

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

REPORTABLE

Case no: CA 44/2021

In the matter between:

**MEMBER OF EXECUTIVE COUNCIL FOR
ROADS AND PUBLIC WORKS, EASTERN CAPE
and**

RICHARD ALEXANDER YEOMANS

APPELLANT

RESPONDENT

FULL COURT APPEAL JUDGMENT

VAN ZYL DJP

[1] The issue to be decided in this appeal is a limited one. It is confined to whether the plaintiff's (the respondent in the appeal) claim for damages arising from injuries which he sustained in a motor vehicle accident lies against the Road Accident Fund in terms of section 17(1) of the Road Accident Fund Act¹ (the RAF Act) to the exclusion of the identified wrongdoer at common law and the Compensation Commissioner appointed in terms of the Compensation for Occupational Injuries and Diseases Act² (COIDA).

[2] The plaintiff was employed as a long-distance truck driver by a close corporation trading as RTD Transport (the employer). The accident occurred at about midnight on 6 August 2012 when the plaintiff was driving a truck owned by his employer. He was

¹ Act 56 of 1996.

² Act 130 of 1993.

conveying a load of frozen vegetables for his employer. He failed to negotiate a sharp bend in the road while travelling between the Gariep Dam and Venterstad. The truck overturned and the plaintiff was injured. The road, the R701, is a provincial road that is under the control and the supervision of the Department of Roads and Public Works of the Eastern Cape Government (the Department) in terms of the provisions of the Eastern Cape Roads Act³ (the Roads Act). The plaintiff subsequently sued the Member of the Executive Council for Roads and Public Works of the Eastern Cape Province (the MEC, who is the appellant in the appeal) in her nominal capacity, and the Road Accident Fund (the Fund) for damages.

[3] The plaintiff's case against the MEC was premised on the failure of the Department to comply with its statutory duty to control, maintain, protect and rehabilitate the road in question, and to provide and maintain traffic signs, traffic control devices and markings, for the guidance and safety of road users.⁴ The plaintiff alleged that the cause of the accident was the negligent conduct of the Department by *inter alia* failing to ensure that

“sufficient and appropriate traffic signs or control devices or markings were in place to give motorists sufficient or adequate warning that they were approaching a sharp bend to the right, or to reduce their speed prior to entering a sharp bend, to the right, or sufficient or adequate to reduce their speed prior to entering a sharp bend, or sufficient or adequate warning that the road surface in that sharp bend and the vicinity thereof, was in a poor condition, or that the edges thereof were worn or neglected or that the width of the tar road in that sharp bend has been reduced by wear and tear.”

[4] In the alternative, the plaintiff pleaded that the Fund was liable to compensate him for his damages, in that the accident was caused by the negligence of the owner of

³ Act 3 of 2003.

⁴ Section 3 (1)(a) of the Roads Act.

the truck and/or its employees. The owner's negligence was averred to have arisen from its failure or that of its employees to ensure that the truck was in a roadworthy condition, and by instructing the plaintiff to undertake a journey with the truck without having taken reasonable steps to remedy a problem with the brakes of the truck that had previously been identified. In the further alternative, the plaintiff sought to apportion liability for his damages caused by the accident to the MEC and to the Fund by alleging that the accident was caused **"partly by the fault of the first defendant and partly by the fault of the plaintiff's employer or of an employee of the plaintiff's employer."**

[5] The trial court (Smith J) gave the plaintiff leave to withdraw his claims against the Fund. The court was of the view that the withdrawal of the action against the Fund did not preclude the MEC from raising the issue of the Fund's statutory liability, and proceeded to decide the matter on that basis. The withdrawal of the action was motivated by a special plea raised by the Fund. The defence raised in the special plea was simply that any liability of the RAF to compensate the plaintiff could only arise from a reliance on a wrongful act of the owner of the truck or its employees as contemplated in section 17(1) of the RAF Act, and because the owner of the truck was also the employer of the plaintiff, and its liability to compensate the plaintiff in that capacity is excluded by the provisions of COIDA, the Fund is not liable to compensate the plaintiff for any damages arising from the accident.

[6] The plaintiff's withdrawal of his claims against the Fund was on the premise that the owner of the truck was also his employer, and what he sustained in the accident was an occupational injury as contemplated in COIDA. On that basis, and on an interpretation of sections 19(a) and 21 of the RAF Act together with section 35(1) of COIDA, the plaintiff's acceptance that the Fund was not liable to compensate him for his injuries, was correct. The requirements for the obligation of the Fund to compensate any person for any loss or damage suffered as a result of any bodily injury or death, is found in section 17(1) of the RAF Act.⁵ Section 19 however excludes the liability of the Fund

⁵ It reads:

(1) The Fund or an agent shall –

as contemplated in section 17(1) in certain circumstances. Paragraph (a) of section 19 provides that the Fund shall not be obliged to compensate any person in terms of section 17 for any loss or damage **“for which neither the driver nor the owner of the motor vehicle would have been liable but for section 21”**. What this exclusion means is that if the third party cannot hold the wrongdoer in section 21 liable at law, that is, for a reason other than the exclusion of his liability in terms of section 21, the Fund is also not liable. Who a wrongdoer is in terms of section 21, is dealt with in paragraphs [39] to [43] of this judgment.

[7] Section 35(1) of COIDA in turn precludes an employee from recovering damages from his or her employer in respect of an occupational injury. It reads 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.”

The Constitutional validity of the exclusion of the employers’ liability in COIDA was challenged in **Jooste v Score Supermarket Trading (Pty) Ltd.**⁶ The Constitutional Court found that the exclusion of an employee’s common law right to claim damages in

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- (a) Subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
 - (b) Subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
- be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

⁶ 1999 (2) SA 1 (CC).

favour of certain benefits not available at common law, did not infringe upon any Constitutional right. The exclusionary effect of section 35 (1) was confirmed by the Supreme Court of appeal in **Mankayi v AngloGold Ashanti Ltd**⁷:

“The common law may be altered expressly or by implication. To my mind the clear provisions of s 35(1) of COIDA show that there is an intention to alter the common law and to make inroads into existing rights: its plain meaning is that it bars claims by all employees as defined.”⁸

[8] The legislative intent of a provision worded similarly to section 35(1) was construed in **Mphosi v Central Board for Co-Operative Insurance Ltd**⁹ to preclude an employee’s common law delictual action for all damages against his employer in respect of any occupational injury. That being the position, and provided that the plaintiff suffered an **“occupational injury,”** the owner of the truck in the present matter would not, if section 21 of the RAF Act had not been enacted, have been liable to the plaintiff for any loss or damage suffered by him in respect of the injuries caused by his negligence, and the Fund is accordingly in terms of section 19(a) of the RAF Act not liable to compensate the plaintiff for such loss or damage. Simply put, if the plaintiff is found to have been injured while at work and he has a claim for workers compensation in terms of COIDA, he cannot also claim delictual damages from his employer, and as a consequence of which, also not receive compensation from the Fund.

[9] The exclusion in section 35(1) is limited to damages for which the employer would otherwise have been liable for at common law. Read with section 36, section 35 does not preclude an employee from claiming compensation in terms of COIDA, and instituting a claim for damages in a court of law when someone other than his employer is liable for damages in respect of an occupational injury. Section 36(1)(a) reads as follows:

⁷ 2010 (5) SA 137 (SCA).

⁸ At para [38].

⁹ 1974 (4) SA 633 (A). See also *Mankayi v AngloGold Ashanti* supra fn 7 at paras [21] and [29].

“If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the ‘third party’) being liable for damages in respect of such injury or disease –

(a)The employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party.”

[10] The construction given to section 35(1) in **Mphosi** was confirmed in a later decision in **Road Accident Fund v Monjane**.¹⁰ Scott JA reasoned that since the legislature retained the statutory provisions upon which the **Mphosi** case was decided, it must be accepted as being a correct reflection of the legislature’s intention:

“Section 19 (a) of the RAF Act, read with s 35(1) of COIDA, indicates when that line has been drawn: an employee who sustains an ‘occupational injury’ in the context of a motor accident will have no claim under the RAF Act if the wrongdoer is his or her employer. This was recognised by this court as long ago as 1974 in *Mphosi’s* case. It is well-established rule of construction that the legislature is presumed to know the law, including the authoritative interpretation placed on its previous enactments by the courts. Significantly, the legislature has in a series of subsequent enactments retained in substance the statutory provisions upon which *Mphosi’s* case was decided. It must be accepted, therefore, that the construction placed upon them correctly reflects the policy of the legislature.”¹¹

¹⁰ 2010 (3) SA 641 (SCA).

¹¹At para [12].

[11] The decision in *Monjane* has been criticised.¹² The basis for the criticism is in essence the unfairness that may arise from the construction placed on the section 35(1) of COIDA read with section 19(a) of the RAF Act. The unfairness complained of arises from the fact that an employee who is the victim of a motor vehicle accident which is due to the negligence of the driver or the wrongful act of the owner, and who has sustained an injury as contemplated in COIDA, is limited to a claim for compensation on the scale of benefits provided for in COIDA. The view expressed is that such a claimant should, as in the case of a passenger who is an employee of the driver or the owner of the vehicle, be entitled to benefit from both Acts.¹³ As this issue, which is primarily the result of section 19(a) of the RAF Act, does not arise in the present matter on the facts found by the trial court to have been proved, it is not necessary to deal with what *prima facie* appears to be the unequal treatment without a rational basis of equally placed victims of a road accident.

[12] The withdrawal of the action against the Fund left the MEC as the only remaining defendant in the action. The MEC did not seek to amend its plea following the withdrawal. On the pleadings as it stood, the MEC denied that the Department was negligent, alleging instead that the accident was caused by the negligence of the plaintiff as the driver of the truck, alternatively, that if the Department is found to have been negligent, the accident was caused by the contributory negligence of the plaintiff. The MEC further pleaded that if the plaintiff is found to have been injured as a result of an unlawful act of the owner of the truck, the Fund must be held solely liable for the plaintiff's damages.

[13] The trial court found that the plaintiff sustained an occupational injury, and that the liability of the Fund was as a result excluded by section 19(a) of the RAF Act. It held that the plaintiff was not negligent in any way, and that the sole cause of the accident was the negligence of the Department. The MEC did not appeal the finding that the Department was negligent in failing to comply with its statutory obligations. It is

¹² See eg Ahmed **Finding the intention of the legislature – RAF v Monjane 2010 (3) SA 641 (SCA)** 2011 (74), *Tydskrif vir Heedendaagse Romeins – Hollandse Reg* at page 494.

¹³ Section 18(2) of the RAF Act.

consequently not necessary to consider the correctness of that finding. The position in the appeal is therefore that the MEC accepted that the Department was negligent. The case advanced was instead that the trial court erred in finding that the Department's negligence was the sole cause of the conduct. It was contended that on the evidence the culpable conduct of the owner of the truck contributed to the accident. The MEC argued that the contributory negligence of the owner meant that the exclusive liability to compensate the plaintiff for his loss or damage suffered by him must be found to lie with the Fund. That submission was essentially based on four grounds: The first is that the plaintiff did not sustain an **"occupational injury"** as envisaged in section 35(1) of COIDA. The second is that the injuries sustained by the plaintiff was due to a wrongful act of the owner of the truck as contemplated in section 17 (1) of the RAF Act. Thirdly, the wrongful act of the owner contributed to the accident, and following therefrom, the last leg of the argument was that section 17(1) **"fixes liability at the door"** of the Fund to the exclusion of a wrongdoer at common law.

[14] The wrongful act on which the MEC sought to place reliance on was what was said to be the wrongful instruction given to the plaintiff by his employer, who was also the owner of the truck, to drive the truck while its brakes were faulty. What was contended on behalf of the MEC to constitute wrongful conduct on the part of the employer is premised on a factual finding that the brakes of the truck were defective before the accident; that the employer had knowledge of the defect (or reasonably ought to have had such knowledge); that the employer instructed the plaintiff notwithstanding to drive the truck; and that the defect in the brakes was a contributory cause of the accident. The trial court found that the evidence did not establish that the brakes were faulty, or that it contributed to the accident. The sole cause of the accident was found to be the negligence of the Department in failing to comply with its statutory duty to maintain the road and to provide adequate warning to road users of the sharp bend in the road.

[15] As stated, the trial court found that the plaintiff's injuries were occupational injuries as defined in COIDA. It reasoned that he was employed as a truck driver, and

the accident occurred while he drove the truck within the course and scope of his duties as such. This, the court concluded, meant that any liability on the part of the Fund for any damages sustained by the plaintiff in the accident, was excluded by virtue of section 19 (a) of the RAF Act read with section 35 of COIDA, and that the MEC was liable to compensate the plaintiff for such damages as he may be able to prove. This conclusion is, on the facts found to have been proved, consistent with section 36(1)(a) of COIDA referred to earlier.

[16] The premise on which the MEC based the argument that the Fund is exclusively liable to compensate the plaintiff for any damages suffered by him, is not supported by the evidence and the facts. It is further based on a wrong construction of the relevant sections in the RAF Act, and an incorrect application of the requirements for an **“occupational injury”** as envisaged in COIDA. The focus of the argument in the appeal was predominantly on the question whether the fact that the owner of the truck, who was also the plaintiff’s employer, meant that any liability that may lie with the Fund, was excluded by the provisions of COIDA. For that reason alone, I shall commence with a determination of the issues raised by the provisions of COIDA.

[17] It was not in dispute that if the plaintiff did not suffer an occupational injury as envisaged in COIDA, the plaintiff would on the factual position contended for by the MEC, have had the right to claim compensation from the Fund in terms of section 17(1) of the RAF Act. The driver of a motor vehicle in a single driver vehicle accident is a **“third party”** as envisaged in the section.¹⁴ It is further not necessary for the injury (or death) to have been caused by or arising from the negligence of the driver of the motor vehicle, for liability to arise. The section explicitly provides for legally blameworthy conduct as the cause of an injury on the part of persons other than the driver, such as the failure to maintain a vehicle.

“The negligence or unlawful conduct ... may consist of some antecedent or ancillary act or omission on the part of the driver or the

¹⁴ Abrahams v Road Accident Fund 2016 (6) SA 545 (WCC).

owner of the vehicle or the servant of the owner, such as failing to maintain a vehicle in a roadworthy condition or overloading the vehicle. The death or bodily injury ... must be causally related to this negligent or otherwise unlawful act and also to the driving of the vehicle.”¹⁵

[18] Counsel for the MEC in argument also referred to the decisions in **Road Accident Fund v Abrahams**¹⁶ (a burst tyre) and **Maatla v Road Accident Fund**¹⁷ (a defective steering) as authority for the fact that the failure of an owner of a motor vehicle to maintain his vehicle may constitute a **“wrongful act”** as envisaged in section 17 (1) of the RAF Act. Applied to the factual scenario proposed by the MEC, the failure by the owner to maintain the truck, and by instructing the plaintiff to drive it knowing it to be defective (or ought to have known it to be defective), would constitute wrongful conduct for purposes of section 17(1). This blameworthy conduct of the owner would further be sufficiently closely connected to the injury sustained by the plaintiff to conclude that it was **“arising from the driving of a motor vehicle”** as envisaged in section 17(1).¹⁸

[19] The question is then whether the Fund’s liability is excluded by section 35(1) of COIDA as the trial court concluded. In short, the argument of the MEC in this regard, based on the proposed set of facts, was that:

(a) The instruction issued to the plaintiff by his employer to drive a truck with faulty brakes was an unlawful instruction which he would otherwise have been entitled to disobey;

(b) The unlawful instruction was the legal cause of the accident of the plaintiff’s injuries, in that if it was not for the instruction, the plaintiff would not have undertaken the journey, and he would not have been injured; and

¹⁵ Wells and Another v Shield Insurance Co Ltd 1965 (2) SA 865 (C) at 670 C – D and Santam Versekeringsmaatskappy Bpk v Kemp 1971 (3) SA 305(A) at 332 D- F.

¹⁶ 2018 (5) SA 169 (SCA).

¹⁷ (11690/11) [2015] ZAGPPHC 129 (6 March 2015).

¹⁸ Wells supra fn 15 at 870 E-F.

(c) With reliance on the decision in **MEC for Health, Free State Province v DN**¹⁹, the wrongful instruction was not a “**risk incidental**” to the employment of the plaintiff.

[20] I intend to deal with the validity of this argument on the assumption of the correctness of the facts relied on by the MEC. Before doing so, it may be convenient to first make some general observations, and to highlight a few aspects. The first aspect is that the right of an employee to claim compensation, and the duty of the Compensation Commissioner to compensate the employee, arises from the provisions of section 22(1) of COIDA²⁰. Consequently, the requirements for the existence of a liability to pay such compensation are derived from COIDA itself, and are not to be conflated with the requirements for the liability of the Fund to pay compensation for damages as envisaged in the RAF Act. The compensation structure created by COIDA provides for a form of the no-fault liability. As stated, in **Jooste v Score Supermarket Trading (Pty) Ltd**²¹ the Constitutional Court was asked to *inter alia* decide whether the prohibition in section 35(1) of COIDA violates the constitutional right to equal protection and treatment under the law. The Court held that COIDA is important social legislation with the purpose of providing “**no fault**” compensation to employees from a Compensation Fund.²² The fact that liability is not based on fault (*culpa*), means that the fact that the employee is injured in an accident caused by his own negligence, does not constitute a bar to a claim for workmen’s compensation.

[21] Culpable conduct on the part of the employer does similarly not exclude a claim for compensation. “**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.**”²³ That this is so, is confirmed by section

¹⁹ 2015 (1) SA 182 (SCA).

²⁰ It reads: “**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.**”

²¹ Supra fn 6.

²² Mankayi v Anglogold Ashanti supra fn 7 at para [16] and MEC for Health, Free State v DN supra fn 19 at para [8].

²³ Jooste v Score Supermarket Trading (Pty) Ltd supra fn 6 at para [14].

56(1) of COIDA. It provides that if an employee meets with an accident which is due to the negligence of his employer, he is entitled to increased compensation. Of particular significance in the context of the present matter is the deeming provision in sub-section (2). It reads as follows:

“For the purposes of subsection (1) an accident or occupational disease shall be deemed also to be due to the negligence of the employer if it was caused by a patent defect in the condition of the premises, place of employment, equipment, material or machinery used in the business concerned, which defect the employer or a person referred to in paragraph (b), (c), (d) or (e) of subsection (1) has failed to remedy or cause to be remedied.”

[22] Unlike the position under COIDA, liability in terms of the RAF Act is based on fault. The substantive basis for the Fund’s liability is found in common law delictual liability.²⁴ Section 17(1) provides that the Fund shall be obliged to compensate any person **“if the injury or death is due to the negligence or other wrongful act of the driver or the owner of the motor vehicle or of his or her employer.”** This is an important difference between the RAF Act and COIDA that makes it advisable to avoid using legal concepts and terminology that belong in the sphere of determining liability based on fault, when asked to determine whether an employee is entitled to compensation as envisaged in section 22 of COIDA. Otherwise than the RAF Act, the application of COIDA is based on the proposition that the common law requirements for delictual liability for personal injuries incidental to the operations of the workplace based upon negligence of the employer, with its defences of contributory negligence and the assumption of risk, are inapplicable to workmen’s compensation.

[23] The second aspect, which flows from the first, is that the liability to pay workmen’s compensation must be determined on the facts of each case by having regard to the wording of COIDA. Accordingly, a test that is convenient and appropriate

²⁴ Road Accident Fund v Abrahams supra fn 16 at para [13].

to the facts of a particular case, must not be elevated to a general statement of the law, and be applied without more outside of the context in which it was originally used. In **Plumb v Cobden Flour Mills Co Ltd**²⁵ the Court appropriately cautioned as follows in the context of the British workmen's compensation legislation: **"It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself."**

[24] In **MEC for Heath, Free State v DN**²⁶ the Supreme Court of Appeal similarly emphasised that there is no **"bright line"** test that applies to claims for workmen's compensation, and that each case must be dealt with on its own facts. This is correct. The enquiry is always first and foremost whether, on the particular facts and in the circumstances of each case, the statutory requirements as expressed by the wording of COIDA have been satisfied, rather than a mechanical application of some word test or a definition used in another case. The obvious reason lies in the fact that the enquiry envisaged by the definition of an **"accident"** is factual in nature, and that a factual finding in one case cannot, for reasons equally obvious, without more be transposed onto another.

²⁵ [1914] AC 62 at 65 to 66. Also *Blair and Co Ltd v Chilton* (1915) 84 LJKB 1147 at 1148 and *Harris v Associated Portland Cement Manufacturers Ltd* [1938] All ER 831 HL.

²⁶ *Supra* fn 19 at para [31]. See also *Churchill v the Premier of Mpumalanga and Another* (889/2019) [2021] ZASCA 16 (4 March 2021) at para [36].

[25] What may look like a test applied in a particular case, is in effect nothing more than an explanation for a finding that the accident in that case arose from or occurred within the course of the workmen's employment. The correct approach, which is not always clearly stated in the judgments referred to, is that the court is required to have regard to, and weigh in the balance every factor which may be pointing towards or away from a finding that the accident in the case at hand arose from and occurred in the course of the employee's employment. Some factors may be found to be either material or irrelevant in a given factual situation, but it is generally unhelpful to attempt to lay down rules or tests.²⁷

[26] Workmen's compensation is paid when an employee meets with an accident and suffers an occupational injury.²⁸ What an occupational injury is, is defined in section 1 of COIDA. It reads as follows:

“Occupational injury” means a personal injury sustained as a result of an accident.”

“Accident” is in turn 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.”

[27] On reading of these definitions, it is evident that there are four distinct components to determining the existence of an occupational injury. First, a personal injury must have been sustained by an employee. Second, the injury must result from an accident. The third aspect is that the accident must arise from the employee's

²⁷ In *Plumb v Cobden Flour Mills Co Ltd* supra fn 25 Lord Dunedin pointed out that most of the erroneous arguments put forward in cases involving workmen's compensation in England will be found to be the result of disregarding the salutary rule that a “test” convenient in a particular case must not be allowed to override the wording of the enactment itself.

²⁸ Section 22 (1) of COIDA.

employment. Finally, it must be demonstrated that the injury was sustained in the course of the employment.

[28] The first requirement does not in the present matter present with any difficulties. What an accident is, is not defined.²⁹ Our courts have adopted a meaning that extends beyond the ordinary grammatical meaning of an accident as being an unintended or unexpected occurrence.³⁰ It will be wrong in my view to attempt to define the word **“accident”** with any precision when technological advances are redefining traditional notions relating to the workplace. It may lead to results that are inconsistent with the legislative intention and the purpose of the enactment.

[29] What an **“accident”** is must be construed in its setting and in the context and the purpose which appears from COIDA. What the definition contemplates is an external identifiable event or occurrence, from the perspective of the person that is injured, that is the factual cause of the injury sustained. The event or occurrence with which the statute is concerned, is circumscribed by the definition itself, in requiring it to have two limiting characteristics: It must be the factual cause of the misfortune that befell the employee; and it must be an event or occurrence that can be identified as arising out of and in the course of the employee’s employment.

[30] The terms **“arising out of”** employment, and **“in the course of”** employment, are not synonyms and are treated as two separate elements or requirements. **“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)³¹ An injury to an employee is said to arise from his employment if there is, in a broad sense, a causal connection between the employment and the injury sustained. **“... dit ontstaan “uit sy diens” as die**

²⁹ *McQueen v Village Deep G M Co Ltd* 1914 TPD 344 at 347 to 348 and 350. See generally Joubert **The Law of South Africa** (LAWSA) vol 30 at para 126.

³⁰ See the case law discussed with apparent approval in *MEC, for Health v DN* supra fn 19 at para [17].

³¹ *MEC for Health, Free State v DN* supra fn 19 at para [17].

ongeval in verband staan met sy werksaamhede ...” and it “eis alleen in breë sin ’n kousale verband tussen diens en ongeval.”³²

[31] An injury is said to arise **“in the course”** of employment if it occurred while the employee was busy fulfilling his duties of his employment. **“... die ongeval moet plaasvind terwyl die werksman besig is met sy werksaamhede.”³³** Where the first requirement is concerned with whether or not the injury was caused by the employee’s employment, the latter requirement raises the question whether or not the employee was doing the work he was employed to do when he was injured.

[32] The question is then whether on the facts on which the MEC says the trial court should have determined the matter, the plaintiff’s injuries were caused by an accident that arose out of and in the course of his employment. The question must be answered in the affirmative. The plaintiff suffered a personal injury. The cause of the injury was the motor vehicle accident. The plaintiff’s driving of the truck at the time was an act which he was engaged in performing for the purposes of, and in connection with his employer’s business. Put differently, at the time of the occurrence that caused the injury, the plaintiff was doing what he was employed to do at a place he may reasonably have been at in the performance of his duties.

[33] The flaw in the argument put forward on behalf of the MEC is that it equates what is culpable conduct on the part of the employer, with what the legislature intended to be an external occurrence or an event that is the cause of the personal injury sustained by the employee. As stated, the object of COIDA is to provide for compensation to be paid to workmen where the employer would not otherwise at common law have incurred any liability. COIDA does not deprive an employee of a claim for compensation because of the existence of fault, but rather because the accident did not arise out of and in the course of his employment. Accordingly, the culpable conduct of the employee or that of the employer, is not a bar to a claim for compensation in terms of COIDA.

³² Minister of Justice v Khoza 1966 (1) SA 410 (A) at 417 D.

³³ Ibid. See also MEC for Health, Free State v DN fn 19 supra at paras [16] and [17].

[34] This would in my view include culpable conduct of the employer that may consist of the giving of an order or instruction to perform a specific action that may in itself be culpable. In terms of section 22 (4) of COIDA, **“an accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was at the time of the accident acting contrary to any law applicable to his employment or to any order by or on behalf of his employer, or that he was acting without any order of his employer.”** (My emphasis). The effect of this provision is that the accident is deemed to have arisen out of and in the course of the employment notwithstanding the employee having acted against an order or instruction given to him by his employer. It is difficult to see how an employee who complies with an instruction from his employer can be said to have acted outside of the course and scope his employment, when the failure of an employee to comply with an order of his employer does not place the accident outside the course and scope of his employment.

[35] Seen against the purpose and the scheme of COIDA, the blameworthy conduct of an employer that consists of a failure to maintain its equipment or machinery which he then expects an employee to use in the performance of his duties, is in my view exactly the type of mischief the statute intended should not operate to exclude the liability of the Compensation Commissioner to pay compensation to an employee for harm suffered by him in the course and scope of his employment. COIDA **“supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which the employers are obliged to contribute.”**³⁴

[36] The MEC's reliance on the decision in **MEC for Health, Free State v DN**³⁵ in support of its argument that a wrongful instruction to an employee by his employer is not

³⁴ Jooste v Score Supermarket Trading (Pty) Ltd supra fn 6 at para [14].

³⁵ Supra fn 19.

a risk incidental to such employee's employment is misplaced. The argument employs the term "incidental risk" in the wrong context. The question is not whether the culpable conduct of the employer constitutes an incidental risk, but rather whether the accident, that is, the occurrence that caused the injury, constitutes a risk that is incidental to the employee's employment. The decision in **DN** is also clearly distinguishable on the facts. The event or the occurrence that gave rise to a personal injury in that case constituted a criminal act. The employee was a medical doctor who was assaulted by an intruder and was raped while she was on night duty at her place of employment. The trial court was asked to determine the employer's special plea that liability based on negligence was barred by section 35(1) of COIDA. It dismissed the special plea. On appeal the Supreme Court of Appeal upheld the decision of the trial court to dismiss the special plea. It agreed with the trial court that the rape did not arise from the employee's employment as envisaged in COIDA. In deciding this aspect, the court asked 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."**³⁶

[37] The term **"incidental risk"** on which the MEC seeks to place reliance in the present matter is nothing more than a factor that may be relevant in a particular factual context for determining whether the **"accident"** arose from the employee's employment, by having regard to whether or not the accident is a peril which the employee is at risk of encountering while doing what he is employed to do. It gives consideration to whether there is something about the employee's employment that exposes him to the occurrence that caused the injury beyond that of the public generally. Simply put, was it part of the injured employee's employment to risk that, or to do that, which caused the injury?

[38] Otherwise than in the present matter where the risk of meeting with a motor vehicle accident when driving his employer's truck in the course of his employer's business, is a risk that is inherent to the plaintiff's employment as a truck driver, and

³⁶ At para [30].

clearly **“arose”** from his employment as envisaged in COIDA, the risk of becoming a victim of crime at the work place was found by the Court on appeal in **MEC for Health, Free State v DN**³⁷ not to be a risk that is connected to the employee’s employment. The decision is correct. Unlike an employee whose duties require the safekeeping of monies, the exercise of which may expose that employee to the risk of being the victim of certain kinds of crime, such as a security guard or possibly a bank teller, the duties of the employee bore no connection to the crimes committed. The performance of her duties as a medical doctor did not place her in a position any different to that of a patient at the hospital or any other member of the public.³⁸

[39] I accordingly conclude that on the facts relied on by the MEC, the Fund’s liability is excluded by section 35 (1) of COIDA read with section 19 (a) of the RAF Act. The next aspect to consider is the correctness or otherwise of the MEC’s submission, based on the same factual scenario relied on, that a finding that a wrongful act of the owner of the truck contributed to the accident, section 17(1) makes the Fund exclusively liable for the plaintiff’s damages. This argument is premised on the fact of the Department’s own negligence. On the proposed factual context, that makes the Department a concurrent wrongdoer. **“Concurrent wrongdoers” are persons whose independence or ‘several’ delictual (or omissions) combine to produce the same damage.”**³⁹ The import of the MEC submission is therefore that the protection afforded to wrongdoers by the RAF Act extends to a concurrent wrongdoer whose negligence contributed to an accident that otherwise falls within the provisions of section 17(1) of the Act.

[40] This submission is based on a wrong interpretation of section 17(1) of the RAF Act. Section 17(1) sets out the requirements for attaching liability to the Fund, and it must be read **“subject to this Act”**. The obligation of the Fund to compensate a third party is derived from section 17 read with sections 19 and 21 of the Act. Its effect is to

³⁷ Supra fn 19.

³⁸ See also *Churchill v The Premier of Mpumalanga* supra fn 26 at para [36].

³⁹ *Nedcor Bank Ltd t/a Nedbank v Lloyd – Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) at para [10]. **“The distinction between joint and concurrent wrongdoers is, of course, now largely academic in view of the provisions of the Act (Apportionment of Damages Act) which recognise and regulate a right of contribution between ‘joint wrongdoers’ who are so defined as to include both joint and concurrent wrongdoers at common law.”**

substitute the Fund for the insured wrongdoer, that is, the Fund steps into the shoes of the wrongdoer. The wrongdoers for whom the Fund is substituted, are identified in section 21. It reads as follows:

“Abolition of certain common law claims.

(1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie –

(a) Against the owner or driver of a motor vehicle; or

(b) Against the employer of the driver.”

[41] On a reading of section 21, the protection afforded by the RAF Act is limited to the driver of the motor vehicle, the employer of the driver, and the owner of the motor vehicle. Section 17 and 21 do no more than to substitute for the common law action for damages, based upon the negligence or other unlawful act of the identified wrongdoer causing injury or death, an action against the Fund, thereby relieving the wrongdoer, *viz-a-viz* the third party, of his original liability.⁴⁰ From the perspective of the injured party, section 21 of the RAF Act takes away his right to recover his damages from any of the insured wrongdoers. The Department is not an insured wrongdoer for purposes of the RAF Act, and as stated in **Evins v Shield Insurance Co Ltd**,⁴¹ the statutory liability of the Fund goes no wider than the common law liability of the identified insured wrongdoers. An important aspect to also bear in mind is that the intended beneficiary of the Fund is the innocent injured claimant, and not the wrongdoer whose fault was the cause of his injuries.⁴²

[42] With this in mind, section 21 of the RAF Act cannot operate to relieve a wrongdoer other than the insured wrongdoer from his own common law delictual liability

⁴⁰ See *Da Silva and Hunter v Coutinho* 1971 (3) SA 123 (A) at 139 E – G, where the court dealt with legislation that preceded the RAF Act. The purpose of the legislation is the same.

⁴¹ 1980 (2) SA 814 (A) at 841 E – G.

⁴² *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA) at para [9].

to compensate an injured claimant. The MEC is, on the proposed factual scenario, a concurrent wrongdoer whose independent wrongful act combined with that of an identified wrongdoer in the RAF Act (the owner) to cause the same harmful consequences. At common law an injured party has the right to fully recover his damages in respect of injuries suffered as a result of negligence of another person. Where there are concurrent wrongdoers, a claimant may recover the full amount of his loss from any one of the number of wrongdoers. The reason lies in the fact that concurrent wrongdoers are at common law severally liable *in solidum*⁴³.

[43] The principle of liability *in solidum* means that each one of the wrongdoers are liable for the full amount of the claimant's damages, and the claimant may choose which one of the wrongdoer's he will sue.⁴⁴ One wrongdoer may therefore be called upon to pay the whole of a claimant's claim. The wrongdoer paying the claimant then has right to a contribution against the other. On the proposed facts, the MEC is liable to the plaintiff *in solidum*, and there is no reason to conclude that the legislature has intended to alter the common law position, and to take away existing rights beyond the express wording of section of the RAF Act.⁴⁵ The plaintiff was therefore entitled to choose to recover the full amount of his loss from the MEC.

[44] That leaves the correctness or otherwise of the factual findings made by the trial court. As stated, those findings do not support the MEC's submission that there was culpable conduct as contemplated by section 17(1) on the part of the owner of the truck. The factual findings of the trial court, which are relevant to the issue raised in this appeal, are in essence confined to the question whether the employer in the present matter was negligent in failing to maintain the brakes of the truck, and instructing the plaintiff to drive the truck knowing that the brakes were defective. The defect in the brakes of the truck on which the MEC sought to rely on, was what the plaintiff described as a slight shudder whenever he applied the brakes. The plaintiff's evidence was that he

⁴³ Union Government (Minister of Railways) v Lee 1927 AD 202; Windrum v Neunborn 1968 (4) SA 286 (T) at 287 H – 288 A and Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd supra fn 39 at para [10].

⁴⁴ Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd supra fn 39 at para [10].

⁴⁵ See the authorities referred to in Rose's Car Hire (Pty) Ltd v Grant 1948 (2) SA 466 (A) at 471.

had reported this to the employer. The employer then instructed him to take the vehicle for inspection and repairs to a repair shop. The braking system was disassembled and inspected in the plaintiff's presence. There was no obvious fault found with the brakes and their ability to cause the truck to slow down or stop, except the shudder when the brakes were applied. In a written report the engineer advised the owner to **“have the brake drums skimmed and the brake shoes radius ground as this normally cures a shudder.”** It was thereafter that the plaintiff undertook his journey with the truck on the instructions of his employer.

[45] The evidence does not support the conclusion contended for on behalf of the MEC. The factual findings made by the trial court in this regard are supported by the evidence, and in the absence of any obvious and serious misdirection, I can find no reason to interfere with those findings.⁴⁶

[46] I accordingly conclude that the trial court cannot be faulted for finding that in law and on the facts there was no merit in the submission that the Fund was exclusively liable for any such damages as the plaintiff may have suffered.

[47] In the result, the appeal is dismissed with costs, such costs to include the costs of two counsel where so employed.

SIGNED

D VAN ZYL

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

SIGNED

N G BESHE

⁴⁶ See *R v Dhlumayo* 1948 (2) SA 677 (A) at 705 – 706; *Mashongwa v Prasa* 2016 (3) SA 528 (CC) at para [45] and *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (WLD) at para [7].

JUDGE OF THE HIGH COURT

I agree:

SIGNED

M S RUGUNANAN

JUDGE OF THE HIGH COURT

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