



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

8 August 2025

Date

.....
Signature

Case number: 2024-080008

In the matter between:

BERNADINE WARNE
KEDIBONE MASHIGO
TEBOGO MAAKE
BESSY MAYINDI
SELINA SEKGOBELA
MOKGADI OLGA SELOWA

First Plaintiff (Respondent)
Second Plaintiff
Third Plaintiff
Fourth Plaintiff
Fifth Plaintiff
Sixth Plaintiff

and

PALABORA MINING COMPANY
MINISTER OF MINERAL RESOURCES & ENERGY
THE DIRECTOR-GENERAL OF MINERAL
RESOURCES & ENERGY
THE DEPARTMENT OF MINERAL RESOURCES

First Defendant (Excipient)
Second Defendant

Third Defendant
Fourth Defendant

JUDGMENT – 8 AUGUST 2025

WILLIAMS, AJ

- [1] The six Respondents (as Plaintiffs in the action under the instant Case Number) have claimed for loss of support, as well as damages for “*psychological trauma and emotional damage*” that they allegedly suffer as a result of their beloved breadwinners’ tragic death by fire in the Excipient’s Palabora Mine. They also include claims on behalf of the deceased for “*painful death*” and for “*pain and suffering before death*”.
- [2] The First Defendant (“the excipient”) raises two grounds of exception against the Particulars of Claim, both allege there is no cause of action.
- [3] I accept for purposes of the exception, that the Excipient was grossly negligent and caused the tragic death of the six employees.

FIRST GROUND OF EXCEPTION:

- [4] The Excipient contends that the Respondents can only claim under the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (“COIDA”).
- [5] Section 35(1) of COIDA bars an action by an employee or by his or her dependant against the employer, 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".

(My underlining.)

- [6] When read with the definitions in section 1 of the Act, an employer has protection under COIDA if a death was suffered as a result of an accident which arose out of and in the course of the employee's employment. Put differently, if the accident arose out of and in the course of the employee's employment, the exclusionary provision in section 35(1) of the Act would apply. I quote the full section for the sake of clarity. It is not necessary to quote the definitions, since that is traversed in the authorities referred to hereunder:

"35(1) No actions still 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". (My underlining.)

- [7] At the time of their tragic death, the six mineworkers were on duty at the mine. The risk of injury or death caused by an underground fire, was incidental to their employment as underground miners. The very nature of their work took them into a hazardous zone.¹ Hence the very statutory dictates re fire prevention prevailed (which the respondents allege were breached).

¹ **Churchill v Premier, Mpumalanga** 2021 (4) SA 422 (SCA) at [14] to [20].

- [8] In **Churchill**², cited below, the on-duty injured employee was assaulted by an outsider, who was participating in protest action outside her workplace. The only connection between the assault and the employment was that the employee was at work at the time. The assault by the outsider was because of a misunderstanding. The perpetrator thought the employee had insulted him. She had done anything wrong in her work. Moreover, the employee was not assaulted for any reason related to the protest.
- [9] The Supreme Court held that her injuries did not arise out of the employment. The same reasoning was followed in **Lumka Twalo v Minister of Safety & Security & Another** (317/05) quoted by the respondents. There the intentional shooting of one police colleague by another, was also held not to be a death arising from an accident under COIDA, despite them both being on duty. Such unexpected behaviour is not an incidental risk to being a policeman.
- [10] The facts in **Churchill** and in **Lumka Twalo** are thus on a different footing to the facts in the instant matter. As alluded above, the Plaintiffs' Particulars of Claim here support the conclusion that the deceased mineworkers died from an accident directly related to their work – an accident there where and whilst they do their daily work. The failed duty to maintain the fire-retardant systems alleged in the Particulars of Claim, is the legislation aimed to protect them from, inter alia, death by fire.

² See fn 1 above.

- [11] I have read the **Nicosia** and **Khoza** cases referred to by the Respondent. If anything, these cases confirm my conclusion. These cases were correctly decided on very different facts to those in this matter.
- [12] As for the reliance of rights enshrined in the Constitution, it is trite that direct reliance is not permissible. It would be for a higher court, presumably the Constitutional Court, to conclude that section 35 is to mean something else than what it clearly says (because it offends a right enshrined in the Bill of Rights).
- [13] Compensation under COIDA is automatic and requires no proof of fault. It is limited compensation, but there is provision for additional compensation when the employer was negligent. It is trite that the Scheme is calculated to benefit both employees and their dependants on the one hand, and employers on the other (who should not be wiped out to the detriment of other employees, because of a single accident).
- [14] **Mankayi v Anglogold**³ is distinguishable. If anything, it confirms my view (at para 101), that section 35 of COIDA passes constitutional muster. This must be so if one takes into account that section 56 of COIDA allows for an application under COIDA for additional compensation if the employer was negligent.
- [15] The first ground of exception must thus be upheld.

³ 2011 (3) SA 237 CC.

SECOND GROUND OF EXCEPTION - PRESCRIPTION:

[16] Upholding the first exception is destructive of the Respondents' case. But if I am wrong, here is my finding on the second ground of exception. I have read **Habib v Ethekewini Municipality**.⁴ It states that notionally prescription can be raised by way of exception (i.e. it is not irregular to do so, but that when evaluated, it will usually fail, because no Plaintiff pleads when prescription began or ran out).

[17] I respectfully differ. Extinctive prescription under the Prescription Act, 68 of 1969 ("the Prescription Act") should not be raised, nor decided by way of exception. Since there is no Rule 30 proceedings to declare here that the second exception is irregular, I will say no more – but it is clear that raising prescription by way of exception is an abortive endeavour.

[18] Here the 3-year period provided for in section 11 of the Prescription Act has, on the face of it, expired, before the Respondents sued. The difficulty for the Excipient is this: It is trite that the party raising prescription must plead prescription and prove when prescription commenced to run. That can only be done in a Plea, to which a Plaintiff may replicate. No Plaintiff volunteers when prescription started to run. That date of the event is often not the commencement date.

[19] The Excipient here assumes, for purposes of its exception, that the date of the fire is when prescription began to run. But, it is always open to the

⁴ 2020 (1) SA 580 KZD.

respondents as Plaintiffs, to contend otherwise. The deaths may not all have occurred on that very day. Also, there may be, as there is here, minor claimants against whom prescription have never run.

[20] Any one or more of the Respondents may also contend that they or anyone of them laboured under a disability recognised in the Prescription Act, which precluded them having the requisite knowledge of their claim. Be it that they were mentally precluded, or otherwise misled about the existence of their respective claims. The Prescription Act does not allow prescription to run if a Defendant keeps a Plaintiff in the dark.

[21] In the result the second ground of exception falls to be dismissed. It does not mean that, if and when the Excipient pleads, it cannot then plead prescription.

RESPONDENTS' APPLICATION FOR "CONDONATION":

[22] After the Excipient raised prescription by way of exception, the Respondents launched an application for "condonation". It is contended that the alleged failure to sue timeously, should be "condoned".

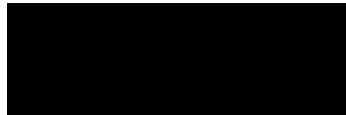
[23] The Prescription Act does not allow for such condonation.

[24] The reasons advanced for "condonation" is that Respondents had the wool pulled over their eyes. The Excipient they say, kept them in the dark, while purporting to help the dependants/families. They will in due course allege in a replication that prescription did not run. (This demonstrates my point re the undesirability of assessing the issue of prescription by way of exception.)

[25] The application for "condonation" falls to be dismissed.

[26] I order as follows:

- 22.1. The first exception is upheld, with costs.
- 22.2. The second exception is dismissed, with costs.
- 22.3. The application for condonation is dismissed, with costs.
- 22.4. The cost in each instance is on Scale C, such costs to include the costs of counsel and, when employed, the costs of two counsel.



J O WILLIAMS AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date heard : **5 August 2025**

Date of judgment : **8 August 2025**

Representation for the Plaintiffs: Adv D J Sibuyi

Representation for the excipient/
first Defendant:

Adv D J Joubert SC
Adv G V R Fouché
Instructed by Edward Nathan Sonnenbergs
Inc.

Representation for second to
fourth Defendants:

None. The respondents abide.