second defendant is misplaced;

15.1 section 36 of COIDA allows claims against third party;

15.2 the first defendant is an 'employer individually liable' in terms of the COIDA, and is exempt in terms of section 84(1)(a) from paying assessments to the Compensation Fund;

15.3 as the government is an 'employer individually liable', you can still claim from such employer;

15.4 the first defendant is liable in terms of section 36 of COIDA, for future medical treatment. A concession was made by the plaintiff that their entire claim cannot be proceeded against the first dependent.

[16] This Court must consider the following questions:

16.1 Was a claim lodged with the Compensation Commissioner, which claim was registered and accepted for payment of compensation and reasonable medical expenses?

16.2 Is the plaintiff barred from instituting a civil claim against the defendants for the recovery of any damages due by virtue of the provisions of section 35(1) of COIDA?

16.3 Is the first defendant an 'employer individually liable' in terms of COIDA and if the answer is in the affirmative, can the plaintiff institute a civil claim against the first defendant?

16.4 Is the first defendant liable in terms of section 36 for future medical treatment?

16.5 Is the second defendant protected under COIDA and can the plaintiff claim from the second defendant?

16.6 Does section 36 of COIDA permit the plaintiff to claim damages from a third party, namely, the second defendant?

E. WAS A CLAIM LODGED WITH THE COMPENSATION COMMISSIONER?

[17] Ms Benade testified that in January 1976 she commenced her employment with the Department of Justice and Constitutional Development ("the Department of Justice") as an administrative clerk. Pursuant thereto, she was granted a bursary and she studied full-time at the University of Bloemfontein, where she obtained her BJuris degree in 1979. Thereafter, she started working as a prosecutor until May 1988 when she resigned. She returned to the Department of Justice in October 1988 as a senior prosecutor and on 01 November 1990, she was appointed as an additional magistrate. In 2000, she was appointed as a senior magistrate, head of office in Brits, and on 01 April 2004, she was appointed as a regional court magistrate based at Odi, Ga-Rankuwa, and is still there.

[18] She confirmed that the appointment date reflected on the salary advice was 10 October 1988, which was when she was employed by the Department of Justice as a senior prosecutor.

[19] In cross-examination, she testified that on 15 May 2011, she injured her back at the Magistrates' Court, Brits, while pushing a heavy table at work and the L5/S1 disc popped. A claim was lodged with the Workmen's Compensation Commissioner ("the Commissioner") as she was on duty when she injured her back, and the Commissioner accepted liability for

the injury. The plaintiff testified that she was not compensated. Under cross-examination, she conceded that she was negligent and that is the reason why she did not pursue with the claim.

[20] A second incident occurred on 07 May 2004, at the Magistrates' Court in Ga-Rankuwa, where she stepped on polished steps when climbing the steps to enter the court. She sustained a bruised buttock and stiff muscles. It was put to her that she immediately lodged a claim with the Commissioner, she replied "I think I must just put it in perspective. I reported the incident. I never lodged claims or wanted money from them, I just reported it."

[21] The Commissioner in a letter stated the following:

"The employer, was informed that liability of the claim was accepted for payment of compensation and reasonable medical expenses. No medical report was received up to this date."

[22] The plaintiff replied that she did not receive any compensation for the fall in 2004.

[23] She was then referred to the incident for which she issued summons, which occurred on 19 January 2006, where she sustained an L1 fracture, and was asked:

"Question: Are these the only incidents where claims were submitted either by you or on your behalf for compensation?"

Answer: That is according to me the only claim. I cannot recall any other claim."

[24] The plaintiff was asked questions about a letter from her attorney, addressed to the Director General, Department of Labour, dated 14 July 2006, it reads, inter alia, as follows:

"Ons kliënt het reeds die Department asook haar werkgever kennis gegee van 'n voorval wat plaasgevind het op 19 Januarie 2006 alternatiewelik dien hierdie skrywe ter kennisname daarvan."

Ons kliënt is geregtig op eise alternatiewelik voordele alternatiewelik vergoeding in terme van die Wet op Vergoeding vir Beroepsbeserings en Siektes No. 130 of 1993.

Sodanige eise is alternatiewelik sal alternatiewelik sal van tyd tot tyd deur ons kliënt ingedien word by die betrokke department vir doeleindes van die verkryging van die voordele en/of vergoeding voortspruitend uit die voormelde Wet.

Ons heg vir u hierby aan 'n skrywe gerig aan die Department Justisie, waarvan die inhoud van sigself spreek.

Sodanige eise is addisioneel tot vergoeding in terme waarvan ons kliënt geregtig is in terme van die Wet op Vergoeding van Beroepsbeserings en Siektes No. 130 van 1993.

Voormelde moet geensins gesien word of geïnterpreteer word as 'n afstanddoening van enige van ons kliënt se regte voortspruitend uit voormelde wetgewing nie.

In sover enige van die eise uiteengesit in die hierby aangehegte kennisgewing, voordele en/of eise is waarop ons kliënt geregtig

is voortspruitend uit die Wet op Vergoeding vir Beroepsbeserings en Siektes No. 130 van 1993, dien hierdie skrywe ter aanmaning vir betaling daarvan.”

[25] The letter of demand referred to in the aforesaid letter is dated 12 July 2006, and is addressed to the Department of Justice in terms of the Institution of Legal Proceedings Act, wherein the plaintiff claimed payment in the amount of R4 000 000.00 (Four Million Rand) because of the injuries she sustained.

[26] A letter dated 07 November 2006 was sent from the Department of Labour to the plaintiff's attorney. The letter was attached to the defendant's plea and reads as follows:

“COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

EMPLOYER: DEPT. JUSTICE AND CONSTITUTIONAL DEVELOPMENT

EMPLOYEE: BENADE S J

DATE OF ACCIDENT: 17 MAY 2001

REFERENCE: (176313922)

Your letter reference S J Pistorius/Van Aardt/LB 1103/JB 289 dated 14 July 2006 which was addressed to the Director General Department of Labour, is hereby acknowledged.

Following an investigation on Ms S J Benade's claims, please be advised as follows:

1. Ms. Benade sustained a back injury on 15 May 2001 whilst moving heavy furniture in her office. The employer's report (W.Cl.2) together with the medical reports was received in this office on 2 January 2002. The claim was registered and claim number A1/S00938 was allocated. According to Dr. W J Du Plessis medical report, she visited him on 22 May 2001. Ms Benade was treated for a tender back condition on the lower back levels L5/S1.

The employer was informed on 16 December 2005 that the claim was accepted for the payment of compensation and all reasonable medical expenses incurred. A progress report dated 22 October 2001 was received from Dr. Du Plessis indicating that she was still receiving physiotherapy. The final medical report (W.CL.5) was requested on 20 August 2001, but the report has not been received up to this date. (copy attached)

2. On 7 May 2004 Ms. Benade injured her back again when she used the staircase which was polished. She slipped and fell on her back. The employer's report (WCl.2) was received in this office on 21 July 2004, the claim was registered and claim number A4/S00711 was allocated. A first medical report received from Dr. F Schultz indicates that Ms Benade was seen by him on 8 May 2004, and she was treated for a “ligament injury” to her lumber spine. X-rays were taken by Dr Kruger, but no medical account was received. Dr. Schultz mentioned in his report dated 8 June 2004 that Ms. Benade will be fit for normal duty on 20 May 2004.

The employer was informed that liability of the claim was accepted for the payment of compensation and reasonable medical expenses

incurred. A final medical report (WC.1.5) was requested on 15 May 2006, but the report has not been received up to this date.

(Copy attached)

3. Ms. Benade injured her back again on 19 January 2006. She slipped on a floor wet with polish and fell on her back. The employer's report of accident (W.CL.2) was received in this office and the claim was registered on 7 March 2006. Claim number A6/S00014 was allocated. Dr. Bezuidenhout indicates on the first medical report (WC.1.4), that she sustained a left burst fracture in her lower back. Dr Bezuidenhout booked her off for 9 weeks. The employer was informed that liability of the claim was accepted for the payment of compensation and reasonable medical expenses. No final medical report (W.Cl.5) was received up to this date. (copy attached)

On all these three claims liability was accepted and the employer was informed that compensation must be paid to Ms. Benade for the periods she was off duty as a result of the accident.

Whereas this office is liable for the payment of reasonable medical expenses, but only one account was received from Dr. Schultz to the amount of R347,76 and paid by this office on 2 December 2004. The payment was directly transferred into his [sic] number 45100425.

Ms. Benade must submit all medical accounts regarding these claims to enable this office to consider payment.

To enable this office to finalise her claim a final medical report (WC.L.5) must be submitted which indicates in detail any present

anatomical defect and/or impairment of functions as a result of the accident."

[27] The plaintiff's attorney, on 14 May 2008, addressed a letter to the Department of Labour. The content thereof is as follows:

"RE: COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES [sic] ACT, 1993:

EMPLOYEE: S J BENADE

DATE OF ACCIDENT: 19 JANUARY 2006

CLAIM NO A6 S0004

The abovementioned matter refers

We herein act on behalf of Mrs S.J Benade.

As you are aware our client was injured at work on the 19th of January 2006 in pursuance whereof our offices accepted liability as more comprehensively set out in your letter addressed to our offices dated the 7th of November 2006.

Drs Percy Bezuidenhout, in accordance with his advises forwarded to yourself, suggested a further operation to which you responded by way of your letter of the 18th of April 2008.

In terms of your letter you stated that: ‘With reference to the request for T12/L2 posterior fusion an L5/S1 charity as per claim reopening from dated 10/04/2006 and telephonic

communication, pleased be advised that acceptance of liability for payment cannot be approved.

Kindly note that the claim was accepted for lower back injury with lumber vertebrae affected. . . .’

As such an operation is required by our client our client reserves the right to fund same out of other sources on condition that your offices will be held liable for payment of compensation and/or damages.

This letter therefore serves as demand for payment of the operation alternatively the expenses incurred by our client.

Should we not receive your favourable response within 30 (thirty) days from date of this letter, our client’s rights to proceed with legal action remain reserved.

This is not a comprehensive response and all our client’s rights, notwithstanding the aforesaid, remains reserved in toto.”

[28] The defendant called Mr Twana Makhubela (“Mr Makhubela”), the risk manager in the office of the Commissioner, in Pretoria. He is appointed in terms of the Public Service Regulation. His role is to investigate corruption and fraud, manage the fraud unit, implement litigation and risks within the Department.

[29] He testified that the plaintiff’s claim was submitted, registered and adjudicated, and liability was accepted without investigation.

[30] He said that once liability is accepted, the claim continues for two years and liability stays open until the relevant parties submit documentation. He said with regards the plaintiff’s case, they are still waiting for the final medical reports.

[31] He further testified that once the employer lodges a claim, you cannot claim from the employer. He also stated that the employees in the Department of Justice fall under executive employees and must report to the Commissioner.

[32] From the foregoing it is apparent that a claim was lodged in terms of COIDA, which claim was accepted and communicated to the plaintiff.

F. IS THE PLAINTIFF BARRED FROM INSTITUTING A CIVIL CLAIM AGAINST THE DEFENDANTS?

[33] The answer to this question can be found in sections 35 and 36 of COIDA, which reads:

“35. Substitution of compensation for other legal remedies

- (1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
- (2) For the purposes of subsection (1) a person referred to in section 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.

36. 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 Director-General 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 subsection (1)(a) the court shall have regard to the compensation paid in terms of 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 Director-General 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.”

- [34] The Supreme Court of Appeal (“the SCA”) in MEC for Education, Western Cape Province v Stauss [2008] 1 All SA 440 SCA, held that:

“COIDA came into operation on 1 March 1994 providing for a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases.”

- [35] The Constitutional Court in Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening) 1999 (2) SA 1 (CC) at 11E – F, paragraph 15, where the Court held that:

“COIDA 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 the employers are obliged to contribute.”

- [36] In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* supra, the Court held that section 35 does not violate the right to equal protection and benefit of the law. The Constitutional Court accepted that the bar on civil claims in section 35 is rationally corrected to the purpose of providing ‘no fault’ financial compensation to employees from a compensation fund to which employers are required to contribute.
- [37] Compensation is payable irrespective of the common law liability of the employer. The Act, thereby increased the rights of the employee but on the other hand, the right to compensation substituted all other remedies the employee has. See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* supra.
- [38] COIDA provides for compensation for employees and section 35(1) expressly excluded liability on the part of the employer for damages in respect of any occupational injury or disease resulting in disablement or death.

Hence, COIDA removed the common law right of an injured or ill employee to claim damages from his/her employer in a court of law.

- [39] An employer is defined in the Act as follows:

“ ‘employer’ means any person, including the state, who employs an employee, and include – . . . ”

- [40] It is only employers who are protected by the Act’s substitution of compensation for other legal remedies, all others remain liable for damages. An employer is only protected in its capacity as an employer.
- [41] It is the plaintiff’s case that the first defendant is her employer.
- [42] The ‘employee’ referred to in section 35(1) whose common law claim was expunged was limited to an ‘employee’ under COIDA in respect of occupational diseases mentioned in COIDA. It was this ‘employee’ that section 35(1) of COIDA excluded from instituting a claim for the recovery of damages against the employer for occupational diseases resulting in disablement or death. See *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC).
- [43] An employee is defined to be any person who has entered into contract of service, apprenticeship or learnership with an employer. The prohibition on employees instituting an action against an employer covers both claims based on an employer’s vicarious liability for the acts of employees and claims occasioned by the employee’s own negligence. All claims for damages are excluded, including those for pain, suffering and loss of amenities of life. See *Mphosi v Central Board for Co-Operative Insurance Ltd* 1974 (4) SA 633 (A) at 644B.

- [44] The Supreme Court of Appeal in *The President of RSA v Reinecke* (210/13) [2014] ZA SCA 3 (28 February 2014) at paragraph 12, held that:

“[12] The Magistrates Act did not, however, put an end to the status of magistrates as employees within the general public service, although by making special arrangements in relation to them, it removed them from most of the provisions applicable to other public service employees in terms of the Public Service Act. Had it terminated their status as employees that would have involved a radical alteration to the basis upon which they had been appointed as magistrates. It would have converted them from employees of the State to office bearers having no contractual link to the State and dependent solely on public law remedies to enforce the rights vested in them by the Magistrates Act and the regulations made thereunder. If that was the purpose of the legislation one would have expected there to be clear language to that effect, as it would involve the removal of existing rights and their substitution by uncertain other rights. There is no such clear language in the Magistrates Act. On the contrary s 18(3), which is part of the transitional and savings provisions, provides that the conditions of service applicable to magistrates prior to the date of commencement of s 12 of the Magistrates Act ‘shall not be affected to his or her detriment’. This provision was protective of the established legal rights of magistrates appointed prior to that date.”

Also paragraph 13:

“[13] As the following summary shows, the terms of the Magistrates Act also indicate that the relationship of magistrates, once appointed, and the State, as represented by the Department of Justice and Constitutional Development, continued to be one of employment under a contract of employment.”

- [45] Although I have cited the above authority, it should be noted that it is not the plaintiff's case that she is not an employee as referred to in section 35(1) of COIDA. This can be borne from both the pleadings and evidence on record.

G. EMPLOYER INDIVIDUALLY LIABLE

- [46] In terms of section 1 of COIDA, an employer individually liable is defined to mean an employer who is exempt from paying assessments to the Compensation Fund. There are two types of employers individually liable in terms of section 84 of COIDA, firstly, the organs of state and certain other authorities, and secondly, employers who had, with the approval of the Director-General, obtained from a mutual association a policy of insurance for the full extent of their potential under the Act.
- [47] Mr Makhubela testified that an exempted employer does not pay any compensation contribution as they put a pay guarantee to the Commissioner. When questioned about the meaning of employer individually liable, he replied that it is those employers who have their own third party insurance to take care of claim liabilities. He said this employee is still compelled to register and must get approval from the Commissioner for exemption.

- [48] Liability is attached to either the Director-General (who replaced the Commissioner), the employer individually liable or the mutual association (sections 29, 61 and 62). The employer is not liable to the employee unless the liability arises under COIDA (section 35). See *Rand Mutual Assurance Company Limited v Road Accident Fund* [2008] ZA SCA 114.
- [49] The fact that an organ of state falls under the category of an 'employer individually liable' only means that the organ of state is obliged to comply with the statutory requirements set by COIDA and the main difference is that the organ of state pays the benefits directly to the employee after such benefits have been determined by the Compensation Commission.
- [50] As stated *supra*, COIDA expressly removed the plaintiff's common law right to claim damages from her employer. The plaintiff's reliance on 'employer individually liable' in terms of section 84(1)(a) to mean that the plaintiff can institute an action for compensation and damages against the employer is misconstrued.

H. INCREASED COMPENSATION

- [51] Employees are able to apply for increased compensation payments based on employer negligence. This is an exception to the Act's system of 'no fault' compensation. An employee is entitled to increased compensation if she is injured in an accident or suffers from an occupational disease caused by the negligence of her employer. See section 56(1)(a); *Fred Saber (Pty) Ltd v Franks* 1949 (1) SA 388 (A) at 403.
- [52] Negligence play a role only when an employee claims additional compensation in circumstances where it can be established that the injury was caused by the negligence of the employer or certain categories of managers and fellow employees.
- [53] 'Employer' is defined widely to include all persons whose negligence could render the employer liable to a claim for additional compensation. See section 35(2) read with section 56(1)(b)–(e).
- [54] It is compensation that is being paid and not damages. See *Young v Compensation Commission and Another* (1998) 19 ILJ 1096 (T) at 1107A. Hence the concession by the plaintiff referred to *supra*, that its claim against the first defendant is limited.
- [55] However, a claim of this nature must be done in terms of the COIDA. The procedure for claiming increased compensation based on the employer's negligence is prescribed in section 56 of COIDA. It is not the plaintiff's case that she launched her claim as provided in terms of section 56.
- [56] The plaintiff could not rely on section 36(1)(a) of COIDA for its submission, that the first defendant is liable for future medical treatment as it was incumbent on the plaintiff to lodge her claim in terms of section 56 of COIDA as stated *supra*, which the plaintiff has not done.

[57] It should also be noted that in the case of *Jooste v Score Supermarket Trading (Pty) Ltd* (Minister of Labour intervening) *supra*, the Court at paragraph 14 held that 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 section 35(1) deprives the employee of the right to a common law claim for damages.

I. THE SECOND DEFENDANT

[58] It is the plaintiff's case that section 35 does not protect the second defendant as the second defendant is not the plaintiff's employer.

[59] An employee may recover damages from a third party who has caused an accident or occupational disease. See section 36(1)(a) *supra*.

[60] In awarding damages in a claim instituted by an employee against a third party, the court must have regard to the amount of compensation paid in terms of the Act. See section 36(2).

[61] As stated *supra*, the plaintiff did not lodge the claim in terms of section 56.

[62] The term 'third party', covers all persons other than an employer and those employees whose negligence would render the employer liable to pay increased compensation. See section 36(2)(a).

[63] The Constitution 108 of 1996 now defines the concept 'organ of state' as:

"(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation but does not include a court or a judicial officer."

[64] As a general rule, one organ of the state could not hitherto sue another organ of state. The state is to be regarded as one employer, therefore an employee in one state department may not claim for an occupational injury or disease from another state department on the basis that the injury or disease was caused by the negligence of an employee of the latter department. See *Briel en Andere v Minister van Veiligheid en Sekuriteit*

[1997] 3 All SA 132 (T).

[65] The second respondent is not a third party, but falls within the definition of employer as stated *supra*. Accordingly, in terms of section 35, the plaintiff is barred from pursuing her claim against the second defendant.

J.

CONCLUSION

[66] In the circumstances, I am of the view that section 35(1) expressly excluded liability on the part of both the first and second defendants for damages and compensation in respect of the plaintiff's occupational injury.

[67] The plaintiff's claim against the first and second defendants is accordingly extinguished by section 35 of COIDA.

K. ORDER

[68] In the circumstances, I grant the following order:

- a) The special plea upheld.
- b) Plaintiff's claim is dismissed.
- c) The plaintiff is to pay the costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 03 DECEMBER 2013

DATE OF JUDGMENT

: 17 APRIL 2014

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Prepared on 9 October 2026 · Esheria