

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG****Case no: 2022/15161**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>2023/11/15</u>	
DATE	SIGNATURE

In the matter between:

UZZAH GIFT TSHABALALA**Plaintiff****And****METSO OUTOTEC SOUTH AFRICA****Defendant**

This judgment has been delivered by uploading it to the caselines digital data base of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery is 10h00 on 15 November 2023

JUDGMENT

Sutherland DJP:

[1] The plaintiff has sued the defendant, his former employer, for damages. It is alleged that the defendant is liable to pay damages because the plaintiff contracted asthma whilst working for the defendant in a high-risk occupation. The parties have pleaded out their respective cases. Amongst the several defences pleaded is a special plea which contests the viability of the claim as pleaded by the plaintiff. The parties agreed to have the special plea argued as a separated issue in terms of rule 33(4).

[2] A traverse of the pleadings discloses the following:

2.1 The plaintiff in his initial particulars of claim alleged that the defendant was the owner of a mine or works as defined in the Occupational disease in Mines and works Act 78 of 1973 (ODIMWA). Further, it is alleged a duty of care to secure safe working conditions existed upon the defendant, in which duty the defendant failed, the plaintiff contracted asthma, and in consequence, the defendant is liable in damages to the plaintiff. The basis for this averment is that it is enshrined in section 24 of the Constitution that everyone has a right to an environment that is not harmful to their health. Amongst other defences irrelevant for present purposes, the defendant put up a special plea.

2.2 The defendant's special plea is to the effect that the claim articulated in the plaintiff's particulars of claim constitutes a claim under the provisions

of the Compensation for Occupational Diseases Act 130 of 1993 (COIDA) and, that because under section 35 of COIDA the employer is exempt from liability, the plaintiff has no claim against the defendant. This averment is made despite no allusion was made to COIDA in the plaintiff's claim; ie it is the defendant's characterisation of the case pleaded by the plaintiff not the plaintiff's own characterisation.

2.3 In answer to this averment, the plaintiff pleaded in paragraphs 5, 6 and 7 of a 'reply', a repetition that the workplace was regulated by ODIMWA.

Further the plaintiff avers that section 100(2) of ODIMWA provides thus:

'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 controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under the Workmen's Compensation Act, 1941 (Act 30 of 1941), or any other law.'

Therefore, based on this provision, the averment is then made that the claim falls outside the ambit of COIDA.

2.4 To this, the defendant in a rejoinder, averred that the particulars pleaded by the plaintiff do not make out a case for ODIMWA to apply to the plaintiff's claim. Moreover, it is averred that for ODIMWA to apply, the plaintiff would have had to plead that his asthma was a 'compensatable disease' as defined in section 1 of ODIMWA. That definition reads thus:

"compensatable disease" means-

- (a) pneumoconiosis;
- (b) the joint condition of pneumoconiosis and tuberculosis;
- (c) tuberculosis which, in the opinion of the certification committee, was contracted while the person concerned was performing risk work, or with which the person concerned was in the opinion of the certification committee already affected at any time within the twelve months immediately following the date on which that person performed such work for the last time;
- (d) permanent obstruction of the airways which, in the opinion of the certification committee, is attributable to the performance of risk work;

(e) any other permanent disease of the cardio-respiratory organs which in the opinion of the certification committee is attributable to the performance of risk work; or
 (eA) progressive systemic sclerosis which, in the opinion of the certification committee, is attributable to the performance of risk work; or
 (f) any other disease which the Minister, acting on the advice of a committee consisting of the director and not fewer than three other medical practitioners designated by the Minister, has, subject to the provisions of subsection (2), by notice in the *Gazette* declared to be a compensatable disease and which, in the opinion of the certification committee, is attributable to the performance of risk work at a mine or works;'

2.5 The parties then held a pre-trial conference on 30 October 2023. They exchanged interrogatories. The plaintiff is minuted as stating that "...he relies for his claim on ODIMWA." The plaintiff in answering a question from the defendant states: "the alleged disease is a compensatable disease as defined in sections 1(d), (e) and (f) of ODIMWA.

[3] The argument before me was conducted on the premise that the claim of the plaintiff against the defendant is for compensation for a compensatable disease. If the plaintiff's case turns on whether what he has pleaded satisfies the criteria for a claim under ODIMWA, then the debate resolves into a simple question of interpreting the definition of a compensatable disease. The argument for the defendant is that a claim as such cannot be sustained without also pleading that the disease had been certified as stipulated in the text of the definition cited above. The argument for the plaintiff is that the absence of a certification does not inhibit the plaintiff's claim because the question of certification is an aspect of evidence which can be adduced later on at trial. As is plain, the plaintiff accepts the premise of the contestation over the definition of 'compensatable disease.'

[4] In my view it is obvious that the certification is part of what defines a disease as compensatable and in the absence of any allegation of certification, a claim based on such a *causa* fails. The defendant's contention on this exact point is

correct. The defendant would have it that this finding results in the dismissal of the action. That view is in error.

- [5] The saga which has played out reflects gross confusion by both parties.

- [6] The claim of the plaintiff as pleaded is alleged to be based on “ ... both common law and statute” (para 6.4 of Plaintiff’s particulars of claim). Presumably the “statute” referred to is ODMIWA. However, what does this mean? Indeed, what *can* this mean? The claim is patently *not a claim in terms of ODIMWA*. Such a claim is against the ODIMWA fund not against an employer. (See: sections 32, 62, 72 of ODIMWA) An aggrieved worker does not sue his employer *under the terms* of ODIMWA. Unlike in COIDA where the employer’s liability is excluded for the events and circumstances regulated therein, a worker can claim under ODIMWA against the ODIMWA fund without relinquishing a claim under the common law against his employer. That is what the plaintiff pleaded claim avers. The allusions to ODIMWA in the particulars of claim are superfluous.

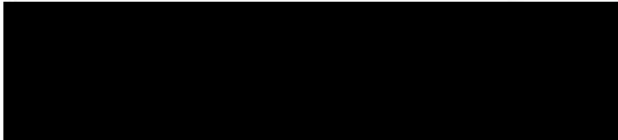
- [7] The fuss about a compensatable disease and its definition is a red herring. Both parties are confused about the issue. On the text of the pleaded claim the plaintiff invokes a common law right. If the *causa* relied on by the plaintiff indeed falls within COIDA then the defendant is at liberty to prove that allegation of fact. However, the fact that no case is made out on the pleadings that asthma of the plaintiff is eligible for compensation under ODMIWA is irrelevant to the case actually pleaded by the plaintiff.

- [8] Reference was made in argument to the decision in *Manyaki v AngloGold Ashanti 2011 (3) SA 237 (CC at para [86] ff*. All this authority establishes is that if you have a valid claim under the terms of ODIMWA, i.e. against that fund, you can still sue your employer to top up your quantum.

- [9] The sally into this special plea, engaged in by the parties, has been singularly unproductive, other than to point to the necessity of pleading only what is relevant and avoiding decorative padding, which, in this example, has led both parties down the rabbit hole. For that reason, there shall be no costs order.
- [10] As to the outcome, a declaration is appropriate that it is correct that the definition of a compensatable disease includes the specified disease being certified in the person of the claimant as being such as malady. As regards the special plea, the averments therein must be proven elsewhere. The plaintiff cannot therefore succeed in its special plea on the premise put before the court.

The Order

- (1) It is declared that the definition of 'compensatable diseases' in section 1 of ODIMWA means a specified disease certified as such in terms of the certification procedure stipulated by the statute.
- (2) The special plea (the Third Special Plea), that the plaintiff's claim as pleaded falls under COIDA, cannot be decided on the premise placed before the court
- (3) Each party shall bear their own costs.



Roland Sutherland
Deputy Judge President, Gauteng
Division, Johannesburg.

Heard: 13 November 2023

Judgment: 15 November 2023

Appearances:

For the Plaintiff:

Mr T Khoza

Instructed by TP Khoza Attorneys Inc.

For the Defendant:

Adv GM Young

Instructed by Van Gaalen Attorneys