IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: AR272/2021P
Case No: KZN/DBNRC: 5705/13

In the matter between:

ANDRE WILHELM LIEBENBERG **APPELLANT**

and

CRAIG ASHLEY KARNAGARAN PILLAY **RESPONDENT**

ORDER

On appeal from: Civil Regional Court, Durban, sitting as the court of first instance magistrate Mr BS Gumede presiding:

The appeal is dismissed with costs.

JUDGMENT

Henriques J (Jikela AJ concurring)

Introduction

[1] The civil action presented to the Durban Regional Court revolved around the question as to whether the plaintiff's common law claim against the Minister of Safety and Security as a result of his alleged wrongful arrest and detention was precluded by section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

[2] To this end, the parties filed a joint statement of factual assumptions for the purpose of determining the question of law in terms of the rule 29(4) of the Magistrates' Court Rules.

[3] The regional magistrate found in favour of the respondent for the reasons that appear in a judgement dated 27 May 2021, and as amplified by a statement, in terms of rule 51(8) of the Magistrates' Court Rules, dated 2 August 2021. The appeal which serves before us is against the entire judgement of the regional magistrate.

The pleadings in the action

[4] The respondent, a policeman, employed as an Inspector at Chatsworth Police Station (South African Police Service (SAPS), Chatsworth) instituted action against the appellant, an attorney, for professional negligence arising from a contract of mandate concluded in February 2009, in which the respondent instructed the appellant to institute a claim for unlawful arrest and detention against his employer, the Minister of Safety and Security.

[5] In breach of the contract of mandate the respondent alleges that the appellant failed to investigate his claim, to process his claim, to exercise the requisite skill, knowledge and diligence expected of a practising attorney, to institute an action in the prescribed period and to advise him of the legal risks and consequences in respect of the intended litigation. As a consequence, his claim against his employer prescribed on 12 September 2011.

[6] The appellant defended the action and filed a special plea in which he denied the arrest and detention was unlawful and indicated the respondent's arrest arose

from a complaint from a prisoner who was held in the holding cells where the respondent worked. Such complaint emanated from the respondent's alleged breach of police regulations and protocols. The appellant indicated that the respondent's claim was precluded by the provisions of section 35(1) of COIDA as the breach of the regulations, subsequent complaint and arrest, fell within the ambit of an accident giving rise to risk incidental to his employment and further that the injury arose out of his employment.

[7] In the court *a quo* the parties agreed to a set of factual assumptions and requested the presiding regional magistrate to determine a question of law in terms of rule 29(4) of the Magistrates' Court Rules.

Issue in the court *a quo*

[8] The question for determination in the court *a quo* was whether the respondent's common law claim against his employer, the Minister of Safety and Security, for the damages he sustained as a result of his unlawful arrest and detention were precluded by s 35 of COIDA.

[9] The agreed factual assumptions to determine the question of law were the following, namely:

(a) On 21 September 2007, between 7h00 and 19h00 the respondent acting in the course of his employment as a policeman was performing duties as a cell commander in charge of the police cells at the Chatsworth Police Station where certain accused were detained;

(b) Among his duties as cell commander, the respondent was required to inspect the cells. On completion of his shift, the respondent handed the keys to the cells to Superintendent Reddy;

(c) Approximately a week later the respondent was informed by Detective Inspector Khumalo, stationed at the Chatsworth Detective Branch of the SAPS, that an African female complainant had alleged that between 19h00 on 21 September 2007 and 7h00 on 22 September 2007, she had been indecently assaulted by a policeman who wore glasses in the police cells at the Chatsworth Police Station;

(d) Inspector Khumalo requested the respondent to attend an identification parade, which did not materialise;

(e) Whilst the respondent was on duty at Chatsworth Police Station on 11 September 2008, Inspector Khumalo approached him accompanied by an African female. At the time Inspector Khumalo pointed to the respondent and questioned the African female as to whether the respondent was the person who had indecently assaulted her and she responded in the affirmative;

(f) As a consequence Inspector Khumalo then arrested the respondent on a charge of indecently assaulting the female complainant whilst in police custody between 19h00 on 21 and 7h00 on 22 September 2007;

(g) At the time of the respondent's arrest, Inspector Khumalo was acting in the course and scope of his employment as a member of the SAPS;

(h) The arrest of the respondent was without a warrant and as a consequence of his arrest the respondent was detained in the police cells at the Chatsworth Police Station. Whilst being detained he complained of chest pains and was conveyed to the Chatsmed Garden Hospital where he remained under armed guard overnight;

(i) On 12 September 2008, the respondent whilst under arrest, was conveyed to the Chatsworth Magistrates' Court, where he was further detained in the court cells. On that day the charges against the respondent were withdrawn at the Chatsworth Magistrates' Court and he was released from custody;

(j) The respondent's arrest and detention was unlawful in that there existed no reasonable suspicion at the time of his arrest by Inspector Khumalo, that he had committed an offence. In consequence, the respondent suffered damages in the nature of contumelia, shock and discomfort and/or mental stress and emotional trauma.[1]

The findings of the court *a quo*

[10] After considering various decisions on whether or not such a claim was precluded by s 35 of COIDA specifically *Minister of Justice v Khoza*,[2] *MEC for the Department of Health, Free State Province v DN*[3] and *Churchill v Premier of*

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[1] These are taken verbatim from the record of proceedings.
[2] *Minister of Justice v Khoza* 1966 (1) SA 410 (A) (*Khoza*).
[3] *MEC for the Department of Health, Free State Province v DN* [2014] ZASCA 167; 2015 (1) SA 182 (SCA) (*MEC v DN*).

Mpumalanga[4] and after hearing argument based on the agreed factual assumptions, the court *a quo*, dismissed the appellant's special plea and found that the respondent's claim did not fall within the statutory exclusion contemplated in s 35 of COIDA.

[11] In doing so the court *a quo* distinguished between an injury intentionally inflicted and one that arose out of the negligence of an employer. It concluded that negligence on the part of an employer was not a bar to a claim under s 35 of COIDA. In addition, an intentional act would not be defined as 'an accident' that arose in the course of a person's employment.

[12] It held further that widening the ambit of COIDA to include cases of arrest of police officers by colleagues would lead to an absurdity and that the infliction of the injury by an arresting police officer was not only done intentionally but also in terms of the law. The court *a quo* found that to allow such a claim would require the compensation fund to compensate policer officers whose injuries were justifiable in law and those who should have been punished and not compensated following their arrest.

[13] It further opined that it was 'unthinkable' that the legislature intended to include claims which arose from deliberate injury causing infractions and distinguish between a police arrestee who is accidentally injured during his arrest, and an injury caused by the arrest itself which was as a result of a deliberate act by an employer. In the last-mentioned instance, the claim could not be compensated for under COIDA.

[14] In the additional concise reasons filed on 2 August 2021, subsequent to the appellant's grounds of appeal being filed, the court *a quo* reasoned that the complaint of sexual assault did not cause the respondent 'injury' as the arresting officer, Inspector Khumalo, could have used other means to bring the respondent to court and public policy required only an unlawful arrest to be compensated.

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[4] *Churchill v Premier, Mpumalanga and another* [2021] ZASCA 16; 2021 (4) SA 422 (SCA); [2021] 2 All SA 323 (SCA) (*Churchill*).

[15] The court *a quo* took the view that it could not have been the intention of the legislature when enacting s 35 of COIDA that police officers could claim compensation as some of them would have been arrested lawfully and therefore damages arising from an unlawful arrest and detention should be claimed for under the common law.

[16] In its view, the court *a quo* reasoned that the exclusion of an unlawful arrest from the definition of an 'accident' was consistent with the fact that an arrest would always follow a conscious decision by the arrestor to arrest the person when there were alternate ways of dealing with them and it would be absurd if police officers, who were arrested at work on suspicion of having committed crimes, were allowed to claim under COIDA before being convicted and sentenced for those offences.

The submissions of the respective parties on appeal

[17] The appellant submits that the court *a quo* did not analyse the facts of the matter sufficiently closely when concluding that s 35 of COIDA did not apply and consequently committed a misdirection. The court *a quo* approached the matter generally in respect of any arrest of a police officer that might occur. The question which the appellant submits the court *a quo* was required to consider, was whether the respondent's injury arose out of his employment and whether the risk of injury was incidental to his employment.

[18] In addition, the appellant submits the closer the link between the injury sustained and the performance of the ordinary duties of the respondent, the more likely it will be that it was sustained out of his employment. The appellant submits that the respondent was employed as a cell commander at the Chatsworth Police Station and was on duty at the time of the alleged indecent assault. The complainant was in his custody in the police cells at the Chatsworth Police Station and the incident is alleged to have occurred at his place of employment specifically in the context of where the respondent performed his duties as a cell commander. The respondent's injury occurred at work and the court *a quo* failed to properly analyse the nature of the respondent's employment to determine whether it gave rise to the risk that eventuated.

[19] The respondent in turn submits that on a proper interpretation of s 35 of COIDA the provisions of this section would not have been a bar to his claim against his employer. The members of the SAPS arrested him on 11 September 2008 and the act of arresting and detaining him and ensuring his attendance at court was intentional and unlawful. They rely on the decision in *Minister of Justice v Sekhoto*[5] which held that an arrest may be unlawful in circumstances were there are alternate ways to secure the attendance of an accused at court. The injury which resulted was as a result of an intentional unlawful act on the part of members of the SAPS and did not amount to an 'accident' as defined in s 35 of COIDA.

[20] An intentional act that results in an injury does not engage s 35 even if it occurred during the course and scope of employment. The respondent submits that the incident was not a risk inherent to the respondent's vocation as a policeman and the incident cannot be defined as an 'accident' nor did it give rise to an occupational injury.

Issue on appeal

[21] The issue on appeal is whether the provisions of s 35(1) of COIDA precluded the respondent, a policeman, from instituting an action for damages against his employer arising from an intentional unlawful arrest and detention during the course and scope of his employment and in finding that such a claim was not precluded, whether the court *a quo* committed a misdirection.

Compensation for Occupational Injuries and Diseases Act

[22] COIDA was enacted to provide protection for employers from claims for compensation by their employees for injuries and illnesses sustained at their workplace. The requirements that the accident occurs in the course of and arises out of the injured party's employment circumscribes the liability of the compensation fund established in terms of s 15 of COIDA.

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[5] *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA) (*Sekhoto*).

[23] The Constitutional Court in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)*[6] has described COIDA as 'important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large.' In *Jooste* the purpose of COIDA was described as 'to provide compensation for disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.'[7]

[24] *Churchill* states that[8]

'While long-standing authority dictates that social legislation of this type is given a generous construction, it is not directed at providing compensation and exempting employers from liability for injuries and diseases that are only tenuously and tangentially connected to the duties of the employee. Had that been the purpose the legislation could simply provide for compensation for all and any injuries or illnesses sustained when at work, or when working.'

The statutory framework

[25] Before dealing with the issue on appeal it is necessary to perhaps remind ourselves of the statutory framework within which the issue must be decided.

[26] Section 35(1) of COIDA provides as follows:

'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.'

[27] Section 1 of COIDA defines an 'occupational injury' as 'a personal injury sustained as a result of an accident'. An 'accident' is further defined in section 1 as '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.'

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[6] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) para 9 (*Jooste*).
[7] *Jooste* para 13.
[8] *Churchill* para 30.

[28] Consequently, for the appellant to succeed it must demonstrate that the respondent suffered an occupational injury, which was sustained as a result of an accident that arose out of and in the course of his employment.

[29] In order to interpret s 35(1) of COIDA one must determine the plain meaning of the words in the relevant statutory provision to be construed. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another*[9] the Constitutional Court held the following:

'A cardinal rule in the construction of any legislation is that the intention of the legislature must be sought in the words employed in the legislation. The first step in this exercise is a determination of the plain meaning to be ascribed to the words. Two competing arguments on this score were presented:

(a) The first respondent supported the approach of the Supreme Court of Appeal to the effect that the plain meaning of the wording of the proviso was that the proviso was meant to operate only as long as the land affected remained situated within the jurisdiction of a transitional council.

(b) The counter-argument supported the approach of the High Court that the proviso identified "a point in time" with reference to which it was to be determined whether land qualified as "agricultural land", and, if so, it retained that status notwithstanding any subsequent changes in local government structures and their boundaries.' (footnotes omitted)

[30] A fundamental tenet of statutory interpretation is that the words used in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. This was confirmed by the Constitutional Court in *SATAWU and another v Garvas and others*[10] where the court held the following:

'This court has previously held that an interpretation of a statutory provision that gives rise to an absurdity or irrationality should be avoided where there is another reasonable construction which may be given to that provision. In other words, where a legislative provision is reasonably capable of a meaning that keeps it within constitutional bounds, a court must, through the use of legitimate interpretive aids, seek to preserve that provision's constitutional validity. Thus, to the extent that it is possible, s 11(2) must be interpreted in a

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[9] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) para 58.

[10] *South African Transport and Allied Workers Union and another v Garvas and others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) para 37 (*SATAWU*).

manner that yields a rational meaning and preserves its validity, so that the purpose it was enacted to serve is realised.' (footnotes omitted)

[31] In *Cool Ideas 1186 CC v Hubbard and another*[11] the Constitutional Court held that

'There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.' (footnotes omitted)

[32] The purpose of the statute plays an important role in establishing the context that clarifies the scope and intended effect of the law. Unduly strained interpretations must be avoided.[12]

How have our courts interpreted s 35 of COIDA

[33] In *MEC v DN*, Navsa ADP, as he then was, highlighted the difficulty which courts in the country have grappled with in 'determining . . . whether an incident constitutes an accident and arose out of and in the course of employment of an employee.'[13] The court also had regard to *McQueen v Village Deep GM Co Ltd*[14] and held that the 'most difficult question which arises in the present case is whether the facts as stated by the magistrate can be said to constitute an "accident" within the meaning of the law.'

[34] Navsa ADP acknowledged that our courts have not been consistent in their approach in determining whether an accident arose out of an individual's employment.

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[11] *Cool Ideas 1186 CC v Hubbard and another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

[12] *Bertie Van Zyl (Pty) Ltd and another v Minister for Safety and Security and others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) para 21; *Democratic Alliance v African National Congress and another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) para 41.

[13] *MEC v DN* para 11.

[14] *McQueen v Village Deep GM Co Ltd* 1914 TPD 344 at 347 (*McQueen*).

[35] These sentiments were echoed in *Churchill* when after considering the authorities the court held the following:[15]

'It is necessary to repeat what has oft been said before in these cases, namely that there is no bright line test and the enquiry is always whether the statutory requirement that the accident arose out of the person's employment, as well as in the course of that employment, is satisfied. The court must analyse the facts closely to determine whether on balance the accident arose out of the person's employment. And in the last resort an employer seeking to rely on s 35 to avoid liability bears the onus of satisfying the court that the accident arose out of the claimant's employment.'

[36] Wallis JA in *Churchill* indicated that it was neither feasible nor desirable to formulate a single test to determine whether an injury arose out of an injured party's employment.[16]

[37] In establishing or determining whether an event constitutes an occupational injury, it is important to define the word 'accident'. Our courts have interpreted 'accident' within the ambit of COIDA to mean an incident which is confined only to negligent conduct.

[38] In *MEC v DN*[17] the Supreme Court of Appeal citing *McQueen* held the following:

'Courts in this country and elsewhere have over decades grappled with the enduring difficulty of determining, for the purposes of similar preceding and present legislation, whether an incident constitutes an accident and arose out of and in the course of employment of an employee. They also discussed the policy behind employee-compensation legislation and the approach to be adopted in interpreting the legislation. In *McQueen v Village Deep GM Co Ltd* 1914 TPD 344 De Villiers JP at 347, in relation to the prevailing employee-compensation scheme, said the following at the commencement of the judgment:

> "The most difficult question which arises in the present case is whether the facts as stated by the magistrate can be said to constitute an accident within the meaning of the law."

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[15] *Churchill* para 36.
[16] *Churchill* para 18.
[17] *MEC v DN* para 11.

De Villiers JP took the view that it was perfectly plain that an "accident" in the legislative context was not an accident in the ordinary acceptance of the word, which, in general terms, is "an effect which was not intended". He had regard to developments in English law in which an "accident| for the purposes of the legislation there in force had been given an extended meaning beyond an "unlooked for mishap" and "an untoward event which is not expected or designed". He recorded in his judgment that our then Workmen's Compensation Act derived directly from the English Act and, as discussed above, considered that it ought to be interpreted beneficially for an employee. De Villiers JP went on to the next critical question: whether it could be said that the injury arose out of the employee's work? With reference to *Mitchinson v Day Brothers* [1913] KB 603 (CA), he reasoned that what fell to be decided is whether the event is a risk which can be reasonably held to be incidental to the employment. On that aspect he concluded as follows at 349:

> "If it be such a risk, and if the injury flows from that risk, it must be held to be an injury arising out of the employment."'

[39] It would seem that the definition of 'accident' is therefore only confined to negligent conduct and once an intention is found to exist, s 35(1) finds no application in the dispute between the parties.

[40] This was reiterated by the Eastern Cape High Court in *Twalo v Minister of Safety and Security and another*[18] as follows:

'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.'

[41] Consequently, in order to determine whether an event which gave rise to an injury that constitutes an 'accident', the incident must have occurred due to an unintended and unexpected occurrence which produces hurt or loss. In *Nicosia v Workmen's Compensation Commissioner*[19] in which the court considered the similar section to COIDA's predecessor, the Workmen's Compensation Act 30 of 1941 this approach was confirmed.

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[18] *Twalo v Minister of Safety and Security and another* [2009] 2 All SA 491 (E) para 17 (*Twalo*).
[19] *Nicosia v Workmen's Compensation Commissioner* 1954 (3) SA 897 (T) at 901G (*Nicosa*).

[42] The authorities are clear where an accident occurs, it must be due to an unintended and unexpected occurrence for COIDA to be engaged. In circumstances where an injury is caused by an *intentional*[20] unlawful act on the part of the employer, s 35 is not engaged.[21]

[43] I agree with the finding of the court *a quo* that in assessing liability one must draw a distinction between an injury caused by an intentional act and one that arises from the negligence of an employer.

[44] In *Churchill* Wallis JA held that the word 'accident' has a broader meaning than 'an unexpected or usual event or happening that is external to the [employee]' [22] The court after considering the development in English Law and considering the decision in *Nicosia* had regard to two further judgements, namely *Khoza* and *MEC v DN*, which set out the broad approach to be adopted to the meaning, namely the first element of the test is whether the accident arose in the course of an employee's duties, and secondly, which is the far more problematic element is whether it arose out of his or her employment.

[45] The court whilst considering the two decisions of *Khoza* and *MEC v DN* answered the second question as follows: Referring to *Khoza*, the court, in *Churchill*, held that the mere presence of the employee at the workplace would not be sufficient. The court held the following:[23]

'The majority judgment in *Khoza* made it clear that mere presence at the workplace would not suffice, although in general the fact that the accident occurred at the injured person's place of employment pointed to it having arisen out of their employment. Nor is foreseeability of the risk definitive. Even an entirely unforeseen and unforeseeable event may arise out of employment.[24] Williamson JA made this point in his concurring judgment saying that: [25]

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[20] My emphasis.
[21] *Kau v Fourie* 1971 (3) SA 623 (T) (*Kau*).
[22] *Churchill* para 12.
[23] *Churchill* para 18.
[24] Wallis JA in *Churchill* stated in the original footnote
> 'Instances drawn from the English cases are the wall of an adjacent building collapsing on to the building in which the claimant was working and causing her injuries (*Thom (or Simpson) v Sinclair* [1917] AC 127) and the fireman standing at the entrance to his engine who was struck by a pellet fired not at him, but at the engine (*Powell v Great Western Railway Co* [1940] 1 All ER 87 (CA)).'

[25] *Khoza* at 419H-I.

> "The decision is in essence in each case one of fact related only to the particular facts in issue. 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 action causing injury. If it was, the action arose 'out of the employment' ..."

The fact that the course of employment brought the worker into the zone of the hazard may be a necessary condition of the injury arising out of the employment but, as the subsequent decision of this court demonstrated, it is not a sufficient condition.'[26]

[46] The court then considered the decision in *MEC v DN* to determine whether the injuries arose out of her employment. In other words, whether the injuries were sufficiently closely connected to the employment to have arisen from it? The fact that it occurred at her workplace when the employee was going about her duties is undoubtedly a factor that connected it to her employment. In that sense her employment brought her within the zone of risk, but that is merely where the enquiry commences. Was the risk so incidental to her employment?

[47] In *Churchill* Wallis JA held the following:[27]

'To adopt the language used in *Khoza* in describing an instance where the assault would not arise out of the employee's employment, such an assault has no connection with the working duties of the employee. It is connected to their employment, but not to their duties in that employment.'

[48] *Churchill* went on to hold that the claimant was not assaulted because of the position she held or anything she had done in carrying out her duties or for any reason related to the protest action that occurred on the day. Rather she was assaulted because an individual mistakenly thought she had sworn at him and he together with others responded by assaulting and humiliating her. The court found consequently that the injuries did not arise out of her employment.

[49] *Churchill* also held that for the purpose of s 35 of COIDA there must be a causal connection between the accident and the employee's service in general. In

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[26] Wallis JA in *Churchill* stated in the original footnote:

> 'The problem in treating it as such is illustrated by the decision in *Ex parte Workmen's Compensation Commissioner: In re Manthe* 1979 (4) SA 812 (E) at 817E-818F.'

[27] *Churchill* para 28.

circumstances where the accident is of such a nature that the employee would have suffered the injury even though he was at a place other than where his work demanded, the existing connection between his service and accident is severed.

[50] This the Supreme Court of Appeal confirmed in *Churchill* where it held as follows:[28]

'The judgment was careful to point out that it was no more than a generalisation to say that a causal connection would ordinarily be established if the accident occurred at the employee's place of work. Whilst it was unnecessary to attempt to identify the exceptions, nonetheless the following was said:

> "It is in any event clear that this causal connection for the purposes of the Act would among other things disappear if the accident was of such a nature that the workman would have suffered the injuries even though he was at a place other than the one his work demanded, or if the workman by his own act severed the existing connection between his service and the accident, *or where the workman was deliberately injured by another person and the motive for the assault had no connection with the working duties of the workman.*"' (Wallis JA's translation. Emphasis in *Churchill*. Footnote omitted.)

[51] Consequently, the question that has to be addressed in respect of the facts of this matter is 'whether the act causing the injury was a risk incidental to the employment'.[29]

[52] This approach was confirmed by the Supreme Court of Appeal in *MEC v DN* where it held the following:[30]

'[31] Counsel on behalf of the MEC did not go so far as to suggest that the dictum in *Khoza* referred to in the preceding paragraph was clearly wrong and that we should depart from it, but pointed out that relating the causal connection, as Rumpff JA did, to the motive of the perpetrator of the wrong that caused the injury was problematic and would lead to uncertainty. I agree. However, it appears to me that the problem can be resolved by a slight adjustment, namely to ask the question whether the wrong causing the injury bears a connection to the employee's employment. Put differently, the question that might rightly be asked is whether the act causing the injury was a risk incidental to the employment. There is

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[28] *Churchill* paras 17-18.
[29] *MEC v DN* para 31.
[30] *MEC v DN* paras 31-32.

of course, as pointed out in numerous authorities, no bright-line test. Each case must be dealt with on its own facts.

[32] I am unable to see how a rape perpetrated by an outsider on a doctor — a paediatrician in training — on duty at a hospital arises out of the doctor's employment. I cannot conceive of the risk of rape being incidental to such employment. There is no more egregious invasion of a woman's physical integrity and indeed of her mental wellbeing than rape. As a matter of policy alone an action based on rape should not, except in circumstances in which the risk is inherent, and I have difficulty conceiving of such circumstances, be excluded and compensation then be restricted to a claim for compensation in terms of COIDA..'

[53] Navsa ADP approved the test and conclusion enunciated by Rumpff JA in *Khoza* that the causal connection would be extinguished if the accident was of such a kind that the employee would have sustained the injuries even if he had been at a place other than where he was executing his duties as an employee or when, through his own act, he caused the causal connection to be extinguished. He considered the causal connection to be severed where the employee was intentionally injured and the motive bore no connection to the injured person's employment.

[54] Following on the decision in *Khoza* Navsa ADP was of the view that the question to be asked is 'whether the wrong causing the injury bears a connection to the employee's employment. Put differently, the question that might rightly be asked is whether the act causing the injury was a risk incidental to the employment.'[31]

[55] In *Twalo*[32] the defendant submitted that the test was

'not whether or 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.'

According to counsel for the defendant the definition of accident included both a negligent and an intentional act. The court did not agree with these submissions in *Twalo* and followed the test enunciated in *Khoza* at 419H-420H, being:[33]

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[31] *MEC v DN* para 31
[32] *Twalo* para 13.
[33] *Twalo* para 15, fn 12.

'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"'

[56] Ebrahim J, in *Twalo*,[34] was of the view that a reading of the judgement in *Khoza* as well as in *Jooste* did not find substantiation for the contention that the definition of an accident ought to be broadened to include both negligent and intentional acts and was of the view that the correct test was enunciated in *Khoza.* The court went on to find that the shooting of the deceased in *Twalo* on the facts was not 'an unintended occurrence' and therefore was of the view that the provisions of s 35 of COIDA were not applicable.

[57] Each case must however be considered on its own set of unique facts and circumstances.[35] It must also be borne in mind that the appellant bears the onus to establish that the event constitutes 'an accident' that arose out of the respondent's employment.[36]

[58] That then brings me to the facts of this matter and the respective submissions of the parties.The problem with the appellant's submissions is that it considers the injury as being a continuous act, the laying of the false charge of indecent assault and the arrest, whereas the respondent considers the injury as being the unlawful arrest. One cannot in my view consider the injury as a continuous act. This is where the parties part ways in the application of the relevant law. The intentional act, which the respondent relies on, is the unlawful arrest as constituting the injury, not the laying of the complaint of indecent assault by the complainant.

[59] There are a plethora of cases dealing with the definition of COIDA and its purpose and there have been different applications and interpretations of the section. It is undisputed that our courts have grappled with the difficulty of determining

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[34] *Twalo* para 16.
[35] *Churchill* para 18.
[36] *Churchill* para 36.

whether an incident constitutes an 'accident' and 'arose out of' and in the course of employment of an employee.[37]

[60] Navsa ADP indicated that the policy behind the act was to provide[38]

'a ready source of compensation for employees who suffer employment-related injuries and provides for compensation without the necessity of having to prove negligence, although negligence may result in greater compensation. It should, however, be borne in mind that the object of the Act is to benefit employees and that their common-law remedies were restricted to enable easy access to compensation. It does not necessarily mean that compensation for every kind of harm they suffer whilst at their place of employment has to be pursued through that statutory channel. However, if the injury were caused by an accident that arose out of an employee's employment, then the latter *is* restricted to a claim under the Act. This is referred to as the exclusivity doctrine.'

[61] Given the long line of cases which have interpreted section 35 of COIDA, I propose to only focus on the leading decisions of *Churchill* and *MEC v DN*. It would seem that our courts draw a distinction between an accident occurring 'in the course of' but not 'arising' out of the employment. Most of the cases, however, in their interpretation are fact specific. I align myself with the sentiments expressed by Wallis JA that

'the enquiry is always whether the statutory requirement that the accident arose out of the person's employment, as well as in the course of that employment, is satisfied. The court must analyse the facts closely to determine whether on balance the accident arose out of the person's employment.'[39]

[62] The appellant submits that the question to be asked is whether the risk of harm at the hands of a suspect whilst on duty is a risk incidental to the employment of policeman. They rely on the decision in *Churchill* and submit that the situation is no different in law to a position where a policeman is assaulted or attacked whilst at work. The appellant acknowledges that Wallis JA in *Churchill* draws a distinction between incidents which 'arise' out of and in the 'course of employment'.

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[37] *MEC v DN* para 11.
[38] *MEC v DN* para 8.
[39] *Churchill* para 36.

[63] The appellant submits that the incident occurred at a SAPS police station whilst in the course of the respondent's employment. This incident is no different if the policeman was inspecting the cells and the complainant reached across the bars causing harm – that would qualify as an incident in terms of s 35 of COIDA. The appellant submits that the harm in this instance was caused not by the physical attack but rather by a verbal one, and the court *a quo* focused on the arrest and not on the set of continuous facts.

[64] Mr *Shapiro* submitted that one must regard the laying of the complaint of indecent assault and the arrest as one continuous act. He submitted that the question to be asked on the facts of this matter is whether the risk is incidental to the employment that an accused person would cause harm to a policeman. He distinguished the decisions in *Twalo* and *Minnies v Ayshlie and another*[40] but submitted that the situation in the present instance was analogous to that of *Khoza*.

[65] He continued and submitted that the court committed a misdirection in determining the kind of unlawful conduct. Here the incident arose as a consequence of an accused person acting unlawfully and the verbal complaint of indecent assault is what caused the harm to the respondent not the arrest itself. If the arresting officer had a personal agenda against the respondent then the situation in this matter would be analogous to that in *Twalo*.

[66] Mr *Shapiro* submitted that the case was a corollary to *Churchill* as a policeman in the course of the performance of his duties was harmed by an accused person. The nature of his job as a policeman resulted in the risk being incidental to the job he performs, specifically that of the laying of a false charge which was incidental to and related to his employment. He submitted that the requirements envisaged in *Churchill* were satisfied as the conduct was unintended, the respondent was arrested at work in the course of his employment and that the arrest was not a factor to be considered in isolation, even if he was arrested at home.

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[40] *Minnies v Ayshlie and another* [2021] ZAWCHC 24 (*Minnies*).

[67] Regrettably, I cannot agree with the submissions of the appellant and his interpretation of the facts in line with the authorities. I agree with the submissions of Mr *Veerasamy*, who appeared for the respondent, that to focus beyond the arrest is to bring into play extraneous factors which the employer relies on for invoking the provisions of s 35. The submission of the appellant misconstrues what caused the injury. It was the arrest and not the laying of the false complaint.

[68] Relying on the decision in *Diljan v Minister of Police*[41] an arrest without a warrant at the discretion of an arresting officer is the harm- the incident complained of. It is not the complainant that caused the injury, it is the unlawful arrest and detention. The respondent is not saying that the employer must protect him from the complaint, but rather he submits the injury arose out of the unlawful arrest and detention as the arresting officer did not properly exercise the discretion vested in him.

[69] If one accepts, as the appellant wants this court to do, that the laying of the false complaint is the 'injury' it ignores the fact that the investigating officer took a decision independent of the complainant to arrest the respondent. It was not the complaint but it was the decision of the investigating officer which constitutes the injury. As a consequence, the employer wrongfully arrested him.

[70] On the particular facts in the matter, at the time of his arrest the respondent, was employed by the Minister of Police as a police officer. After 21 September 2007, ie after his shift, the respondent was informed that a female prisoner had laid a complaint of indecent assault against him. The indecent assault was alleged to have occurred whilst the complainant had been detained in the police cells between 19h00 on 21 September 2007 and 7h00 on 22 September 2007, and whilst the respondent was on duty. A year later on 11 September 2008, the respondent was arrested by Inspector Khumalo at the police station in the company of the complainant. The arrest and detention of the respondent was an intentional act.

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[41] *Diljan v Minister of Police* [2022] ZASCA 103.

[71] The reason why it constituted an intentional act was that the investigating officer, Inspector Kumalo, made the effort to locate the respondent a year after the complaint had been laid, conducted an identification of the respondent with the complainant. in order to ascertain whether the respondent 'was a person that had assaulted her'. and arrested and charged him with indecent assault. Inspector Khumalo's conduct was deliberate and intentional.

[72] It has not been disputed, and in fact, it was conceded that the charges were subsequently withdrawn against the respondent and that the arrest was unlawful. The investigating officer, Inspector Khumalo, could have utilised other means to secure the attendance of the respondent at court apart from arresting him and detaining him. In addition, the liability of the minister arises from Inspector Khumalo's failure to properly exercise his discretion and to arrest the respondent.

[73] The authorities are clear. Both *Churchill* and *MEC v DN* indicate that a distinction must be drawn between an injury which is inflicted intentionally and one which arises out of the negligence of an employer. I can find no fault in the court *a quo* applying the principles set out in *Khoza* (which was endorsed in both *MEC v DN* and *Churchill*) that s 35 of COIDA is not engaged where an injury is caused intentionally. This approach would be consistent with the distinction that is drawn in determining whether an incident arises in the course of but not out of one's employment. As was held in *Khoza* the injury was deliberate and intentional and was thus excluded from the operation of s 35 of COIDA.

[74] *Churchill* indicates that almost anything which unexpectedly causes an injury to, or illness, or death of an employee falls within the concept of an accident. But whether the accident arose out of and in the course of the employee's employment is the question to be asked. *Churchill* stated that it has been 'held that the two expressions are not coterminous so that an accident may arise in the course of, but not out of, the employee's employment.'[42] This, with respect, is what the appellant wants the court to consider: that the incident arose during the course of but not out of his employment. This is what distinguishes *Khoza* from the current matter.

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[42] *Churchill* para 14.

[75] In *Khoza* the policemen were on duty and responsible for arresting and holding in safe custody suspects in a van. A 19-year old police constable, who was playing with his service revolver at the back of the van in the presence of another constable, fired a shot which hit his colleague. The court found that the provisions of s 35 of COIDA had been engaged, that the first element was satisfied as both policemen were on duty and responsible for arresting and holding in safe custody other people in the van.

[76] The problematic element identified by Rumpff JA was whether Constable Khoza's injuries arose out of his employment. This is where the test for a causal connection between an employee's service and the accident was identified. In *Churchill* following on the decision in *Khoza* the court confirmed that what is required is a causal connection between the employee's service and the accident. Rumpff JA found a causal connection between an accident and service in general is set aside when the accident occurs at the place where an employee is executing his duties.

[77] Although the nature and extent of the causal connection is not defined in the statute, Rumpff JA held that given the statutory purpose there would in general be a causal connection between the accident and the person's employment if the accident occurred at the place where the employee was performing their duties. On that basis the court took the view that Constable Khoza was shot in an accident arising out of his employment and consequently dismissed his claim. In *Khoza* [43]the court was careful to point out that it was no more than a generalisation to say a causal connection would ordinarily be established if the accident occurred at the employee's place of work.

[78] Following the majority judgement in *Khoza*, *Churchill* confirmed that the causal connection is lost where the injury is intentional or constitutes a deliberate act and if the accident could have occurred somewhere else. The mere presence at the workplace would not suffice.

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[43] *Khoza 417 F-I*

[79] I consequently agree with the submission of Mr *Veerasamy* that the question to be asked was whether the investigating officer, Inspector Khumalo, was compelled to arrest the respondent at his place of employment or was it merely convenient or circumstantial that it happened there. The arrest could have taken place anywhere and on the stated facts of the matter the respondent just happened to be present at work, a year after Inspector Khumalo decided to arrest him.

[80] In *MEC v DN* where Navsa ADP held that one does not consider that rape is something we are going to encounter at work, similarly, in this particular matter, in my view, the court *a quo* was correct in finding that the respondent did not think he would go to work and be arrested unlawfully and wrongfully by his employer. I agree with the submission that it is 'an inherent risk' that he may get assaulted or hurt by a prisoner whilst executing his duties in arresting a suspect.

[81] However, I agree that it is not an inherent risk arising out of his employment that an employer may unlawfully arrest and detain someone in the position of the respondent. The unlawful arrest is not an inherent risk incidental to the employment of a police officer. Once again, I find solace for this view in the fact that the courts draw a distinction between intentional and deliberate conduct. In *Langeberg Foods Ltd and another v Tokwe*,[44] which was decided on its own set of facts, the court found that although the injury occurred at the workplace it did not 'arise out of the employment'. Although both parties were on duty at the time, it was the smoking of the dagga at his place of employment which caused the one employee to be assaulted by another fellow employee.

[82] As was stated hereinbefore and to emphasize Rumpff JA in *Khoza* stated that in determining whether the injury arose out of one's employment what was required in the broad sense was a causal connection between the employment and the accident. The causal connection for purposes of the act may be severed where the accident occurred even at a place other than where one was executing one's duties. The causal connection is also severed where the injury was intentionally inflicted.

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[44] *Langeberg Foods Ltd and another v Tokwe* [1997] 3 All SA 43 (E).

[83] In my view the court *a quo* was correct in finding that the arrest of the respondent fell outside the ambit of COIDA as when Inspector Khumalo arrested the respondent it was a deliberate act which did not arise out of the respondent's employment. Although the court in *Twalo*[45] found no substantiation for the contention to broaden the definition of accident to include both negligent and intentional conduct and rejected it, in *Kau*[46] the court took the view that if the injury or incident was unlawful and wrongful on the part of the employer it fell outside the ambit of COIDA.

[84] It follows that I agree with the submission of Mr *Veerasamy* that it was not the false complaint which caused the injury but rather the unlawful arrest. The SCA held in *Diljan*[47] that the discretion to act on the complaint is solely that of the police officer's and one must divorce the complaint from the arrest. In order to find that the arrest and the complaint comprise a singular event, one would have to find that a police officer, without a warrant, is forced to act on that complaint.

[85] If the police officer has a discretion, which we know he does from *Diljan* and *Sekhoto* (as he can secure his attendance by means other than arrest), and the arresting officer takes a decision to arrest on his own he applies his own discretion outside of the complaint. What resulted in the 'accident' is the deliberate and intentional act by Inspector Khumalo to exercise his own discretion to arrest the respondent. What is unlawful about Inspector Khumalo's conduct, which caused the injury and the arrest, is the discretion which he exercised in arresting the respondent.

[86] Navsa ADP in *MEC v DN* held that the 'South African courts have not been a model of consistency in their approach to the determination of whether an accident arose out of an individual's employment.'[48] In *MEC v DN* the complainant was raped whilst on duty and the minister raised a defence of a special plea invoking s 35 of COIDA. Navsa ADP came to the conclusion that in keeping with the purpose of the act in[49]

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[45] *Twalo* para 19.
[46] *Kau* at 417.
[47] *Diljan v Minister of Police* (746/2021)[2022] ZASCA 103 (24 June 2022)
[48] *MEC v DN* para 23.
[49] *MEC v DN* para 33.

'Dealing with a vulnerable class within our society and contemplating that rape is a scourge upon South African society I have difficulty contemplating that employees would be assisted if their common-law rights were to be restricted as proposed on behalf of the MEC.'

He found that given the nature of the incident, that of a rape, it ought not to be restricted to COIDA as this would be adverse to the interests of employees and would be sending an unacceptable message to employees that they are precluded from suing their employers for what they assert is a failure to provide reasonable protective measures against rape. He was of the view that the Constitution would not countenance this.

[87] As already stated in *Churchill*, 'the only safe approach is to examine closely the facts of each case in order to decide whether the person's injuries arose out of their employment.'[50] The question which the court asked in *Churchill* was whether the incident arose out of the employment. On the facts of *Churchill*, Wallis JA found that although the assault occurred at the workplace, it resulted from something external to the workplace and external to the duties of the person assaulted, the incident could not be said to 'arise out of Ms Churchill's employment.'[51] The court was also of the view that one cannot 'use the motive of the perpetrator to establish the requisite connection between the incident and the duties of the injured party'.[52]

[88] *Minnies* concerned two policemen, one of whom was a cleaner, who was shot by a fellow policeman whilst on duty. The minister similarly raised a special plea of s 35 of COIDA. The court in *Minnies*, after reiterating that each matter must be decided on its own set of facts, held the following:

'The court is required to make a judgment call on the facts. The proper determination of this type of question must be grounded on a real world appreciation, not an ivory tower assessment.'[53]

[89] Therefore, following on the reasoning in *MEC v DN*, *Churchill*, *Khoza, Kau* as well as in *Minnie*s the fact that the respondent's employment brought him within the same space as Inspector Khumalo did not make the possibility of him being

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[50] *Churchill* para 20
[51] *Churchill* para 26 onwards.
[52] *Churchill* para 35.
[53] *Minnies* para 27.

unlawfully arrested by one of them a risk that was incidental to his employment. It did not arise out of the nature of his work as a policeman and therefore did not arise out of his employment. The fact that he was arrested at the police station did not mean it arose out of his employment as Inspector Khumalo could have elected to arrest him anywhere else.

[90] For all the aforementioned reasons I am of the view that the judgement of the court *a quo* was sound in its reasoning and on the facts of this particular matter s 35 of COIDA was correctly held not to be engaged.

Costs

[91] There is no reason to depart from the usual order in relation to costs and the parties did not suggest otherwise.

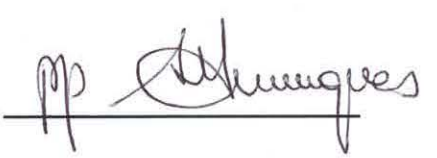
Conclusion

[92] In the result the following order will issue:

The appeal is dismissed with costs.

HENRIQUES J

I agree,



JIKELA AJ

CASE INFORMATION

Date of Hearing:	20 July 2022
Date of Judgment:	19 December 2023
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This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 14h30 on 19 December 2023.