

FILING SHEET FOR HIGH COURT, BISHO

JUDGMENT

PARTIES:

LUMKA TWALO

vs

MINISTER OF SAFETY & SECURITY & ANO

[1] Case Number: **317/05**

DATE HEARD: **26 November 2008**

JUDGMENT DELIVERED: **7 January 2009**

JUDGE: **Y EBRAHIM**

LEGAL REPRESENTATIVES:

Appearances:

[1] for the Plaintiff: **Mr S H Cole**

[2] for the Defendants: **Mr G H Bloem**

Instructing attorneys:

(a) Plaintiff's: **Mbambo Attorneys**

(g) Defendants: **State Attorney**

CASE INFORMATION -

(3) *Nature of proceedings:* **Special Plea**

(4) *Topic:* **Claim for damages by plaintiff for herself and minor children for loss of support due to death of deceased; Defence pleaded by *First Defendant* that plaintiff's claim barred by provisions of s 35(1) of Compensation for Occupational Injuries & Diseases Act No. 130 of 1993**

(5) *Key Words:* **Second defendant and deceased employed as policemen by first defendant; both on duty when second defendant intentionally shot and killed deceased who had taunted him about relationship deceased had with his wife; second defendant motivated by personal malice towards deceased; provisions of s 35(1) held not to be applicable; special plea dismissed with costs**

IN THE HIGH COURT OF SOUTH AFRICA

BISHO

CASE NO: 317/05

In the matter between:

LUMKA TWALO

Plaintiff

and

THE MINISTER OF SAFETY & SECURITY

1st Defendant

VUYANI JEREMIA KEVA

2nd Defendant

JUDGMENT

Y EBRAHIM J:

[2] The plaintiff claims damages, in her personal capacity and in her capacity as mother and natural guardian of her three minor children, from the first and second defendants for loss of support totalling R902 400,00 due to the death of her husband, Thabo Gladstone Twalo ('the deceased'). The plaintiff also claims the sum of R8 500,00 for funeral expenses.

[3] The plaintiff's cause of action is set out in the following paragraphs of the particulars of claim:

'4. On the 9th May 2003 and at the Kleinbullhoek Police Station, Whittlesea the Second Defendant wrongfully, unlawfully and intentionally assaulted one THABO GLADSTONE TWALO by shooting him with a firearm.

ALTERNATIVELY TO PARAGRAPH 4 ABOVE SUPRA:

5. On the 9th of May 2003 and at the Kleinbullhoek Police Station, Whittlesea the Second Defendant shot one THABO GLADSTONE TWALO with a firearm.

6. The aforesaid shooting was attributed solely to the negligence of the Second Defendant, he having been negligent in one or more of the following respects:

6.1 He discharged the firearm at a time when the discharge thereof posed a danger to persons in the immediate vicinity, and more particularly to the said THABO GLADSTONE TWALO.

6.2 He discharged his firearm without establishing whether the discharge thereof was safe at the time.

6.3 He allowed his firearm to be discharged at a time when the discharge thereof posed a danger to persons in the immediate vicinity and more particularly to the said THABO GLADSTONE TWALO.

6.4 He failed to take the necessary precautions to prevent the discharge of the firearm at a stage when the discharge thereof posed a danger to the said THABO GLADSTONE TWALO.

6.5 He failed to avoid shooting THABO GLADSTONE TWALO when, by the exercise of reasonable care and skill he could and should have done so.

7. At all times material hereto the Second Defendant was an employee of the First Defendant and was acting in the course and scope of his employment as such.'

[4] The first defendant denied liability and delivered a plea in which the first defendant admitted that at the time of the shooting the second defendant was an employee but denied that the second defendant was acting in the course and scope of his employment with the first defendant when he shot

the deceased. In addition to the plea the first defendant delivered a first and second special plea.

[5] The defence pleaded in the second special plea is phrased in the following terms:

- '1. The Plaintiff's claim is barred by the provisions of section 35 (1) of the Compensation for Occupational Injuries and Disease Act, 1993 (Act No. 130 of 1993).
2. In paragraph 10 of her Particulars of Claim the Plaintiff alleged that at all times material hereto:
 - 2.1 the Plaintiff and THABO GLADSTONE TWALO (the deceased) were married to one another;
 - 2.2 the deceased was the father of THANDO, NTANDO and BAKHUMBULE; and
 - 2.3 the Plaintiff and the aforesaid minor children were maintained and supported by the deceased.
3. The deceased was on duty and accordingly acting within the course and scope of his duty as the First Defendant's employee when he was shot and killed on 9 May 2003.
4. In terms of section 35 (1) of the above Act no action shall lie by the Plaintiff or the aforesaid minor children, if they are the deceased's dependants, against the First Defendant for the recovery of damages in respect of any occupational injury resulting in the death of the deceased.

WHEREFORE the First Defendant prays that the Plaintiff's claim be dismissed with costs.'

[6] On 17 June 2008, the first defendant brought an application to have the second special plea determined without any evidence being led on the issues raised therein. The Court thereupon issued an order that 'the second special plea raises questions of law which might conveniently be decided separately from any other question' and that '[a]ll further proceedings be stayed until the Applicant's second special plea has been disposed of.' The order did

not indicate if the plaintiff could lead evidence but the parties have informed me that this was an omission and that the plaintiff had not been precluded from doing so. In regard to the costs of the application the Court ordered that this 'be determined by the Court hearing the first defendant's special plea'.

[7] At the commencement of the present hearing the Court was informed that the plaintiff would not be leading any evidence as the parties had reached agreement on certain facts. The agreed facts were that:

- (a) The second defendant and the deceased were permanently employed by the first defendant;
- (b) The second defendant was on duty as a police officer when he shot the deceased;
- (c) At the time of the shooting incident 'the deceased was engaged in detective duties and accordingly was in the course (*sic*) of his duties';
- (d) The second defendant had pleaded guilty to a charge of murder;
- (e) A paternity test carried out in a maintenance matter proved that the deceased was the father of a child born to the wife of the second defendant and the deceased was ordered to pay maintenance for the said child;
- (f) Certain forms which the plaintiff had signed were brought to her by a police officer who informed her that 'the forms were to get money for her' and 'she would have to sign it (*sic*), if she wanted the money'; and

- (g) The first defendant had enquired into the status of the claim and was advised that the claim had been received and was dormant.

[8] The issue that the second special raises for determination is whether the shooting of the deceased was an accident as defined in the Compensation for Occupational Injuries and Diseases Act¹ ('COIDA') and that it caused the deceased to sustain an occupational injury which resulted in his death.

[9] The definitions of an accident and an occupational injury are set out in s 1² of COIDA and an employee's right to compensation is specified in s 22(1).³

¹ Act No. 130 of 1993

² **'1 Definitions**

'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."

'occupational injury' means a personal injury sustained as a result of an accident."

³ **'22 Right of employee to compensation**

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

[10]In *Jooste v Score Supermarket Trading (Pty) Ltd*⁴ Justice Yacoob articulated in explicit terms the purpose of COIDA,⁵ which had repealed the Workmen's Compensation Act⁶ ('WC Act').

[11]What constitutes an accident was discussed fairly extensively in the case of *Nicosia v Workmen's Compensation Commissioner*,⁷ while the Court's comments in *Kau v Fourie*⁸ provide guidance regarding the circumstances in which an injury is considered to be an occupational injury. (Although

⁴ 1999 (2) BCLR 139 (CC)

⁵ See note 4 *supra* at para [12]:

'[12] The purpose of the Compensation Act, as appears from its long title, is to provide compensation for disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. The Compensation Act provides for a system of compensation which differs substantially from the rights of an employee to claim damages at common law. Only a brief summary of this common-law position is necessary for the purposes of this case. In the absence of any legislation, an employee could claim damages only if it could be established that the employer was negligent. The worker would face the prospect of a proportional reduction of damages based on contributory negligence and would have to resort to expensive and time-consuming litigation to pursue a claim. In addition, there would be no guarantee that an award would be recoverable because there would be no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were lost. On the other hand, an employee could, if successful, be awarded general damages, including damages for past and future pain and suffering, loss of amenities of life and estimated "lump sum" awards for future loss of earnings and future medical expenses, apart from special damages including loss of earnings and past medical expenses.'

⁶ Act No. 30 of 1941

⁷ 1954 (3) SA 897 (TPD) at 901G where the Court referred to *Briesch v Geduld Proprietary Mines, Ltd.*, in which Smith J quoted what Lord Linley had said in *Fenton v Thorley*, namely: ' "Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident." '

⁸ 1971 (3) SA at 628H:

'Of die feite wat aanvaar word vir doeleindes van hierdie appél beskou moet word as 'n uitsondering wat in die *Khoza*-uitspraak in die vooruitsig gestel is, of eenvoudig 'n stel omstandighede wat buite die kring van die vereiste kousale verband val, meen ek dat die vereiste van die Wet nie bevredig is nie want dit is nie weens sy diensverhouding dat die eiser die aanranding op die lyf geloop het nie, maar weens die ongeoorloofde, opsetlike en wederregtelike optrede van die werkgever. Die werkgever het hom aangerand omdat hy ontevrede was oor die skade aan die vragmotor. Hierdie motief inagnemende kon die verweerder netsowel die eiser aangerand het op enige ander plek waar hy die eiser raakgeloop het en selfs na diensure. Indien die verweerder byvoorbeeld nie op die perseel was toe die eiser met die vragmotor daar aangekom het nie, en reeds na sy huis vertrek het omdat sy diensure verstryk het en die verweerder sou hom by sy huis gaan opsoek en hom daar aanrand sou die ongeval nie „uit sy diens" ontstaan het nie, maar nie op grond van die feit alleen dat hy reeds van die plek waar hy diens doen, vertrek het nie, maar op grond daarvan dat dit nie weens sy diens is nie, maar weens 'n motief aan die kant van die werkgever om hom te straf vir die beskadiging aan sy voertuig. Die feit dat hy toevallig nog op die perseel van die werkgever was toe die aanranding plaasgevind het, kan die ongeval nie binne die kousale verband bring nie.'

both cases dealt with the previous WC Act the comments in each case are equally apposite insofar as COIDA is concerned).

[12]In his submissions, on behalf of the plaintiff, Mr Cole said that since the first defendant had denied that the shooting was attributable to the negligence of the second defendant the shooting was not an accident. The second defendant had intentionally shot the deceased and this bore no relationship with the deceased's duties as a police officer as he was not carrying out any function in relation to his duties as a police officer. In support of this he referred to the *dicta* of Rumpff JA in *Minister of Justice v Khoza*.⁹ He accordingly contended that the provisions of s 35¹⁰ of COIDA were not applicable.

[13]Mr Bloem, who appeared for the first defendant, cognisant of the difficulty that the intentional shooting of the deceased presented, put forward a creative argument in support of the first defendant's special defence that the provisions of s 35 debarred the plaintiff from claiming damages from the first defendant.

⁹ 1966 (1) SA 410 (AD) at 417G-H:

'Dis in elk geval duidelik dat hierdie kousale verband vir doeleindes van die Wet sou verdwyn, onder andere, indien die ongeval van so 'n aard is dat die werksman die beserings sou opgedoen het al was hy op 'n ander plek as wat sy diens sou vereis het of wanneer die werksman deur sy eie handeling die plaaslike verband tussen diens en ongeval uitskakel of wanneer die werksman opsetlik beseer word deur 'n ander persoon en die motief van die aanranding geen verband hou met die werksaamhede van die werksman nie.'

¹⁰ **'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'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.'

[14]He submitted that the Court should not merely look at the second defendant's motive for shooting the deceased but also at what the deceased was doing at the time. The test, he submitted, was 'not whether or not the "wrongdoer" was acting within the course and scope of his employment but rather whether the "victim" was acting within the course and scope of his employment at the time when he sustained or contracted the occupational injury.'

[15]In amplification of his argument Mr Bloem urged the Court not place a restrictive interpretation on the definition of 'accident'. According to him, the proper interpretation was that an accident included both a negligent as well as an intentional act. In support of his argument Mr Bloem referred to what Justice Yacoob had stated in the *Jooste* case.¹¹

¹¹ See note 3 *supra* at paras [13], [14] and [15]:

'[13] By way of contrast the effect of the Compensation Act may be summarised as follows. An employee who is disabled in the course of employment has the right to claim pecuniary loss only [sections 47-64] through an administrative process [sections 38-46] which requires a Compensation Commissioner [section 2] to adjudicate upon the claim and to determine the precise amount to which that employee is entitled [section 4]. The procedure provides for speedy adjudication and for payment of the amount due out of a fund [section 15] established by the Compensation Act to which the employer is obliged to contribute on pain of criminal sanction [section 87]. Payment of compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee's contributory negligence [section 22(1)]. The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant's actual pecuniary loss [section 56(4)]. An employee who is dissatisfied with an award of the Commissioner has recourse to a court of law which is, however, bound by the provisions of the Compensation Act [section 91(5)]. That then is the context in which section 35(1) deprives the employee of the right to a common-law claim for damages.

[14] The Compensation Act 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 does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute. Compensation is payable even if the employer was not negligent. Though the institution of the regime contemplates a differentiation between employees and others, it is very much an open question whether the scheme is to the disadvantage of employees.

[15] Counsel for the applicant did not base his contention on a comparison of the position of the worker under the scheme contemplated by the Compensation Act with the position at common law. He submitted instead that section 35(1) had to be viewed independently of the rest of the Compensation Act because it did not have to be an integral part of the scheme, that there was no reason why a negligent employer should not be obliged to pay both the assessed contributions to the fund and common-law damages, and that there was accordingly no rational basis for the inclusion of section 35(1) as part of the scheme. He said that the assumption that it was unduly onerous for the employer to be

[16]The definitions in COIDA make it plain that an “occupational injury” is ‘a personal injury as a result of an accident’. An injury sustained by an employee while acting in the course and scope of his employment gives rise to a claim under COIDA provided that the “accident” is one ‘arising out of and in the course of an employee’s employment’. In *Minister of Justice v Khoza*¹² Williamson JA enunciated the test that should be applied.

[17]I do not find any merit in Mr Bloem’s submission that the right to claim compensation in terms of COIDA had been extended by Justice Yakoob’s statement that ‘[p]ayment of compensation is not dependent on the employer’s negligence’ In my reading of the judgment I do not find any substantiation for the contention that the definition of an accident should be broadened to include not only a negligent act but also the intentional killing by one employee of another despite the absence of any causal connection with their respective duties *vis-à-vis* their mutual employer.

obliged to pay both contributions to the fund and common law-damages if negligent was ill-founded. Indeed, counsel confessed that his contention concerning the absence of a rational connection amounted to the employee having “the best of both worlds”. In essence, the contention amounted to this: the nature of the balance achieved by the legislature through the Compensation Act tilts somewhat in favour of the employer while requirements of policy and the nature of the relationship between the employee and the employer indicate that a different balance is appropriate. It was contended that the object of the Act is to provide compensation for workers, not to benefit employers. Section 35(1) benefits only employers. It is therefore not rationally related to the purpose of the legislation.’

¹² 1966 (1) SA 410 (AD) at 419H to 420A:

‘The enquiry on the particular issue is whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident causing injury. If it was, the accident arose “out of the employment”; see the remarks of Lord Shaw in *Simpson v Sinclair*, 1917 A.C. 127 at p. 142, and the case of *Powell v Great Western Railway Co.*, (1940) 1 All E.R. 87, which illustrates the proper approach to each set of facts.’

See also *Ex Parte Workmen’s Compensation Commissioner: In Re Manthe* 1979 (4) SA 812 (ECD) at 815E-F and 817G-H

[18] On the basis of the pleadings and the agreed facts it was not in dispute that the second defendant intentionally shot the deceased and pleaded guilty to a charge of murder. There was no question, therefore, that the deceased's death was due to any negligence on the part of the second defendant. In any event, the first defendant had specifically denied any such negligence. On these facts the shooting was patently not an accident as defined in COIDA.

[19] It was similarly not in dispute that the second defendant was not acting in the course and scope of his employment with the first defendant when he shot the deceased. While it could be said that the shooting was an 'unexpected occurrence' it was by no means 'unintended'. The second defendant's actions in shooting the deceased were premeditated and carried out with the intention to kill him. The second defendant was motivated by personal malice towards the deceased who had taunted him about the relationship the deceased had with his wife.

[20] In addition to the fact that the intentional shooting of the deceased was not an accident he was not, as said by Zulman AJ in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*,¹³ 'about the affairs, or business, or doing the work of, the employer,' namely the first defendant. The sole reason for the second defendant shooting the deceased was the existence of a private dispute between them. The fact that it took place while both of them were on duty as policemen and at their workplace was entirely coincidental. The shooting could have occurred, for that matter, at any other place

¹³ 2001 (1) SA 372 (SCA) at para [5]

entirely unrelated to their work environment as the motive for the shooting bore no causal relationship with their work.

[21]The problem that the line of reasoning postulated by Mr Bloem creates is that the right to claim compensation in terms of COIDA would effectively be unqualified. It would mean that, as long as the employee (i.e. the victim) was acting in the course and scope of his/her employment at the time of the incident, it would not be necessary to show that a causal relationship existed between the nature of the injury and the duties carried out by the employee. It is self-evident that such an approach would lead to anomalous results.

[22]I am accordingly satisfied on the facts, as presented, that the intentional shooting of the deceased was not an accident and that the deceased did not sustain an occupational injury that resulted in his death. The provisions of s 35 of COIDA are accordingly not applicable and the plaintiff is not precluded from claiming damages from the first defendant.

[23]It follows that the first defendant's second special plea falls to be dismissed with costs.

[24]The costs of the application by the first defendant for the special plea to be argued without evidence being led were left for determination by the Court hearing the special plea. In my view such costs should be costs in

the special plea and must, as a result, similarly be borne by the first defendant.

[25]In the result, the first defendant's second special plea is dismissed with costs inclusive of the costs of the first defendant's application that was heard on 17 June 2008.

JUDGE Y EBRAHIM

30 December 2008

Judgment delivered on:

7 January 2009

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