THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 2694 / 2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

28 June 2022 .....
DATE SIGNATURE

In the matter between:

RICHARD ROETZ PRINSLOO **APPLICANT**

and

MEMBER OF THE COUNCIL **RESPONDENT**
DEPARTMENT OF EDUCATION
MPUMALANGA PROVINCE

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 14H00 on 28 June 2022.

Civil law and Procedure - Notice to be served on State organ in terms of sec 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 within six months from the date the debt became due.
Condonation for non-compliance. Good cause and prospects of success. Whether the claim is barred by sec 35(1) of Compensation for Occupational Injuries and Diseases Act, no. 130 of 1993 (COIDA). Definition of accident in terms of COIDA.

The Applicant, a school teacher at the time of the incident, was physically assaulted by a learner in a classroom in the presence of other learners. After the incident, he was subjected to a disciplinary hearing, and later resigned as a teacher. He now claims for damages and loss of earning against the MEC for Education, Mpumalanga for not providing adequate protection. Over two years had lapsed by the time summons was issued. The application is confined to condonation for non-compliance with sec 3 of Act 40 of 2002. The Respondent opposes the application in that there is no good cause shown, entailing reasonable prospects of success, as the claim is precluded by sec 35(1) of COIDA for being an accident that is covered under sec 25.
Considered, if the accident arose in the course of employment and out of employment in line with the definition of accident in COIDA.
Held, that the accident happened in the course of employment but not out of employment and therefore not excluded by sec 35(1) of COIDA.
Held further that a good cause was shown and that there were reasonable prospects of success. Condonation in terms of Act 40 of 2002 was therefore granted.

J U D G M E N T

RATSHIBVUMO J:

[1] In this application, the Applicant seeks condonation for its late delivery of a statutory notice to the Respondent, as stipulated in section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 (the Act). The application is sought in terms of section 3(4)(a) of the Act. The application is opposed, mainly for reason that no good cause was shown as the claim lacks prospects of success.

[2] The 5th of March 2018 may have been an ordinary day for the learners and the teachers at Bergvlam High School in Mbombela, a public school at which the Applicant was employed as a teacher. However, the events in one Grade 10 classroom where the Applicant was, changed the course of events into idiosyncrasy. Among the learners in the classroom was Liewellyn van der Linde, a learner who had recently witnessed the death of his mother in a motor collision. The Applicant was aware of this. He made some remarks about this, which triggered this learner to react by physically assaulting him. The assault continued until the learner was restrained by the other learners.

[3] Over the next few months there was a disciplinary hearing against the Applicant which culminated in October 2018. The outcome of the hearing had as one of the recommendations that the Applicant should attend a behaviour management counselling and report back at the school in January 2019. The Applicant resigned as a teacher in December 2019. On 08 August 2019, the Applicant's erstwhile attorney had a letter of demand served on the

Respondent in an attempt to comply with section 3(1) of the Act. On 20 October 2020, he issued summons against the Respondent suing for damages suffered from the incident and for loss of income, totalling in excess of R8 million.[1] In essence, he pleads that the Respondent failed to protect him and/or to give him the necessary support following the attack.

[4] It is apposite at this stage to deal with the condonation by the Respondent for the acceptance of the supplementary answering affidavit filed on record. The gist of the application is to cure the loopholes that were exposed by the Applicant that exists in the answering affidavit such as hearsay evidence. Although an undertaking was made in the replying affidavit by the Applicant, that he will bring an application to have certain averments struck out of the answering affidavit, the condonation is not opposed, except that the heads of argument highlight that there is no formal application before the court.

[5] I suppose the approach by the Applicant must have been informed by the fact that there is no real prejudice he would suffer if the condonation is allowed. The condonation is to allow the confirmatory affidavits by the persons who were not available at the time of filing of the answering affidavits due to festive and/or school holidays. The acceptance of the supplementary answering affidavit gives a complete picture to the puzzle poised by the application and the opposition thereof and would be in the interests of justice so to do. After all, as alluded to already, the acceptance does not prejudice the Applicant's case. The condonation is therefore allowed.

[6] It is common cause that a letter of demand was not served on the person stipulated in the Act who in this case would be the Head of the Department of Education, and not the Member of the Executive Committee (the MEC). In

[1] See amended particulars of claim on p. 49 of the paginated bundle.

advancing this argument, counsel for the Respondent relied on *Mfundisi Gcam-Gcam v Minister of Safety and Security*[2] where Mbenenge ADJP (as he then was) said,

> "Nothing from a reading of the section points to any form of ambiguity or difficulty of interpretation. It makes it imperative (and not merely directory) for a claimant to serve the notice on the head of a department. In the case of the SAPS such head is the National Commissioner. The reason for the requirement that notice to institute proceedings against a department be served on the department's head at that early stage is not far to seek. In terms of section 36 of the Public Finance Management Act 1 of 1999 (the PFMA) the head of a department must be the accounting officer for the department. The responsibilities of accounting officers are set out in section 38 of the PFMA. Section 38 (1) (d) renders accounting officers responsible for the management of the liabilities of the department. It is also significant that the National Commissioner exercises control over and manages the SAPS in accordance with section 207 (2) of the Constitution of the Republic of South Africa, 1996 and is obliged to perform any legal act or to act in any legal capacity on behalf of the SAPS."

[7] The Applicant concedes to the fact that the notice should have been served on the Head of the Department of Education and not the MEC. In the replying affidavit, the Applicant said, "I intended requesting the Court's condonation for non-compliance with section 3(1) of the Act, which included late delivery and any other defect with the notice. This is clear from the correspondence exchanged between the parties, for instance, annexure "RR3" to the founding affidavit, that what is in issue is non-compliance with the Act in respect of statutory notice, and it is in fact opportunistic cynical of the Respondent now to take this technical point that the application for condonation does not go far enough to cure or to address the whole issue of non-compliance…"[3]

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[2] (187/11) [2017] ZAECMHC 31 (12 September 2017) at para 18.
[3] See para 7.3 of the replying affidavit on p. 233 of the paginated bundle.

[8] His counsel went as far as to ask that court to invoke the "further or alternative relief" sought as per notice of motion to grant the condonation sought. For this reason, two draft orders were prepared, one reflecting the relief as per notice of motion as it stands, and another, encompassing the failure to direct the notice to the appropriate person identified in the Act. This reasoning in opposing the condonation is on narrow technicalities as the issues in dispute are common to both parties, to wit, non-compliance with the provisions of section 3(1) of the Act. Whether this non-compliance is on late service of the notice or no notice at all, it's immaterial.

[9] Although it is desirable that the relief sought should be as framed in the notice of motion and that where it becomes necessary, the notice of motion be amended, I equally do not see any harm or prejudice in invoking the relief as requested, provided all the requirements for condonation are satisfactorily met. Allowing the relief would after all be in the interests of justice.

[10] The relevant parts of section 3 of the Act read,

> "3 (1)No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-
>
> (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
>
> (b) the organ of state in question has consented in writing to the institution of that legal proceedings-
>
> …
>
> (2) A notice must-
>
> (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and
>
> …

> (4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.
>
> (b) The court may grant an application referred to in paragraph (a) if it is satisfied that-
>
> (i) the debt has not been extinguished by prescription;
>
> (ii) good cause exists for the failure by the creditor; and
>
> (iii) the organ of state was not unreasonably prejudiced by the failure.

[11] The Applicant gave details on why the notice was not sent on time including that he was not aware of this legal provision. He also alleged that all he was interested in was to deal with the disciplinary hearing and at the time he had no intention to sue the Respondent. He also had to raise funds to instruct the attorneys to lodge this claim which at the time he did not have. It would appear that the erstwhile attorneys did not have a contingency fee agreement and as such, legal fees had to be paid up front, something that caused him to terminate their mandate.

[12] The current legal representative has what appears to be a contingency fee agreement with the Applicant as he has not charged him an upfront payment fee. His erstwhile attorneys contributed in the delay and/or sending the notice to the wrong persons. The delay by the Respondent in serving the notice to defend the matter until when there was a default judgment application did not salvage the situation. I find the explanation regarding non-compliance to be satisfactory.

[13] The Applicant's submission to the effect that the debt has not been extinguished by prescription and that the Respondent was not unreasonably prejudiced by its failure to comply with section 3(1) of the Act is not in contention. It is the good cause requirement that is the subject of this

application. The Respondent placed emphasis on the judgment of *Grootboom v National Prosecuting Authority and Another*[4], where the Constitutional Court said,

> "Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation. The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

[14] Counsel for the Respondent made further reference to the judgment of the Supreme Court of Appeal (the SCA) in *Madinda v Minister of Safety and Security*[5] where it held,

> "The second requirement is a variant of one well known in cases of procedural non-compliance. See *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 227I - 228F and the cases there cited. 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation

[4] (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC), (21 October 2013) at para 50-51
[5] [2008] ZASCA 34; 2008 (4) SA 312 (SCA) at para 8.

> offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor."

[15] The Respondent argues that the claim against it lacks prospects of success. To the extent that there could be a claim, the Applicant was compelled to claim under the Compensation for Occupational Injuries and Diseases Act, no. 130 of 1993 (COIDA). The Respondent further submitted that to the extent that the injuries exist, they arose out of and in the scope of the Applicant's employment. Where an employee is entitled to compensation under COIDA any right of action against the employer is excluded by section 35(1) which provides,

> "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."

[16] In advancing this argument, the Respondent relied on the SCA judgment of *Churchill v Premier of Mpumalanga and Another*.[6] Interestingly, the Applicant also relies on the same judgment in arguing that the Respondent is misinterpreting COIDA. Section 25 of COIDA provides,

> "If an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act."

Accident is defined under COIDA 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. [My emphasis].

[6] (889/2019) [2021] ZASCA 16; [2021] 2 All SA 323 (SCA); 2021 (4) SA 422 (SCA) (4 March 2021).

Interpretation of COIDA through *Churchill* judgment.

[17] Ms. Churchill had instituted an action against her employer for damages linked to the assault on her person by a group of protesting fellow employees. A plea raised by her employer to the effect that her claim was covered under COIDA was upheld by the trial court leading to the appeal before the SCA. In the course of a protest by members of a trade union at the offices of the Premier of Mpumalanga where Ms. Churchill worked, she returned to her office, which she found to be locked. This annoyed her and in frustration she uttered an expletive which was overheard by nearby protestors, who misconstrued it to be directed at them. They then assaulted and humiliated her in front of other employees causing her physical and psychiatric injuries.

[18] It was agreed between the parties that the incident had arisen "in the course of" her employment but the dispute was whether it had arisen "out of" her employment. The fact that the assault took place at her workplace, made it easy to conclude that it arose in the course of her employment. In answering the question in dispute, the SCA analysed the history of COIDA and a number of judgments including foreign authorities.

[19] The SCA made reference to its earlier decision of *MEC for Health, Free State v DN*[7] where a doctor on night duty, walking along a passage between two wards, was assaulted by an intruder, who hit her with a brick and raped her. Her claim for damages against the MEC, on the basis that, through negligence, inadequate security precautions had been taken, was met with a plea based on s 35(1) of COIDA. The plea was dismissed by the SCA per Harms ADP who held,

> "…the question that might rightly be asked is whether the act causing the injury was a risk incidental to the employment… I am unable to see how a rape

[7] 2015 (1) SA 182 (SCA)

> perpetrated by an outsider on a doctor – a paediatrician in training – on duty at a hospital arises out of the doctor's employment. I cannot conceive of the risk of rape being incidental to such employment."[8] [My emphasis].

[20] In *Churchill*, the SCA held therefore that the right approach was 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 those duties, and the less the 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.[9] The SCA concluded therefore as follows,

> "It is not apparent to me why the possibility of protests or industrial action turning violent and resulting in assaults on non-participating employees, means that the assaults are risks incidental to the employment of those assaulted. The wider implications of this were explored with counsel. They appear to be far-reaching. Take the case of a non-striking employee who crossed a picket line to work and was condemned as a scab by the strikers. Would an aggravated assault aimed at persuading them to desist arise from their employment? Would it make a difference if the assault was an act of revenge after the strike ended? Neither situation seems to me to be closely connected to the performance of their duties as an employee. To adopt the language used in *Khoza*[10] in describing an instance where the assault would not arise out of the employee's employment, such an assault has no connection with the working duties of the employee. It is connected to their employment, but not to their duties in that employment.[11] [My emphasis].

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[8] *MEC for Health, Free State v DN (supra)* at para 31-32.
[9] See *Churchill (supra)* at para 20.
[10] See *Minister of Justice v Khoza* 1966 (1) SA 410 (A).
[11] See *Churchill (supra)* at para 28

[21] The SCA concluded that the assault on Ms. Churchill did not arise out of her employment. The appeal was as such upheld and the plea was dismissed. The SCA did acknowledge though that there are instances where the assault can arise in the course of employment such as jobs the nature of which gives rise to a risk of assault by co-workers, outsiders or criminals arising from the performance of the worker's ordinary duties. Security personnel come to mind in that regard. It said,

> "Assaults sometimes occur in the context of employment and may arise from it, as in the case of the trammer in *McQueen*[12] assaulted by a miner after he tried to pull him to work at a different point in the mine. But assault on a co-worker is treated in many, if not most, workplaces as a serious disciplinary offence that may lead to dismissal. It is not something that ordinarily arises from a person's employment. Where the assault occurs in the workplace, but as a result of something external to the workplace and the duties of the person assaulted, it is difficult to see on what basis it can be said to arise out of their employment."

[22] The reference to *McQueen* by the SCA above opened the doors for the Respondent to rely and refer this court to *Kelly v Board of Management Trim Dist. School*[13] a 1913 judgment by a court of appeal of Ireland. This is because reference was made to it in *McQueen* judgment. Counsel for the Respondent in an attempt to draw similarities submitted that *Kelly* involved the killing of a teacher at the hands of his pupils, which the court found to have arisen out of his employment. Reference to this authority is misleading for reason that no disclosure was made that this was not an ordinary school but an industrial school the boys of which were known to be rough and unruly. This feature alone is enough to distinguish *Kelly* from the facts of this case. Over and above that, it remains doubtful if the Ireland court of appeal would still approach facts

[12] *McQueen v Village Deep GM Co Ltd* 1914 TPD 344.
[13] (6 B.W.C.C. 921)

as in *Kelly*, from the same angle they did over a century ago, if they were to be presented before it today.

[23] Turning to the facts of this case, it is equally obvious that the assault on the Applicant arose in the course of his employment. The question is whether it was out of his employment. It should therefore be asked as it was in *Khoza*[14], "what connection is there in the assault with the working duties of the teacher?" This unless the Applicant was a boxing coach, of which he was not. Just as it was concluded in *Churchill*, the closer the link between the injury sustained and the performance of the ordinary duties of the teacher, the more likely it will be that they were sustained out of their employment. The further removed from those duties, and the less the likelihood that those duties will bring the Applicant into a situation where such injuries might be sustained, the less likely that they arose out of his employment.

[24] The motive of the learner in attacking the Applicant is irrelevant. Questioning the motive for the attack falls into the very error identified in *MEC for Health, Free State v DN*[15] of using the motive of the perpetrator to establish the requisite connection between the incident and the duties of the injured party. It is rather apposite to ask 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 Applicant's employment.

[25] I am unable to see how assault on a teacher on duty at school arises out of his employment. I cannot conceive of the risk of assault being incidental to teaching. The argument that the claim is barred by section 35(1) of COIDA

[14] *Supra*, see footnote 10 above.
[15] *Supra* at para 31.

is therefore with no merit as evidence presented does not show that the assault arose out of the Applicant's employment.

[26] Over and above the reasons given above, I am of the view that the defence on COIDA would mark a departure from the established approach such as the one adopted in *Jacobs v The Chairman of the Governing Body of Rhodes High School and Others.*[16] In that case the court awarded the damages in excess of R1.1 million to a teacher who was bludgeoned by a hammer in the hands of a learner in full view of the other learners in classroom. When counsel to the Respondent was alerted to this matter, he submitted that *Jacobs* could be distinguished in that COIDA was not pleaded. I am of the view that this submission is not good enough. If the Applicant is to forfeit the rights that claimants in his situation always enjoyed in the past, this should at least take place after he had exercised his right to present evidence to prove his claim in a trial.

[27] Further submission was made by the Respondent to the effect that since the Applicant was subjected to a disciplinary hearing the outcome of which was not appealed against, the outcome was rendered final thus, *res judicata.* This argument is without merit as the outcome of a disciplinary hearing is not a court judgment. *Res judicata* can only be pleaded when the settlement of the matter was through a court judgment, between the same parties and over the similar issues.[17] I am therefore of a view that a good cause was shown regarding the Applicant's failure to comply with section 3(1) of the Act.

[28] The Applicant was successful in this application and I see no reason why costs should not follow the order. This is one of those cases where the Respondent did not have tangible reason to oppose the application.

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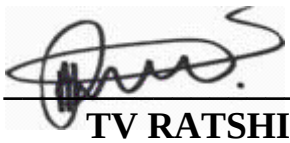
[16] (7953/2004) [2010] ZAWCHC 213; 2011 (1) SA 160 (WCC) (4 November 2010).
[17] See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[29] For these reasons set out above, I make the following order.

[29.1] Condonation in terms of section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002, occasioned by the Applicant's failure to serve a notice as prescribed, is hereby granted.

[29.2] The Respondent is ordered to pay the costs of this application including the costs of Senior Counsel.



TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

FOR THE APPLICANT:	**: ADV D MILLS SC**
INSTRUCTED BY	**: PRINSLOO WHITEHEAD MADALANE ATTORNEYS PRETORIA C/O LUNEBURG JANSE VAN VUUREN ATTORNEYS : MBOMBELA**
FOR THE RESPONDENT	**: ADV. DH WIJNBEEK**

INSTRUCTED BY	**: ADENDORF THERON INC MBOMBELA**
DATE HEARD	**: 24 MAY 2022**
JUDGMENT DELIVERED	**: 28 JUNE 2022**