

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case no: **34404/2007**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: **01 SEPTEMBER 2023**

SIGNATURE

In the matter between:

TSHEPO ABRAM MANZINI

PLAINTIFF

And

GREAT NORTH TRANSPORT (PTY) LTD

RESPONDENT

J U D G M E N T

MAKHOBHA, J

[1] The plaintiff claim for damages against the defendant as a result of an incident that took place in defendant's premises on 24 December 2004.

[2] The plaintiff started to work for the defendant in the year 1991. In the year 2000 the plaintiff was promoted to a position of supervisor.

- [3] The defendant is Great North Transport (PTY) LTD a state-owned entity with registered address situated at 2[...] H[...] v[...] R[...] street Polokwane, Limpopo province.
- [4] By agreement between parties, the merits and quantum were separated, and the matter proceeded in respect of the merits only.
- [5] In proving his case the plaintiff was the only witness. He testified that he was employed by the defendant and when the incident in question took place, he was a supervisor.
- [6] On 24 December 2004 he was on duty when an altercation ensued between himself and a certain Mr. Hlongwane, also employee of the defendant.
- [7] The rancour between him and Mr. Hlongwane was about a reduced salary paid to the latter.
- [8] On 24 December 2004 when Mr. Hlongwane came to the depot where the plaintiff is stationed. Mr. Hlongwane during the altercation with him said to him that *"If he is not paid what is owed to him one of them must die"*
- [9] Mr. Hlongwane took out a firearm and fired a shot at him but missed. During the incident Mr. Hlongwane was on duty, his shift started at 7am and was supposed to end at 7pm. The defendant did not call any witness and closed its case.
- [10] **THE FOLLOWING IS COMMON CAUSE:**
- 10.1 Both Mr. Hlongwane and the plaintiff were employed by the defendant on the day of the incident.
- 10.2 The defendant admitted the shooting incident.
- 10.3 The procedure when one enters the premises of the defendant and that there is a signage which indicates that firearms are not allowed in the premises.

[11] The defendant in its plea submits that the offending actions by Mr. Hlongwane were not taken within the course and scope of his employment with the defendant and the defendant is not vicariously liable to the plaintiff¹.

[12] Furthermore, the defendant excepts to the plaintiff's particulars of claim on the basis that it does not disclose a cause of action. Counsel for the defendant in his heads of argument² avers that the plaintiff did not state on what legal duty or duty of care it relies on but only pleaded that such duty exists.

[13] The defendant raised a special plea against the plaintiff's claim, premised on the provisions of section 35(1) of the Compensation for Occupation Injuries and Diseases Act 130 of 1993 (the "Act").

[14] Counsel for the defendant leaves the special plea in the court's hands and submit that defendant will abide by the court's decision³

[15] I will first deal with the exception raised by the defendant in his heads of argument.

[16] There are two types of exceptions; being an objection that a pleading is vague and embarrassing, and an objection that a pleading does not disclose a cause of action⁴. The two types of exceptions are adjudicated differently. The aim of exception procedure is to void the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost-effective manner⁵.

[17] **Provisions of rule 18 (4) of Uniform Rules reads as follows:**

¹ Paragraph 3 of the plea CaseLines 001-66 to 001-68

² Page 12 par 35.

³ Page 20 par 62.

⁴ Rule 23 of the Uniform Rules of Court.

⁵ Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706.

“Every pleading shall contain a clear and concise statement of the material facts upon which pleader relies for his claim... with sufficient particularity to enable the opposite party to reply thereto”.

- [18] In reading and interpreting pleading, minor blemishes are irrelevant, and pleadings must be read as a whole. Only facts must be pleaded and not the law⁶.
- [19] The defendant must persuade the court that upon every reasonable interpretation, the particulars of claim fail to disclose a cause of action⁷.
- [20] The defendant argues that, the plaintiff's failure to specify the duty of care and the circumstances on which he relies for such duty is expiable.
- [21] In my view the argument by the defendant has no merit since the plaintiff is precluded to plead the evidence but only the facts⁸. The excipient is therefore not entitled to an order upholding the exception. The defendant's exception is dismissed.
- [22] With regard to the special plea and the question whether Mr. Hlongwane when he acted it was within the course and scope of his employment, I will deal with these two defences by the defendant together.
- [23] Counsel for the defendant in persuading the court on the special plea referred the court to various decisions.
- [24] However, I am going to refer to two decisions which have relevance on the special plea and “acting within the course and scope of employment.”

⁶ Jowell v Bramwell – Jones and others 1998 (1) SA 836 (W) at 902 I-J and 903 A- B.

⁷ First National Bank of Southern Africa Ltd v Perry N.O and other 2001 (3) SA 960 (SCA) at 965D.

⁸ Jowell op cit.

[25] The first matter is *MEC for Health, Free State v DN*⁹ the facts are slightly similar with the facts in this case. Furthermore, the defendant also relied on section 35(1) of Compensation for Occupational Injuries and Disease Act 130 of 1993 (hereinafter referred to as COIDA).

[26] In the MEC for Health case a medical practitioner was raped by an intruder at hospital where she was working.

[27] In paragraph 10 of the judgment the court said the following:

“[10] Thus, as can be seen, in order for COIDA to operate and preclude a common-law claim, the fact must show that the employee either contracted a disease or met with an accident arising out of and in the course of his or her employment. This requires a determination of whether the respondent’s rape constituted an ‘accident’ for the purpose of COIDA and arose out of and in the course of her employment by the appellant. If that is answered in the affirmative, the special plea should succeed.”

[28] The court further held that the question to be asked is whether the act causing the injury was a risk incidental to the employment. The court was quick to point out that there is no bright-line test and each case must be dealt with on its own facts.

[29] The court concluded by saying that the rape perpetrated on the doctor did not arise out of the doctor’s employment.

[30] In *Churchhill v Premier, Mpumalanga and another*¹⁰ in this case the plaintiff whilst on duty, she was subjected to violence resulting in physical and psychiatric injuries. She sued the employer.

⁹ 2015 (1) SA 182 (SCA).

¹⁰ 2021 (4) SA 422 (SCA).

- [31] The employer raised plea that her claim was precluded by section 35 of COIDA. The court reiterated what was said in *MEC for Health* case that there is no bright line test.
- [32] The court further found that the incident bore no relation to her duties and was the result of misplaced anger directed at her. Thus, her injuries did not arise out of her employment.
- [33] In my view the incident in this case before me took place within the course and scope of the plaintiff's employment because he was still on duty and within the company's premises when Mr. Hlongwane fired a shot at him.
- [34] The two decisions that I have referred to above both agree that the question to be asked is whether the risk was incidental to the employment.
- [35] In my view the shooting of the plaintiff by Mr. Hlongwane was not connected with the duties and employment of the plaintiff. To put it differently the firing of the shot by Mr. Hlongwane to the plaintiff did not arise out of the plaintiff's employment but simply a dispute between the plaintiff and Mr. Hlongwane. Thus therefore, in my view the claim by the plaintiff is not precluded by section 35 of COIDA. I find that the plaintiff succeeded in proving the claim on preponderance of probabilities.
- [36] I make the following order:

36.1 The special plea is dismissed.

36.2 The defendant is liable to compensate the plaintiff for such damages as may be agreed or proved arising out of the injuries or otherwise suffered by the plaintiff on 24 December 2004.

36.3 Cost of suit.

MAKHOB A J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD AND RESERVED JUDGMENT: 24 JULY2023

JUDGMENT HANDED DOWN ON: 01 SEPTEMBER 2023

Appearances:

For the Applicant: Adv T C Kwina (instructed by) Makhafola & Verster Inc

For the Respondent: Adv W Gibbs (instructed by) Venter de Villiers