

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: **10325/17**

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED: YES/NO
21/5/2024	

In the matter between: -

STEPHEN MMOLOTSI MOTHABANE

Plaintiff

and

SCAW METALS GROUP

Defendant/Excipient

JUDGMENT

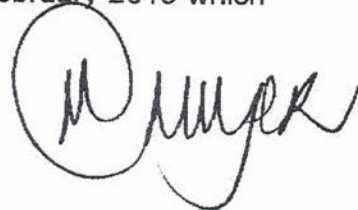
This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 21 May 2024.

MEYER AJ

- [1] The defendant has excepted to the plaintiff's particulars of claim which was filed on 3 February 2020 on the basis that the plaintiff was precluded alternatively barred from seeking damages against it by virtue of the provisions of section 35(1) of the Compensation for Compensation for Occupational Injuries and Diseases Act, Act 130 of 1993 (*"the Act"*) which section states the following:

"35 Substitution of compensation for other legal remedies

- (1) *No action shall lie by an employee or any dependent 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 employee shall arise under the provisions of this Act in respect of such disablement or death...."*
- [2] The procedure for claiming occupational injury benefits by an employee under the Act is set out in Chapter V thereof.
- [3] The plaintiff's claim is against the defendant, the plaintiff's employer for compensational damages in the amount of R3 015 000.00 which claim is premised on a breach of the terms and conditions of the defendant's employment contract with the plaintiff alternatively delict. Both claims whilst pleaded in the alternative are premised on common law legal remedies.
- [4] The plaintiff's claim against the defendant arose out of an occupational injury sustained by the plaintiff on 28 February 2013 whilst in the employ of the defendant as a workshop assistant at its steel factory located in Klerksdorp.
- [5] It appears from the oral argument advanced before me that it is not in dispute that the plaintiff had suffered a workplace injury on 28 February 2013 which



injury fell within the ambit of a “*disablement*” as envisaged under the Act, moreover it does not appear to be dispute that the plaintiff and defendant qualified as an “*employee*” and “*employer*” as envisaged under the Act.

- [6] I have had regard to the **Constitutional Court decision of Jooste v Score Supermarket Trading (Pty) Ltd**¹ which succinctly summarised the common-law right of an employee to claim damages and contrasted it to the legislative regime regulated under the Act in order to advance the context of section 35(1) of the Act which deprived an employee of the right to claim damages under the Act². The court found that section 35(1) of the Act was logically and rationally connected to the legitimate purpose of the Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. Moreover, the Act was found to essentially replace the individualistic common law position, typically represented by civil claims of a plaintiff employee against a defendant employer who may or may not have been negligent³. The aforesaid position was reaffirmed by the Constitutional Court in **Mankayi v Anglogold Ashanti**⁴. Notably, the Constitutional Court in **Jooste v Score Supermarket Trading (Pty) Ltd** found that the provisions of section 35(1) of the Act which forms the subject matter of these proceedings were not inconsistent with either the interim or the 1996 Constitution⁵.
- [7] It is apparent from a reading of the provisions of section 35(1) of the Act that the relevant section precludes an employee from claiming damages from his employer in respect of an occupational injury such as that sustained per the pleading filed by the plaintiff.
- [8] That being said, it was contended on behalf of the plaintiff that notwithstanding the fact that the plaintiff had pleaded a delictual claim as against the defendant

¹ [1998] JOL 4158 (CC) at paragraph 12.

² Paragraphs 14 and 15.

³ Paragraph 30.

⁴ 2011 (3) SA 237 (CC).

⁵ Paragraph 14.

which claim arose out of an occupational injury, the plaintiff's cause of action was not destroyed by the provisions of section 35(1) of the Act. The reasons advanced on behalf of the plaintiff in support of the aforesaid contention are premised on the fact that the plaintiff may proceed to court based on the plaintiff's constitutional right to bodily security and integrity. Reliance was placed by the plaintiff on the Constitutional Court decision of the **Minister of Defence and Military Veterans v Thomas**⁶.

- [9] In the aforesaid matter, the respondent ("*Dr Thomas*"), a medical doctor was employed by the Western Cape Provincial Government ("*the provincial government*") in its health department. While seconded to a military hospital under the control of the applicant ("*the Minister of Defence and Military Veterans*") ("*the Minister*"), Dr Thomas slipped and injured herself in a building which was under the control of the Department of Defence. Dr Thomas claimed compensation from the provincial government under the Compensation for Occupational Injuries and Disease Act, Act 130 of 1993 ("*COIDA*") and instituted a claim for damages against the Minister. The Minister in turn raised a special plea resisting Dr Thomas's claim for damages, arguing that Dr Thomas was precluded from claiming against him in terms of section 35(1) of COIDA which provided that "*...no action shall lie by an employee..... for the recovery of damages in respect of any occupational injury..... against such employee's employer.*" The Minister contended that for the purposes of determining who Dr Thomas's employer was under COIDA, it did not matter whether it was the provincial or national government. Both were arms government, albeit different spheres and hence Dr Thomas's employer was the overall entity representing all spheres of government, namely the State. According to Minister, the "*State*" qualified a single entity, operating at three different levels: national, provincial and local (single entity). The Minister contended further that insofar as reference is made in the Compensation Act to the "*State*", such must be understood to mean a "single entity" (single employer). As a consequence, the claim lodged against the Minister was under the circumstances precluded under section 35(1) of the

⁶ 2016 (1) SA 103 (CC), see also Plaintiff's heads of argument, paragraph 17.

Act having regard to the claim against the provincial government under the Act for occupational injury benefits.

- [10] The Constitutional Court in the **Minister of Defence and Military Veterans v Thomas** held that *"..... section 35 provides that no action shall lie by an employee for the recovery of damages in respect of any occupational injury 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. The critical question then, was the identity of the respondent's employer i.e. the state as a single employer or its individual components, in this case the provincial government.*

The Court held that there is nothing in the Constitution or other legislation that supports a general constitutional principle that the state is a single employer for all employees working in the three different spheres of government. The Court found that the definition of "employer" in the Act is wider than its ordinary meaning. Accordingly, where the employer seconded an employee to a third party, the entity that originally employed her [Thomas] continues to be her employer....."

- [11] In the judgement of **Minister of Defence and Military Veterans v Thomas**, Froneman J stated the following:

"[1] The respondent (Dr Thomas) is a medical doctor employed by the Western Cape Provincial Government (provincial government) in its health department. She was injured in an accident while on secondment to a military hospital under the control of the applicant, the Minister of Defence and Military Veterans ("minister"). Legislation in the form of the Compensation for Occupational Injuries and Disease Act ("Compensation Act or Act") governs the compensation she may claim arising from injuries suffered while at work.

[2] Compensation under the Act may come in two guises. The first is for prescribed benefits payable under the Act for occupational injuries sustained as a result of a work accident (occupational injury benefits). It

is payable irrespective of any negligence on the part of the employer. The second is for damages, beyond those benefits that were caused by a third party at the workplace (workplace damages). This is an ordinary delictual claim, dependent on proof of wrongful and negligent conduct by the third party. In contrast, the common law delictual claim against an employer for work place damages is precluded.

...

- [24] *..... where the employer seconded an employee to a third party or allows the employee to work for another person for a limited period, the person to whom an employee is seconded does not become an employer in the eyes of the Act. The definition specifically states that throughout the secondment, the person who originally employed the worker continues to be her employer. When applying this part of the definition to the present matter, it means the Western Cape Provincial Government, which employed Dr Thomas within the State, remained her employer during the secondment to the Department of Defence and Military Veterans.*

...

- [29] *An employee is entitled to claim occupational injury benefits under the Compensation Act for occupational injuries sustained in an accident arising from her employment. This is not a claim for damages under the common law, but for specified benefits under the Act. This is not dependent on proof of any negligence on the part of the employer. An employee may have a workplace damages claim against a third party, not the employer, if the occupational injury was caused in circumstances where the third party is liable for damages.*

...

- [39] *At stake is Dr Thomas's fundamental right to bodily integrity of her person, a right that underlies her common law right for workplace*

damages. The interpretation advocated for by the minister precludes a further delictual claim and this is more restrictive of Dr Thomas's rights. On that score the Supreme Court of Appeal's interpretation must be favoured and therefore, upheld. To deprive her of her full common law entitlement would, in these circumstances, not be justified. "

- [12] Simply put, the Constitutional Court found that the Western Cape Provincial Government, which employed Dr Thomas within the State, remained her employer during the secondment to the Department of Defence and Military Veterans and as an employee of the provincial government, Dr Thomas was entitled to claim occupational injury benefits under the Compensation Act for occupational injuries sustained in an accident arising from her employment. The aforesaid claim was not for damages under the common law but for specified damages envisaged under the Act. The Constitutional Court gave clarity to the definition of "employer" under the Act, more particularly insofar as the "State" was identified as an employer having regard to the three (3) different levels of government, namely national, provincial and local. The Court found that the interpretation of the Minister that the State was a single entity to be too restrictive having the effect of precluding a workplace damages claim against a third party. This would in turn have the effect of depriving Dr Thomas of her full common law entitlement which under the circumstances would not be justified.
- [13] It is apparent from the aforementioned discussion when reconciled with the merits in these proceedings that the authority relied upon by the plaintiff, namely the **Minister of Defence and Military Veterans v Thomas** is clearly distinguishable in that:
- 13.1 No dispute exists between the parties in regard to the nature, scope and extent of the definition of "employer" as defined under the Act insofar as the definition of an "employer" relates to the defendant; and
 - 13.2 The plaintiff's claim for occupational injuries does not envisage a claim for the recovery of damages from a third party for workplace damages,

the limitation of which would deprive an employee of their full common entitlement which circumstances could not be justified.

- [14] In the result, the authority relied upon by the plaintiff provides no assistance to the plaintiff and has no merit in refuting the grounds of exception raised and relied upon by the defendant.
- [15] Insofar as the contention advanced on behalf of the plaintiff that the “.... *defendant failed to report the accident to the Compensation Commissioner within (7) seven days*”⁷ and that the “*defendant failed to assist plaintiff to make a claim to the Commission within 12 months of the accident*”⁸ culminated in the plaintiff’s claim with the Commission becoming prescribed under section 44 of the Act⁹ similarly does not assist the plaintiff.
- [16] The mere fact that the defendant was less than dilatory in expeditiously reporting the accident to the Commissioner under the Act does not assist the plaintiff in any way. The plaintiff was entitled in terms of the provisions of section 38(1) of the Act to give notice of the accident to the Commissioner in the event of the employer failing to comply with the statutory obligation imposed upon the defendant under the Act. Moreover, whatever delay there may have been does not transform the plaintiff’s claim into a delictual one which would entitle the plaintiff to institute an action for damages under the common law¹⁰. Further to the above, section 43 of the Act allows the plaintiff to submit his own claim for compensation. The issues surrounding the provisions of section 38(1) and 43 alluded to above were not traversed by the plaintiff in his pleading and/or argument advanced to the court.
- [17] The plaintiff’s remedy was to seek compensation in accordance with the machinery created by the Act.

⁷ Plaintiff’s particulars of claim, paragraph 13(b).

⁸ Plaintiff’s particulars of claim, paragraph 13(c).

⁹ Plaintiff’s particulars of claim, paragraph 13(d).

¹⁰ *Skorbinski v Deon Beyers Bezuidenhout t/a DB Transport* [2010] JOL 25099 (ECP).

- [18] The injury was and remains an occupational injury as envisaged under the Act and as a consequence section 35(1) of the Act precludes an employee from claiming damages from his employer in respect of such an injury.
- [19] In my view, the exception raised by the defendant must be upheld, in the result, the following order is granted:
1. The exception is upheld with costs.
 2. The plaintiff is given leave to amend his particulars of claim should he so elect within fifteen (15) court days of the granting of this order.
 3. In the event that the plaintiff fails, alternatively neglects to file an amended particulars of claim as envisaged in paragraph 2 above, the defendant may approach the Court for an order dismissing the plaintiff's claim.



M MEYER
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 3 May 2023

Date of judgment: 21 May 2024

Appearance

On behalf of the Plaintiff

Instructed by

ADVOCATE A GOVENDER

RUSSIA LANGA ATTORNEYS

On behalf of the Defendant/Excipient

Instructed by

ADVOCATE I HUSSAIN SC

EDWARD NATHAN SONNENBERGS INC

c/o GERHARD BOTHA & PARTNERS INC