

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO: 128/2014

Date Heard: 15 August 2024

Date Delivered: 3 September 2024

In the matter between:

ZOLA NDIKI

PLAINTIFF

and

MEC FOR EDUCATION, EASTERN CAPE PROVINCE

DEFENDANT

JUDGMENT

MULLINS AJ

[1] On 6 September 2011 the Plaintiff, who was an educator employed by the Department of Education, Eastern Cape, at Nontswabu Junior Secondary School, was stabbed by a learner as a result of which he sustained certain injuries, both physical and psychological (the details of which are not relevant for present purposes).

[2] In due course the Plaintiff issued summons against the Defendant, his employer, claiming damages in delict (the details of the grounds of negligence and the quantification of the damages not being relevant for present purposes).

[3] The Defendant has defended the action, denying liability and, in addition, in its amended plea taking a special plea to the effect that the Plaintiff was precluded from instituting an action against his employer in that he (the Plaintiff) had failed to comply

with s35(1) of the Compensation of Occupational Injuries and Diseases Act, 130 of 1993 ("COIDA").

[4] It is the Defendant's contention that the altercation that occurred between the Plaintiff and the learner, which resulted in the Plaintiff being stabbed, was an occupational injury, alternatively an accident, as envisaged in COIDA.

[5] The Plaintiff filed a replication admitting that when the incident occurred he was on duty and that he was performing his duties as an educator. However, he denied that the assault fell within the scope of COIDA.

[6] The matter was eventually set down for trial on 17 April 2024, three days being allocated for the matter.

[7] On 15 April 2024 the Defendant's attorney wrote to the Plaintiff's attorney suggesting that the COIDA issue should be decided by way of a stated case and attaching a draft of the proposed terms thereof in accordance with rule 33(2).

[8] On 16 April 2024 the Plaintiff's attorney responded that the Defendant's special plea had been filed in October 2019, yet the Defendant had waited until the 11th hour to propose that the matter be dealt with by way of a stated case. The Plaintiff had prepared for trial and did not at that late stage have adequate time in which to prepare to deal with a stated case. In the result the Defendant's attorney refused to agree to the proposal and stated that any application to have the matter dealt with in this manner would be opposed.

[9] At the commencement of the trial on 17 April 2024 the Defendant brought a substantive application in terms of rule 33(4), not rule 33(1) as had been suggested in the correspondence, for the special plea to be decided separately from the other issues.

[10] I am advised that the matter stood down and that the parties reached an agreement that the special plea would be dealt with as a stated case. The Defendant tendered the costs of the first day of trial, the balance of the wasted costs being

reserved to be dealt with when the stated case was argued. The matter was postponed to 15 August 2024.

[11] In due course the parties reached agreement as to the terms of the stated case, the issue in dispute being defined as follows:

“The issue for determination by this Honourable Court in this stated case is whether COIDA finds application. Consequently, COIDA prevents the plaintiff from pursuing the damages claim against the defendant.”

[12] The terms of the dispute are somewhat inelegantly phrased and it would make more sense if the word “*Consequently...*” read “*If that is the case...*”. I intend to deal with the matter accordingly.

[13] The agreed facts may be summarised as follows:

(a) On the day in question an altercation occurred between the Plaintiff and a learner;

(b) The Plaintiff’s colleagues intervened and the learner left the school premises only to return later with a knife, which he used to stab the Plaintiff;

(c) At the time the Plaintiff was on duty and performing his duties as an educator.

[14] The following provisions of COIDA are of relevance to the stated case:

“Section 1

‘accident’ means 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;

'occupational injury' means a personal injury sustained as a result of an accident;

Section 15(1)

There is hereby established a fund to be known as the compensation fund.

Section 16(1)

The compensation fund shall, subject to the provisions of this Act, be under the control of the Director-General and its monies shall be applied by the Director-General to –

- (a) the payment of compensation, the cost of medical aid or other pecuniary benefits to or on behalf of or in respect of employees in terms of this Act when no other person is liable for such payment;

Section 22(1)

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

Section 35(1)

No action shall lie by an employee or any dependent 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."

[15] In simple terms, if an employee is injured (or contracts a disease) in circumstances which arise out of his/her employment, he/she cannot sue his/her employer, but must submit a claim for compensation in accordance with COIDA¹ (which is still commonly referred to as “workmen’s compensation” because of the now repealed very similar Workmen’s Compensation Act, 30 of 1941).

[16] Despite the apparent clarity of the provisions of the Act quoted above COIDA (and the previous Act) has spawned a plethora of litigation which shows no signs of abating, as is evidenced by this matter. The reason being is that there is sometimes a fine line, or grey area, between what qualifies as an event which arises out of an employee’s employment, and hence covered by COIDA, and an event that does not. Nor has there been a Uniform approach to the issue.

[17] In the seminal decision of **Minister of Justice v Khoza**,² dealing with what “*out of his employment*” meant, Williamson JA had the following to say (at 419A –B):

“On this aspect of the matter this Court was treated to an interesting dissertation by both counsel on a number of decisions, chiefly in the Courts of England, as to when it can be said that the workman’s injury arose “out of his employment”. I regret to say that, through no fault of counsel, I did not find an examination and consideration of all these decisions, as well as several others on similar lines referred to in the 36th edition of Willis on Workmen’s Compensation, rendered any material assistance comparable to the interest created by counsel’s arguments. In fact a perusal of the leading English authorities reveals a number of completely irreconcilable approaches to the problem from time to time.” (My underlining).

[18] And in **MEC for Health, Free State v DN**,³ Navsa ADP stated the following (at para 23):

¹ See generally: Lawsa; Vol. 13(2); First Reissue; paras 328 - 334

² 1996 (1) 410 (AD).

³ 2015 (1) SA 182 (SCA)

“South African courts have not been a model of consistency in their approach to the determination of whether an accident arose out of an individual’s employment.”

[19] The problem is that every case has to be decided based on its own specific facts, and as no two cases will ever have the same factual matrix, conflicting decisions are bound to arise. As was stated by Williamson JA in **Khoza** (at 419H):

“On every set of facts the question to be answered is the same; but it is seldom that facts are identical. The decision is in essence in each case one of fact related only to the particular facts in issue. The enquiry on a particular issue is whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident causing the injury. If it was the accident arose “out of employment...”.

[20] The problem is illustrated by two cases involving police officers being shot by a colleague while on duty. In **Khoza** the court held that the matter fell to be decided in accordance with COIDA, whereas **Twalo v Minister of Safety and Security and Another**⁴ came to the opposite conclusion.

[21] In **Khoza** two police constables were guarding prisoners. One of them was playing with his firearm and accidentally fired a shot which struck his colleague. The Appellate Division held that COIDA’s predecessor, the Workmen’s Compensation Act, was of application. In **Twalo** a police officer was taunting a colleague about his wife’s morals as a result of which the offended officer shot and killed the colleague. The court found that COIDA did not apply.

[22] The distinguishing feature between these two cases appears to be that the one involved in accidental act, whereas the other was intentional. Thus, in **Khoza** in

⁴ [2009] 2 All SA 491 (E)

dealing with a causal connection between the event and the workplace Rumpff JA stated the following (at 417F – I):⁵

“It is in any event clear that this causal connection for the purposes of the Act would among other things disappear if the accident was of such a nature that the workman would have suffered the injuries even though he was at a place other than the one his work demanded, or if the workman by his own act severed the existing connection between his service and the accident, or where the workman was deliberately injured by another person and the motive for the assault had no connection with the working duties of the workman.” (My emphasis).

[23] However, as is dealt with below, the fact that an injury results from a deliberate, intentional and/or premeditated act is not necessarily decisive.

[24] With regard to a school environment two cases are illustrative of the issue, namely **MEC for Education, WCP v Strauss**⁶ and **Ndala v Minister of Education and Others**.⁷

[25] In **Strauss** the educator in question was teaching learners how to throw a discus. In the process she was struck on the forehead by a discus and seriously injured. The educator sued her employer, the MEC for Education, and on appeal it was held that COIDA applied. In **Ndala** the facts are remarkably similar to the present matter. An educator instructed a learner to bring his hairstyle in line with the school’s dress code. He did not do so and when again confronted by the educator the learner went home and fetched a knife and on his return stabbed the educator. In this instance the court held that COIDA did indeed apply. The learned judge stated as follows (at para 16):

“The plaintiff in refuting the defendant’s plea, contends that the injuries of knife stab wounds or injuries sustained are not related or incidental or ancillary to

⁵ Translated from Afrikaans

⁶ 2008 (2) SA 366 (SCA)

⁷ [2019] ZAGPPHC 387

occupational injuries in the ordinary course of employment and as such do not ordinarily arise in the workplace. This argument is of no moment when considering the definition of occupational injury.”

[26] I am in respectful disagreement with the conclusion reached by the learned judge in the **Ndala** matter. The test to be applied is, in my view, whether the injury complained of is not whether it occurred during the course of the educator’s employment (which it did) but whether it arose out of or was incidental to the employee’s employment. Thus, a soldier can hardly be heard to complain if, in the line of duty, he is shot; a security guard, whose job it is to protect property from being broken into, can hardly be heard to complain if he is assaulted by persons breaking into the property; a doctor working in a psychiatric hospital in which there are violent patients would be in a similar position. In contrast, the doctor in **DN** was attacked and raped in hospital by an intruder, not a disgruntled fellow employee or deranged patient. The court held that COIDA did not apply.

[27] In **Churchill v Premier, Mpumalanga and Another**⁸ Wallis JA stated (at para 20):

“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. In the case of Ms Churchill, it is common cause that her injuries were sustained in the course of her employment. The only issue is whether they arose out of her employment.” (My emphasis).

[28] In **Churchill** the plaintiff, who was employed in the defendant’s office, got caught up in strike action and was, *inter alia*, assaulted. She sued her employer for damages who took a special plea that COIDA applied. The special plea was successful in the court *a quo*. Overturning the judgment on appeal Wallis JA stated:

⁸ [2021] ZASCA 16

[26] Did this incident arise out of Ms Churchill's employment so that her injuries, both physical and psychiatric, were sustained in an accident for the purposes of COIDA? It was accepted that because it happened at her place of employment and while she was going about her duties it arose in the course of her employment. Did it arise out of her employment? In other words, was it sufficiently closely connected to her employment to have arisen from it? The fact that it occurred in her workplace when she was going about her duties is undoubtedly a factor that connected it to her employment. In that sense her employment brought her within the zone of risk, but that is merely where the enquiry commences. Was the risk also incidental to her employment?

[27] The respondents argued that the risk was foreseeable, because it is a regrettable reality that protest action and industrial action can sometimes lead to incidents where people are pushed, shoved or attacked in a more aggressive fashion. They referred to a previous protest in 2016, where women members of the bargaining group who had remained at their posts were forcibly removed from their work stations. It was agreed that the employees not engaged in the protest were wary of intimidation by the protestors and realised that because feelings were running strong the protest might turn "unpeaceful", that is, violent, with a risk of physical injury to those employees.

[28] 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* 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." (My emphasis).

[29] In concluding the discussion on this point I can do no better than, once again, quoting from **DN**:

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

[31] Counsel on behalf of the Defendant did not go so far as to suggest that the dictum in *Khoza*, referred to in the preceding paragraph, was clearly wrong and that I should depart from it, but pointed out that relating the causal connection, as Rumpff JA did, to the motive of the perpetrator of the wrong that caused the injury was problematic and would lead to uncertainty. I agree. However it appears to me that the problem can be resolved by a slight adjustment, namely to ask the question whether the wrong causing the injury bears a connection to the employee's employment. Put differently, the question that might rightly be asked is whether the act causing the injury was a risk incidental to the employment. There is of course, as pointed out in numerous authorities, no bright-line test. Each case must be dealt with its own facts.

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

[30] An unusual situation arose in **Van De Venter v MEC of Education, Free State Province**.⁹ The plaintiff, who was the cashier at a school, was injured in an armed robbery. In due course she issued summons against her employer for damages. The action was defended and, *inter alia*, the defendant pleaded that the plaintiff had failed to deliver the statutory notice timeously. She applied for condonation. In opposing condonation one of the points taken was that, as COIDA applied, the action against the MEC had no prospects of success and hence condonation should be refused. The learned judge agreed and stated (at para 44):

“[44] On the strength of decided caselaw, I am persuaded that the proposed action has no prospects of success. The facts did not give rise to a novel situation. The fact that the applicant was injured by criminal outsiders and not by fellow employees made no difference. A few litigants have previously travelled down that same route before and all of them ended nowhere. I am certain that the applicant’s proposed action would probably be found seriously wanting.”

And (at para 53):

“Accordingly I have come to the conclusion that, even if section 35, Act No 130/1993 did not apply, the proposed main action would still have no prospects of success, to mitigate her unsatisfactory explanation and culpability as a whole.”

And, quoting **Urquhart v Compensation commissioner**¹⁰ with approval (at para 41):

“It follows, therefore, that any personal injury sustained by an employee caused by an criminal act arising out of and during the course of an employee's employment amounts to an accident as defined in section 1.”

⁹ [2012] ZAFSHC 185

¹⁰ 2006 (1) SA 75 (ECD)

[31] **Urquhart** concerned a press photographer who over the years had been exposed to many traumatic events, the last straw being assaulted while photographing a fraud suspect outside a court building. He suffered from post-traumatic stress (which was not in dispute). On appeal the court held that the plaintiff's condition was an accident as defined in section 1 of COIDA.

[32] I am in respectful agreement with the conclusion reached in **Urquhart**. The plaintiff's job placed him in potentially dangerous situations. I also do not take issue with the conclusion reached by the learned judge in **Van De Venter**. The plaintiff was in control of the school's money which was on the premises and a robbery was not beyond the realms of possibility. However, what I do take issue with is the "hard line" adopted by the learned judge, as quoted above, which does not accord with the weight of authority. Not every criminal act arising out of or during the course of an employee's employment falls to be determined in accordance with COIDA.

[33] To return to the present matter. The role of an educator is to educate learners. As an educator often has to deal with large groups of learners it goes with the territory that they, the learners, will on occasion become unruly and that friction between them and the educator will occur. There will always be those learners who test the boundaries. It is for this reason that the Department has rules, as do schools, governing what is, and what is not, acceptable behaviour. Incidental to an educator's employment is the enforcement of those rules. However, that a disgruntled learner would, or even may, assault an educator in the exercise of his/her duties is not something that arises out of his/her employment and/or is incidental thereto.

[34] In the circumstances, I find that the incident giving rise to the Plaintiff's injuries was not an accident as defined by COIDA and that the special plea stands to be dismissed with costs.

[35] On the question of the wasted costs occasioned by the matter having to be postponed on 17 April 2024, counsel for the Plaintiff urged me to make an order that the wasted costs should include all three days which had been allocated to the

matter on that occasion (the first day's costs having already been tendered by the Defendant) as well as preparation, travel and accommodation costs, and so forth.

[36] I am satisfied that the Plaintiff is entitled to the wasted costs whatever they may be, but to order that these costs are to include the days allocated for trial would be usurping the role of the taxing master. What is reasonable in the circumstances is not something a court should determine and I do not intend to do so.

[37] Insofar as the costs occasioned by the special plea are concerned, both counsel were *ad idem* that scale A should apply. The same scale shall apply to the wasted costs.

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

1. The Defendant's special plea is dismissed.
2. The Defendant is liable for the costs occasioned by the special plea, such costs to be taxed according to scale A.
3. The Defendant is liable for the wasted costs occasioned by the postponement of the matter on 17 April 2024, such costs to be taxed according to scale A.

NJ MULLINS
ACTING JUDGE IN THE HIGH COURT

DATE:

APPEARANCES: Plaintiff: Adv. S Conjwa
Attorneys ZYM Ndzabela Inc.
c/o Sigaba and Associates

Defendant: Adv. S Swatbooi SC
State Attorney, King William's Town