REPORTABLE

IN THE SOUTH GAUTENG

HIGH COURT (JOHANNESBURG)

Case Number: 2010/16004

DATE: 7 October 2010

In the matter between:

ANDRE JOHN SANAN Plaintiff

And

ESKOM HOLDINGS LIMITED Defendant

JUDGMENT

C. J. CLAASSEN J:

[1] This is an exception taken by the defendant to the plaintiff's particulars of claim. In it the plaintiff claims an amount of R16 060 000.00 (sixteen million and sixty thousand rand) as damages in respect of past hospital expenses, past medical expenses, estimated future medical expenses, past loss of income, estimated future loss of income, general damages for pain and suffering, disability and loss of amenities of life.

[2] The plaintiff alleges that he was employed by the defendant as an apprentice electrician during the period 1966 to 1971. During the course

of this employment the plaintiff was exposed to asbestos and/or asbestos fibres and/or asbestos dust particles. During or about May 2009 the plaintiff was diagnosed with malignant epitheloid mesothelioma. This disease is a rare form of cancer which develops in the protective lining that covers many of the body's internal organs. This cancer is usually caused by exposure to asbestos.

[3] The plaintiff's claim for damages is framed in delict. He alleges that he suffered the damages due to the negligence of the defendant's employees and servants while acting within the course and scope of their employment with the defendant, in that they failed to advise the plaintiff about the dangers of working with asbestos and failed to provide a safe working environment for the plaintiff. Due to the defendant's negligent breach of the aforesaid duty of care, the plaintiff alleged that he contracted the disease and suffered the damages referred to above.

EXCEPTION

[4] The defendant alleges that the plaintiff's particulars of claim discloses no cause of action in view of the statutory embargo to such claims contained in section 35 of the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 ("COIDA"). Section 35 of the aforesaid Act reads as follows:

> "**35. Substitution of compensation for other legal remedies.-**
>
> (1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
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> (2) For the purposes of subsection (1) a person referred to in section 56(1)(*b*), (*c*), (*d*) and (*e*) shall be deemed to be an employer."

[5] Section 56 of the Act provides for increased compensation payable to an employee by the employer in case of the latter's negligence which caused the employee's accident or occupational disease. Section 56(1) recognises the employer's responsibility in regard to various individuals including other employees and/or engineers whose negligence may have caused the employee's accident and/or occupational disease. In such event subsection (3) permits an employee to apply for increased compensation from the Commissioner.

[6] The defendant contends that section 35 is a complete bar to the plaintiff's claim as alleged in the particulars of claim and thus discloses no cause of action.

EVALUATION

[7] The predecessor to Act 130 of 1993 was the Workman's Compensation Act No 30 of 1941. Section 7 of this Act contained a similar provision as is contained in section 35 of the 1993 Act. It has been held that section 7 of the 1941 Act totally precludes any damages action by an employee against an employer resulting from injuries suffered or occupational diseases contracted in the exercise of the employee's employment. [1] It has also been held that section 7 precludes any claim by the employee for the difference between the compensation paid under that Act and the common law damages suffered by the employee. [2]

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[1] See **Mphosi v Central Board for Co-operative Insurance Ltd** 1974 (4) SA 633 (A) where Botha JA at 644A – B held:

> "The conclusion to which I come, therefore, is that sec. 7 (a) precludes a workman's common law action for all damages, including damages for pain and suffering and loss of amenities, in respect of an injury which is compensable under the Act."

[2] See **Vogel v South African Railways** 1968 (4) SA 452 (ECD).

[8] It is now settled law that the bar contained in section 7 of the 1941 Act and section 35 of the 1993 Act is not unconstitutional. The bar against civil claims contemplated therein is rationally connected to the purposes of the Act of providing financial compensation to employees from a compensation fund to which employers are required to contribute. [3]

[9] In my view, the matter has now been settled, authoritatively, by the Supreme Court of Appeal in the decision of **Mankayi v AngloGold Ashanti Ltd** 2010 (5) SA 137 (SCA). That matter commenced before Joffe J in the South Gauteng High Court. Joffe J upheld an exception against the appellant's particulars of claim. The appellant was employed as a mine worker by the respondent and he sought payment from the respondent of some R2 600 000.00 (two million six hundred thousand rand) with interest and costs based on the latter's alleged breach of duty or care owed to him. The claim was, therefore, also framed in delict. It was alleged that the appellant's claim against the respondent arose both under the common law and statute, to provide a safe and healthy environment in which the plaintiff could work. The plaintiff contracted a disease known as miner's phthisis. Exception was taken before Joffe J relying on section 35(1) of the 1993 Act. Joffe J upheld this exception and with leave of that court, the appellant appealed to the Supreme Court of Appeal.

[10] In the **Mankayi** case Malan JA traversed the history of workman's compensation legislation in South Africa. He noted that the 1993 Act came into operation on 1 March 1994 and repealed the entire Workman's Compensation Act No 30 of 1941. At page 151 paragraph [21], Malan JA said the following:

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[3] See **Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)** 1999 (2) SA 1 (CC) at 11 paragraph [15].

> "[21] Section 35(1) of COIDA abolished an employee's common-law right to claim damages from the employer. Section 36 regulates and preserves an employee's rights against a third party who may incur liability to the employee. Of significance is s 56(1), which provides that, if a person has met with an accident or contracted an occupational disease owing to his or her employer's negligence, the employee may apply to the commissioner to receive 'increased compensation in addition to the compensation normally payable in terms of this Act'. The amount of additional compensation is determined by the Director-General in an amount deemed equitable, but which may not exceed the amount of pecuniary loss the claimant has or will suffer (s 56(4)). Where increased compensation is payable in terms of s 56, the negligent employer may be assessed at a higher tariff than the tariff for the assessment of employers in a like business (ss 56(7) and 85(2))."

[11] Where an employee meets with an accident resulting in his/her disablement or death or contracts an occupational disease he/she is entitled to the benefits provided for by the 1993 Act. Section 65 of this Act deals with the compensation payable for occupational diseases and states the following:

> "**65. Compensation for occupational diseases**.-
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> (1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for an prescribed in this Act if it is proved to the satisfaction of the Director-General –
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> (a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or
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> (b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment."

[12] An occupational disease is defined as any disease contemplated in section 65(1)(a) or (b). In Schedule 3 paragraph 3.1.1 cancer caused by asbestos is declared to be an occupational disease. It is clear from the wording of section 65 that the Legislature intended to cast the ambit of an employee's entitlement to compensation for occupational diseases as widely as possible. [4]

[4] See **Mankayi** *supra* at 152F.

[13] Malan JA in the **Mankayi** case further held that although section 35(1) of the 1993 Act followed the pattern of section 7 of the 1941 Act, the 1993 Act has a wider ambit of application than the repealed 1941 Act. With reference to **Pettersen v Irvin and Johnson Ltd** 1963 (3) SA 255 (C), Malan JA further held at 156F – 157A as follows:

> "This means that an employee's common-law claim for general damages was excluded by s 7, even though the 1941 Workman's Compensation Act did not provide for compensation for such damages.
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> [29] The same reasoning applies to s 35(1) of COIDA. The employee's action for the 'recovery of damages in respect of an occupational injury or disease resulting in the disablement or death' of the employee is extinguished. The subsection does not require that the employee must be entitled to receive compensation under COIDA. It refers to an action for the recovery of damages that is abrogated. This right is qualified with reference to 'an occupational injury or disease' and to 'disablement' and 'death'. Section 35(1) uses the words and expressions occurring in COIDA. However, it does not follow that it is implied that the employee must also be entitled to compensation under COIDA. Nor does the word 'substitution', used in the heading of the section, lead to the conclusion that the employee must be entitled to compensation under COIDA: where the words in the text of the provision are clear, they cannot be overridden by the words in the heading."

I am therefore of the view that the exception was well taken and should be upheld.

EXCEPTION OR SPECIAL PLEA?

[14] However, Mr Reilly contended that the exception should be dismissed on the ground that the defendant should have raised the statutory bar to the plaintiff's claim by way of a special plea and not by exception. He submitted that it is clear in cases where prescription is raised as a defence, that it should be pleaded as a special plea in order for the plaintiff to be able to replicate thereto under the provisions of the Prescription Act.

[15] In my view there is no substance in this argument. First of all, it is highly relevant that the section 35(1) objection to particulars of claim in the **Mankayi** matter was raised by exception before the court *a quo*. In the judgment of Malan JA as well as that of Harms DP and Cloete JA, the procedure adopted of raising the defect by way of an exception, was not criticised or disapproved of.

[16] Secondly it seems to me that confusion has reigned supreme in regard to the determination whether a special plea or an exception is the appropriate procedure to raise a defence. In the seminal work of Voet "AD PANDECTAES" 46.1, exceptions are discussed in great detail. It appears, however, that Voet termed as exceptions, both "exceptions" in the way we understand it as well as "special defences" or "special pleas". In several places he refers to exceptions in the wider sense of the word as if it did not matter whether it is an "exception" in the true sense of the word or a "special plea". In Voet 46.1.2 an exception is defined as the "shutting out of an action which is available in strict law." In Voet 46.1.4 exceptions are divided into those of fact or law, dilatory or temporary and peremptory or permanent. Voet then states the following:

> "There are various divisions of exceptions. In the first place according to the commentators some are called exceptions of law, and others exceptions of facts. They term those exceptions of fact by which it is denied that there is an action, such as the exceptions of payment, set off, destruction of the thing and so forth. They are exceptions of law when they presuppose an action which is available in strict law, but is unfair and is thus to be smashed by an exception based on fairness. Such exceptions are properly included under the definition of exceptions."

[17] As to dilatory, temporary, peremptory or permanent exceptions Voet expresses himself as follows:

> "But especially are they on the one hand dilatory or temporary, when they put off the action to another time, and thus when once raised do not always stand in the way, but have only a temporary effect. Or on the other hand they are peremptory or permanent, when they put an end to the judicial proceeding, and after being once raised are forever an obstruction to those who sue. Very

> many examples of both kinds are strewn throughout the entirety of our law, and have already been dealt with in great part in the early portions of this *Commentary*, though some will still have to be discussed in the course of what follows."

[18] Voet then proceeds to give examples resorting under this heading as being "exceptions" to: (a) the jurisdiction of the court; (b) the recusal of a judge; (c) the time or limit given being too narrow; (d) the day being a holiday; (e) contumacy; (f) that leave to sue has not been obtained; (g) a lawful impediment exists; (h) the requisite of a preliminary proceeding; (i) the claim being excessive; (j) that a temporary agreement was concluded between the parties; (k) the sovereign having ordered a stay of payments; (l) a pending suit exists; (m) the claim being vague and embarrassing; (n) cession of actions; (o) surprise and deception; (p) spoliation; (q) multiplicity of actions; (r) and suretyships and guarantees. It goes without saying that some of the aforesaid defences are often raised by way of exception and some by way of special plea. It, therefore, seems to me of little moment whether a particular defence is raised by way of exception or by way of special plea, provided that it is properly and timeously raised in an intelligible form. Sometimes an exception needs to be raised by a preceding application on motion for example an application to stay further proceedings pending the payment by the plaintiff of taxed costs awarded to the defendant in another action between the parties. [5] Would it matter if an exception in the true sense of the word is raised by way of a special plea? Surely not. Why then would the converse be fatal? Does it, therefore, really matter in what form the defect is raised? I think not.

[19] A further complication exacerbating the confusion, is the fact that in certain cases terminology from English law was borrowed to describe the nature of a particular defence. Thus, terms like "plea in bar", "plea in

[5] See Chapter 10 p 304 *et seq* in Herbstein and Van Winsen "The Practice of the High Courts in South Africa" Fifth Edition as read with p 600 thereof.

abatement", "special pleas" were borrowed from the English law and introduced into our law. In certain instances [6] it would seem that a special plea in abatement was referred to as an exception. [7] This lead to an admonition to practitioners by Claassen J [8] to desist from heading the defences with specific nomenclature such as "plea in bar" or "plea in abatement". The learned judge advised that it would be wiser to describe such a pleading as a special plea and to set out in the body of the plea the grounds to be relied on.

[20] In regard to the question of a defence being either an exception or a special plea Herbstein and Van Winsen, Fifth Edition *supra* at 599 and 600 has the following to say:

> "The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the pleading itself; the excipient must accept as correct the factual allegations contained in it and may not introduce any fresh matters. Special pleas, on the other hand, do not appear *ex facie* the pleadings. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading, whereas the special plea is appropriate when it is necessary to place facts before the court to show that there is a defect. The defence of prescription appears to be an exception to this rule for it has been held that that defence should be raised by way of special plea even when it appears *ex facie* the plaintiff's particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption." [9]

With respect to the learned authors, it seems to me incongruous that a party is obliged to raise a defence in a particular way in order to accommodate or assist his opponent in raising a counter argument to

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[6] See **Le Roux v Le Roux and Joel** (1897) 4 OR 74 and Herbstein and Dumont "A Handbook of Superior Court Practice" Second Edition p 92-3.

[7] See also **Schuddingh v Uitenhage Municipality** 1937 CPD 113; **Stanhope v Combined Holdings and Industries Ltd** 1950 (3) SA 52 (E); **Glennie, Egan and Sikkel v Du Toit's Kloof Co Ltd** 1953 (2) SA 85 (C); and **Van der Westhuizen v Smit NO** 1954 (3) SA 427 (SWA).

[8] The late father of the present writer.

[9] See further **Union and SWA Insurance Co Ltd v Hoosein** 1982 (2) SA 481 (W) at 482G – H; and **Rand Staple-Machine Leasing (Pty) Ltd v ICI** (SA) Ltd 1977 (3) SA 199 (W).

such defence. Notionally, if prescription were to be raised by way of an exception, the obvious argument against it succeeding is that evidence will reveal it to be unsound. Alternatively, if the prescription defence is sound, it will be incumbent on the other party to allege in its pleading the necessary averments to counter any possible defence of prescription. If such party cannot do so, it simply means that there is no triable issue and such party should not litigate.

[21] It would seem to me that the nature of a defence raised by special plea or exception is more important than the procedure adopted. It is the nature of such defence which would determine whether or not evidence is required and whether or not the defence should have been raised *in initio litis* or whether it can be raised on appeal. How the defence is raised is of lesser importance than the grounds for the defence and the point in time that it is raised. It is trite law that an exception which can be cured by evidence at the trial, will not succeed. It is also trite that an exception will only succeed if it holds good on any interpretation of the pleading. Thus, whether the defence is raised as a special plea or by way of exception will matter little if evidence will cure the defect or if a proper interpretation of the pleading will cure the defect. In my view this conclusion is fortified by the fact that practicalities determine the method by which a defence is raised. One may rhetorically ask why is the defence of prescription an exception to the rule that an exception must appear *ex facie* the four corners of the pleading? If a defence of prescription is to be specially pleaded in order for a plaintiff to file a replication thereto, then notionally a defence of misjoinder or non-joinder should also be specially pleaded in order for the plaintiff to replicate where plaintiff's evidence will show why a non-joinder or a misjoinder in the circumstances of the case is apposite. Yet, misjoinder and non-joinder defences are frequently raised by way of exceptions and not in special pleas.

CONCLUSION

[22] For the reasons set out above I am of the view that the exception was well taken and should be upheld. I therefore make the following order:

1. The exception is upheld with costs.
2. The plaintiff is given leave to amend his particulars of claim within 20 days from the date of this order.

DATED THE _____ DAY OF OCTOBER 2010 AT JOHANNESBURG

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C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv N. Reilly
Counsel for the Defendant: Adv A. P. S. Nxumalo

Attorney for the Plaintiff: Koikanyang Incorporated
Attorney for the Defendant: Snaid & Edworthy Attorneys

Argument was heard on 21 September 2010.
Judgment Date: 07th October 2010.