

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

Date: 8 April 2022 E van der Schyff

CASE NO: 34918/2021

In the matter between:

PAYNTER'S HARDWARE CC

EXCIPIENT/ DEFENDANTS

and

BONANI MOSES CHAUKE

RESPONDENT/PLAINTIFF

JUDGMENT

Van der Schyff J

- [1] The respondent ("plaintiff") issued summons against the excipient ("defendant"). The defendant is a close corporation with CK No: CK87/05235/23 with its principal place of business at 480 Moot Street, Daspoort, Hercules, Pretoria, Gauteng.
- [2] The plaintiff alleged that he was an employee of the defendant who was injured while acting within the scope and course of his employment. The defendant is allegedly

an employer as envisaged in section 1 of the Compensation for Occupational Injuries and Disease Act, 130 of 1993 ("COIDA"). The plaintiff seeks damages in respect of the occupational injury suffered. The plaintiff alleges that the defendant had a duty to provide and maintain a working environment that is safe and without risk to the health of its employees in terms of the Occupational Health and Safety Act 85 of 1993 (OHSA), and to report the incident to the Compensation Board in terms of COIDA. The defendant failed in its duty and was negligent in that it, amongst others, failed to report the injury as required in terms of COIDA, failed to register the plaintiff for protection under COIDA and failed to ensure that its employees have safety working equipment as per OHSA.

- [3] The defendant raised an exception that the applicant's particulars of claim lack the necessary averments to sustain a cause of action. The defendant submits that the plaintiff is statutorily barred from bringing the claim against his employer.

- [4] The defendant's legal representative drew attention to the Constitutional Court's decision in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)*¹ where the court held that the statutory limitation of common law personal injury claims against employers was specifically and deliberately excluded in the legislation, and that the limitation was constitutional. I was also referred to the decisions in *Skorbinski v Deon Bezuidenhout t/a DB Transport*² and *Boer v Momo Developments CC & Another*.³

- [5] The plaintiff appeared in person after his attorneys of record withdrew from the record for a second time. The services of a translator were obtained at the eleventh hour. The plaintiff informed the court that he consulted with a new attorney earlier in the week and requested a postponement of the matter.

- [6] I am of the view that if the plaintiff's claim is indeed bad in law, it will not serve any purpose to postpone the exception. A postponement will only result in more costs.

¹ 1999 (2) BCLR 139 (CC) par [16].

² [2010] JOL 25099 (ECP).

³ [2005] JOL 13303 (T).

[7] Section 22(1) of COIDA provides:

'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 the Act, be entitled to the benefits provided for and described in this Act.'

Section 35(1) of COIDA in turn provides:

'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.'

[8] In following the reasoning of Van der Byl AJ in *Boer, supra*, and based on the particulars of claim, I have to find that sections 22(1) and 35(1) of COIDA are decisive of the matter. Van der Byl AJ held that even where an employer has failed to register the employee in terms of COIDA, the employee is not prevented from claiming compensation from the Commissioner. The employer will be subject to a fine, but cannot be sued by the employee. This position was entrenched by the Supreme Court of Appeal in *MEC for Education, Western Cape Province v Strauss*.⁴ In this case the Supreme Court of Appeal explained that COIDA came into operation on 1 March 1994 and provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment. The SCA held, based on the Constitutional Court's view in *Jooste, supra*, that 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

⁴ 2008 (2) SA 366 (SCA).

does enable employees to obtain limited compensation from a fund to which their employers are obliged to contribute.'

that section 35 of COIDA abolished an employee's common-law right to claim damages.

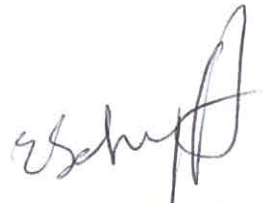
- [9] In *Boer, supra*, the court found that the exception succeeded but granted leave to the plaintiff to amend its particulars of claim if so advised. In the current matter, the defendant's legal representative argued that such an order would proverbially speaking only prolong the proceedings and incur costs for if the action is bad in law, no amendment of the particulars of claim can bring the claim within the ambit of the law.
- [10] I agree with the defendant's legal representative that if the allegations in the particulars of claim are accepted for purposes of this exception to be true, that the plaintiff is barred from claiming damages from the defendant
- [11] As far as costs are concerned, based on the assumption that the averments made in the particulars of claim are true, and in the absence of any indication to the contrary, I can only echo the sentiments expressed by Van der Byl AJ:

'Wat koste betref, dui dit onteenseglik daarop dat die eerste verweerder die rede vir die eiser se delimma is aangesien hy versuim het om hom as werkgewer ingevolge die Wet te registreer. Ek kan my afkeur aan sy ... optrede slegs betoon deur nie aan hom die voordeel van 'n kostebevel te laat toekom nie.'

Order

In light of the above, the following order is granted:

1. The exception is upheld.
2. Each party is to pay its own costs.



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The plaintiff will be informed telephonically that a copy of the judgment can be collected from the court.

For the excipient:	Mr. S J Hyman
Instructed by:	VZLR Inc.
For the plaintiff / respondent:	In person
Date of the hearing:	6 April 2022
Date of judgment:	8 April 2022