

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES:

- Case Number: **1935/08**
- High Court: **PORT ELIZABETH**
- DATE HEARD: **30 April 2009**
- DATE DELIVERED: **5 May 2009**

JUDGE(S):

LEGAL REPRESENTATIVES –

Appearances:

- for the Excipient(s): **Adv P.E Jooste / Adv T. Zietsman**
- for the Respondent(s): **Adv L.A Schubart SC**

Instructing attorneys:

- Applicant(s): **Nash Vandayar & Associates (ref: Vandayar)**
- Respondent(s): **Pagdens (ref: R.H Parker)**

CASE INFORMATION -

1. *Nature of proceedings:* **Exception**
2. *Topic:*
 - **Key Words:** **Exception – Compensation for Occupational Injuries and Diseases Act 130/1993 – S 35 (1) precluding action against the Employer for occupational injury – Exception upheld**

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE – PORT ELIZABETH

In the matter between:

Case No: 1935/08

GEORGE HENRY SKORBINSKI

Plaintiff/Respondent

And

DEON BEYERS BEZUIDENHOUT t/a

DB TRANSPORT

Defendant/Excipient

Coram: Chetty, J

Date Heard: 30 April 2009

Date Delivered: 5 May 2009

Summary: *Exception – Compensation for Occupational Injuries and Diseases Act 130/1993 – S 35 (1) precluding action against employer for occupational injury – Exception upheld*

JUDGMENT

CHETTY, J

- [1] The defendant has excepted to the plaintiff's particulars of claim on the basis that he is precluded from seeking damages against him by virtue of the provisions of s 35 (1) of the **Compensation for Occupational**

Injuries and Diseases Act¹ (the Act). Under the rubric, *Substitution of Compensation for other legal remedies*, s 35 (1) provides that –

“(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] In **Jooste v Score Supermarket Trading (Pty) Ltd**² Yacoob J succinctly summarised the common law right of an employee to claim damages and contrasted it to the legislative regime regulated by the Act in order to posit the context in which s 35 (1) deprived an employee of the right to claim damages under the Act. At paragraph [14] of the judgment he articulated the position thus –

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

¹ Act 130 of 1993

² 1999 (2) SA (1) CC

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

- [3] The gravamen of the plaintiff's defence to the exception raised is the contention that his damages claim against the defendant is founded in delict and "falls outside the ambit of the Act". The stance adopted is disingenuous and the invitation by plaintiff's counsel to view the

particulars of claim benevolently to sustain such an interpretation must be declined.

[4] The mere fact that the defendant was less than dilatory in expeditiously reporting the accident to the Commissioner does not assist the plaintiff in any way. The latter was entitled in terms of the provisions of s 38 (1) of the Act to give notice of the accident to the Commissioner in the event of the employer failing to comply with the statutory obligation imposed on him. Whatever delay there may have been thereanent does not transform the plaintiff's claim into a delictual one entitling him to institute an action for damages under the common law. The plaintiff's remedy was to seek compensation pursuant to the machinery created by the Act. The injury sustained to his hand was and remains an occupational injury in terms thereof. As adumbrated earlier s 35 (1) of the Act precludes an employee from claiming damages from his employer in respect of such an injury.

[5] In my view the exception must be upheld and in the result the following order will issue –

3. The exception is upheld with costs.

4. The plaintiff's particulars of claim is set aside and the plaintiff, if so advised, afforded a period of one month to amend his particulars of claim.

D. CHETTY
JUDGE OF THE HIGH COURT

Obo the Plaintiff/Respondent:

Adv P.E Jooste / Adv T Zietsman

Instructed by

Andre Dorfling Attorneys

C/o Nash Vandayar & Associates

1st Floor, Nedbank Building

522 Govan Mbeki Ave

North End

Port Elizabeth

Obo the Defendant/Excipient

Adv L.A Schubart

Instructed by

Pagdens Attorneys

18 Castle Hill

Central

Port Elizabeth

(Ref: R. H Parker)