

SOUTH AFRICA / JUDGMENT

Clementz v Millbo Paper CC and Others
(27096/2019) [2021] ZAGPJHC 43; [2021] 2 All SA
774 (GJ); [2021] 7 BLLR 728 (GJ); 2021 (4) SA 186
(GJ) ; (2021) 42 ILJ 1796 (GJ) (19 March 2021)
[2021] ZAGPJHC 43

COURT

South Gauteng High Court, Johannesburg

BEFORE

Gilbert

CASE / FILE NUMBER

27096/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

(1)

REPORTABLE: Yes

/ No

(2)

OF INTEREST TO OTHER JUDGES: Yes / No

Case No.:

27096/2019

In

the matter between:

SIMON CLEMENTZ

Plaintiff

and

MILLBO PAPER CC

First Defendant

GREENBAT (PTY)

LIMITED

Second Defendant

RONALD PRINSLOO

Third Defendant

SHANE ROBIN ERIC

ISAACS

Fourth Defendant

DAVID MELVILLE
GRIFFITHS
Fifth Defendant

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email.

Per Gilbert AJ:

1. The plaintiff pleads in these action proceedings that he suffered severe injuries at work while performing his duties on machinery when hot molten adhesive blew up onto his face, hands and abdomen. The plaintiff further pleads that the incident was caused by the sole negligence of three of his (now former) employer's senior management while they were under the influence of alcohol.[1]
2. What I am required to decide is nothing new. What I am to decide is the narrow issue of whether the incident pursuant to which the plaintiff suffered personal injuries at his workplace arose out of his employment, within the meaning of "accident" in section 1 of the Compensation for Occupational Injuries and Diseases Act, 1993 ["the Act"]. If it did, then the plaintiff would not be able to pursue his common law claim for damages against his erstwhile employer and the senior management because of the exclusionary provisions of section 35 of the Act, which substitutes that common law civil claim with a statutory administrative claim for compensation.
3. The courts regularly have to decide this issue, both in South Africa and in foreign jurisdictions in relation to similarly worded statutes providing for statutory compensation to employees for workplace injuries. The reported cases show that often it may be a difficult task to decide whether on a particular set of facts the accident arose out of the employee's employment.
4. In this instance, I am asked to decide the issue on exception, and without having had the benefit of evidence at a trial.
5. Navsa ADP in Member of the Executive Council for the Department of Health, Free State Province v EJN

[2015] 1 All SA 20 (SCA)[2], after referring to one of the appeal court's earlier decisions nearly fifty years previously, had this to say:

"In Minister of Justice v Khoza 1966 (1) SA 410 (A), this Court had to wrestle with the vexed question of whether an accident arose out of an employee's employment. That question is at the heart of the present case."

6. Navsa ADP continued[3] that “South African courts have not been a model of consistency in their approach to the determination of whether an accident arose out of an individual’s employment”, pointing out that a similar situation prevails internationally.[4]
7. After considering the oft-cited Minister of Justice v Khoza,[5] which required that there be in the broad sense a causal connection between the employment and the accident, Navsa ADP in paragraph 31 of his judgment refined the test to asking “the question whether the wrong causing the injury bears a connection to the employee’s employment. Put differently, the question that might rightly be asked is whether the act causing the injury was a risk incidental to the employment”. [6]
8. Nonetheless Navsa ADP continued in that same paragraph that:

“There is of course, as pointed out in numerous authorities, no bright-line test. Each case must be dealt with on its own facts.”
9. Navsa ADP also[7] referred to Addleson J’s consideration of Khoza in Ex parte Workmen’s Compensation Commissioner: in re Manthe 1979
- (4) SA 812 (E) that Khoza did not intend to “lay down” any principle of invariable application to all possible combinations of circumstances and that the facts must rule the decision in each case.
10. In last year’s South African Law Reports, for 2020, there are two reported cases wrestling with the same question and which both unsurprisingly refer to MEC v EJN.
11. In De Gee v Transnet SOC Limited 2020
- (2) SA 488 (GJ) this Division repeated what Navsa ADP had stated that there was no bright-line test and each case must be dealt with on its own facts.[8] In that matter, on the facts, the court found that the accident did not arise out of the employee’s employment and therefore his common law damages claim was not excluded.
12. In Churchill v Premier, Mpumalanga and another 2020
- (2) SA 309 (MN) the court too referred to MEC v EJN[9] and reiterated[10] that whether an injury suffered by a workman is an ‘occupational injury’ for purposes of the Act is ‘a perplexing question’ and that over a century ago, in McQueen v Village Deep GM Co Limited 1914 TPD 344 the court then already stated at 347 that ‘the most difficult question which arises in the present case is whether the facts as stated by the magistrate can be said to constitute an ‘accident’ within the meaning of the law.’
13. The court in Churchill found that the employee plaintiff who was injured during an employment related protest by protesting employees had suffered injury from an accident arising out of her employment and therefore her common law damages claim was excluded.

14. During the course of preparation of my judgment, the Supreme Court of Appeal overturned the decision of the court a quo in Churchill.[11] Again, this time per Wallis JA, the court found that formulating a single test to determine whether an injury arose out of the injured party's employment is neither feasible nor desirable.[12]
15. After referring to the appeal court's previous decision in MEC v EJN, Wallis JA held that:
"[t]he only safe approach is to examine closely the facts of each case in order to decide whether the person's injuries arose out of their employment. The closer the link between the injury sustained and the performance of the ordinary duties of the employee, the more likely it will be that they were sustained out of their employment. The further removed from their duties, and the less likelihood that those duties will bring the employee into a situation where such injuries might be sustained, the less likely that they arose out of their employment."[13]
16. To emphasise the point, Wallis JA later in the judgment[14] stated that:
"It is necessary to repeat what has oft been said before in these cases, namely that there is no bright line test and the enquiry is always whether the statutory requirement that the accident arose out of the person's employment, as well as in the course of that employment, is satisfied. The court must analyse the

facts

closely to determine whether on balance the accident arose out of the person's employment. And in the last resort an employer seeking to rely on s35 to avoid liability bears the onus of satisfying the court that the accident arose out of the claimant's employment."

17. Ordinarily, the vexing issue whether the accident arose out of the employee's employment is to be decided by a trial court after having had the benefit of evidence. But in this particular instance the first, fourth and fifth defendants seek of the court to decide this vexing question by way of exception. The second and third defendants have not excepted, and have pleaded.
18. The excipients acknowledge that the facts pleaded by the plaintiff must be accepted as correct for purposes of deciding the exception but submit that even on a benevolent interpretation of those accepted facts,[15] the plaintiff will not be able to establish at trial, after evidence is led within the parameters of what is pleaded,[16] that the accident arose out of his employment and that therefore their exception that the particulars of claim lack averments which

are necessary to sustain an action should be upheld.

19. Once the contours of deciding the issue include that there is no bright line test and each case must be decided on a close consideration of its own facts, the limitations of answering the question by way of exception become apparent. This is not to say that the issue is incapable of determination by exception.[17] No doubt there are the ‘run-of-the-mill’ cases, which do not usually make the law reports, where the facts may not present any difficulty and the question can be decided on exception. Is this one of those cases? The excipients contend so.
20. Having set out this introduction, the rest of this judgment is structured as follows:
- 20.1. a brief overview of the relevant provisions of the Act;
- 20.2. the relevant pleaded facts that must be accepted as correct for purposes of determining the exception;
- 20.3. whether on exception I am able to find that on the pleaded facts the plaintiff will not be able at trial, after leading evidence, to prove that the accident arose out of his employment.

A BRIEF OVERVIEW OF THE RELEVANT PROVISIONS OF THE ACT

21. As the long title of the Act expressly provides, its purpose is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases, and to provide for matters connected therewith.
22. The Constitutional Court in *Jooste v Score Supermarket Trading (Pty) Limited (Minister of Labour intervening)* 1999
- (2) SA 1 (CC) described the Act as ‘important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large’.
[18]
23. Section 22, which is the central operative provision and which is headed ‘Rights of employee to compensation’, provides:
- “22(1) If an employee meets with an accident resulting in his disablement or death such employee or the dependents of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.”*
24. Section 22(3)(a) limits this right of an employee to compensation,:
- “If an accident is attributable to the serious and wilful misconduct of the employee, no compensation shall be payable in terms of this Act, unless –*
- (i) the accident results in serious disablement; or
- (ii) the employee dies in consequence thereof leaving a dependant wholly financially dependent upon him.”

25. 'Serious and wilful misconduct' is defined in section 1 to include "being under the influence of intoxicating liquor or a drug having a narcotic effect".
26. Navsa ADJ in MEC v EJN described the Act as follows:[19]
- "In a nutshell, the Act provides a ready source of compensation for employees who suffer employment related injuries and provides for compensation without the necessity of having to prove negligence, although negligence may result in greater compensation. It should, however, be borne in mind, that the object of the Act is to benefit employees and that their common law remedies were restricted to enable easy access to compensation. It does not necessarily mean that compensation for every kind of harm they suffer whilst at their place of employment has to be pursued through that statutory channel. However, if the injury was caused by an accident that arose out of an employee's employment, then the latter is restricted to a claim under the Act. This is referred to as the exclusivity doctrine."*
27. Negligence features in the present instance. The plaintiff pleads that the defendants' sole negligence caused the accident. Section 56 of the Act provides that an employee who meets with an accident which is due to the negligence of his employer or various other specified persons may apply for increased compensation in addition to the compensation normally payable in terms of the Act. Although negligence need not be proven for an employee to claim statutory compensation, negligence does entitle the employee to apply for increased statutory compensation.
28. Whether the employee claims compensation under section 22(1) or applies for increased compensation under section 56 where negligence is present, the employee needs to 'meet with an accident'.
29. An 'accident' is defined in section 1 as meaning 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee'.
30. Given the social utility of the Act, and its predecessors, the courts have often pointed out that the Act must be interpreted generously in favour of the employees. So, for example, in Davis v Workmen's Compensation Commissioner 1995
- (3) SA 689 (C) at 694F:[20]
- "The policy of the Act is to assist workmen as far as possible. See Williams v Workmen's Compensation Commissioner 1952 (3) SA 105 (C) at 109C. The Act should therefore not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favour to him."*
31. But a generous interpretation of what constitutes 'an accident' is a double-edged sword.
32. Section 35 of the Act, which is headed 'Substitution of compensation for other legal remedies' provides that:

“(1) No action shall lie by an employee or any dependent 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 disablement or death.”

33. The scope of the exclusion of the common law damages claim under section 35 is extended by way of a deeming provision as to who is an employer for purposes of its exclusionary provisions. Section 35(2) provides that:

“35(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.”

34. Sections 56(1)(b), (c), (d) and (e) refer to the following persons:

“(b) ... an employee charged by the employer with the management or control of the business or of any branch or department thereof;

- (c) ... an employee who has a right to engage or discharge employees on behalf of the employer;
- (d) ... an engineer appointed to be in general charge of machinery, or a person appointed to assist such engineer in terms of any regulation made under the Minerals Act, 1991 (Act 50 of 1991); or
- (e) ... a person appointed to be in charge of machinery in terms of any regulation made under the Occupational Health and Safety Act 1993 (Act 85 of 1993).”

35. As will appear below, this deeming provision is directly relevant.

36. The Constitutional Court in *Jooste* examined the difference between compensation in terms of the Act and at common law, and which demonstrates the swings and roundabouts

created by the Act, both for the employee and the employer.[21]

37. An employee is provided with the right to claim compensation by way of an administrative process, without having to prove negligence and without the costs and risks attendant upon civil litigation. The employee is paid compensation from the statutory fund and does not have to run the risk of an empty judgment against the employer. The trade-off by an employee for his right to statutory

compensation is that he then is excluded in terms of section 35 from instituting action against his employer, for what may have been significantly larger damages.

38. Similarly for the employer. The employer has to contribute to the statutory fund by way of obligatory payments, on pain of criminal sanction. In return the employer is protected from being sued by his employee as the employee is to claim compensation under Act and foregoes his common law damages claim against the employer.

39. A generous interpretation for employees of what falls within the ambit of an 'accident' for purposes of facilitating claims for statutory compensation under section 22 (and for increased compensation under section 56 if the employer is negligent), has the corresponding disadvantage for the employees that as the same definition of an 'accident' is used for purposes of section 35, the wider the exclusion of the employees' claims for common law damages. Although section 35 does not directly refer to an 'accident', it does refer to any 'occupational injury', which means 'a personal injury sustained as a result of an accident'.^[22]
40. Where a generous definition of an 'accident' cuts its double-sided swath is where the employee fails to claim compensation under the Act. Section 43 of the Act provides that a claim for compensation must be lodged by or on behalf of the claimant employee in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death, failing which the claim for compensation will not be considered, save in certain limited circumstances. Should an employee fail to lodge his or her claim for statutory compensation timeously, he or she would not only be unable to claim statutory compensation but will also forfeit his or her common law claim to damages.
41. The excipients' counsel urged upon me that in adopting a generous interpretation of an accident for purposes of section 22, it cuts both ways, and that the same generous interpretation should also apply when it comes to the exclusionary provisions of section 35. There is, as appears above, appeal in this submission.
42. Nonetheless, as appears below, this double-edged effect of adopting a generous interpretation of an 'accident' has bothered the courts. Rather than wrestling directly with the legislation (such as attempting to reason how 'accident' could perhaps mean something different depending upon which section is under consideration and notwithstanding the presumption of statutory

interpretation that the same words in a statute bear the same meaning throughout^[23]), the courts instead find scope in their application of the definition of 'accident' to the particular facts before them in order to decide whether a claim is to be excluded or not under section 35.

THE PLEADED RELEVANT FACTS THAT MUST BE ACCEPTED AS CORRECT FOR PURPOSES OF DETERMINING THE EXCEPTION

43. The plaintiff is an 'employee' for purposes of the Act.
44. The first defendant, a close corporation, is an 'employer' for purposes of the Act.
45. The fourth defendant is employed by the first defendant as the factory and maintenance manager and is a member of the first defendant.
46. The fifth defendant is employed as the head of sales of the first defendant and is also a member of the first defendant.

47. There is no real dispute, for present purposes, that the fourth and fifth defendants fall within the extended deeming definition of an 'employer', as provided for in section 56(1)(b) and (c) as read with section 35(2) of the Act.
48. The plaintiff suffered an 'occupational injury' and is seeking to recover damages as a result thereof.
49. The accident arose in the course of the plaintiff's employment, as the accident did occur while the plaintiff was working.
50. The only outstanding issue that needs to be decided before the plaintiff's claim would be excluded under section 35 of

the Act, and so whether the exceptions should succeed, is whether the accident, in addition to arising in the course of the employment,

also arose out of that employment. It is trite that the requirement that the accident arose out of the employment is distinct from the accident arising in the course of the employment, and that both requirements must be satisfied for there to be an 'accident' as defined.[24]

51. The incident leading to the plaintiff's personal injuries is described as follows in the particulars of claim:

"On or about 8 August 2016, whilst performing his duties during the night shift and on the premises of the second defendant, the plaintiff was seriously injured on duty when hot molten adhesive blew up onto the plaintiff's face, hands and abdomen ("the incident").

At the time immediately preceding the incident, the plaintiff was cleaning a filter, and had turned the valve to the 'shut' position and switched off the gear pump in accordance with the safety procedures."

52. The plaintiff describes in the particulars of claim his duties as employee to include the overseeing of the manufacturing of hot molten and water-based adhesives and to measure the specification of hot molten and water-based adhesives.
53. If the pleaded facts ended there, there would have been little difficulty finding that the accident not only arose during the course of the plaintiff's employment as he was working at the time of the incident, but that the incident also arose out of his employment as he was working on the very equipment that he was employed to work on.
54. But the particulars of claim do not end there.
55. As the plaintiff is advancing a common law delictual claim for damages, he goes on to plead, which must be accepted as correct for purposes of the exception, that the sole cause of the incident was the negligence of the defendants. In particular, he pleads that the employee defendants (i.e. the third, fourth and fifth defendants):

55.1. failed to adhere to the safety procedures by entering the factory premises during the nightshift under the influence of alcohol;

55.2. abused their positions as director and members of the first and second defendants and by virtue of the roles as senior management by entering the factory premises when it was unsafe to do so;

55.3. failed to adhere to the safety procedures by continuing to consume alcohol in the factory premises;

55.4. acted recklessly, alternatively negligently by opening the valve to the tank containing hot molten adhesive;

55.5. acted recklessly, alternatively negligently by switching on the gear pump causing the line to come under pressure resulting in a blow up;

55.6. failed to take reasonable care for the health and safety of persons who may be affected by their acts or omissions;

55.7. owed the plaintiff a common law duty of care to take reasonable measures to ensure the safety of persons employed in the workplace, which included a duty of ensuring that the provisions of the Occupational Health and Safety Act, 1993 ('OHSA') and regulations were complied with;

55.8. failed to take reasonable measures to ensure the safety of persons entering upon the premises of the first and second defendants which premises and operating procedures are inherently dangerous and further created a source of danger; and

55.9. failed to exercise reasonable care and precaution reasonably expected of directors and members of the first and second defendants.

56. In respect of the employer defendants (i.e. the first and second defendants) the plaintiff pleads that they:

56.1. failed to provide a safe, secure and healthy working environment;

56.2. failed to develop, implement and enforce appropriate, adequate and effective control measures;

56.3. failed to take any or reasonable measures to prevent persons under the influence of alcohol or other substances from entering the factory premises and to prevent harm to employees;

56.4. failed to take reasonable measures to ensure the safety of persons entering upon the premises and operating procedures which are inherently dangers; and

56.5. owed the plaintiff a common law duty of care to take reasonable measures to ensure the safety of persons employed in the workplace, which included the duty to ensure that the provisions of the OHSA and regulations were complied with.

57. On these pleaded facts, which must be accepted as correct for purposes of the exception, the senior management who caused the accident were under the influence of alcohol, and were abusing their position of authority.
58. Would this potentially take the incident outside that which arises out of the plaintiff's employment, and so enable the plaintiff to avoid the exclusionary ambit of section 35 of the Act?

WHETHER ON EXCEPTION I AM ABLE TO FIND THAT ON THE PLEADED FACTS THE PLAINTIFF WILL NOT BE ABLE AT TRIAL, AFTER LEADING EVIDENCE, TO PROVE THAT THE ACCIDENT AROSE OUT OF HIS EMPLOYMENT

59. It is the additional pleaded element of the incident having been caused by the senior management while intoxicated that complicates what might otherwise have been a straightforward determination that the incident constituted an 'accident' within the meaning of the Act.
60. The excipients' counsel submitted that a generous interpretation of what constitutes an 'accident' is called for so that employees in the position of the plaintiff, who are injured through the negligence of intoxicated co-employees, would be able to claim statutory compensation under sections 22 and 56 of the Act. And, the submission continues, that it must then follow that the same generous interpretation is to be applied to the exclusion in section 35 of the plaintiff's common law damages claim.
61. But the cases show that this tension of the double-edgedness of a generous interpretation of what constitutes an 'accident' is not easily resolved.
62. I do not propose traversing the range of cases referred to by counsel in their helpful submissions because it must be accepted, as recently reiterated by the Supreme Court of Appeal in MEC v EJN and then Churchill that there is no bright line test and that each case must be considered on its own facts.
63. I will nonetheless refer to those cases upon which the plaintiff's counsel placed specific reliance given that in her submissions the cases most favourably disposed towards the plaintiff would be emphasised.
64. In Langeberg Foods Limited and another v Tokwe [1997] 3 All SA 43 (E) an employee was injured at work when a security guard employed by his employer apprehended him when he attempted to flee after having been caught smoking dagga during a scheduled tea break. The matter was approached on the basis that the security guard had assaulted the employee during the course of the employee fleeing. It was also accepted that the employee had committed a criminal act as he was in possession of dagga.
65. The Full Bench[25] referred with approval to the dictum of Williamson JA in Minister of Justice v Khoza:[26]

“On every set of facts the question to be answered is the same; but it is seldom that facts are identical. The decision is in essence in each case one of fact related only to the particular facts in issue. The enquiry on a particular issue is whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident causing injury. If it was, the accident arose ‘out of employment ...’.”

66. The Full Bench[27] also referred with approval to the test adopted in McQueen:[28]

“The test we have to apply, therefore, is whether there was a special risk to which the employee would not have been subjected but for the fact that he was engaged in that employment.”

67. Applying those tests, the Full Bench found that the employee smoking dagga had nothing whatsoever to do with his employment and that it was the employee’s smoking of dagga and not that he was in the course of his employment that brought him within the range or zone of a possible assault upon him by the security guard. The court therefore concluded that the incident did not arise out of his employment and therefore that the employee’s common law claim for damages was not excluded.
68. Self-evidently the present facts are distinguishable. In Langeberg Foods the employee was in the wrong and there was a deliberate assault on the employee. In the present instance the plaintiff employee was neither in the wrong nor was there a deliberate assault upon him. The plaintiff in the present instance has pleaded only that the intoxicated management were negligent. Intuitively, it is more difficult to find that a deliberate assault was something that arose out of employment, than a negligent incident.
69. Applying the test extracted from Khoza to the present pleaded facts, the actual fact that the plaintiff was in the course of his employment when cleaning the equipment brought him within the range or zone of a hazard arising out of an injury caused by that equipment. But the question arises whether such range or zone of hazard includes intoxicated senior management causing the incident.
70. Applying the test extracted from McQueen, namely whether there was a special risk to which the employee would not have been subjected but for the fact that he was engaged in his employment, but for the fact that the plaintiff was employed to operate and clean the machinery, he would not have been exposed to a special risk of injury by that machinery. But again the question arises whether that special risk includes an incident caused by intoxicated senior management.
71. Framed differently, can it be said that an employee takes upon him- or herself the special risk that senior management whilst intoxicated may negligently injure him or her? Or to use the recent phraseology of Wallis JA in Churchill,[29] does being negligently injured by intoxicated senior management ‘go with the job’?

72. In Khoza the plaintiff employee was injured as a result of a fellow policeman discharging his firearm while playfully waving it around at a time they were transporting arrested persons in the back of a police van. The then Appellate Division found that such conduct did arise out of the employee's employment, and that therefore his common law claim for damages was excluded.
73. Noteworthy is that section 36 of the Act provides that where the occupational injury was caused in circumstances resulting in some person other than the employer of the employee concerned (i.e. a third party) being liable for damages in respect of such injury, the employee may claim statutory compensation in terms of the Act and may also institute action for damages in a court against that third party. In the factual circumstances described in Khoza, the plaintiff employee would have been entitled to statutory compensation but would have retained his common law claim against the fellow police officer who had negligently shot him as that fellow police officer would not fall within the expanded deemed definition of an employer for purposes of the exclusionary protection in section
35. The plaintiff employee in that instance would at least have had the solace that if he had missed the opportunity to claim statutory compensation and was also excluded from recovering against his employer, as he was, he could still institute proceedings against his fellow police officer who had shot him.
74. In the present matter, as the defendant employees fall within the expanded deemed definition of employer for the purposes of section 35(1), the plaintiff would not be able to institute a civil claim against the employees who had negligently harmed him. The incongruity is apparent – if his fellow co-employees on the factory floor had injured him, he would have retained his common law claim against them in terms of section 36, but he foregoes his claim against senior employees who should have been exercising care and control, and who may be more likely to be financially able to compensate him. This creates a further tension within the Act insofar as the Act is intended to advance the interests of employees.
75. In both Langeberg Foods and Khoza the person causing the injury was a co-employee. In Langeberg it was a security guard. In Khoza it was a fellow policeman. The position is considerably complicated when the person causing the injury is an outsider that has nothing to do with the employer. The courts have nonetheless found that an employee injured by an outsider, and in effect an intruder, and intentionally so, nonetheless do constitute 'accidents' and therefore confer upon the employee a statutory claim but at the cost of the loss of the employee's common law claim for damages against the employer.
76. In *Van de Venter v MEC of Education: Free State Province*[30] the employee was assaulted during a robbery at the school where she was a school administrative clerk. The court, in deciding whether

there was good cause to condone the employee's failure to comply with the statutory requirement to have given the respondent

employer as an organ of state the requisite statutory notice before instituting legal proceedings, [31] held that the employee's claim did not have good prospects of success in that the employee's claim was excluded in terms of section 35.

77. The court found[32] that the definition of 'accident' had to be construed in favour of employees and that 'whether doing so is good or bad remains at debate for another day'. The court found that a criminal act arising out of and during the course of an employee's employment amounts to an 'accident', and so section 35 precluded the employee's common law damages claim.
78. In *Ex parte Workmen's Compensation Commissioner: In re Manthe* 1979
- (4) SA 812 (E) an employee was also assaulted during a robbery at his workplace. The court, applying the test from *Khoza*, held that 'it was the actual fact' that the employee 'was in the course of his employment that brought him within the range or zone of the hazard, namely the hazard of robbery'. Accordingly, the court found that he was entitled to statutory compensation from the Commissioner.
79. These two cases constitute authority that even where the incident is caused by an intruder whilst the employee is at work that it may qualify as an 'accident' falling within the definition of the relevant Act. This would favour employees seeking to claim statutory compensation, as was the case in *Ex parte Workmen's Compensation*. Conversely, as the same definition of 'accident' features, this would not be in their favour when it came to exclusion of their common law damages claim, as in *Van de Venter*.
80. Perhaps what could be taken from these two cases is that the incidents of robbery are so prevalent in our society that it constitutes a special risk to which an employee is subjected by way of his or her employment. I return to this aspect later. And perhaps where the persons who cause the harm are not outside intruders but are employees, and more so senior employees, then a fortiori should an incident caused by those senior employees also constitute an accident arising out of the employee's employment.
81. But the decision of the Supreme Court of Appeal in *MEC v EJN* which wrestles with the tension described above in a particularly egregious set of facts demonstrates that there is more at play.
82. In that matter the plaintiff paediatrician was raped by an intruder who had gained access to the hospital premises. The plaintiff was working the night shift in the public hospital and whilst moving between different parts of the hospital was attacked by being struck with a brick, rendered unconscious and raped. This took place in a part of the hospital building where the lights were not

working and whilst certain construction work was being carried out at the hospital.

83. Navsa ADP looked at several of the cases which sought to extract the test to be applied in determining whether an accident arose out of employment for purposes of the Act, acknowledging, as already set out earlier in this judgment, the vexed nature of the issue. After referring to both South African and foreign decisions, Navsa ADP stated the test as ‘whether the act causing the injury was a risk incidental to the employment’ but again that there was no bright line test and that each case must be decided on its own facts.[33]
84. Navsa ADP found that he could not see how a rape perpetrated by an outsider on a doctor on duty at a hospital arises out of the doctor’s employment, continuing as follows:

“I cannot conceive of the risk of rape being incidental to such employment. There is no more egregious invasion of a woman’s physical integrity and indeed of her mental well-being than rape. As a matter of policy alone an action based on rape should not, except in circumstances in which the risk is inherent, and I have difficulty conceiving of such circumstances, be excluded and compensation then be restricted to a claim for compensation in terms of COIDA.”

85. Entirely justifiably, in EJM rape was not seen as incidental to the employment. In contrast the courts in Workmen’s Compensation and Van de Venter found that robbery was sufficiently related to employment for purposes of finding the incident arose out of employment (bearing in mind that in Van de Venter the employee was an administrative clerk at a school and in Workmen’s Compensation the employee was an overseer of labourers).
86. There must at the very least be a sense of unease in endorsing an approach that finds that serious criminal activities, such as robbery, are so prevalent in our society that they must be taken to be a special risk assumed by an employee when engaging in employment, or to put it differently, ‘go with the job’. Apart from being an indictment of our society, to adopt such a position perpetuates an unhealthy sense of helplessness in having to accept such criminal activity as an inevitable part of our daily working life.
87. Navsa ADP in MEC v EJM, casting doubt as to what had been decided in Van de Venter as it did not refer to Khoza,[34] continued[35] follows:

“I can understand that courts have strained to come to the rescue of particularly impecunious individuals and have held them entitled to claim compensation from a fund established for that purpose. I also understand that courts have done this by adopting a position in line with the policy behind the workmen’s compensation legislature, namely, that workers should as far as possible be assisted to claim compensation that is their due under the Act and which flow from incidents connected to their employment and which can rightly be said to be a risk attendant upon or inherent to the employment. Dealing with a vulnerable class within our society and contemplating that rape is a scourge of South African society, I have difficulty contemplating that employees would be assisted if the common law rights were to be restricted as proposed on behalf of the MEC. If anything, it might rightly be said to be adverse to the interests of the employees injured by rape to restrict them to COIDA. It would therefore be sending an unacceptable message to employees, especially women, namely, that you are precluded from suing your employer for what you assert is a failure to provide reasonable protective

measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our constitution will countenance.”

88. Wallis JA in the recent Churchill decision similarly expressed himself:

“As held in [MEC v EJN] it is difficult to see on what basis, as a general proposition, attacks on a person's dignity and bodily integrity are incidental to their employment. In simple language they are not things that 'go with the job'.[36]

89. Clearly policy considerations come into play and in certain circumstances it may be that certain incidents that might otherwise fall within the definition of an accident should be excluded for policy reasons. It is also evident that the prevalence of a particular crime or set of circumstances should not invariably result in an incident being classified as an accident as to do so may send an unacceptable or unhealthy message to employees and to society at large.

90. In the present matter even on a most benevolent reading of the pleadings there is no indication that the defendant employees intentionally

sought to cause the plaintiff any harm. I appreciate that in the present instance I am not concerned with deliberate criminal activity

in the form of rape or armed robbery. But what I am also cognisant of is that the plaintiff has pleaded that his injuries were caused by his intoxicated senior managers. A finding on exception that an employee takes upon him- or herself the special risk that he would be caused injury by intoxicated senior management may be sending the wrong message to employees and employers. Questions arise as to the prevalence of intoxication at the workplace. Questions arise as to what policy considerations should come into play in finding whether incidents caused by intoxicated senior management would fall within the ambit of an accident under the Act and therefore result in the exclusion of an employee's common law damages claim. Consideration needs to be given to the incongruity identified earlier in this judgment that the senior management, who in this instance were intoxicated, are protected from a claim in terms of the extended definition of employer in section 35(2) of the Act whereas if the incident had been caused by an employee that was not senior management then that other employee would not enjoy such protection. Consideration would have to be given to the excipients' counsels' submission that the Act does take into account intoxication in at least certain respects, such as in defining what would constitute 'serious and wilful misconduct'[37] of an employee (not an employer) for purposes of excluding an employee's claim for statutory compensation in certain instances[38] and which submission continues that the legislature, being cognisant of intoxication at the workplace, would have expressly provided for it to be deserving of special attention in ascertaining what constitutes an 'accident' should it so have intended.

91. These are all questions that in my view should be answered by a trial court after considering such evidence as the parties may lead. As held by the Supreme Court of Appeal in *Children's Resource Centre Trust and others v Pioneer Foods (Pty) Limited and others* 2013

- (2) SA 213 (SCA)[39] the need for a court to be fully informed in regard to the policy elements of an enquiry militates against that decision being taken without evidence. Although the SCA has also held that some public policy considerations can be decided without a detailed factual matrix,[40] in my view this is not one of those instances.
92. In *Vermeulen v Goose Valley Investments (Pty) Limited* 2001
- (3) SA 986 (SCA)[41] the court held that ‘it is trite that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law.’
93. Wallis JA in *Pioneer Food* had the following to say about what would constitute a hopeless case:
- “Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. These are categories that have long been recognised in our law and practice. A case is legally hopeless if it could be the subject of a successful exception. It is factually hopeless if the evidence available and potentially available after discovery, and other steps directed at procuring evidence will not sustain the cause of action on which the claim is based. In other words, if there is no prima facie case then it is factually hopeless.”*[42]
94. In *Barclays Bank International v African Diamond Exporters (Pty) Limited* (2) 1976
- (1) SA 100 (W) the court stated that in considering an exception the court’s main concern always is to ensure that no injustice is done between the parties.[43]
95. In the present instance, I am unable to find that on the pleaded facts, which I must accept as correct and which must be benevolently interpreted in favour of the plaintiff, that the plaintiff’s claim is (not may be) bad in law, that the claim is legally hopeless or that no injustice will be done in upholding the exception that the
- pleadings lack averments which are necessary to sustain an action.
96. On the question of costs, in my view, the costs should be reserved, although the exceptions are dismissed.
97. As was stated in *McKelvey v Cowan* N.O. 1980 (4) SA 525 (Z):
- “It does seem to me that this was a matter in which the defendant was justified in raising the matter by way of exception. This has been an extremely arguable matter, and the defendant might have succeeded on his exception, which would have greatly reduced the costs of the action. It is trite law that, if a defendant does not raise a matter by way of exception, and the case goes to trial and the defendant succeeds at the trial, but it is pointed out that the trial was a wasted expense as he would have succeeded had he raised the matter by way of exception and not gone to trial, in these circumstances the successful defendant was often deprived of his costs of the trial and his costs were limited simply to those of an exception. This is an encouragement to parties to raise matters by exception where there is good*

chance of the exception succeeding.

The law does not discourage parties from taking exceptions where the exceptions may have the result of reducing costs and shortening the proceedings, and this is one of those cases where I considered the defendant was justified in raising the matter by way of exception, even though in the result he has proved to be unsuccessful.”

98. This is precisely the situation in the present matter.

99. The following order is made:

99.1. The first, fourth and fifth defendants’ exceptions are dismissed.

99.2. The costs of the exceptions are reserved for determination by the trial court.

Gilbert AJ

Date of hearing:

26 January 2021

Date of judgment:

19 March 2021

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[1] Although the plaintiff pleads that both the first and second defendants were his employees, for ease of reference I refer to employer in the singular, particularly as the second defendant has not excepted.

[2]

[2015] 1 All SA 20 (SCA). Also reported as MEC for Health, Free State v DN 2015 (1) SA 182 (SCA).

[3] At para 23 to 29.

[4] At para 31.

[5] Above, at para 17.

[6] At para 31.

[7] At para 20.

[8] At para 11.

[9] At para 11.

[10] At para 10.

[11] Churchill v Premier, Mpumalanga (889/2019)

[2021] ZASCA 16 (4 March 2021).

[12] Para 18.

[13] Para 20.

[14] Para 36.

[15] First National Bank of Southern Africa Ltd v Perry NO and Others 2001

(3) S A 960 (SCA) at 972J-973A; Nel and Others NNO v McArthur and Others 2003 (4) S A 142 (T) at 149F.

[16] If evidence can be led which can disclose a cause of action, that particular pleading is not excipiable. A pleading is only excipiable

on the basis that no possible evidence led on the pleading can disclose a cause of action.

McKelvey v Cowan NO 1980 (4) SA 525 (Z) at 526.

[17] This Division in Sanan v Eskom Holdings Ltd 2010 (6) SA 639 (GSJ) expressly held that an exception could be taken and that a defendant was not obliged to raise the exclusion under section 35 by way of a special plea. An apprentice electrician as the plaintiff alleged that he had contracted cancer as a result of exposure to asbestos whilst acting within the course and scope of his employment. The defendant employer successfully excepted. Mankayi v AngloGold Ashanti Ltd 2011 (3) SA 237 (CC) had its origins in an exception. In that matter, the

plaintiff underground mineworker alleged that he contracted a disease known as miner's phthisis from being exposed to harmful dusts and gases whilst working underground. The exception ultimately failed in the Constitutional Court.

- [17] This Division in *Sanan v Eskom Holdings Ltd* 2010 (6) SA 639 (GSJ) expressly held that an exception could be taken and that a defendant was not obliged to raise the exclusion under section 35 by way of a special plea. An apprentice electrician as the plaintiff alleged that he had contracted cancer as a result of exposure to asbestos whilst acting within the course and scope of his employment. The defendant employer successfully excepted.

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- [18] At para 9.

- [19] At para 8.

- [20] As cited with approval in *MEC v EJN* in para 7.

- [21] Para 13 to 15.

- [22] Section 1 of the Act.

- [23] Although the presumption is not an inflexible rule and cannot apply where the word is used in different contexts (see *Singer NO v The Master and another* 1996 (2) SA 133 (A) at 139F), it would be difficult to justify a differential treatment in the present instance given the legislative choice of substituting the common law damages claim with a statutory compensation claim, as enunciated upon by the Constitutional Court in *Jooste*, above.

- [24] Most recently, the SCA decision in *Churchill* above, para 14.

- [25] At p 50.

- [26] Above at 419 H.

- [27] At p 50.

- [28] Above, at 352.

- [29] Para 34.

- [30]

- [2012] ZAFSHC185 (4 October 2012).

- [31] *Institution of Legal Proceedings against Certain Organs of State Act*, 2002.

- [32] Para 40.

[33] At para 31.

[34] At para 18.

[35] Para 33.

[36] Para 34.

[37] As defined in section 1 of the Act.

[38] Section 22(3)(a) of the Act.

[39] At para 37.

[40] Telematrix (Pty) Limited t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at para 2.

[41] At para 7.

[42] Although the court was dealing with hopelessness in relation to whether to certify a class action, what was stated was with direct reference to what would suffice for purposes of an exception.

[43] At 107 D.

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