

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT ON SPECIAL PLEA

Case No: I 3093/2011

In the matter between:

DISHO MUHURA NO
PAULINE MBAWO SIKWAYA

FIRST PLAINTIFF
SECOND PLAINTIFF

And

LEWCOR CC

DEFENDANT

Neutral Citation: *Muhura NO v Lewcor CC* (I 3093/2011) [2018] NAHCMD 375 (23 November 2018)

CORAM: PRINSLOO J

Heard: 08 October 2018

Delivered: 23 November 2018

Flynote: Delict – Loss of support – Plaintiff suing for loss of support under common law alleged as a result of the due to the negligence of the defendant – Special plea raised

by defendant – Defendant indicating that plaintiffs are barred by the Employee's Compensation Act 30 of 1941 from pursuing a claim for damages in terms of the common-law against the defendant – Court to determine whether s 7 of the Employee's Compensation Act 30 of 1941 precludes any action against an employer for damages in terms of the common law.

Summary: The plaintiff instituted summons wherein in the particulars of claim, she claimed for loss of support in the death of the late Mr. Andreas Sikwaya Ndara, whom the plaintiff alleges is a result of the defendant's negligence.

The defendants however raised a special plea by virtue of s 7 of the Employee's Compensation Act 30 of 1941 which precludes any action against an employer for damages in terms of the common law.

As the plaintiffs were unrepresented and chose to litigate in-person, the court now had to determine the special plea raised by the defendant.

Held – In order to consider the argument advanced on behalf of the defendant, it was necessary for this court to have regard to the Compensation for Occupational Injuries and Diseases Act 130 of 1993 of South Africa, which legislation has a similar section incorporated in the said Act. The reason for this approach was simply the position no similar cases in this jurisdiction dealt with the issued at hand.

Held – The Employee's Compensation Act, Act 41 of 1930 provides for the administrative process for the recovery of compensation as set out in s 50 to 63 of the Act in an instance where an employee meets with an accident, resulting in his/her disablement or death.

Held further – I am of the considered view that the facts of the matter in *casu* falls within the ambit of the Employee's Compensation Act and the plaintiffs are therefore by virtue

of s 7 of the Act, barred from suing defendant in terms of the common law for damages.

ORDER

1. The special plea is upheld.
2. Each party to pay their own costs.

JUDGMENT

PRINSLOO J:

Introduction

[1] The parties before me, to whom I will refer as they are in the main action, are as follows:

The first plaintiff is Disho Muhura NO, an adult female residing in Okahandja, acting in her capacity as the legal guardian of minor child R.W.S born on 19th of September 2005. The second plaintiff is Pauline Mbawo Skiwayo, an adult female residing at Kaguni Village, Rundu.

[2] The defendant LEWCOR CC,¹ a close corporation, incorporated in terms of the Close Corporation Act, 1984 (Act 69 of 1984) with its registered offices at Old Southern Pipeline Site, North Street, Okahandja, Republic of Namibia.

¹ As per the plea of the Defendant on the merits the Defendant was converted to a private company during 2016.

[3] At the initial stages of the proceedings Navachab Gold Mine Namibia was cited as the second defendant in this matter but the plaintiffs subsequently abandoned their claim against Navachab and only proceeded against the defendant.

Background

[4] The plaintiffs issued summons in this matter on 28 September 2011 pursuant the passing away of the late Andreas Sikwaya Ndara, who died on 02 June 2009 in a fatal accident at Navachab mine. The late Mr. Ndara was employed as a general worker with the defendant who was contracted by Navachab Gold Mine Namibia (Pty) to render services at its mine in Karibib.

[5] It was alleged in the plaintiffs' particulars of claim that the fatal accident was due to the negligence of the defendant.

[6] The defendant and Navachab Gold Mine defended the said action where after the defendants (as they were then) raised exceptions to the plaintiffs' particulars of claim.

[7] Unfortunately the proceedings came to a halt towards the end of 2012 and remained inactive until 2016.

[8] A further amended particular of claim was filed on behalf of the plaintiffs in April 2016.

[9] In terms of the amended particulars of claim, the plaintiffs claimed that as a result of the defendant's negligent conduct, the first and second plaintiffs lost their right to support from the deceased and claimed damages the following terms:

'a) Payment in the amount of N\$ 1 000 000 (One Million Dollars);

- b) Interest on the amount of N\$ 1 000 000 (One Million Dollars) at the rate of 20% per annum from the date of judgment to the date of final payment;
- c) Cost of suit;
- d) Further and/or alternative relief.'

[10] The defendant filed its plea following the further amended particulars of claim but filed a notice of intention to amend its plea on 20 November 2017. The proposed amendment was opposed by the plaintiffs and after hearing argument in that interlocutory matter during May 2018, leave was granted to amend the defendant's plea and the defendant was ordered to file its amended plea on or before 28 May 2018.

[11] At this point, I need to interpose and mention that from the time of instituting the action, two legal firms came on record and subsequently withdrew as legal practitioners of record. In 2017, the plaintiffs applied for legal aid from the Legal Aid Directorate, which application was successful, however the legal practitioners so appointed did not accept the brief. Therefor from approximately June 2017, the plaintiffs had no legal representation. From the time that the plaintiff first appeared before me in Judicial Case Management, a concerted effort was made by the court to explain to the plaintiffs the dangers of conducting their own case in a complex matter as the one *in casu*, and directing the plaintiffs to Legal Aid Directorate for the new appointment of a legal practitioner on their behalf. Unfortunately, both the plaintiffs were insistent that they will conduct this matter themselves and as a result, no comprehensible arguments were advanced in either their opposition to the application for leave to amend and special plea.

The special plea

[12] The defendant filed its amended plea on 23 May 2018 and raised a special plea during 2017 following the filing of the amended particulars of claim.

[13] The special plea raised on behalf of the defendant is as follows, which I quote in full:

1. The late Mr. Andreas Ndara was employed by the Defendant on a permanent basis, who was paid a gross annual salary of N\$ 28 000.00.

2. The late Mr. Andreas Ndara was an employee as envisaged by the provisions of section 3 of the Employee's Compensation Act 30 of 1941 (the 'Act'). The Defendant is an employer as envisaged by the provisions of section 5 of the Act. The Plaintiffs are dependents as envisaged by the provisions of section 4 of the Act.

3. By virtue of the provisions of section 7(a) of the Act, no action in law lies against the defendant by the Plaintiffs and the Defendant is not liable towards the Plaintiffs for any damages (the occasioning of which is not admitted) in respect of the death of the late Mr. Ndara.

4. By virtue of the provisions of section 7(b) of the Act, no liability (the existence which is denied) for compensation as against the Defendant arises save as provided for in terms of the provisions of the Act, in respect of any death.

WHEREFORE the Defendant prays that the Plaintiff's claim be dismissed with costs, such cost to include the costs of one instructing and one instructed counsel.'

[14] The arguments in respect of the special plea was heard on 08 October 2018.

[15] At this juncture, it is imperative to add that although the defendant pleaded to the merits of the plaintiff's claim, I am not required to consider the plea on the merits for purposes of this ruling. With that said, I shall proceed to the arguments advanced.

On behalf of the defendant

[16] Mr. Van Vuuren, counsel acting on behalf of the defendant, argued that the late Mr. Andreas Ndara was employed by the defendant on a permanent basis as an

employee earning a gross salary of N\$ 28 000 per annum. He argued that the late Mr. Ndara was an employee as envisaged by the provisions of s 3 of the Employee's Compensation Act, 30 of 1941 ('the Act').

[17] In turn, the defendant was an employer as envisaged by the provisions of s 5 of the Act and the plaintiffs are dependents as envisaged by the provisions of s 4 of the Act.

[18] The late Mr. Ndara passed away as a consequence of injuries he sustained from an accident that occurred while he was carrying out his duties as an employee of the defendant.

[19] Mr. Van Vuuren submitted that whether the accident occurred as a result of the negligence of the late Mr. Ndara or that of the defendant is irrelevant to the consideration of whether the plaintiffs as a consequence of s 7 of the Act, are precluded from instituting action against the defendant.

[20] By virtue of the provisions of s 7(a) of the Act, no action in law lies against the defendant by the plaintiffs and the defendant is not liable towards the plaintiffs for any damages, which remains denied, in respect of the death of the late Mr. Ndara.

[21] In concluding, Mr. Van Vuuren argued that the remuneration of the late Mr. Ndara being N\$ 28 000 per annum was within the threshold as set out in the Act, in fact the threshold at the time of Mr. Ndara's passing was N\$ 72 000² per annum and therefore falls within the ambit of the Act.

[22] Mr. Van Vuuren submitted that the plaintiffs should have lodged a claim in terms of the Act and therefore the special plea should be upheld with costs.

On behalf of the plaintiffs

² The amount referred to in section 3(2)(b) is set at N\$72 000 with effect from 1 March 2001 (GN 100/2001, GG 2544).

[23] Unfortunately the plaintiffs did not file any arguments that are of assistance to this court in reaching a decision herein. The matter was postponed from 28 September 2018 to 08 October 2018 to give the plaintiff a further opportunity to obtain assistance in drafting their heads of argument but what was presented to court was a reply to the defendants averments in earlier proceedings was due to the delay by the plaintiff in this matter and a request for an interpreter, which was duly provided to them.

The Applicable Law

[24] In its special plea, the defendant took the point that the plaintiffs are barred by the Employee's Compensation Act 30 of 1941 from pursuing a claim for damages in terms of the common-law against the defendant. In this regard the court is referred to s 7 which reads as follows:

'7 Substitution of compensation for other legal remedy

(a) No action at law shall lie by an employee or any dependant of an employee against such employee's employer to recover any damages in respect of an injury due to an accident resulting in the disablement or the death of such employee.

(b) No liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of any such disablement or death.'

[25] "Accident" in terms of this Act means an accident arising out of and in the course of an employee's employment and resulting in a personal injury.³

[26] The question that this court needs to adjudicate on is whether the aforementioned section precludes any action against an employer for damages in terms of the common law and in order to do so, the court needs to consider whether the facts of this case falls within the ambit of the section in question.

³ S. 2 of the Act as per Definitions.

[27] The purpose of the Act is to amend and consolidate the laws relating to compensation for disablement caused by accidents to or industrial diseases contracted by workmen in the course of their employment, or for death resulting from such accidents and diseases.⁴

[28] Section 7(a) refers to the employee and employer and it would be important to determine what the relationship between that the late Mr. Ndara and the defendant was.

[29] If one has regard to the particulars of claim, it is common cause that the late Mr. Ndara and the defendant were in an employee/employer relationship.⁵ There appears to be a dispute on whether the late Mr Ndara was appointed as a general worker or as a qualified drill operator. The dispute regarding his exact position is however not relevant for these proceedings. It is also common cause that his annual salary was below the threshold as set out in s.3 of the Act.

[30] In terms of s. 3 of the Act, the definition of **an employee** is as follows (with reference to what is relevant to the matter *in casu*):

'(1) Subject to the provisions of subsection (2) and unless inconsistent with the context, "employee" in this Act means any person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, is oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes-

(a)

(b)

(c) when an employee is dead or under disability, his representative, his dependants and any other person to whom or for whose benefit compensation is payable;

⁴ As per the long title of the Act.

⁵ Paragraph 8 of the Further Amended Particulars of Claim.

(d)

(2) The following persons **shall not** be regarded for the purposes of this Act as workmen-

(a)

(b) persons whose annual earnings calculated in the manner set forth in section 41 exceed R36 000 * ⁶or, from a date determined by the Minister by notice in the Gazette, such higher amount as he may so determine;'

[31] In terms of the Act, an employer is defined as follows (again with reference to the relevant portion only):

'5 Definition of "employer"

(1) Subject to the further provisions of this section and unless inconsistent with the context, **"employer"** in this Act means a person who employs an employee and includes the State and any person controlling the business of an employer.'

[32] As the plaintiff brought the action in their capacity as dependents of the late Mr. Ndara, it is also important to have regard to what the Act regards as dependants. Section 4 reads as follows:

'4 Dependants of an employee

(1) Subject to the further provisions of this section and unless inconsistent with the context, "dependant" in this Act means-

(a) the surviving spouse, if married to the employee at the time of the accident;

⁶ See footnote 2.

- (b) if there is no surviving spouse who, at the time of the accident, was wholly or partly dependent upon the employee for the necessities of life ,any person with whom the employee was in the opinion of the Commission living as man and wife at the time of the accident;

[Para (a) and (b) substituted by sec 3(a) of Act 5 of 1995.]

- (c) any child: Provided that in the case of an adopted child the Commission is satisfied that the child was adopted prior to the accident;
- (d) a parent or step-parent or an adoptive parent who adopted such employee if the Commission is satisfied that the employee was in fact adopted and in either case that the employee was adopted prior to the accident;
- (e) a son or daughter (other than a child as defined): a brother, sister, half-brother, or half-sister: a sister or brother of a parent: a grand-parent or grand-child;
- (f) any other person who, in the opinion of the Commission, was at the time of the accident wholly or partly dependent upon the employee for the necessities of life:

[Para (f) substituted by sec 2 of Act 28 of 1977.]

Provided that-

- (i) a dependant other than one referred to in paragraph (f) shall not be entitled to compensation unless, at the time of the accident, he was wholly or partly dependent upon the employee for the necessities of life;
- (ii) any right to compensation shall ipso facto cease upon the death of the dependant to whom such compensation was payable; and
- (iii) unless the contrary is proved, the surviving spouse or child of an employee or a person referred to in the second proviso to section 40(1)(c) who

would, if under eighteen years of age, be the child of the employee, shall be deemed to be dependent for the necessaries of life upon such employee.'

[33] In order to consider the argument advanced on behalf of the defendant, it will be necessary for me to have regard to the Compensation for Occupational Injuries and Diseases Act 130 of 1993 of South Africa, which legislation has a similar section incorporated in the said Act. My motivation to consider the South African position in this regards is because after a diligent search, I was unable to find similar cases in this jurisdiction.

[34] Section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) provides that:

'(1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.'

[35] In *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC), the Court was called upon to decide on the constitutionality of the s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and in doing so, addressed the differentiation between employees injured in the course of their employment and other common law personal injury claimants. Yacoob J writing for the Constitutional Court stated as follows:

[13] 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 also 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.

[14] 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 through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled. The procedure provides for speedy adjudication and for payment of the amount due out of a fund established by the Compensation Act to which the employer is obliged to contribute on pain of criminal sanction. 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. 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. 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. That then is the context in which s 35(1) deprives the employee of the right to a common-law claim for damages.

[15] 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. ...' (quoted without reference to the footnotes)

[36] The Employee's Compensation Act, Act 41 of 1930 provides for the administrative process for the recovery of compensation as set out in s 50 to 63 of the Act in an instance where an employee meets with an accident, resulting in his/her disablement or death.

[37] In *Sanan v Eskom Holdings Limited*,⁷ C J Claassens J stated the following at paragraphs 7 to 8:

'The predecessor to Act 130 of 1993 was the Workman's Compensation Act No 30 of 1941. Section 7 of that Act contained a similar provision as is contained in section 35 of the 1993 Act. It has been held that section 7 of the 1941 Act totally precludes any damages action by an employee against an employer resulting from injuries suffered or occupational diseases contracted in the exercise of the employee's employment.⁸ It has also been held that section 7 precludes any claim by the employee for the difference between the compensation paid under that Act and the common law damages suffered by the employee.⁹ (own emphasis)

It is now settled law that the bar contained in section 7 of the 1941 Act and section 35 of the 1993 Act is not unconstitutional. The bar against civil claims contemplated therein is rationally connected to the purposes of the Act of providing financial compensation to employees from a compensation fund to which employers are required to contribute.¹⁰

[38] I am of the considered view that the facts of the matter in *casu* falls within the ambit of the Employee's Compensation Act and the plaintiffs are therefore by virtue of s 7 of the Act, barred from from suing defendant in terms of the common law for damages.

[39] I am in agreement with the argument advanced on behalf of the defendant that the plaintiffs should have lodged a claim in terms of the Act.

⁷ 2010 (6) SA 638 (GSJ) (7 October 2010).

⁸ See *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) where Botha JA at 644A – B held:

"The conclusion to which I come, therefore, is that sec. 7 (a) precludes a workman's common law action for all damages, including damages for pain and suffering and loss of amenities, in respect of an injury which is compensable under the Act."

⁹ See *Vogel v South African Railways* 1968 (4) SA 452 (ECD).

¹⁰ See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) at 11 paragraph [15].

Costs

[40] The only remaining issue to decide is the issue of costs. It appears that the plaintiffs in this matter are indigent.

[41] In *Nationwide Detectives and Professional Practitioners Cc v Standard Bank Of Namibia Ltd*¹¹ Shivute CJ made the following remarks on the issue of costs:

[40] The basic rule is that an award of costs is in the discretion of the court. In *Kruger Bros & Wasserman v Ruskin*,¹² a decision that has been consistently followed by South African courts, Innes CJ said the following in respect of this basic rule:

. . . the rule of our law is that all costs - unless expressly otherwise enacted - are in the discretion of the Judge. His discretion must be judicially exercised; but it cannot be challenged, taken alone and apart from the main order, without his permission.¹³

[41] The learned author Cilliers also points out that even the general rule, namely that costs follow the event, is subject to the above overriding principle¹⁴. It seems to me that when a court considers issues relating to whether or not to grant an order as to costs and the extent to which such costs are awarded, it exercises discretion...'

[42] The court is cognisant of the history of this matter and that cost should normally follow the event but considering the fact that the first plaintiff acts in a nominal capacity on behalf of the minor child and the second plaintiff is the unemployed, elderly mother of the late Mr. Ndara, I am of the opinion that this is not an appropriate matter wherein the plaintiff should be mulcted with costs.

¹¹ 2008 (1) NR 290 (SC).

¹² 1918 AD 63 at 69.

¹³ At 69. See also *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) ([1999] 2 All SA 304) at 1055F - G (SA) and other authorities cited by AC Cilliers *Law of Costs* 3 ed at 2 - 5 para 2.03, fn 1.

¹⁴ AC Cilliers *Law of Costs* 3 para 2.03 at 2 - 5.

[43] My order is therefore as follows:

1. The special plea is upheld.
2. Each party to pay their own costs.

J S Prinsloo
Judge

APPEARANCES

PLAINTIFFS: In- Person

DEFENDANT: A Van Vuuren (with him R Linde)
instructed by Theunissen, Louw Legal Practitioners,
Windhoek