



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number 437/2020

In the matter of:

BULELWA PAMANA

FIRST PLAINTIFF

NYANISILE ANTON STUURMAN

SECOND PLAINTIFF

ESTATE LATE NOMSA JOYCE STUURMAM

THIRD PARTY

And

MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

DEFENDANT

CORAM: NAIDOO, J

HEARD ON: 18 & 19 OCTOBER and 28 NOVEMBER 2022

DELIVERED ON: 15 MAY 2023

JUDGMENT

- [1] This matter arises from a summons issued, for the recovery of damages by the first and second plaintiffs against the defendant, as a result of an incident that occurred at the Goedemoed Correctional Centre (Goedemoed), in the Free State Province, on 29 March 2019. The first plaintiff and Nomsa Joyce Stuurman (the deceased), were correctional officers employed by the defendant at Goedemoed at the time and were on duty on the day in question. They were attacked by a sentenced inmate, who was assigned to clean their offices. The inmate murdered the deceased and raped the first plaintiff. The second plaintiff is the husband of the deceased and the father of their minor child. He claims in his personal capacity as well as his representative capacity on behalf of the minor child. The plaintiffs were represented by Adv MA Dewrance SC and the defendant was represented by Adv BS Mene SC, who appeared with Adv (Ms) RB Mofokeng
- [2] The defendant raised a special plea, alleging that the first plaintiff and deceased were Correctional Officials and that the injury suffered by the first plaintiff and the death of the deceased arose in the course and scope of their employment with the defendant. The incident on 29 March 2019 was an accident contemplated in section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). By virtue of the provisions of section 35(1) of COIDA, the first and second plaintiffs are precluded from recovering their damages from the defendant, their employer. The plaintiffs deny that the incident is an accident contemplated in section 35 of COIDA, asserting that rape, murder and being taken hostage fall within the ambit of the Criminal Procedure Act 51 of 1977. They also deny that the incident arose in the course and

scope of the first plaintiff's and the deceased's employment, and assert that the first and second plaintiffs are exercising their common law and constitutional rights. They are, therefore, not precluded from instituting a claim against their employer. The defendant sought the dismissal of the first and second plaintiffs' claims with costs, while the latter sought the dismissal of the defendant's special plea with costs.

[3] The parties agreed that the special plea be adjudicated separately from the merits. To this end, the defendant indicated that he would be calling at least three witnesses, largely to testify about the duties of the first plaintiff and the deceased, as the plaintiffs allege that the incident fell outside the scope of the duties of the first plaintiff and the deceased. The defendant led the evidence of Mr Boetie Danke Chabane (Chabane), who is the Head of Goedemoed Correctional Centre Medium B. He gave a detailed exposition of the training that a correctional official is required to undergo before he/she can be recruited to a correctional centre. The training comprises two parts – theory and physical training.

[4] In the theoretical part of the training, officials are trained on various functions that a correctional officer is required to perform. These include duties at the access control gate, duties at the gate leading to the prison, and section duties. The latter includes what happens when inmates are served meals, require medication and are moved between units or cells. The procedures relating to the movement of inmates to outside squares and sports fields are also part of the curriculum, as are details of night shift duties,

personnel administration, supply chain management and finance.
Handling

requests from and complaints by inmates is also part of this training component.

- [5] The practical or physical component entails training on the use of security equipment, how to handle a hostage situation and the use of force. This is necessary because the prison environment is risky, as inmates can attack, assault or take people, especially officials, hostage. In the prison environment, the correctional officials render security services internally and externally, that is, inside the prison and outside the prison. As part of their normal day, officials gather at a central point, which gathering has been referred to as a parade. The parade is used as an information sharing session where officials are given their duties for the day and advised of proceedings for the day. Thereafter all officials, irrespective of whether they were working inside or outside, were required to sign for (and presumably receive) their security equipment. If they were working externally, they would sign for firearms, teargas and two-way radios. These were to control unruly inmates or those that may attempt to escape. Those officials who were working inside the prison would sign for teargas, two-way radios and a baton, which the witnesses referred to as a tonfa. These were used for the same purposes as the equipment issued to those working outside.
- [6] Each morning, at the parade, officials are sensitised and reminded that the environment they work in a risky environment, and that they need to be alert and vigilant at all times. There was also a system in place called the “Buddy-Buddy” system, which

required officials never to be alone, and that they must always be accompanied by another official, especially when they open the

cells. This witness also indicated that as part of the training that correctional officials receive, they are made aware that they are working in an abnormal environment, with criminals. They are sensitised to the fact that criminals are not their friends and that the officials should not trust them, as they are capable of doing anything.

- [7] The first plaintiff and the deceased would have received the same kind of training that he explained and were subject to the protocols he mentioned. Chabane then listed a range of other sections at which officials performed duties, such as the case management component, which deals with the admission, classification and release of offenders, kitchen duties where inmates prepare food for other inmates as well as religious or pastoral care. He was shown a salary advice document belonging to the first plaintiff, and asked about an allowance reflected thereon as “Std Danger Allowance”. He indicated that this is an allowance paid to every official who works in a prison because it is a dangerous and risky environment.
- [8] Upon questions from the court, this witness outlined the duties that would have been performed by the first plaintiff and the deceased, from which it was apparent their work entailed their frequent interaction with the inmates in performing various duties, for example, conducting a head count of inmates when cells are unlocked, to ensure that the lock-up count of the previous day tallies with the unlock count, they also test the windows, doors, window frames and bars on the cells to ensure that they are

sound. The case manager of inmates allocates work to inmates, such as cooking, cleaning services etc. The correctional officials, including

the first plaintiff and deceased, would be responsible for these inmates and to ensure that safety measures are in place when they are around these inmates. In addition, Chabane informed the court that all officials, including the first plaintiff and deceased, were required to carry the security equipment he mentioned on their person at all times, and that their uniforms were designed to carry those items.

- [9] The next witness, Vuyani Watson Marks (Marks), is a Human Resource (HR) practitioner (employed by the Department of Correctional Services), who provides in-house training to correctional officials in the Goedemoed Management area from Monday to Friday. During weekends, he performs the same type of security services in the prison as did the first plaintiff and the deceased. The training of correctional officers is guided by a Work Skills Plan (WSP) from the national office of the Department of Correctional Services, which highlights priority learning areas for the year. In the main, it will be training on corrections, security, departmental legal mandates and all the laws relevant to their mandate, as well as self- defence. Under Corrections, officials are trained on what rehabilitation programmes can be offered to inmates and how to deal with admission and release of inmates. Security training entails procedures relevant to locking and unlocking cells, searching and maintenance of order. Officials are also trained on escorting inmates and on gang culture and their

operations. Self-defence entails training on the proper use of security equipment such as firearms, pepper spray and tonfas. They are also trained on how to deal with a hostage situation.

[10] Marks indicated that there is an emphasis on self-defence because the prison environment is a dangerous one, where the people they guard (the inmates) are dangerous people. The other dynamic is the gangs in prison, whose culture it is to fight the laws of Correctional Services. In order to move up in the ranks of the gang, a gang member is required to stab a correctional officer. The more times a gang member stabs a correctional officer, the higher he rises in the ranks of the gang. Marks testified that he knows the first plaintiff and the deceased. Although he had no independent recollection of whether they attended the training he offered, he asserted that he has trained almost all the correctional officials, as these were refresher courses to supplement what they were taught in their initial training. He would have to refer to the HR records to ascertain this.

[11] I pause to mention that all the documents referred to by this witness were accepted by the plaintiff, making it unnecessary to call the third witness that the defendant intended to call. Marks confirmed the evidence of Chabane with regard to security requirements for correctional officials, as well as the “Buddy-Buddy” system. He further indicated that with regard to pepper spray and two-way radios, there were not enough for each official to get one, so the supervisor allocates it to the officials, depending on what their duties for the day are. The officials may also request same from the supervisor.

[12] Both Counsel submitted written Heads of Argument and also presented oral arguments in court. Mr Mene persisted with his submission that section 35 of COIDA finds application in this matter, precluding the plaintiffs from claiming damages from the

defendant. Mr Dewrance also maintained his position that the incident did not arise from the duties of the first plaintiff and the deceased, so that they were not precluded from claiming damages from their employer, the defendant. In support of the latter submission, Mr Dewrance appears to advance the argument that this matter should be decided on the basis of the Constitution of South Africa. He alleged that this matter brought into sharp focus section 12(c) of the Constitution and proceeded to give an exposition of the matter of *Mankayi v Anglo Gold Ashanti Limited* [2011] 6 BLLR 527 (CC) paras [13] to [17] and the cases referred to therein. He relied heavily on that case for the proposition that the right to freedom and security of person as enshrined in section 12 dictated that the plaintiffs were not barred from claiming damages from the defendant.

[13] Mr Dewrance, in oral argument sought declaratory relief in terms of section 172 of the Constitution and referred the court to paragraph 42 of his Heads of Argument. I shall return to these aspects later.

[14] Section 35(1) of COIDA provides as follows:

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.

“Occupational injury” is defined in the Act as a personal injury sustained as a result of an accident; and “accident” is defined 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;

[15] Section 35(1) and the related definitions that I mentioned above have occupied much judicial attention. Our courts have grappled with the issue of whether an accident as envisaged in section 35(1) of COIDA arose in the course of an employee's employment and was incidental thereto, and have attempted to give guidance in this regard, in order to determine whether a common law claim is precluded by COIDA.

[16] In the present matter it is common cause or not in dispute between the parties that:

- 16.1 the first plaintiff and the deceased were employed by the defendant as correctional officials, stationed at Goedemeoed Correctional Centre;
- 16.2 they were at their place of employment, performing duties they were employed to do, when the incident occurred on 29 March 2019;
- 16.3 they underwent the necessary training to enable them to perform their duties;
- 16.4 They were attacked by a sentenced prisoner who was serving life sentences for rape, attempted murder and assault. He was rendering cleaning services in the section in which they were performing their duties.

16.5 As a result of the attack, the first plaintiff was raped and Mrs Stuurman (the deceased) was murdered.

[17] The issues for this court to adjudicate are whether:

- 17.1 the incident which occurred on 29 March 2019 at Goedemoed Correctional Centre arose in the course and scope of the employment of the first plaintiff and the deceased and/or was incidental to such employment;
- 17.3 the incident is an accident contemplated in section 35(1) of COIDA;
- 17.4 section 35(1) of COIDA precludes the plaintiffs from instituting a common law claim against the employer.

[18] Both counsel referred to the matter of *MEC for Health, Free State v DN 2015(1) SA 182 (SCA)* (the DN case) and quoted extensively from this case. Although the facts are different from this case, the court in that matter (the SCA) undertook a comprehensive analysis of the domestic as well as international case law on the issue of an accident/incident arising in the course of an employee's employment, and the impact on the employee's ability to pursue a common law claim for damages against the employer. The court expressed some useful views and guidelines, even though it remarked, as did courts in many other cases, that there is no "*bright-line test*" and that "*Each case must be dealt with on its own facts*". The DN case emanates from this Division, where the High Court dismissed a similar special plea raised by the MEC for Health, as has been raised in this matter, that section 35(1) of COIDA is applicable and therefore precludes a claim against the employer. The facts of DN are briefly that the plaintiff was a trainee

doctor training for specialisation as a paediatrician, who was on duty at the hospital where she worked. During her ward rounds in the early hours of the morning, she was attacked and raped by an intruder, who was not a patient or employee at the hospital. He had no

authority or permission to be in the confines of the hospital. He was ultimately convicted of rape and sentenced to 15 years' imprisonment.

- [19] At para 11, the court said "Courts in this country and elsewhere have over decades grappled with the enduring difficulty of determining.... whether an incident constitutes an accident and arose out of and in the course of employment of an employee". The court referred to the matter of *McQueen v Village Deep GM Co Ltd 1914 TPD 344*, the facts of which it summarised thus:

"The employee in question was a trammer in a mine in charge of a gang of employees who were doing shovelling work in one of the stopes underground. He grabbed one of them by the wrist in an attempt to take him to a particular spot where he thought work should be done. In retaliation, the labourer concerned struck him on the head with a stone. In a patronising tone and language typical of the times, the court concluded as follows:

'It seems to me that it can fairly be said that this is a special risk which is incidental to the employment of a man in charge of a gang of uncivilised natives underground in a mine'.

Thus, the court held that the said injuries were caused by an accident which arose out of and in the course of the plaintiff's employment".

- [20] The court continued to discuss the dicta in *McQueen*:

"De Villiers JP took the view that it was perfectly plain that an 'accident' in the legislative context was not an accident in the ordinary acceptance of the word, which, in general terms, is 'an effect which was not intended'. He had regard to developments in English law in which an 'accident' for the purposes of the legislation there in force had been given an extended meaning beyond an

'unlooked for mishap' and 'an untoward event which is not expected or designed'. He recorded in his judgment that our then Workmen's Compensation Act derived directly from the English Act and, as discussed above, considered that it ought to be interpreted beneficially for an employee. De Villiers JP went

on to the next critical question: whether it could be said that the injury arose out of the employee's work? With reference to *Mitchinson v Day Brothers* [1913] KB 603 (CA), he reasoned that what fell to be decided is whether the event is a risk which can be reasonably held to be incidental to the employment. On that aspect he concluded as follows at 349:

'If it be such a risk, and if the injury flows from that risk, it must be held to be an injury arising out of the employment.'

- [21] The case of *Minister of Justice v Khoza 1966 (1) SA 410 (A)* was considered by both the High Court and the SCA in the *DN* case. The court in *Khoza*, like the SCA in *DN*, and which this court must now do, had to deal with the question of whether the accident arose out the employee's employment. The SCA repeated at para 16 of its judgment, the entire passage at 417 D-H of *Khoza* and followed in para 17 with a translation thereof. This was useful as the relevant principles on the issue were expounded by Rumpff JA in that passage in *Khoza*.

- [22] Para 17 of the *DN* case reads as follows:

"In order for a common-law claim against an employer to be precluded, the accident must have occurred during the course of an employee's employment and it must also arise out of that employment (my emphasis). In *Khoza* this court considered the sole difficulty in that case to be whether the accident arose out of the respondent's employment. That is also the sole problem present in this case. In *Khoza* the respondent was injured as a result of a fellow policeman discharging his firearm whilst playfully waving it about at a time when they were transporting arrested persons in the back of a police van. In the passage set out in the preceding paragraph this court noted that

the prevailing employee-compensation legislation did not circumscribe the expression 'arising out of an employee's employment'. Rumpff JA stated that what was required in the broad sense was a causal connection between employment and the accident (my emphasis). He went on to state that, in general, the causal

connection between the accident and employment is met when the accident occurs at the place where the employee works. The learned judge of appeal took into account that an employee, in the execution of his duties, may be at various locations but that an accident could notionally be said *to arise out of an employee's employment* if it occurred and the workman was injured whilst he was busy executing his duties. As examples he considered the position of a labourer at a factory who is injured when a gust of wind dislodges a sheet of roof iron which strikes him, whilst he is walking in the street or riding in a motor vehicle going about his duties as an employee. Rumpff JA went on to consider instances in which the causal connection for the purposes of the Act could be said to have been severed. He held that it was clear that the causal connection would be extinguished if the accident were of such a kind that the employee would have sustained the injuries even if he had been at a place other than where he was executing his duties as an employee or when, through his own act, he caused the causal connection to be extinguished. More significantly, for the purposes of the present case, he considered the causal connection to be severed when the employee, was intentionally injured by a stranger and the motive for the assault bore no connection to the injured person's employment. I shall, in due course, return to this important aspect."

- [23] The court dealt with "this important aspect" in paras 30 and 31 of the *DN* case, and in order to preserve the principles enunciated therein and the context thereof, it is perhaps prudent to repeat both extracts in their entirety:

"[30] By employing terms such as 'necessary risk of employment' or 'risk incidental to employment', courts have attempted to determine whether the cause of injuries sustained by employees was related to the employee's employment. The latter part of the quote from *Khoza* set out in para [16] and summarised in English in para [17], in similar fashion, sought to provide

some guidance in determining whether an accident 'arose out of employment'.

[31] Counsel on behalf of the MEC did not go so far as to suggest that the dictum in *Khoza* referred to in the preceding paragraph was clearly wrong and that we should depart from it, but pointed out that relating the causal

connection, as Rumpff JA did, to the motive of the perpetrator of the wrong that caused the injury was problematic and would lead to uncertainty. I agree. However, it appears to me that the problem can be resolved by a slight adjustment, namely to ask 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 (my emphasis). There is of course, as pointed out in numerous authorities, no bright-line test. Each case must be dealt with on its own facts.”

[24] Having applied the test as set out above, the SCA confirmed the findings of the High Court and dismissed the appeal. In asking the question whether the act causing the injury was a risk incidental to the plaintiff's employment, the court held that a rape perpetrated by an outsider upon a doctor, who was a paediatrician in training and who was on duty at the hospital, did not arise from her employment. It cannot be conceived that rape is incidental to such employment. The learned judge held further that “As a matter of policy alone an action based on rape should not, except in circumstances in which the risk is inherent... be excluded and compensation then be restricted to a claim for compensation in terms of COIDA”. (My emphasis).

[25] More recently, the SCA had occasion to consider a similar appeal from the judgment of the High Court in the matter of *Churchill v Premier, Mpumalanga and Another* 2021 (4) SA 422 (SCA). The facts briefly are that the plaintiff (Ms Churchill) worked at the Office of the Premier, Mpumalanga where she was employed as the Chief Director: Policy and Research. During a labour-related

protest by members of a trade union, she was, due to a misunderstanding, assaulted, mistreated by the protestors and evicted from the building. She instituted an action for damages against the Premier, claiming that he had negligently failed to ensure her safety. The Premier raised a special plea that she had suffered an occupational injury and was, therefore, barred from instituting action against her

employer, in terms of section 35(1) of COIDA. The special plea was upheld by the High Court, and Ms Churchill appealed against that order to the SCA.

[26] The SCA referred to the *Khoza* decision and applied the principles set out in the *DN* matter in its deliberations. The parties agreed that the incident had arisen “in the course of” Ms Churchill's employment but there was a disputed that it had arisen “out of” her employment. The court then interrogated whether the incident was sufficiently closely connected to the employee's employment to be regarded as arising from it and concluded that it was not, on the basis that the only link between the incident and Ms Churchill's job was that she was at work at the time; and that the incident had no relation to her duties, her position or the reason for the protest, but was due to a misunderstanding.

[27] As I indicated, Mr Dewrance placed much reliance on the *Mankayi* case. I shall cite the relevant parts of the background as summarised by the editor in that case. The plaintiff in that matter was a mineworker who contracted a type of tuberculosis as a result of being exposed to dust and gases during his employment as a mineworker, which was defined as an occupational disease in terms of the Occupational Diseases in Mines and Works Act 78 of 1973 (“ODIMWA”). The plaintiff instituted action his employer (Ashanti Gold) under the common law for damages as a result of

the employer's failure to provide him with a safe and healthy work environment. Ashanti Gold filed an exception on the basis that section 35 of COIDA excluded such a claim.

[28] Applicant contended that because he had contracted an "occupational disease" as defined in ODIMWA and had received compensation under ODIMWA, he was not entitled to compensation under COIDA, and that therefore he was not an "employee" as contemplated in COIDA. Section 100(2) of ODIMWA provides that notwithstanding anything in any other law contained, no person who has a claim to benefits under this Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or was employed at a mine, shall be entitled, in respect of such disease, to benefits under [COIDA]". The High Court upheld the exception. Applicant then appealed unsuccessfully to the Supreme Court of Appeal. Applicant approached the Constitutional Court seeking leave to appeal against the judgment of the Supreme Court of Appeal, which was granted and the appeal was upheld.

[29] In a unanimous judgment (per Khampepe J) the Constitutional Court set out its reasons for concluding that the word "employee" in section 35(1) of COIDA includes employees covered by ODIMWA, notwithstanding that those employees are barred from claiming benefits under COIDA. Section 35(1) had to be read in the context of the other provisions of COIDA. The "employee" referred to in section 35(1) whose common law claim was expunged was limited to an "employee" who had a claim for compensation under COIDA in respect of occupational diseases mentioned in COIDA. It was that "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. The expungement did not extend to an "employee" who **was not entitled** to claim compensation in respect of "occupational diseases" under COIDA. (my emphasis) Section 35(1) did not cover an "employee" who qualified for compensation in respect of "compensatable diseases" under ODIMWA. The exclusion of liability in section 35(1) was therefore limited to "employees" who were entitled to compensation in respect of "occupational diseases" under COIDA.

[30] It was against that background that the Constitutional Court held that the provisions of the Constitution, such as section 12(1)(c), would be implicated if the applicant were denied the right to claim against his employer at common law. It is clear that the first plaintiff and the deceased are not barred from claiming compensation under COIDA, and are not in the same position as Mr Mankayi was in. I also note that in their Replication to the defendant's special plea, the plaintiffs allege that the incident is not an accident as defined in section 1, read with sections 35 and 36 of COIDA as *"Hostage, Rape and Murder do fall within the meaning of the Criminal Procedure Act 51 of 1977 as amended"*, the incident is not incidental to the first plaintiff and deceased's scope of work and that they are not prohibited from instituting the claim as they are exercising their common law and constitutional rights. The plaintiffs did not mention in argument and did not appear to pursue the allegation that section 36 of COIDA applies to this case, and I will not deal further with this aspect.

[31] There is no mention of exactly which rights they are exercising and why, other than alleging in their summons that the negligence of the defendant and his breach of the duty of care that he owed

them has resulted in their suffering damages mentioned in the summons. It was for the first time in the Heads of Argument that Mr Dewrance raised the constitutional issues in the form that I have mentioned. The plaintiffs seek in their summons an order declaring that the defendant's negligence violated their constitutional rights. I pause to return to the point I made earlier that Mr Dewrance in oral argument sought declaratory relief in terms of section 172 of the Constitution, and referred to paragraph 42 of his Heads of Argument in support thereof. Section 172 of the Constitution provides as follows:

172 Powers of courts in constitutional matters

- (1) When deciding a constitutional matter within its power, a court-
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
- (2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
- (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
- (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

[32] Para 42 of Mr Dewrance's Heads of Argument reads as follows:

"As a result of the defendant's aforesaid constitutional and statutory breaches, the plaintiffs seek a declaratory order that the defendant violated the first constitutional and statutory rights as pleaded in the particular of claim. The Defendant should be declared having breached the same"

It will be noted that a declaratory order is sought to declare that the defendant has breached the plaintiff' and minor child's constitutional and statutory rights, and that section 172 of the Constitution requires a declaration of invalidity to the extent that law or conduct complained of is inconsistent with the Constitution. Mr Dewrance did not pursue this point further and has not indicated if it is a law or conduct that is inconsistent with the Constitution and how, nor has he sought a declaration of invalidity in the pleadings. Other than a cursory reference to section 172 of the Constitution, nothing has been placed before this court to adjudicate upon the matter. The defendants were also not forewarned that the plaintiffs would be seeking an order in terms of section 172, to enable the defendant to respond appropriately.

[33] Furthermore, no issue was taken with the special plea or its effect in the Replication thereto, whereas in his Heads of Argument Mr Dewrance sets out a detailed exposition of the law relating to special pleas. He thereafter concluded that the defendant's special plea is a plea in abatement and the facts as pleaded in the

particulars of claim are the only relevant factors that the court should take into consideration in determining the special plea.

- [34] He asserts that the evidence led by the defendant is of no value and is irrelevant. This is not the case the defendant had to meet, and in my view, is a point not well taken by the plaintiffs. No mention was made of the plaintiff's stance even when the defendant indicated at the commencement of the hearing that it would lead the evidence of three witnesses. It seems that the plaintiffs were relying on *Mankayi* in relation to their point on the special plea. It is noted that in *Mankayi*, Ashanti Gold raised and exception and not a special plea, and that court was not called on to decide a special plea. I deem it unnecessary to deal any further with that point, as it does not advance the plaintiffs' case in any way.
- [35] In the present matter, there is no dispute that the first plaintiff and the deceased were at their place of work, executing the duties they were employed to do. Their duties entailed, inter alia, providing security services, in that they were required to guard inmates at Goedemoed and ensure that in executing their duties, they were responsible for maintaining order amongst inmates, for containing unruly behaviour and they were required to be vigilant and prepared to deal with any dangerous situation that may occur
- [36] They were trained in security and self-defence measures and, importantly, were reminded on a daily basis that they work in a dangerous environment where they were constantly at risk of being attacked and even held hostage by inmates. The "Buddy-Buddy" system was designed to protect employees in the prison environment, and they were reminded never to be alone when interacting with inmates. In this case, it seems that the first plaintiff and the deceased were, indeed alone, while at least one inmate was in their presence or in their immediate vicinity. There were

four officials working together at the time, including the first plaintiff and the deceased. One was called away to attend to an incident at another location, and it is not clear why the fourth official was not present with the first plaintiff and the deceased at the time the incident unfolded. It is also unclear whether the first plaintiff or the deceased took the prescribed steps to ensure that they minimised any risk to themselves.

[37] It is not disputed that the incident occurred in the course of the first plaintiff's and the deceased's employment. In determining if it arose out of that employment, the question to be asked is whether there is a causal connection between the incident and the employment, as expressed in *Khoza* and *DN*. In other words, whether the act causing the injury was a risk incidental to the employment. In my view, the incident was a risk inherent in the employment of the first plaintiff and the deceased, and was incidental to such employment. The fact of them being exposed on a daily basis to dangerous criminals was inherent in their employment and brought them within the range of the hazard which caused them to be injured. The position of the first plaintiff and deceased was different to that of the doctor in *DN* and appellant in *Churchill*, where the application of the same test to the facts indicated that the acts giving rise to their injuries were not incidental to their respective employment.

[38] I pause to mention that the first plaintiff was aware that COIDA

applied in her matter. From the documents that were discovered by the defendant and accepted by the plaintiffs, it is evident that she applied for leave of absence from work, stating under "Type of Leave" that it was "Leave for Occupational Injuries and Diseases".

She also claimed compensation for injury on duty. Vouchers were issued by the Department of Correctional Services for payment of the costs of the doctors treating her. The authorisation form for payment of medical services specifies that the authorisation applies, *inter alia*, to all officials who are examined/treated in accordance with COIDA. It appears that the second plaintiff also lodged a claim in terms of COIDA and an award for compensation was made by the Compensation Commissioner. The plaintiffs did not reveal this at all. It came to light only in the defendant's Heads of Argument. The plaintiffs did not even deal with this aspect, either in their Heads of Argument or in the oral argument in court.

[39] In my view, the defendants have established, on a balance of probabilities, a causal connection between the act causing the injury and the employment of the first plaintiff and the deceased. In the evidence that they led regarding the nature of the work environment, and the duties of the first plaintiff and the deceased, it is apparent that the incident was a risk inherent in their employment.

[40] In the circumstances I make the following order:

40.1 The special plea is upheld with costs, such costs to include the costs consequent upon the appointment of two counsel.

S NAIDOO J

On Behalf of the Plaintiffs:

Instructed by:

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