

SOUTH AFRICA / JUDGMENT

De Necker v MEC for the Department of Health, Free State Province (2399/2012) [2013] ZAFSHC 178; 2014 (3) SA 49 (FB) (23 October 2013)

[2013] ZAFSHC 178

COURT

Free State High Court, Bloemfontein

BEFORE

B.C. Mocumie

CASE / FILE NUMBER

2399/2012

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FREE STATE HIGH

COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH

AFRICA

Case No. : 2399/2012

In the matter between:-

DR

ELIZABETH JOHANNA DE NECKER

.....Plaintiff

and

MEC FOR THE

DEPARTMENT OF HEALTH

FREE STATE PROVINCE

.....Defendant

D J MOSOEU N.O.

.....1st

Third Party

M E BETULA N.O.

.....2nd

Third Party

N W SEBATLELO N.O.

.....3rd

Third Party

N J MOSOEU N.O.

.....4th

Third Party

HEARD ON: 22 OCTOBER 2013

DELIVERED ON: 23 OCTOBER 2013

JUDGMENT

MOCUMIE, J

[1] This matter was set down for trial for three days, 22 -23 October and 25 October. The parties agreed to the determination of the defendant's 1st special plea. The defendant also sought separation of issues in terms of Rule 33 (4), i.e. in the event that the Court should decide in favor of the defendant, that the determination of the merits should be proceeded with only later. This application was based on the usual grounds set out in R33(4) including convenience to all parties and no prejudice suffered by any party if the issues were separated. I held the R33(4) over pending my decision on the defendant's 1st special plea which follows. This 1st special plea had to be decided upon urgently to pave the way forward on the merits. The judgment given will thus be delivered urgently to avoid any delay. I relied substantially on the Heads of Arguments filed by both Counsels which

were helpful considering the time constraints. I am indebted to both Counsels.

[2] For purposes of adjudication of the MEC:Health's ("the defendant") 1st special plea the parties agreed on the following:

"1. Plaintiff was employed by defendant as a paediatric registrar.

2. Plaintiff was on duty from 07:30 on 29 October 2010 until 13:00 on 30 October 2010 at the Pelonomi Hospital.
3. Plaintiff was the only pediatric registrar on night duty on 30 October 2010.
4. She was on duty with two interns who were doctors doing house jobs.
5. Plaintiff was responsible for pediatric patients in the Pediatric ICU, Pediatric Isolation Ward, Neonatal High-Care unit, Ward 3A and 3B and Ward 4A.
6. The Neonatal High Care Unit and Ward 3A are in different buildings, but the buildings were connected by a walkway.
7. After treating a patient in the Neonatal High Care Unit, plaintiff took the most direct route to Ward 3A which is on the third floor, to treat other patients at about 02:00 on 30 October 2010.
8. While on her way to Ward 3A, plaintiff was attacked by being struck with a brick, rendered unconscious and raped on the first floor of the same building in which Ward 3A is situated.

9. Plaintiff's assailant –

9.1 was an 16/17 year old man;

9.2 was not a patient or employee at the Pelonomi Hospital;

9.3. was not authorized or permitted to be within the confines of the hospital;

9.4. was convicted of rape and sentenced to 15 years' imprisonment.

10. At the time –

10.1. there was building construction work being carried out at the hospital;

10.2. the defendant admits that a portion of the parameter fencing was under temporary repair, but not missing;

10.3. The elevator between the ground and first floor where the incident occurred was not working.

10.4. The lights on the first floor where the incident took place were not working.

11. Defendant alleged that the attack and rape were not foreseeable to the defendant.”

[3] Dr de Necker (“the plaintiff”) claims damages for the injuries when she was assaulted and raped in the early hours of 30 October 2010 whilst she was on duty at Pelonomi Hospital, Bloemfontein. The defendant has filed a special plea alleging that she is barred by the Compensation, Occupational and Diseases Act 130 of 1993 (COIDA) from instituting any action against him.

[4] The defendant avers that the incident, which forms the basis her cause of action does not constitute an ‘accident’ as defined in COIDA.

[5] It is common cause between the parties that:

5.1 The plaintiff is an employee as defined in COIDA.

5.2 The defendant is an employer as defined in COIDA.

5.3. ‘Accident’ is defined in COIDA as “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.”

5.4 The word ‘accident’ per se is not specifically defined in COIDA.

[6] The only issues to be determined are:

(a) whether the incident in this case was an ‘accident’ as contemplated in s35 of COIDA; and

(b) Whether the incident arose out of and in the course of employment?

If these two issues are decided in favour of the plaintiff it is the end of the defendant’s special plea. If they are decided in favour of the defendant, the plaintiff’s claim ought to be dismissed.

THE LAW APPLICABLE

[7] Section 35 of COIDA provides:

“No action shall lie by an employee or any dependent of any employee for the recovery of damages in respect of any occupational injury or disease resulting from 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.”

[8] In deciding whether an incident is an ‘accident’ which ‘arose out of or in the course of employment’ in the seminal decision of *Minister of Justice v Khoza* 1966 (1) SA 410 (A) the Appellate Division developed two tests:

8.1. The first is by the majority concurring in the judgment of Rumpff CJ. It is that an injury from an assault at work is not an accident where the motive or reason for the assault is unrelated to the job;

8.2. The second is by Williamson JA in a concurring minority judgment. It is that an injury from an assault at work is an accident where the fact of employment brings the employee within the range or zone of the hazard that gave rise to the injury.

[9] The essence of the Khoza decision and the cases that follow it, is the following:

9.1. An accident may be said to arise ‘out of a workman’s employment, when, in a broad sense, there is a causal connection between the employment and the accident;

9.2. As a general rule there is a causal connection between the employment and the accident where the accident happens at work;

9.3. It is not an injury arising out of and in the course of employment where an employee was injured as a result of a criminal conduct such as an intentional and unlawful assault by another person that is unrelated to the job of that employee-even if it happens at work;

9.4. This means an injury resulting from an assault that is unrelated to the job does not arise ‘out of or in the course of’ employment. (See *Kau v Fourie* [1971] 4 All SA 1 (T) at 6-7 (assault by employer on employee); *Langeberg Foods Ltd v Tokwe* [1997] 3 All SA 43 (E) at 50 (assault by security guard employed by employer); *Twalo v Minister of Safety and Security* at para [17]-[18] [2009] 2 All SA 491 (E) at para [17]-[18] (assault by one police officer on another police officer.)

[10] Mr Wessels (SC), on behalf of the defendant, submitted with reference to *inter alia* *Nicosia v Workmen’s Compensation Commissioner* 1954 (3) SA 897 (T) that ‘accident’ in COIDA and even its predecessors means

“any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt from its cause; and if the cause is not known, the loss or hurt itself would certainly be called an accident. The word ‘accident’ is often used to denote both the cause and the effect, and thus no attempt should be made to discriminate between them.”

[11] Referring to *Skorbinski v Bezuidenhout t/a DB Transport* 2009 (5) SA 461 (EC) at para [14] he maintained that s35 of COIDA precluded an employee from claiming damages from his [or her] employer in respect

of a claim for damages under the common law.

[12] Furthermore, he contended with reference to *Jooste v Score Supermarket* 1999 (2) SA 1 (CC) that the section 35 exclusion of the employee's common law rights against the employer has more advantages than disadvantages. Inter alia COIDA provides for speedy adjudication and for payment of the amount due out of the fund established by the Compensation Act; payment of compensation is not dependent on the employer's negligence or ability to pay; nor is the amount susceptible to reduction by reason of the employee's contributory negligence.

[13] He argued that although the question whether the incident constituted an 'accident' as provided for in COIDA did not feature and was not considered by the court a quo and the Supreme Court of Appeal in *Crown Chickens Pty Ltd t/a Rockland Poultry v Riek* 2007 (2) SA 119 (SCA), if there was any doubt as to whether such incident constituted an 'accident' as provided for in the Act, it would have been raised in or by the court a quo or the Supreme Court of Appeal. The converse he argued was true, that there was no such doubt.

[14] Mr Bruinders (SC) on behalf of the plaintiff submitted that in the absence of a specific definition of the word 'accident' in COIDA, there was no reason why this Court should not give the word its ordinary grammatical meaning within the context of the remaining provisions of the statute and against the purpose of the statute as laid down in *S v Makwanyane* 1995(3) SA 391 (CC) at 404 para [12] -405 para[15]; *Jaga v Donges No; Bhana v Donges No* 1950 (4) SA 653(A) at 662-664. This is the most basic rule of interpretation of statutes.

[15] He submitted further as Mr Wessels that our courts have held the word 'accident' to mean an 'unintended and unexpected occurrence producing loss or harm, but argued that such meaning should not be restricted to unintended acts only. He urged this Court to apply this judicial definition to 'accident' under COIDA and 'accident' in general. See *Twalo v The Minister of Safety and Security* [2009] 2 All SA 491(E); *Nicosia v Workmen's Compensation Commissioner* 1954 (3) SA 897 (T) at 901; *Minister of Justice v Khoza*.

[16] He urged this Court further to apply the guidelines and test set down in *Khoza*, i.e. to determine whether the incident in this case was an 'accident' contemplated by s35 of COIDA and whether the incident arose out of and in the course of the plaintiff's employment as a pediatric registrar at her work place.

[17] I am inclined to adopt the approach set out in *Khoza* not only because the approach is objective but because this judgment has not been set aside by any court be it the Supreme Court of Appeal or the Constitutional Court. The judgment is still good law.

[18] Applying the guidelines set out in Khoza, in answering the question whether the incident in this case was an ‘accident’ as contemplated by section 35 of COIDA, I agree with Mr Bruinders that the incidence was not an accident. Although assault/incident was unexpected it was also intentional and deliberate which cannot be an ‘accident’ in the ordinary and grammatical sense and as courts have interpreted it to mean. See Twalo above at para [17]. In relation to the second question whether the incident arose out of and in the course of the plaintiff’s employment as a pediatric registrar, again I have to agree with Mr Bruinders that there was no causal connection between the plaintiff’s

employment and the incident because she was deliberately injured by another person who was not supposed to be or authorised to be on the employer’s premises “and the motive for the attack bears no relationship to the duties of the workman...” (See Rumpff JA’s qualified proposition in Khoza.). In any event the risk resulting in the injury (i.e the assault and the rape) was not a risk that is a usual natural incidence of the job or which came with the territory of the job.

[19] I have not been persuaded by the defendant’s reliance on two judgments, one of the Eastern Cape and another of the Free State for the following

reasons.

19.1. In *Ex Parte Workmen’s Compensation :In re Mathe* [1979] 4 All SA 885 at 890 an employee who was a supervisor was instructed by his employer to fetch his subordinates’ pay cards. Whilst he was on duty but outside his place of employment but carrying out these instructions, he was robbed. Addleson, J held that it was the actual fact that the employee was on duty that exposed him to the risk of robbery. This judgment can surely not be correct on two legs. First, robbery is not an accident but a deliberate and criminal act. Second, even if it were, it is not one that was related to the job of the employee. By its very nature, the job of a supervisor at a school cannot entail being exposed to such a risk. In principle this judgment is wrong and cannot be followed.

19.2. In the unreported judgment of *Van de Venter v The MEC of Education:Free State* Case no 3545/2010 delivered October 2012 an employee was robbed on school premises by persons unemployed by the school. The court held that an injury sustained by an employee under such circumstances was an ‘accident’ as contemplated by s35.

[20] This judgment cannot be correct for the following reasons:

18.1 At para[37] the court stated

“In the instant matter the factual complex, though not identical with that in Strauss-case supra, it was nonetheless pretty much the same. The question of law was more or less the same here as it was there [with reference to MEC For Education, WCP v Strauss 2008 (2) SA 366 (SCA)]. The conclusion therefore, has to be the same now as then. In that case the court held that an injury sustained by an educator during the course of an educational activity fell under an occupational injury. Accordingly the injured educator’s delictual claim against the defending organ of state was dismissed on appeal.” (Own emphasis)

[21] From this paragraph and para [38] of the same judgment and a reading of the whole judgment it is clear that the remark the court made was obiter because the judgment was about the condonation of the failure to comply with the requirement to give notice to the state before instituting any claim against it. The underlying reason for such obiter remark was that any personal injury suffered by an employee while at work is an 'accident' as contemplated by section 35 of COIDA because it is an injury suffered at work, which is not the requirement of COIDA. COIDA requires that the injury must 'arise out of and in the course of employment.' The interpretation given in Van de Venter is too restrictive to an employee in similar but not the same circumstances. Each case has its own peculiar circumstances and can under no circumstances be determined as was done in Van der Venter as set out in paras [47] and [48]. As the court in Khoza correctly stated

"On every set of facts the question to be answered is the same but it is seldom that facts are identical. The decision in essence in each case is one of fact related only to the particular facts in issue. The enquiry on the particular issue is whether it was the actual fact that [s]he was in the course of employment..."

Moreover, the reasoning in Van der Venter does not and did not apply the clear guidelines and test set out in Khoza which is still good law and has not been set aside on appeal. There is therefore no reason for this Court to follow it as it is, in principle, premised on a wrong legal basis.

[22] I am accordingly satisfied on the facts, as presented, that the intentional criminal act of the perpetrator of the incident was not an 'accident' as contemplated by s35 of COIDA and that the plaintiff did not sustain an occupational injury that resulted in her injuries and damages. The provisions of section 35 of COIDA are accordingly not applicable and the plaintiff is not precluded from claiming damages from the defendant.

[23] In the result I make the following order.

ORDER

The defendant's 1st special plea is dismissed with costs.

B.C. MOCUMIE, J

On behalf of plaintiff: Adv Bruinders SC

Instructed by:

BLOEMFONTEIN

On behalf of defendant: Adv M H Wessels SC

BLOEMFONTEIN BCM/sp

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Prepared on 11 October 2026 · Esheria