REPUBLIC OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case no: 16973/2010

In the matter between:

EBRAHIM PARKER **Plaintiff**

and

ENGINEERING LININGS (PTY) LTD **First Defendant**

GREGORY COLLOP

Second Defendant

JUDGEMENT delivered this 10th day of April 2013

BOQWANA AJ

Introduction

[1] On 09 August 2007 and at approximately 21h00, a motor vehicle accident occurred at B2 Road, Swakopmund, Namibia involving a bakkie with registration number CA 758050, driven by the second defendant. The plaintiff and one Mbulelo Ngxande ('Ngxande') were passengers in this vehicle. All three of them were employees of the first defendant.

[2] The plaintiff's claim is that he sustained injuries as a result of this collision and suffered damages in the amount of R436 500.00, comprising of R36 500.00 for estimated future, medical and related expenses, R300 000.00 for future loss of earning capacity and R100 000.00 for general damages. He claims that the second defendant was at all material times acting in the course and

scope of his employment with the first defendant. Th e parties agreed to separate the merits from the quantum.

[3] The defendant has raised two special pleas which I will address before I deal with the merits of the case. The first special plea is that the claim is precluded by section 35 of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ('COIDA') and the second special plea is that the plaintiff's claim is limited by the Motor Vehicle Accident Fund Act, 2001 ('Namibian Road Accident Fund Act') .

[4] The defendants also deny that the second defendant was negligent and that he was acting in the course and scope of his employment with the first defendant. The defendants' counsel has however conceded in his heads of argument that the second denial cannot be sustained as it is clear from the evidence that the second defendant was in fact acting in the course and scope of his employment with the first defendant at the time of the collision.

[5] It also emerged during the evidence that the plaintiff was not wearing a seatbelt. The Defendants applied for amendment of their Plea, as they did not plead that the plaintiff did not wear a seatbelt. After due deliberations on the matter, parties agreed that this issue be considered together with quantum as it is relevant to the extent of damages to be awarded to the plaintiff, should judgement be in the plaintiff's favour on the merits. This was also done to afford the plaintiff, who was not in court during argument the opportunity to respond to the notice of amendment if he so wished.

Evidence

[6] It is common cause that in August 2007 the plaintiff, second defendant and Ngxande were sent to a uranium mine in Trekkopje, Namibia from Cape Town by the first defendant to carry out a project for which the first defendant was contracted.

[7] The plaintiff is a retired plastic welding technician who had been in the employment of the first defendant for a period of eighteen years.

[8] The plaintiff testified that on 09 August 2007 their way back to Swakopmund the three of them stopped at a pub, where the second defendant and Ngxande drank beer, whilst the plaintiff was waiting in the car. That fact was not denied by the second defendant who however alleged that he and Ngxande only had two 300 ml 'dumpies' of beer each. The plaintiff testified that he saw the second defendant and Ngxande drinking beer when he went to call them after he had been waiting for them to return. He however could not confirm how much they drank.

[9] The plaintiff further testified that the second defendant and Ngxande stopped at the pub for about 2 hours. This was denied by the second defendant who testified that they were in the pub for not more than an hour. He further testified that Ngxande was also eating his food which contributed to them being in the pub for that length of time.

[10] There was however no evidence by the plaintiff as to whether the consumption of alcohol impaired the second defendant's ability to drive in any way. On this point, the second defendant testified that because he had only two dumpies of beer, after he had eaten, the amount of alcohol did not affect his senses in any way.

[11] The three individuals eventually left the pub and drove to Swakopmund. Ngxande was sitting in the middle whilst the plaintiff sat on the left hand side. None of the occupants were wearing a seatbelt. The plaintiff testified that the reason for this was that the bakkie they were travelling in was small and did not allow them to fasten their seatbelts.

[12] According to the plaintiff, whilst they were travelling and on their way to Swakopmund, a fox ran across the road and Ngxande shouted to the second defendant to brake. The second defendant testified that Ngxande shouted 'a jackal' after which he applied brakes and the car swerved off the road and rolled for several times. The plaintiff testified that he did not see a fox himself but he saw a "white thing" moving across the road.

[13] It is common cause that the speed limit on that road is 120 km and the second defendant was driving between 110 and 120 kilometres an hour. The second

defendant testified that the road was an open road, he had his lights on and could clearly see in front of him.

[14] The plaintiff sustained injuries on his right forearm. The three individuals were taken to hospital in Swakopmund but the treatment there was inadequate. They were eventually taken to Groote Schuur Hospital in Cape Town for treatment.

[15] The plaintiff alleged that he was absent from work for three months and that he was unable to do his job due to the pain in his right arm. After about eighteen months he was forced to retire and was paid two months' severance pay.

[16] The plaintiff testified that he knew nothing about a claim submitted in terms of COIDA or to the Road Accident Fund on his behalf.

Evaluation

[17] As regards to the first special plea, the defendants submit that the provisions of COIDA preclude an employee from bringing a delictual claim of damages against the first defendant, his employer.

[18] The purpose of COIDA is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases, and to provide for matters connected therewith.[1]

[19] Section 15(1) provides for the establishment of a Compensation Fund which consists of, *inter alia,* amounts paid by the employers.[2] In terms of section 22(1) an employee who meets with an accident resulting in his disablement, shall, subject to the provisions of COIDA be entitled to the benefits provided for and prescribed in the Act.

[20] In terms of COIDA occupational injury is defined as:

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[1] See COIDA
[2] See section 15(2)(c)

'a personal injury sustained as a result of an accident.'

[21] An accident in turn means:

'an accident arising out of and in the scope of an employee's employment and resulting in a personal injury, illness, or the death of the employee.'

[22] In terms of section 23 (1)(a) of COIDA:

'If an employer carries on business chiefly in the Republic and an employee of his ordinarily employed in the Republic, meets with the an accident while temporarily employed outside the Republic, such employee shall, subject to paragraph (c), be entitled to compensation as if the accident had happened in the Republic.'

[23] COIDA would thus be applicable to the plaintiff, despite the accident having occurred outside the Republic of South Africa. Section 22(5) of COIDA provides further that:

'For the purposes of this Act the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a vehicle driven by the employer himself or one of his employees and especially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment.'

[24] The accident is accordingly deemed by this provision, to have taken place during the course and scope of employment of the plaintiff with the first defendant. This is supported by evidence from both the plaintiff and the second defendant. COIDA is without question applicable in the present circumstances.

[25] The defendants submit that the plaintiff is barred by section 35 of the Act from suing his employer in terms of the common law for delictual damages. Section 35 of COIDA , which is the provision relied on by the first defendant in this special plea provides that:

'(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.'

(2) For the purposes of sub-section (1) a person referred to in Section 56(1) (b), (c), (d) and (e) shall be deemed to be an employer."

[26] Section 56 of COIDA further provides for increased compensation if the employer is found to have been negligent.

[27] The provisions of Section 35(2) read with Section 56 of COIDA are important. Section 35 extends the definition of an employer to certain categories of persons referred to in Section 56 of COIDA. These are:

- An employee charged by the employer with the management or control of the business or of any branch or department thereof;

- An employee who has the right to engage or discharge employees on behalf of the employer;

- An engineer appointed to be in general charge of machinery, or a person appointed to assist such engineer;

- The person appointed to be in charge of machinery in terms of any regulation made under the Occupational Health and Safety Act 1993.

[28] The persons referred to in Section 56 are generally those in management positions. COIDA precludes claims by an injured employee against these categories of persons.

[29] From the provisions of section 35 (1) it is clear that the plaintiff is prevented from bringing an action for damages against his employer. The plaintiff however argues that he is not precluded from bringing an action against the second defendant and that notwithstanding the prohibition in section 35(1) the first defendant remains vicariously liable for the wrongdoing of the second defendant. The plaintiff's counsel referred to the provisions of section 36 of COIDA to advance his argument. Section 36 of COIDA reads as follows:

'(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the "third party") being liable for damages in respect of such injury or disease –

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) the Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2) In awarding damages in an action referred to in subsection (1) (a) the court shall have regard to the compensation paid in terms of this Act.'

[30] According to the plaintiff, COIDA does not alter the common law on vicarious liability of employers for the wrongful deeds or omissions of their employees that were committed in the course and scope of employment with the employer.

[31] That position, in my view, is clear when an accident is caused by a stranger or a non-employee. The circumstances of this case are however different. The second defendant was an employee of the first defendant. In my view, whilst COIDA does not preclude a claim by an employee against a fellow employee who is not in a management position referred to in Section 56, the prohibition on employees and the dependants of employees instituting an action against an employer covers both claims based on an employer's vicarious liability for the acts of employees and claims occasioned by the employer's own negligence. Any different interpretation would in my view be absurd. I agree with Mr Van Reneen's submission that, to argue that liability can be attributed against the first defendant through vicarious liability, in these circumstances will simply make a mockery of the provisions of section 35 (1), especially because employers are generally juristic persons that are primarily represented by their employees who are natural persons. I am therefore of the view that the plaintiff is barred by section 35(1) from bringing an action against his employer.

[32] Mr Olivier who appeared for the plaintiff argued that section 35(1) bars action against an employer expressly *'for compensation on the part of such employer'*. He proposed that this implies that the employee cannot institute action against an employer as such for an occupational injury for which he or she can claim under COIDA but that does not preclude an action based on vicarious liability for damages that are expressly placed outside the ambit of COIDA such as against the third party. Accordingly, even if the plaintiff was awarded damages under COIDA for non-patrimonial loss, he was entitled to sue both the first and second defendants for non-patrimonial loss notwithstanding the provisions of section 35(1) of COIDA.

[33] I do not agree with this proposition. In my view all claims for damages are excluded by COIDA, including those for pain, suffering and loss of amenities of life. In *Sanan v Eskom Holdings Limited*[3] C J Classens J stated the following at paragraphs 7 to 8:

'The predecessor to Act 130 of 1993 was the Workman's Compensation Act No 30 of 1941. Section 7 of that 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. [4] 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. [5] (own emphasis)

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

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[3] 2010 (6) SA 638 (GSJ) (7 October 2010)

[4] 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."

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

required to contribute. [6] '

[34] The plaintiff's argument that COIDA does not exclude claim for general damages must therefore fail.

[35] This brings me to the question of whether or not the second defendant was negligent. Negligence in the form of *culpa* has been defined as the 'failure to exercise a degree of care and skill that a reasonable person would have exercised in the circumstances'.[7]

[36] In *Kruger v Coetzee*[8] Holmes, JA held that negligence arises for the purpose of liability if:

"(a) ***a diligens paterfamilias in the position of the defendant –***

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

[37] In *Mukheiber v Raath & Another*[9] the test for negligence was stated as follows:

"For the purposes of liability *culpa arises if* –

(a) a reasonable person in the position of the defendant –

(i) would have foreseen harm of the general kind that actually occurred;

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

[7] Neethling & another v Oosthuizen 2009 (5) SA 376 (WCC) at para 6 with reference to Kruger v Coetzee at 430 E-F

[8] 1966 (2) SA 428 (A) at 430E-F

[9] 1999 (3) SA 1065 (SCA) at 1077E-F

(ii) would have foreseen the general kind of causal sequence by which the harm occurred;

(iii) would have taken steps to guard against it; and

(b) the defendant failed to take those steps."

[38] The defendants' defence in this case is that of sudden emergency. In *Ntsala and others* v *Mutual and Federal Insurance Co Ltd*[10] the court held that:

'Where a driver of a vehicle suddenly finds himself in a situation of imminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger a driver only has a split-second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision.'[11] (own emphasis).

[39] A driver who is faced with a sudden emergency is required to exercise reasonable care and use reasonable skill to avoid the imminent danger. He is required to take such steps as a reasonable and careful person would fairly be expected to take in the circumstances as the Court in *SA Railways v Symington*[12] said:

'One man may react very quickly to what he sees and takes in, whilst another man may be slower. We must consider what an ordinary reasonable man would have done. Culpa is not to be imputed to a man merely because another person would have realised more promptly and acted more quickly. Where men have to make up their minds how to act in a second or in a fraction of a second, one may think this course the better whilst another may prefer that. It is undoubtedly the duty of every person to avoid an accident, but if the acts reasonably, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for culpa.'

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[10] 1996(2) 184 (T)
[11] At page 192 F-G
[12] 1935 AD 37 at 45

[40] The second defendant testified that a jackal came into the road and that jackal was on the plaintiff's side of the road (plaintiff was sitting on the left). He swerved to the left in order to avoid it, he lost control of the vehicle and it skidded on the gravel and the vehicle capsized. In my view, the second defendant's reaction was not unreasonable. It might have been different had he swerved to the right. That is however not the evidence before me. It must also been borne in mind that a person faced with a sudden situation cannot be judged by the standards of an armchair observer *ex post facto*. The Court must deal with evidence placed before it in order to establish whether the second defendant acted like a reasonable person when faced with the situation.

[41] The second defendant conceded that the road was narrow, it was dark and not raining. He however had clear sight of the road in front of him. His reaction to swerve arose as a result of the jackal that suddenly appeared in front of the vehicle. This is not disputed by the plaintiff. The plaintiff alleges that he did not personally see the jackal, but witnessed a 'white thing' appearing in front of the vehicle. He, however, confirmed that both the second defendant and Ngxande said it was a jackal and that Ngxande shouted 'brake' or 'watch out'. The second defendant cannot be found to have acted unreasonably under the circumstances. He swerved to avoid an animal. That occurrence as well as a shout from Ngxande to 'watch out' may have reasonably encouraged the sudden reaction to swerve and by doing so the second defendant lost control of the vehicle.

[42] It was not, in any event, suggested under cross examination that the second defendant acted unreasonably by swerving. What the plaintiff seems to rely on is that the second defendant drank beer which might have slowed his reaction time to brake. No evidence was led to the effect that the amount of alcohol he consumed impaired his judgement nor was there any indication that he showed signs of a person so impaired by the two 300ml beers he consumed. The second defendant testified that he was not drunk nor was he impaired in any way by the two beers he had drunk. He also suggested that he could not have been drunk, because he had eaten before taking those two beers. Plaintiff's counsel alleged that drinking and driving is plainly wrong and

unlawful. That is not enough in my view, there must be evidence linking the accident to the consumption of alcohol by the second defendant. Either the second defendant should have been observed to have been impaired by the beer or expert evidence should have been led to show that two 300ml of beer consumed by an adult male would impair a person's driving and reaction time in those circumstances.

[43] The second defendant drove within the speed limit allowed, which was between 110 and 120 km, he applied his brakes when it was necessary to do so. Nothing turns on whether he applied breaks before or after Ngxande shouted. Proper analysis of the evidence shows that the reaction was sudden. I therefore cannot find that the collision was caused solely by the second defendant's negligent driving.

[44] In conclusion, I find the following:

1. The plaintiff is precluded from bringing an action against the first defendant, his employer in terms of section 35(1) of COIDA and therefore his action against the first defendant fails.

2. As regards allegation of negligence, the plaintiff has not been able to prove that the collision was caused by the negligent driving of the second defendant.

[45] In view of my findings on negligence, I do not need to deal with whether the claim is limited by the Namibian laws.

[46] As regards costs, my view is that the plaintiff is retired and was injured at during the course and scope of his employment. It was not unreasonable for him to approach the Court. I will therefore not award costs against him.

[47] In the result, I make the following order:

1. The plaintiff's claim against the defendants is dismissed.

2. There is no order as to costs.

NP BOQWANA

Acting Judge of the High Court of South Africa

APPEARANCES:

For the Plaintiff: Advocate G Olivier

Instructed by: J Ramages Attorneys & Conveyancers C/O Ashersons Attorneys, Cape Town

For the Defendant: Advocate Deneys van Reenen

Instructed by: Cohen Shevel and Fourie, Cape Town