Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 23032/2014

With case number: 12552/2013

(Consolidated action)

Before: The Hon. Mr Justice Binns-Ward

Hearing: 25 January; 8-9 February 2021
Judgment : 12 February 2021

In the matter between:

MARIUS JACOBUS MINNIES	Plaintiff
and	
HEINRICH NOWATLYNN AYSHLIE	First Defendant
THE MINISTER OF POLICE	Second Defendant

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 12 February 2021.)

BINNS-WARD J:

[1] In this common law delictual action, the plaintiff claims compensation in damages in respect of the injuries he suffered in a shooting incident at the Merweville police station on 25 July 2012.

[2] The plaintiff was employed as the cleaner at the police station, and it was in that capacity that he was present there at the time he was shot. It was common ground that he fell to be regarded, for the purposes of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA'), as an 'employee' of the second defendant, the Minister of Police.[1] The plaintiff's duties encompassed cleaning the police station and the adjoining cell block and keeping the yard tidy. He was shot by the first defendant, who was a police constable in the South African Police Service stationed at Merweville.

[3] The first defendant was on duty and in uniform at the time of the incident. He was handling his service issue handgun when he shot the plaintiff.

[4] The bullet struck the plaintiff in the head. He lost his left eye as a result, and I was warned by his counsel, when the plaintiff was called to testify, that he could be hard of hearing, reportedly also due to the consequences of the shooting.

[5] As the member of the Cabinet responsible for the police service, the second defendant has been sued on the grounds of his alleged vicarious liability for the wrongful conduct of the first defendant. He delivered a special plea in which he contended that the proceedings by the plaintiff against him were precluded by virtue of the provisions of s 35(1) of COIDA. He also pleaded over and denied any liability at common law for the plaintiff's damages.

[6] Section 35(1) of COIDA provides (underlining supplied for emphasis):

> ***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 <u>occupational injury</u> 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.*

[1] See the definitions of 'employee' and 'employer' in s 1 of COIDA.

[7] The parties agreed during the case management process that the second defendant's special plea should be heard and determined separately from, and before, the other issues in the case. I was given to understand that the case manager judge had made a ruling in terms of rule 33(4) to that effect, and it was on that basis that the matter came up before me for hearing.

[8] I was not satisfied, however, that the separation would be convenient. It appeared to me, and counsel were constrained to confirm, that some of the evidence that the parties proposed to adduce in respect of the special plea would also be material in respect of some of the substantive questions in the action that have been put in dispute by the Minister's general plea. This raised the prospect that much of the same evidence would be led again at a later stage of the action before a different judge if the special plea were dismissed and the matter then proceeded to trial on the merits of the claim. I accordingly made it clear that I was not willing to entertain the special plea in a separate hearing while the merits of the claim remained in issue. The appeal court has emphasised repeatedly that trial courts must approach the question of a separation of issues with circumspection.[2]

[9] Upon being apprised of my position, the second defendant's counsel intimated that the Minister might be willing to concede the issue of liability in the case if the jurisdictional issue raised in the special plea were determined against him. The hearing was consequently adjourned so that the Minister's instructions might be obtained. On the resumption, the Minister's counsel handed up an undertaking placing on record that the Minister would indeed concede liability on the merits of the delictual claim should the special plea be dismissed. The undertaking was expressly made subject to the Minister's right, if so advised, to seek to appeal any adverse determination of the special plea. In the light of the Minister's undertaking, I then agreed to entertain the special plea separately from, and before, the substantive questions in the case and made a fresh ruling in terms of 33(4) to that effect accordingly. It was common ground that the Minister bore the onus of establishing that the special plea should be sustained.

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[2] See e.g. *Denel (Edms) Bpk v Vorster* [2004] ZASCA 4 (5 March 2004), 2004 (4) SA 481 (SCA), [2005] 4 BLLR 313, at para. 3; *Absa Bank Ltd v Bernert* [2010] ZASCA 36 (29 March 2010), 2011 (3) SA 74 (SCA), at para. 21; *Adlem and another v Arlow* [2012] ZASCA 164; [2013] 1 All SA 1 (SCA), 2013 (3) SA 1, at para. 5; *Road Accident Fund v Mohohlo* [2017] ZASCA 155 (24 November 2017), 2018 (2) SA 65 (SCA), at paras. 2-3; *First National Bank v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6 (9 March 2015); 2018 (5) SA 300 (SCA) at paras. 8-14 and *Government of the Western Cape: Department of Social Development v C B and Others* [2018] ZASCA 166 (30 November 2018); 2019 (3) SA 235 (SCA), at paras. 19-25.

[10] The second defendant led the evidence of the first defendant on the factual circumstances of the shooting incident and also the evidence of the police officer who had investigated the charges brought against the first defendant arising out of the incident of attempted murder, alternatively under the Firearms Control Act 60 of 2000 concerning the dangerous handling of a firearm. It suffices to say in that regard that the first defendant was convicted on the alternative charge, to which he had tendered a plea of guilty. He received a wholly suspended sentence of imprisonment. The first defendant's fitness to carry a firearm was also investigated in terms of s 102 of the Firearms Control Act, and he was declared unfit to possess a firearm for a period of five years.

[11] The plaintiff gave evidence concerning the nature of his employment as a cleaner and also as to the facts of the shooting incident, including some contextual history.

[12] The first defendant testified that he had been checking his firearm with a view to making it safe when a shot accidentally went off injuring the plaintiff. He described that he had been holding the pistol up close to his face at that time. He said that the recoil of the pistol when it was fired caused the weapon to bash into his face. A photograph, apparently taken by the investigating police on the same day, was put in to illustrate a superficial injury to the first defendant's cheek just below his left eye.

[13] The first defendant conceded that he had previously given a quite different account of the facts and admitted that he had initially lied about how the incident had happened. It must be said that he persisted with his fallacious account for some time after the incident. His false account was to the effect that the weapon had gone off spontaneously when he was jumping up and down. He said that he had lied because he had been in a state of shock and was frightened that he might be arrested for the negligent use of his firearm. He denied that he had been playing the fool with his firearm. He also denied that he had been in the habit, prior to the incident in issue, of often pretending to threaten people with his firearm by pointing it at them or even pressing it up against their bodies.

[14] The plaintiff testified that he and the first defendant had been what he called 'best friends' at the time. They had not only worked together at the Merweville police station for a number of years, they also spent time together at one another's homes. The plaintiff said that the first defendant used to collect him on most mornings and give him a lift to work. He had also shared duty shifts with the first defendant when he (the plaintiff) had worked afterhours as a police reservist. He said that the first defendant had misbehaved in the manner I have

described in the previous paragraph during some of their shift duties when the shift commander was absent. The plaintiff said that he had initially regarded the first defendant's tomfoolery as something of a joke but had then become concerned that it was dangerous, and that matters could easily go awry. He had become sufficiently concerned about the first defendant's behaviour to raise it at the monthly meeting of Merweville police reservists convened by the local police reservist coordinator and attended by the station commissioner from the nearby Leeu Gamka police station to which Merweville served as a satellite station. He said that he had first raised the matter at the April 2012 meeting and had followed up at the May and June meetings with enquiries as to whether the first defendant had been addressed about his behaviour. It would appear that notwithstanding assurances that the station commissioner would take the matter up, nothing was done about the plaintiff's concerns. He testified that he had searched for the minutes of the meetings concerned but discovered that they had gone missing. He said that the minutes of the reservists' meetings from 2011 and 2013 were available at the Merweville police station, but those for the entire 2012 year were nowhere to be found.

[15] As to the shooting incident itself, the plaintiff testified that it had occurred at about 9:30 in the morning. He said that he and the first defendant had arrived at the police station for work about two hours earlier, and that while he went about his cleaning duties the first defendant had left the police station and gone into the village. He said that when the first defendant returned to the station he brought with him the plaintiff's breakfast which had been given to the first defendant by the plaintiff's wife whom he had encountered at one of the local shops while he had been away from the police station. The breakfast consisted of a pie and a cold drink.

[16] The plaintiff said that he had started having his breakfast in 'the community service centre' (apparently the current term for what has historically been known as 'the charge office'), while the first defendant had gone outside to smoke a cigarette. He had agreed to join the first respondent outside once he had finished his breakfast. He said that he then decided, when his pie was only half eaten, to go outside and join the first defendant. As he opened the back door to the charge office (judged from the photographic evidence it would appear that it might more accurately be called the 'side door'), he observed the first defendant peering around from behind the wall at the corner of the building. He saw that the first defendant was aiming his pistol at him. He said that the first defendant would have been aware that he was coming out of the police station because opening the side door made a

distinctive sound. The plaintiff said that seeing the first defendant in the attitude I have just described was the last thing he could remember until he woke up some time later in a hospital in George, when he discovered that he had been shot. (I believe that a court in this Division can take judicial notice that George is more than 200 km away from Merweville, on the other side of the intervening Swartberg mountain range.)

[17] Inasmuch as there is conflict between the versions of the incident given by the plaintiff and the first defendant, I have no hesitation in accepting that of the plaintiff and rejecting that of the first defendant. The plaintiff impressed on the witness stand as a simple straightforward individual who answered the questions put to him, whether in chief or under-cross-examination, frankly and directly. The first defendant, on the other hand, has given inconsistent versions of the events; and although he admitted that his original story was a dishonest fabrication, I was not persuaded of the truth of his current version. He gave me the very strong impression that he was an individual in denial about his culpability for the serious injuries and consequent disabilities that he had inflicted on the plaintiff.

[18] I found the first defendant's description of how he had held the weapon, supposedly to check whether it had been made safe, improbable. It is most unlikely in my view that anyone practiced in the use of firearms would hold a pistol up virtually at eye level to check whether there was a bullet in the chamber. When demonstrating how he had been holding the weapon, the first respondent used his hands in a manner that might have demonstrated how someone might hold a rifle, not a handgun.

[19] I also found it telling that the photographs taken for forensic purposes shortly after the shooting incident showed what appeared to be marks caused by gun powder residue on the wall at about 1.45 metres above ground level at the corner of the police station where the plaintiff described that the first respondent had been holding the firearm pointing it in his direction. There was no direct evidence as to the character of the substance that caused the marks, but it is evident from the key to the photographs in the police docket that they were thought by the investigators to be gunpowder residue, and that indeed is the impression I formed of them on my consideration of the photographic evidence assessed in the context of the rest of the evidence adduced in the hearing.

[20] The presence of marks that appear to be of the character just discussed is supportive of the plaintiff's version of events and difficult to reconcile with that of the first defendant, whose evidence placed himself some distance from the wall and in an open area when the

shot went off. It would be an extraordinary coincidence that such marks just happened to be found there and that they fitted in so well as corroboration of the plaintiff's version.

[21] Suffice it to record therefore that my consideration of the special plea has proceeded on an acceptance of the facts as related in the plaintiff's evidence.

[22] Counsel on both sides were correctly agreed that the validity of the second defendant's special plea turns on whether the injuries sustained by the plaintiff fall to be characterised as an 'occupational injury' as defined in s 1 of COIDA; and that by virtue thereof, the kernel of the enquiry is whether what happened was an 'accident' within the meaning of the Act.

[23] The term 'occupational injury' is defined in the Act as follows:

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

and the definition of 'accident' is:

> ***'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*.

[24] I do not think that the definition of 'accident' renders the adjective 'occupational' in the term 'occupational injury' redundant. On the contrary, the defined meaning of 'accident' is incidental to, and thus in a sense subordinate to, the term 'occupational injury'. The coincidence of the terms and their defined meanings go to highlight that the injuries that COIDA, as an instrument of social legislation, is directed at providing a compensation safety net for are those that are sustained in circumstances that might reasonably be regarded as evidencing the realisation of one of the risks incidental to the injured employee's employment.[3] That is consistent with the conclusion to which I understand the appeal court came in the very helpful and comprehensive review of s 35(1) and its statutory predecessors and foreign law equivalents provided by Navsa ADP in *MEC for the Department of Health, Free State Province v D* [2014] ZASCA 167 (8 October 2014); 2015 (1) SA 182 (SCA); [2015] 1 All SA 20; [2014] 12 BLLR 1155; (2014) 35 ILJ 3301.[4]

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[3] *Minister of Justice v Khoza* 1966 (1) SA 410 (A) at 417D, Rumpff JA expressed the necessary character of an occupational injury as being one sustained '*in verband met sy werksaamhede*'. That was the construction the learned judge placed on the phrase '*uit sy diens*' in the (signed) Afrikaans text definition of '*ongeval*', which corresponds to '*arising out of*' in the English text definition of accident.

[4] See in particular para 30.

[25] As noted in *MEC for Health*,[5] '[i]n order for a common-law claim against an employer to be precluded, the accident must have occurred during the course of an employee's employment and it must also arise out of that employment'. There is thus a two-tier test in terms of s 35(1) for the 'exclusivity doctrine'[6] inherent in the provision to apply.

[26] Adopting the analysis by Rumpff JA in *Minister of Justice v Khoza* 1966 (1) SA 410 (A) at 417D-H,[7] there is no doubting that the plaintiff's injuries were sustained '*in the course of*' his employment because they were sustained while he was at his place of employment and his presence there at the time was for the purposes of his employment. One tier of the test is therefore satisfied on the facts of this case. The contentious question is the one that has caused difficulty in many of the previous cases in which s 35(1) or its historical equivalents have been in issue; that is whether the incident in which the injuries were sustained was also one that could reasonably be characterised as one that '*arose out of*' his employment. It is in the latter context that the test has sometimes been expressed as being whether it can reasonably be held that the occurrence of the injury to the employee in the particular circumstances was a risk incidental to his or her employment.

[27] The judgment in *MEC for Health* supra, was concerned with exactly the same question, albeit obviously in the very different factual context of that case. Navsa ADP noted that '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'. The learned judge's review of the jurisprudence amply bears out the observation. The nature of the question, assessed in the context of the objects of the Act, makes it what will often be - as the learned judge appositely observed elsewhere in the judgment - a 'vexed' one.[8] There is 'no bright line test. Each case must be dealt with on its own facts'.[9] The court is required to make a judgment call on the facts. The proper determination of this type of question must be grounded on a real world appreciation, not an ivory tower assessment.

[28] Is the risk of being shot by an errant policeman playing the fool with his firearm an incidental risk attaching to employment as a cleaner at a police station? I think not. No more than it would be, for example, in a respect of a person employed as a typist or a clerk at a

[5] In para 17.

[6] MEC for Health supra, in para 8.

[7] The passage is quoted in para 16 of *MEC for Health* supra.

[8] In para 16.

[9] Id, para 31.

police station. One does not ever see that sort of employee going about their work wearing a bullet-proof vest, as one often does uniformed members of the police service in some contexts, but, strikingly, not when they are doing desk duty in a charge office.

[29] Would a member of the public going into the community service centre at his local police station to complain about his neighbour playing loud music in breach of the municipal noise regulations consider a risk of being shot by a wayward policeman an incidental hazard of the undertaking? Of course not. The notional possibility of being shot might well be there, as it sadly is in so many aspects of life in this country, but the idea that a visit to a police station carries with it, as an inherent part of the exercise, the incidental risk of being shot is farfetched in my judgment. There is nothing distinguishable, by way of an incidental risk of personal injury by reason of their mere presence there, between the position of a person employed as a cleaner in a police station and that of a member of the public visiting a police station to make a report or pay a pay a fine.

[30] Mr *Jaga* SC, who appeared for the Minister, submitted however that the facts of the current case are closely comparable to those in *Khoza* supra. He submitted that regard to the result in that case should impel the conclusion in this matter that being shot by a policeman handling his firearm negligently is an incidental risk of employment in any capacity in the police service.

[31] In my view, a careful comparison of the facts in *Khoza* with those of this case shows that the two matters are quite distinguishable. In *Khoza*, the employee who was shot by a constable playing around with his firearm was another police constable. Both of them were engaged at the time in guarding prisoners who were being transported in a van back to prison from a court. The injured policeman therefore sustained his injuries in the context of a police operation in which he was required to work with another armed policeman. Having regard to the object of the legislation (in that matter the Workmen's Compensation Act, which was the then applicable statutory predecessor of COIDA), it is, with respect, readily understandable how the appellate bench unanimously concluded that the risk of being injured by a work colleague in a shooting accident was incidental to the injured policeman's employment.

[32] When one is engaged to work with other employees in tasks in which firearms might have to be used as part of the job, and in which the employees are issued with firearms by the employer for that contingency, it requires no stretch of the imagination to recognise that accidental injuries might result to an employee from the negligent discharge of one of such

firearms by one of the other employees. The risk of sustaining an injury caused in such fashion is very recognisably incidental to the employment, and if it were realised in the course of the employment the resultant harm could very understandably be said to have been incurred arising out of such employment. It would be readily cognisable as an 'occupational injury' in both the specially defined and ordinary senses of the term.

[33] The aforementioned considerations that obtained in the context of the facts of *Khoza*'s case are wholly lacking in the current matter. In my judgment, the Minister has failed to discharge the onus of proving that the plaintiff's injury was sustained in an 'accident' as defined in COIDA. It was not enough merely to show that it happened while he was at his place of work during his hours of work. The fact that the plaintiff's employment brought him into the same space that armed policemen work in did not make the possibility of being shot by one of them a risk that was incidental to his employment any more than the fact that judges work in courthouses, where armed policemen are engaged in the work of guarding prisoners or acting as court orderlies, makes the risk of being shot by one of those policemen an incidental risk in the relevant sense of holding judicial office. Such risk as attaches to the judges in the given example attaches by reason of their presence in the courthouse and therefore arguably *in the course of* their employment. It does not, however, arise out of the nature of their work as judges, and therefore does not *arise out of* their employment.

[34] The defendant's argument in this matter ignored the dichotomous character of an 'accident' as defined in COIDA. It conflated them by suggesting, in essence, that because the injury was sustained *in the course of* the plaintiff's employment by reason that the incident happened at a police station where he worked, it also *arose out of* his employment. The argument ignores that the determination of the risks incidental to any employment - an enquiry bearing on the latter criterion - relates not to whether the accident happened while the employee was working, but to the nature of the work that the employee was engaged to do. The two-tier test for the application of 'the exclusivity doctrine' was satisfied in *Khoza*'s case. It was not satisfied in the current case.

[35] The special plea is therefore dismissed with costs.

A.G. BINNS-WARD

Judge of the High Court