IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case no: 06/22312

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) ~~OF~~ INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

26.6.2009
DATE

SIGNATURE

In the matter between:

MANKAYI THEMBEKILE Plaintiff

And

ANGLOGOLD ASHANTI LIMITED Defendant

J U D G M E N T

JOFFE J:

1. The plaintiff alleges in his first amended particulars of claim ("particulars of claim") that he was employed by the defendant as a mineworker from 4 January 1979 until 11 September 1995. While so employed he contracted certain occupational diseases. He alleges that in 1993 and in 1999 he was diagnosed to be suffering from pulmonary tuberculosis and

that in August 2006 he was informed that he had contracted silicosis and obstructive airways disease.

2. Arising from these alleged occupational diseases the plaintiff instituted action against the defendant. He claims damages in the sum of R 2,612,747-10. The claim is calculated as follows;

Past loss of earnings	R 177,899-16
Future loss of earnings	R 560,247-98
Future medical expenses	R 1,374,600-00
General damages	R 500,000-00.

3. The plaintiff's claim is grounded in delict. The basis of the claim is that the defendant owed the plaintiff a duty of care to provide a safe and healthy environment within which to operate. This duty arose by virtue of both the common law and statute. It is the plaintiff's allegation that his exposure to harmful dust, in particular silica dust, in the work place caused or contributed materially to the fact that he contracted pulmonary tuberculosis. Furthermore, it is the plaintiff's case that, the exposure to silica dust during his employment, caused the plaintiff to develop silicosis and that exposure to the harmful dust and gasses caused or contributed materially to the fact that he developed obstructive airways disease.

4. In paragraph 10 of the particulars of claim it is alleged that;

4.1 each of the mines on which the plaintiff worked at the instance of the defendant was a "controlled mine" as contemplated in

Chapter 11 of the **Occupational Diseases in Mines and Works Act, 78 of 1973** ("**ODIMWA**");

4.2 defendant was and is the "owner" of such mines;

4.3 the plaintiff performed "risk work" as defined in section 13 of **ODIMWA**;

4.4 the occupational diseases from which the plaintiff suffers constitutes compensatable diseases as defined in section 1 of **ODIMWA**;

4.5 the plaintiff was certified in term of section 48(1) of **ODIMWA** to be suffering from a compensatable disease; and that he received compensation of R 16320 from the Compensation Commissioner in terms of section 94 of **ODIMWA**.

4.6 the plaintiff is precluded by the provisions of section 100(2) of **ODIMWA** from receiving any benefit in terms of the **Compensation for Occupational Injuries and Diseases Act, 30 of 1993** ("**COIDA**").

4.7 by reason of his exclusion from the benefits payable in terms of **COIDA**, the plaintiff is not an employee as contemplated in section 35 of **COIDA**. Accordingly the plaintiff is not precluded by section 35 of **COIDA** from bringing an action against the defendant.

5. It is the allegation referred to in pare 4.7 supra, that elicited the defendant's exception. The defendant excepted to the plaintiff's cause of action on the ground that section 35(1) of **COIDA** constitutes a statutory bar to the plaintiff's claim. This section will be considered in greater detail after its genesis has been established.

6. Counsel where at idem that the legislative history of the relevant interventionist legislation which provided, and still today provides, compensation for workmen in South Africa, is of fundamental importance in the determination of the exception. It is to this history that reference will now be made.

7. For present purposes the legislative history commences with the **Miners' Phthisis Act, 34 of 1911**. This Act established a fund of state monies from which a statutory board was authorised to grant on application allowances ***"to persons who are or have been employed in the mines...and who shall be wholly or partially incapacitated by the disease known as miners' phthisis..."***.

8. Two further statutes relating to phthisis were enacted shortly thereafter. The first, the **Miners' Phthisis Act, 19 of 1912**, established a fund known as the Miners' Phthisis Compensation Fund and provided for contributions to the fund by employers (as defined in the Act) and a specified single payment by the then Union Government. A further fund known as the Miners' Phthisis Insurance Fund was established and was

funded for present purposes by contributions made by employers (again as defined in the Act). The second, the **Miners' Phthisis Act Amendment Act, 29 of 1914** amended the 1912 Act in certain respects which need not be detailed herein.

9. Whatever the statutory provisions may have been pre Union, the **Workmen's Compensation Act, 24 of 1914** consolidated, amended and extended throughout the then Union of South Africa, the statutory provisions in respect of compensation for injuries suffered by workmen in the course of their employment or for death resulting from such injuries. Section 1(1) of the Act provided that, in the event of personal injury or death caused to a workman by accident and the injury arose out of and in the course of the workman's work, his employer ***"shall subject to the provisions of the Act, be liable to pay compensation in accordance with the First Schedule to this Act"***. Section 1(1)(b) expressly preserved the workman's right to claim damages ***"if such accident was caused by an act or default of the employer or of some person for whose act or default the employer is responsible..."***. It is noteworthy that section 1(2) deemed certain training in, competitions in respect of and actual first aid, ambulance or rescue work conducted at a mine, to arise out of and be in the course of the workman's work for his employer. Section 2(1) of the Act excluded certain classes of workman from the operation of the Act. None of the classes so excluded are relevant to the determination of the exception, save to note that workmen who work in mines were not so excluded.

10. In summary the 1914 Workmen's Compensation Act provided compensation for a workman payable by the employer in the circumstances stipulated in the Act. At the same time the Act preserved the workman's right to claim delictual damages. A miner would qualify in terms of the Act as a workman even if his entitlement to compensation arose out of the activities referred to in section 1 (2) of the Act. Alongside this statute, the miner specific legislation provided for compensation.

11. The scourge of phthisis resulted in the enactment of a further statute in regard thereto. This was the **Miners' Phthisis Act, 44 of 1916**. According to its long title the purpose of this statute was ***"(t)o make further provision for the relief and assistance of persons suffering, and the dependents of persons dying, of miners' phthisis or any other disease of the lungs or respiratory organs contracted during underground work on mines; to effect a diminution in the intensity and pervalence of any such disease; and to provide further as to other matters incidental thereto."*** The two funds referred to in para 8 supra continued to provide compensation to persons employed in mines who suffered from miners' phthisis or other lung diseases contracted during underground work.

12. The **Workmens' Compensation (Industrial Diseases) Act, 13 of 1917** amended the 1914 Act to provide for compensation in respect of industrial diseases listed in the Schedule to that Act. The listed diseases

where cyanide rash, lead poisoning or its sequelae and mercury poisoning or its sequelae. Prior to their enactment of this statute compensation was limited to personal injury caused by accident. The Act now included compensation for certain limited industrial diseases.

13. Accordingly as at 1917;

13.1 provision had been made for the relief and assistance of, and the grant of benefits to persons employed in the mines who suffered from miners' phthisis or other lung diseases contracted during underground work.

13.2 provision had been made for the compensation of workmen for injuries suffered in the course of their employment and for death resulting from such injuries. This compensation was provided by the employer.

13.3 the Phthisis Acts, referred to supra, did not exclude the right of an employee to claim damages from his or her employer in term of the common law.

13.4 none of the Workmen' Compensation Acts referred to supra, excluded the right of an employee to claim damages from his or her employer in terms of the common law. An injured workmen had an election as to whether to institute proceedings to recover compensation at common law or to institute proceedings for compensation under the 1914 Act. Where a claim for compensation was made under the Act, a workman was however barred from instituting proceedings at

common law against the employer in respect of the same accident.

13.5 certain industrial diseases qualified for compensation in terms of the Workmen's Compensation Act.

14. In 1934 a major innovation occurred in the provision of compensation as described above. This was effected by the enactment of The **Workmen's Compensation Act, 59 of 1934**. This Act repealed the 1914 and 1917 Workmen's Compensation Acts referred to above. Act 59 of 1934 introduced a system of compensation to a workman injured in an accident. Fault of the employer was not a sine qua non for compensation. In return the workman lost his right to claim damages against his employer, even if he was able to prove delictual liability on the part of the employer. In addition to providing compensation for injuries, the Act provided for compensation for certain industrial diseases. It should be emphasised that claims for compensation in terms of the Act were made in terms of a prescribed procedure against either the employer or the employer's insurer (See sections 2, 44, 46 and 74 to 50 of the Act).

15. Act 59 of 1934 achieved this in the following manner:

15.1 Section 2(1) provided:

"If an accident to a workman arising out of and in the course of his employment happens after the commencement of this Act, and results in such

workman's disablement or death his employer shall pay to him or if he dies to his dependants, compensation in accordance with the provisions of this Act ..."

15.2 Section 4 provided:

"(1) No action at common law shall lie by a workman or any dependant of a workman against such workman's employer or the principal as defined in section forty-five to recover any damages for or in respect of any injury resulting in the disablement or death of such workman caused by any accident happening after the commencement of this Act; and any claim for such damages shall be determined under and in accordance with this Act.

(2) No liability for compensation shall arise save under and in accordance with the provisions of this Act in respect of any such injury."

15.3 Section 5 of Act 59 of 1934 provided for the possibility of the increase of compensation where the accident was due to the employer's negligence. The additional compensation was determined by a magistrate in an amount the magistrate deemed equitable. In addition section 46 of the Act provided that if the accident arose in circumstances creating a legal liability in a third party to pay damages, the workman was entitled to take proceedings both against the third party for

damages, and against the employer for compensation. The Act dealt with the eventuality of both compensation and damages being recovered. See as to the effect of the Act, **Maasberg v Springs Mines Limited 1944 TPD 1 on 6**.

15.4 Chapter V of the 1934 Act dealt with industrial diseases and provided for compensation in respect of "scheduled diseases" Section 60 of the Act provided inter alia, as follows;

"Where it shall appear from a certificate granted by a medical practitioner that a workman is suffering from a scheduled disease causing disablement or that the death of a workman was caused by any such disease, and that such disease was due to the nature of the workman's employment as set out in the Second Schedule to this Act at any time within the twelve months previous to the date of such disablement or death, the workman or, if he is deceased, his dependants, shall be entitled to claim compensation under this Act as if such disablement or death had been caused by an accident, and the provisions of this Act shall, subject to the provisions of this Chapter , mutatis mutandis, apply unless at the time of entering into the employment, the workman wilfully and falsely represented to the employer in reply to a specific question

that he had not previously suffered from the disease: Provided..."

The compensation provided for in section 60 was payable in terms of section 61(1) by the employer who last employed the workman during the period of twelve months referred to in section 60 unless that employer proved that the disease was not contracted while the workman was in such employment".

15.5 A ***"scheduled disease"*** was defined in the Act as meaning ***"any disease specified in the Second Schedule to this Act"***. The Second Schedule referred to the three industrial diseases namely cyanide rash, lead poisoning or its sequelae, mercury poisoning or its sequelae provided for in the 1917 Act and further referred to an additional disease namely ankylostomiasis (hook worm). In regard to the latter disease it is noteworthy that in the description of work from which the disease must have arisen for the workman to be entitled to compensation is ***"In mining carried on underground"***.

16. In regard to the issue presently being determined, it is important to emphasise that the effect of the provisions of section 60, read together with section 4 of the 1934 Act, was to provide the employer with an indemnity against delictual claims arising not only from injuries caused by accidents but also from claims arising from defined industrial diseases contracted by a workman. It should however be noted that whilst defined

industrial diseases where included in the 1934 Act, the regime in respect of phthisis as provided for in the enactments referred to above remained unaffected.

17. The **Workmen's Compensation Act, 30 of 1941** repealed the 1934 Act in its entirety and introduced an entirely new statutory system of compensation. The Act provided for a compensation fund from which workers where paid prescribed compensation in certain prescribed circumstances. The 1941 Act, as did the 1934 Act included an indemnity for the employer against common law claims arising from injuries due to accidents at work and in respect of industrial diseases.

18. Act 30 of 1941 achieved this in the following manner:

18.1 Section 27 (1) provided that ***"(I)f an accident happens to a workman resulting in his disablement or death, the workman shall be entitled to the benefits under this Act; Provided that ...".***

18.2 "Accident" was defined in section 2 to mean ***"an accident arising out of and in the course of a workman's employment and resulting in personal injury".***

18.3 Provision was made in section 64 for the establishment of an accident fund, which became liable for payment of compensation, unless the employer was "individually liable" for payment thereof (see section 37). An "employer individually liable" was defined in section 2 as ***"an employer who in***

terms of section 70 is exempt from paying assessments to the accident fund." Section 70 identified various employers who are exempt from paying assessments in terms of the Act. The section need not be considered any further for purposes hereof.

18.4 Section 43 provided for the possibility of an increase in the compensation payable if the Workmen's Compensation Commissioner found that the accident was due to the negligence of the employer.

18.5 Chapter X dealt with compensation in respect of "Industrial Diseases". Section 89 thereof provided as follows; ***"Where it is proved to the satisfaction of the commissioner in such manner as he may determine that the workman is suffering from a scheduled disease due to the nature of his occupation and is thereby disabled for employment, or that the death of the workman was caused by such disease, the workman shall be entitled to compensation as if such disablement or death had been caused by an accident, and the provisions of this Act shall, subject to the provisions of this Chapter, mutatis mutandis apply unless at the time of entering into the employment, the workman wilfully and falsely represented to the employer that he had not previously suffered from the disease...".***

18.6 A "scheduled disease" was defined in section 2 as meaning

"any disease specified in the Second Schedule to this Act". In the Second Schedule as amended reference is made to the disease Ankylostomiasis arising from the occupation of ***"mining carried on underground"*** and ***"Silicosis, asbestos or other fibrosis of the lungs caused by dust*** "arising from ***"(A)ny occupation (other than a "dusty atmosphere" as defined in the mineral Pneumoconiosis Act, 1956), in which workmen are exposed to the inhalation of silica dust, asbestos dust or other mineral dust".*** The Second Schedule as amended provided for many more diseases than had been previously provided for.

18.7 Section 7 provided as follows:

"Substitution of compensation for other legal remedy from and after the fixed date –

(a) no action at law shall lie by a workman or any dependant of a workman against such workman's employer to recover any damages in respect of a injury due to accident resulting in the disablement or the death of such workman; and

(b) no liability for compensation on the part of such employer shall arise under the provision of this Act in respect of any such disablement or death."

19. On a reading of the Second Schedule prior to the repeal of the 1941 Act, silicosis was expressly excluded from the operation of the Act, if it arose

from an occupation in a "dusty atmosphere" as set out in the schedule. Such silicosis continued to be provided for in particular legislation.

20. The major innovation introduced by Act 30 of 1941 was the provision of a fund which paid compensation to workmen as opposed to the workmen's employee paying the compensation. A host of legislation had been enacted between 1925 and 1941 dealing with phthisis. All this legislation was repealed by The Silicosis Act, 47 of 1946. This Act, in section 1 thereof, defined ***"silicosis"*** as ***"Any form of pneumoconiosis due to the inhalation of mineral dust."*** The definition further set out deeming provisions to determine if a person was suffering from silicosis in the first stage, second stage or third stage. ***"Tuberculosis"*** was likewise defined in section 1 as meaning ***"tuberculosis of the respiratory organs"***. The definition further set out deeming provisions to determine if a person was suffering from tuberculosis. A "dusty occupation" was likewise defined in section 1.

21. Act 47 of 1946 proceeded to provide:

    21.1 for the establishment of two funds namely the "Scheduled Mines Compensation Fund" (the "A" Fund) and the "Registered Mines Compensation and Outstanding Liabilities Fund" (the "B" Fund) (section 30)

    21.2 for the funding of these funds by way of the payment of levies "from all owners of scheduled mines and from all owners of registered mines (section 33)

21.3 for the award of benefits from the funds by the Silicosis Board (sections 2 and 94) to miners suffering from silicosis and tuberculosis and tuberculosis combined with silicosis (sections 59 to 64)

21.4 section 84 of the Act provided for the reduction pensions of persons who were also entitled to pensions under the Workmen's Compensation Act 30 of 1941

22. The Silicosis Act of 1946 operated in tandem with the Workmen's Compensation Act of 1941. As is apparent from section 84 the two Acts speak to each other. What is noteworthy of the communication in section 84 is that it refers to a monthly allowance or to a provision in terms of the Act being taken into account and reduced where the miner or a dependant of a deceased miner is also entitled to a monthly allowance or a pension under the Workmen's Compensation Act of 1941.

23. The Silicosis Act of 1946 was in turn repealed by the Pneumoconiosis Act, 57 of 1956. It is to this Act that reference was made in the amended second schedule to Act 30 of 1941 (see paragraph 18.6 supra).

24. The Pneumoconiosis Act of 1956:

24.1 established a Pneumoconiosis Certification Committee. The Committee (section 8) was empowered in section 9 to determine ***"whether any person who works or who has worked in a dusty atmosphere at a controlled mine is***

suffering from pneumoconiosis or from tuberculosis or from pneumoconiosis and from tuberculosis...".

24.2 defined in section 1 a "dusty atmosphere" as ***"a place where dust occurs or is a product which causes or is likely to cause pneumoconiosis in persons employed in mining operations therein or thereat, if such place is – (a) below the natural surface of the earth; or ..."***

24.3 provided in section 54 for the declaration of scheduled and registered mines as controlled mines

24.4 prohibited in section 16 work in a dusty atmosphere at a controlled mine without a prior medical examination and the issuing of the certificate of fitness

24.5 established in section 55 a Controlled Mines Compensation Fund and the payment in section 79 and 83 to 87 of benefits to sufferers from pneumoconiosis and tuberculosis and to the dependents of deceased miners.

25. This Act was in turn repealed by the Pneumoconiosis Compensation Act 64 of 1962. The purpose of this Act was ***"(T)o consolidate and amend the law relating to the payment of compensation in respect of certain diseases contracted by persons employed in mines and matters incidental thereto".***

26. In section 1 (xliv) of the 1966 Act pneumoconiosis is defined. Mineral dust is in turn defined as ***"dust derived from any mineral, including coal and soil, in the course of mining operations"*** (section 1 (xxxvi)).

27. The 1962 Act dealt inter alia with the following matters: restrictions on employment in dusty atmosphere (sections 18 and 19), the examination of persons and the granting of certificates of fitness (sections 20 to 42), declaration of mines as "controlled mines" (sections 43 and 44), the estimation of the pneumoconiosis risk of controlled mines and the notification thereof (sections 66 to 68) and payment of benefits to miners and other labourers and their dependents (section 71 to 80).

28. Section 94 (2) of the 1962 Act provided for a reduction of a monthly allowance or pension where the recipient was also in receipt of a monthly allowance or pension in terms of the Workmen's Compensation Act of 1941.

29. Finally reference must be had to **ODIMWA** and **COIDA**.

30. In June 1973 **ODIMWA** was assented to. The purpose of the Act was to ***"consolidate and amend the law relating to the payment of compensation in respect of certain diseases contracted by persons employed in mines and works and matters incidental thereto."*** **ODIMWA** repealed the Pneumoconiosis Compensation Act of 1962.

31. In section 1 (xiv) of **ODIMWA** ***"compensatable disease"*** was defined as meaning:

> ***(a) pneumoconiosis;***
>
> ***(b) the joint condition of pneumoconiosis and tuberculosis;***
>
> ***(c) tuberculosis which, in the opinion of the certification committee, was contracted while the person concerned was performing risk work, or with which the person concerned was in the opinion of the certification committee already affected at any time within the twelve months immediately following the date on which that person performed such work for the last time;***
>
> ***(d) permanent obstruction of the airways which, in the opinion of the certification committee, is attributable to the inhalation of dust in the course of the performance of risk work;***
>
> ***(e) any other permanent disease of the cardiorespiratory organs which in the opinion of the certification committee is attributable to the performance of risk work;***
>
> ***(f) any other disease which in the opinion of the certification committee is attributable to the performance of risk work at a mine or works and which the Minister has, subject to the provisions of***

subsection (2), by notice in the Gazette declared to be a compensatable disease; (xxxviii).

Chapters vi and vii deal with the payment of compensation to persons who had become entitled thereto.

32. The various chapters of **ODIMWA** dealt respectively with the following:

32.1 Chapter i – the establishment of a bureau, director and staff to give effect to the provisions of the Act.

32.2 Chapter ii - the control of mines and works and the determination of risk.

32.3 Chapter iii - the provision of certificates of medical fitness and medical and other examinations.

32.4 Chapter iv - certification of compensatable disease.

32.5 Chapter v - the establishment of the commission, an advisory committee and the establishment of the Mines and Works Compensation Fund.

32.6 Chapter vi - the provision of compensation to White and Coloured Persons.

32.7 Chapter vii - the provision of compensation to Bantu Persons.

32.8 Chapter viii - General.

33. Section 100 of **ODIMWA** provided that

"(1) No person shall be entitled to benefits under this Act in respect of any disease for which he has received or is still receiving full

benefits under the Workmen's Compensation Act (Act No. 30 of 1941).

(2) Notwithstanding anything in any other law contained, no person who has a claim to benefits under this Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or was employed at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), or any other law."

34. It is manifest from section 100 that the legislator intended to ensure that the claimant did not receive benefits under the Workmen's Compensation Act, 1941 and **ODIMWA**.

35. Most if not all of the legislation thus far referred to contained offensive racial characterisation and differentiation. Reference has not been made thereto herein as it does not take the determination of the issue at hand further. Suffice it to say that such characterisation and differentiation belongs to the past and cannot be adequately deprecated.

36. **COIDA** was assented to on 24 September 1993. It repealed the Workmen's Compensation Act of 1941. The Act's long title is ***"(t)o 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". It was amended by the Compensation for Occupational Injuries and Diseases Amendment Act, 61 of 1997.

37. To achieve this purpose **COIDA** in its present form:

37.1 has in section 1 a wide definition of "employee" and "employer". This is in keeping with the intention of the Act as is apparent from its long title.

37.2 establishes in section 15 a fund, known as the "compensation fund". This fund is under the control of the Director-General, who, in terms of section 16 (1) (a) must apply the monies in the fund to inter alia ***"the payment of compensation, the cost of medical aid or other pecuniary benefits to or on behalf of or in respect of employees in terms of this Act where no other person is liable for such payment".***

37.3 the compensation fund is funded inter alia by assessments by the Director-General calculated on a percentage of the annual earnings of employees and is payable by the employers (see sections 15 (2), 80 to 83 and 86).

37.4 creates an entitlement in section 22 to the benefits provided for and prescribed in the Act for an employee or his dependents if such employee meets with an accident resulting in his death or disablement.

37.5 creates an entitlement in section 65 to compensation provided

for and prescribed in the Act for an employee, if it is proved to the satisfaction of the Director-General ***"(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arises out of and in the course of his or her employment; or***

(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"

37.6 Provision is made in section 56 (1) (d) for increased compensation if an employee meets with an accident or contracts an occupational disease due to the negligence inter alia of his employer.

38. It is correctly submitted by the excipient's counsel that the clear intention of **COIDA** is to cast the net of employees entitled to compensation in terms of **COIDA** as widely as possible, so that only those employees specifically excluded will not fall within the scheme for payment of compensation.

39. There are clear indications in **COIDA** that the net was cast wide enough to include employees employed at mines.

39.1 Section 25, in relevant part, provides as follows:

"Accidents during training for or performance of emergency services

If an employee meets with an accident –

(a) .....

(b) while he is engaged in or about his employer's mine, works or premises in organised first aid, ambulance or rescue work, fire-fighting or any other emergency service;

(c) while he is, with the consent of his employer, engaged in any organised first aid, ambulance or rescue work, fire-fighting or other emergency service on any mine, works or premises other than his employer's,

such accident shall for the purposes of this Act, be deemed to have arisen out of and in the course of his employment."

39.2 The reference in section 25 (b) to ***"his employers mine"*** and in section 25 (c) to ***"on any mine"*** clearly conveys that **COIDA** is applicable to employees employed at mines.

39.3 Section 56(1)(d), in relevant part, provides as follows:

"Increased compensation due to negligence of employer

If an employee meets with an accident or contracts an occupational disease which is due to the negligence

(a) of his employer;

.....

(d) of an engineer appointed to be in general charge of machinery, or of a person appointed to assist such engineer in terms of

any regulations made under the Minerals Act, 1991 (Act 50 of 1991);

the employee may, notwithstanding any provisions to the contrary contained in this Act, apply to the commissioner for increased compensation in addition to the compensation normally payable in terms of this Act."

39.4 The reference to a person appointed under the regulations made under the Minerals Act, 1991, again points to an intention on the part of the Legislature that **COIDA** will apply to employees employed in mines.

39.5 Section 81, in relevant part, provides as follows:

"Employer to keep record

(1) An employer shall keep a register or other record of the earnings and other prescribed particulars of all the employees, and shall at all reasonable times produce such register or record or a microfilm or other microform reproduction thereof on demand to an authorised person referred to in section 7 for inspection.

.....

(4) A health and safety representative elected in terms of .... the Mine Health and Safety, 1996 (Act 29 of 1996), ... shall have the

right to inspect, and where appropriate bring to the attention of the commissioner, any register, record or document which the employer must maintain, keep or complete in terms of this Act"

39.6 The Mine Health and Safety Act is a statute specifically promulgated to provide for the protection of the health and safety of employees and other persons at mines.

39.7 Section 65, the relevant portion whereof have been set out in para 37.5 supra. It is not disputed that the occupational respiratory diseases referred to in para 2.1 of Schedule 3 are mining related "occupational diseases". The "occupational diseases" relied upon by the plaintiff in his particulars of claim are silico-tuberculosis and chronic obstructive pulmonary disease which are listed in Schedule 3. Section 65 (6) of **COIDA** makes it clear that "(T)he provisions of this Act regarding an accident shall apply mutatis mutandis to a disease referred to in subsection (1) except when such provisions are clearly appropriate.

40. As is apparent from the aforegoing both **COIDA** and **ODIMWA** provide statutory regimes which deal for the compensation payable to employees found to be suffering from occupational diseases contracted in consequence of their work. Together they comprise two pieces of

interventionist legislation where provision is made for the claims of employees. Together they comprise the relevant compensation legislation. **COIDA** however contains in section 35 a provision of far reaching consequences. **ODIMWA** does not contain a similar provision.

41. Section 35 (1) of **COIDA** provides as follows:

"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."***

There is no limitation in the language used by the Legislature in section 35(1). Accordingly there is no reason to restrict the provisions of section 35(1) to injury or disease dealt with in **COIDA**. Section 35(1) does not do so. It provides that ***"(N)o action shall lie by an employee ... for the recovery of damages in respect of any occupational injury or disease ... against such employee's employer ..."***. On its express wording it would apply to any occupational injury or disease no matter how arising.

42. The effect of the aforegoing would be that claims in terms of ODIMWA and **COIDA** would be treated identically. As correctly submitted by the

defendant's counsel, as far as legislative policy is concerned, there is no relevant distinction between the two Acts. There is no rational basis for protecting the employer from common law liability in return for funding statutory compensation for diseases contracted by mine employees in **COIDA** but not in **ODIMWA**. If the plaintiff's contention that the protection afforded to employers in section 35 of **COIDA** does not exclude the common law liability for diseases compensatible under **ODIMWA** is correct, it requires the court to assume that the Legislature intended to create and perpetuate a wholly irrational but fundamental distinction between the two Acts. There is no good reason for this assumption to be made.

43. On the contrary there is an indication that the Legislator was content that section 35(1) of **COIDA** would apply to claims in terms of **ODIMWA** as well. The **Occupational Diseases in Mines and Works Amendment Act, 208 of 1993** was legislated after **COIDA** in 1993. It removed the offensive racial characterisation and differentiation referred to in **ODIMWA**. It also provided that the owner of a controlled mine (as defined) ***"shall from the date of commencement of a compensatable disease pay the legitimate and proven cost incurred by or on behalf of a person in his or her service, or who was in his or her service at the commencement of a compensatible disease, in respect of medical aid necessitated by such disease"***. Unfortunately for the plaintiff the amendment does not assist his in respect of his medical expenses. The noteworthy fact, however, is that shortly after enacting

COIDA the legislature saw no need to amend **ODIMWA** to exclude section 35(1) of **COIDA** from its operation.

44. In the circumstances it would appear that section 35(1) of **COIDA** applies equally to **ODIMWA**.

45. It was argued on behalf of the plaintiff that section 35(1) of **COIDA** "does not speak to those persons who are covered by the provisions of **ODIMWA**". Firstly it was argued that the maxim ***"generalia specialibus non derogant"*** applies. In amplification hereof it was submitted that ODIMWA is clearly specialist legislation that deals with specific injuries and diseases and **COIDA**, as general legislation, does not affect **ODIMWA**'s terms. In this regard reliance was placed on the dictum in R v Gwantshu 1931 EDL 29 at 31 where the following was held:

"When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim per Lord Hobhouse delivering the judgment of the Privy Council in Barker v A Edger ([1898] AC at 754). 'Where general words in a later Act are capable of reasoning and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special

legislation is not to be held indirectly. . . altered . . . merely by force of such general words, without any indication of a particular intention to do so. "In such cases it is presumed to have only general cases in view and not particular cases which have been already otherwise provided for by the special Act. Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language . . .(Maxwell Interpretation of Statutes 7th ed at 153)."

As was held by Nicholson J in Mngadi v Beacon Sweets & Chocolates Provident Fund and Others 2004 (5) SA 388 (D) at 393 – 394 A: ***"The maxim generalia specialibus non derogant has been applied in countless cases and provides that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specialty dealt with by earlier legislation, a court is not entitled to hold that earlier and special legislation has been indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."***

46. The maxim does not have application where the legislative intention is manifestly clear and unambiguous. See S v Mseluku 1968 (2) SA 704 (N).

47. Section 7 of the Workmen's Compensation Act, 30 of 1941 (see para 18.7 supra) has been the subject of judicial interpretation. It was held in Petterson v Irvin & Johnson Ltd 1963 (3) SA 255 (C) that ***"The words employed by the Legislature are of the widest connotation. The words "no action shall lie" and the words "to recover any damages" are as widely framed as they could be"***. This judgment was followed in Mlomzale v Mizpah Boerdery (Pty) Ltd 1997 (1) SA 790 C at 793 I.

48. Furthermore as was held in Petz Products v Commercial Electrical Contractors 1990 (4) SA 196 (C) where different acts deal with the same or kindred matter ***"they should in a case of uncertainty or ambiguity, be construed in a manner so as to be consonant and inter-dependant..."*** By holding that section 35(1) of **COIDA** applies equally to **ODIMWA** the enactments are so construed.

49. In the circumstances the maxim aforementioned is not applicable. Section 35(1) is clear and unequivocal and accordingly the maxin is of no application.

50. Secondly, it was argued that the defendants interpretation of section 35(1) of **COIDA** conflicts with the principles relevant to the interpretation of statutes. Plaintiff firstly referred to Veldman v Director of Public Prosecutions, Witwatersrand Local Division 2007 (3) SA 210 (CC) where it was held at para 26: ***"Generally, legislation is not to be interpreted***

to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning". Plaintiff's counsel referred in support hereof to Barlow & Jones Ltd v Elephant Trading Co TS 637 at 648 and to Transvaal Investments Co Ltd v Springs Municipality 1922 AD 337 at 347. These judgments make it clear that the statute would be so interpreted unless the language of the statute is plain or it so expressly appears in the statute. In the present matter the language of the statute is plain. The plaintiff secondly referred to Government of the Republic of Iran v Berends 1998 (4) SA 107 (NB) at 118 J – 119 J where it was stated that the Legislature does not intend a consequence that is harsh, unjust or unreasonable and if there is doubt as to the interpretation, the most beneficial statutory interpretation must be adopted. It is correctly pointed out by the defendant's counsel that this form of beneficial interpretation arises when the rights of the State in one or other guise are to be weighed against the rights of individual citizens. In the present matter the balance must be struck between the competing interests of two citizens and in circumstances where the Act speaks clearly. In the result despite the principle set out above the explicit language of the Act cannot be overridden.

51. It was then argued that if the Act is interpreted in terms of section 39 (2) of the Constitution, an interpretation will be arrived at that enhances access to the courts and would thus preclude section 35(1) of **COIDA** applying to **ODIMWA**. It was argued with reference to Investigating

Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) ltd and Others; in re Hyundai Motor Distributors and Others v Smit N.O and Others 2001 (1) SA 545 (CC) at para 23 that it is established that: ***"judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section"***. This approach is to be followed unless the interpretation sought to be placed on the provision is unduly strained. If the only interpretation of a provision that brings it within constitutional bounds is unduly strained, a court is precluded from interpreting the provision in that way and it would be necessary for a litigant to challenge the provision directly. This approach has been followed in various decisions of the Constitutional Court. See for example de Beer N.O v North-Central Local Council and South-Central local Council and Others (Umhlatuzana Civic Association intervening) 2002 (1) SA 429 (CC) at para 11 and Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC) at para 31.

52. The plaintiff contends that, if the defendant's interpretation were to be adopted, section 35(1) of **COIDA** would violate two constitutional rights. The first is the right to equality and the second is the right to access to the courts.

53. Section 9 of the Constitution provides as follows:

"1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
3. *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
4. *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
5. *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

54. The equality jurisprudence of the Constitutional Court has been conveniently summarised in Harksen v Lane 1998 (1) SA 300 (CC) para 54:

"... it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specific ground, then discrimination will have been established. If it is not on a specific ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have

been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) ***If the discrimination is found to be unfair then a determination will have to be made as to whether the provisions can be justified under the limitations clause (section 33 of the interim Constitution)."***

55. The plaintiff relies on two forms of differentiation. Firstly that **ODIMWA** makes no provision for increased compensation to be paid to those employees whose injuries or diseases where caused by the negligence of their employers whereas **COIDA** does make provision therefore and secondly the compensation that one may claim in terms of **COIDA** is substantially more favourable than the benefits that one may claim in terms of **ODIMWA**.

56. The difficulty with the argument advanced on behalf of the plaintiff is in the identification of a class of persons against whom the state has unjustly discriminated and a class of persons against whom they have not. Clearly there is no class of persons against whom there has been unfair discrimination. If there is discrimination it relates to the benefits the various claimants can claim. The scale of benefits has not been challenged. Furthermore a comparison of benefits would be a futile exercise as they cannot be weighed against each other.

57. In any event the language used in section 35(1) of **COIDA** is clear and unequivocal.

58. in Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening) 1999 (2) SA 1 (CC) the Constitutional Court,in the course of considering whether section 35(1) of **COIDA** infringed section 9(1) and (3) of the Constitution because it deprived employees of their common law right to claim damages against their employers, considered the purpose and effect of **COIDA** and the exclusion of the employers liability as well as the fact that compensation is payable even where the employer is not negligent. It is important to note that the Constitutional Court in the Jooste case declined to involve itself in a policy choice of the alternatives to the advantage to be confirmed by **COIDA** leaving the policy choice to the Legislature. In so doing the court noted that:

"The Legislature clearly considered that it is appropriate to grant the employees certain benefits not available at common-law. The

scheme is financed through contributions from employers. No doubt for these reasons the employee's common-law right against an employer is excluded. Section 35 (1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment."

59. Regard being had to all of the aforegoing the interpretation as required by section 39 (2) of the Constitution does not avail the plaintiff.

60. At the commencement of the hearing of the matter the parties arrived at an agreement. They agreed as follows:

"1. At the commencement of argument the court raised issues relating to the plaintiff's argument foreshadowing a direct constitutional attack on s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA").

2. In order to address those issues, the parties have agreed that the plaintiff will not pursue the direct constitutional challenge at this stage.

3. The parties have further agreed that, if the exception is upheld, either in this court or an appellate court, the plaintiff shall be given leave to amend its particulars of

claim to introduce the direct constitutional challenge to s 35 of COIDA."

61. It is clear that the matter is of such a nature that the successful party should be entitled to the costs of two counsel.

62. In the result the following order is made:

1. The exception is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.
2. The plaintiff is given leave to amend his particulars of claim within 14 days from date of delivery of this judgment.