CIVIL LIABILITY OF AN EMPLOYER
FOR INJURIES ON DUTY

by

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DECLARATION

I declare that the thesis, which I hereby submit for the degree Magister Legum at the Nelson Mandela Metropolitan University, is my own work and has not previously been submitted by me for a degree at another University.

_________________________
DENVER CHARLES BRANDT
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SUMMARY

The workplace has evolved dramatically in the past decades. Technology has improved, innovative ways of utilising nuclear power have been developed, new chemicals have been introduced to the market and the adverse effects of other chemicals on both human health and safety and the environment have been discovered. This has influenced the nature of the workplace itself.

While employees enjoy a common law right to a safe working environment and health and safety, state intervention currently provides restricted claims to an employee who has sustained injuries or contracted occupational diseases.

This thesis explores the effect of section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 which deprives an employee of its common law right to institute civil action against an employer for an injury sustained or disease contracted during the course and scope of employment.

Furthermore, this thesis also explores the marriage between the Occupational Health and Safety Act 89 of 1993 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 as well as the position of ‘employee’ and ‘employer’ insofar as the scope and application of these two acts are concerned with specific reference to the position of labour broker employees.

The use of indemnity clauses and its validity in South Africa will also be explored and discussed.

This thesis also dedicates a chapter to the leading case authority of *Jooste v Score Supermarket Trading (Pty) Ltd* and its effect insofar as the enforcement and application of section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 is concerned.

It is impossible to mention all the changes in the workplace that have occurred in the recent years, and this discussion therefore focuses on the current position of employees who have
been deprived of their common law right to institute delictual action for damages resulting from an injury sustained while on duty as well as the impact of the current restrictive claims available to them. Alterations to existing approaches are also proposed to resurrect the common law right of employees to institute action against their employers.
CHAPTER 1
INTRODUCTION

Where an employee suffers an injury on duty or contracts a occupational disease the common law provides that he\(^1\) institute delictual action against his employer for compensation. The employee will have to prove intent or negligence on the part of his employer, or on the part of a co-employee, were the employer to be held vicariously liable in order to be successful.

Employees enjoy a common law right to safe working environments and health and safety arrangements which provide replacement income for persons affected by a loss of ability to earn as a result of an occupational injury or disease. There are various sources which regulate occupational injuries and diseases. The International Labour Organisation (hereinafter referred to as the ‘ILO’) has a number of conventions concerning employment injuries and diseases.\(^2\) In South Africa, a constitutional imperative regarding social security exists. Collective agreements can also contain arrangements relevant to social security and health and safety at the workplace.

The primary legislation in South Africa which provides for preventative measures are the Occupational Health and Safety Act\(^3\) (hereinafter referred to as ‘OHSA’) and the Mine Health and Safety Act\(^4\) (hereinafter referred to as ‘MHSA’) while the most important legislation that regulate compensation for employees injuries and diseases (and even death) suffered and contracted at work is the Compensation for Occupational Injuries and Diseases Act\(^5\) (hereinafter referred to as ‘COIDA’). There are also the Occupational Diseases in Mines and Works Act\(^6\) which provides for mandatory reporting and the payment of certain benefits to mine workers who develop certain occupational lung diseases, as well as the payment of certain benefits for dependants of workers who die from such diseases. The Road Accident Fund Act\(^7\) (hereinafter referred to as ‘RAF’) is applicable where an employee is injured while

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\(^1\) Note: Reference to the male gender includes reference to the female gender and vice versa.

\(^2\) They include Convention No 102 – Minimum Standards of Social Security 1952; Convention No 121 – Benefits in the Case of employment Injury 1964.

\(^3\) 85 of 1993.

\(^4\) 27 of 1996.

\(^5\) 130 of 1993.

\(^6\) 78 of 1973.

\(^7\) 56 of 1996.
being conveyed by a motor vehicle in the course of his employment. In cases of commuting injuries COIDA and the RAF Act must be read together.

For purposes of this paper however the discussion will be confined to COIDA and OHSA.

It is common that in most social security systems that even where a completely unified scheme for disability exists, a separate and more favourable scheme for industrial injuries is often retained. Occupational injury and disease benefits are not simply granted or allocated; they are bought through insurance contributions. Employees make available their labour to the employer who benefits from it financially. It is therefore accepted that the responsibility of financing such an insurance scheme rests with employers. In return, a statutory provision, such as section 35 of COIDA, replaces an employer’s delictual liability towards the employee with insurance cover. The Compensation Fund established in terms of COIDA requires employers to contribute to a centralized state fund. Subject to certain exceptions (and exempted employers) all employers in South Africa must register and pay assessments to the Fund.

COIDA provides a system of no-fault compensation for employees who are injured in accidents during the course and scope of their employment and who contract occupational diseases. However, negligence continues to play a role since an employee is entitled to additional compensation if he can establish that the injury or disease was caused by the negligence of the employer or certain managers and/or fellow employees.

In Jooste v Score Supermarket Trading (Pty) Ltd (which will be discussed in detail later) the Constitutional Court held that COIDA is important social legislation and the court accepted that the bar on civil claims by section 35\(^8\) is rationally connected to COIDA’s purpose of providing ‘no-fault’ compensation to employees from a fund to which employers are required to contribute.

Whether or not this approach is in fact ‘rational’, reasonable and/or justifiable will be discussed herein below.

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\(^8\) 130 of 1993.
COIDA provides for benefits to be paid to employees who suffer a temporary disablement, employees who are permanently disabled and to dependants of employees who die as a result of injuries from accidents while at work or as a result of an occupational disease. The act also provides for the payment of medical aid received by such employees.

The Labour Relations Act\(^9\) (hereinafter referred to as the ‘LRA’) provides that no employee may be dismissed unfairly. This requires that all dismissals should be procedurally and substantively fair to avoid an order for the re-instatement, re-employment or compensation in favour of the dismissed employee. People with disabilities are included in the definition of the designated groups of the Employment Equity Act.\(^10\) Disabled employees are thus protected against any form of unfair discrimination in South African workplaces and designated employers are compelled to give preference to people with disabilities.

Investigations into the social security system of South Africa revealed that no comprehensive strategy has yet been developed to incorporate prevention as part of the overall system of employment injury and diseases process.

Generally risks are concentrated in four (4) industries:

i) transport;

ii) mining;

iii) agriculture; and

iv) construction.\(^11\)

Incapacity for work is usually conceived as the loss of the ability to earn and is classified under social insurance. Most social security schemes will, therefore, try and provide an income replacement for those persons affected by loss of the ability to earn.

There are two (2) causes for such a loss of the ability to earn:

\(^9\) 66 of 1995.
\(^10\) 55 of 1998.
i) the loss of the possibility to work (unemployment);
ii) loss of the ability to work as a result of illness, injury, invalidity or old age;¹²

The loss of the ability to work is a central integrating factor for individuals in a modern society that threatens the social exclusion of such individuals and their families. The risk of occupational injuries and diseases should thus be addressed by:

i) prevention;
ii) rehabilitation; and
iii) compensation.

I will now briefly deal with the various sources and standards which regulate occupational injuries and diseases in South Africa.

CHAPTER 2
SOURCES AND STANDARDS

There are several national and various other sources regulating occupational injuries and diseases. As mentioned previously the ILO has various conventions concerning employment injuries which include occupational injuries and diseases. While in South Africa a constitutional imperative in relation to social security exists. While mentioned previously, collective agreements also contain arrangements relevant to security and health and safety at work. The most important legislation in South Africa that provide for preventative safety measures in the workplace are:

i) OHSA;

ii) MHSA, while the most important legislation in South Africa insofar as the regulation of compensation of employees for work related illness, injury and death is COIDA.

As mentioned previously, the employer has a common law duty to assess the workplace in order to provide a safe working environment. During the early 1990’s in South Africa OHSA replaced the Machinery and Occupational Safety Act (hereinafter referred to as ‘MOSA’). The Department of Labour is responsible for the administration of this act with OHSA setting out the duties of employers and employees respectively and also makes provisions for a number of offences if the Act is contravened.

The LRA also provides for workplace forums to play an important role in health and safety issues in the workplace. Such a workplace forum can, in terms of S 84 of the Act, be

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14 For the legal effect of collective agreements in South Africa see ss 23, 31 and 32 of the Labour Relations Act 66 of 1995.
15 See Van Zyl v Workmen’s Compensation Commissioner 1995 (1) SA 708 (N), Skinner v Minister of Public Works 1998 JOL 4223 (SE). In the European Community, see chapter 2 and 3 of the European Treaty and article 118A of the Single European Act of 1986 that are devoted to health and safety. See also Directive No. 80/836 of 15 July 1980 regarding basic safety standards for the health protection of the general public and workers against the dangers of ionising radiation.
16 6 of 1983.
17 S 38(1).
18 S 84(5).
consulted regarding the initiation, the review or developing of health and safety matters.\(^\text{19}\) The workplace forum\(^\text{20}\) is also involved in the establishment of health and safety committees\(^\text{21}\) and is entitled to the appointment of one or more members of the forum as health and safety representative in the workplace.\(^\text{22}\)

As mentioned hereinbefore, the focus will remain on OHSA and COIDA.

I will now analyze the origins, scope and purpose of OHSA.

\(^{19}\) Although health and safety measures are not expressly listed as specific matters for consultation in s 84, a representative trade union and an employer may conclude a collective agreement conferring on the workplace forum the right to be consulted about any additional matters in that workplace. See s 84(3) and (5).

\(^{20}\) S 84(5)(a).

\(^{21}\) S 84(5)(b).

\(^{22}\) S 84(5)(c).
CHAPTER 3
THE OCCUPATIONAL HEALTH AND SAFETY ACT 85 OF 1993

Change in South Africa from the MOSA to OHSA was motivated to co-ordinate our approach with international standards and approaches in so far as occupational health and safety in the workplace is concerned.

Certain changes provided for, amongst others more emphasis on the regulation of occupational health and hygiene, the encouragement and endorsement of an active approach to the elimination or mitigation of hazards, the direction of employers to share information with its workforce regarding hazards in the workplace and to provide training to the workforce on the nature of the hazards, the effects of the hazards, appropriate precautions, the maintenance of those precautions and emergency procedures. It also provided for greater trade union participation in the election of health and safety representatives and enhanced rights and functions for health and safety representatives and committee members. It revised the general duties of employees with regard to health and safety and recognizes and makes provisions for the protection of the public from safety and health hazards emanating from the workplace. Finally it increased penalties that a court can impose for breaches of the Act.

3.1 PURPOSE OF THE OCCUPATIONAL HEALTH AND SAFETY ACT

The Act is designed to create an environment of participation between an employer and its workforce, which participation is aimed at the prevention of unhealthy and unsafe working environments.

While the employer is seized with the majority of obligations pertaining to health and safety, employees, health and safety representatives and health and safety committees and the members of those committees are obligated to commit to health and safety within the workplace.

The Department of Labour inspectors police the provisions of the OHSA and its regulations.
It may be worth mentioning that the inspectorate adopts a regulatory approach and an antagonistic approach.

However, it may be selective in relation to the institution of prosecution proceedings where a particular employer and/or employee or any party for that matter displays a degree of defiance and/or gross negligence with regard to any duty in terms of the Act that may have been breached.

OHSA is consistent with the constitutional imperative that each person is entitled to fair labour practices and to an environment which is not detrimental to that person’s health or wellbeing.

3.2 SCOPE AND APPLICATION OF THE OHSA

OHSA covers all areas of employment activity and the use of machinery except those specifically excluded from the Act.23

Unlike the LRA24 it is not confined to an employment relationship. In this regard, the provisions of OHSA also apply to:

i) self employed persons;

ii) persons engaged in the manufacture, production or sale of machinery;

iii) persons involved in the manufacture, production, sale and/or transport of substances used in the workplace.

In any event, employers are required to ensure the health and safety, not only of their employees, but of all persons who may be directly affected by their activities.

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23 S 3(a) and (b).
Section 9 of OHSA is a specific direction to an employer in this regard. It is also not only confined to people who may find themselves on the premises of the employer (this will also be discussed in more detail in paragraph 5.2.3).

The definition of ‘employee’ is so wide that it would in essence cover independent contractors, their employees, employees of labour brokers, consultants and/or visitors or other parties to a workplace (again this will be discussed in more detail herein below).

In any event, section 9 would close the gap and without doubt places an obligation, in general terms, upon an employer to take reasonable care for any third parties who may be affected by its operations.

The case of Serfontein v Spoornet illustrates how liability towards third parties works and what influence the OHSA can have on such liability. In this case a 16-year-old boy climbed onto the roof of a railway truck, and sustained an electric shock from an overhead power line. According to the evidence before the court there was no warning sign near the ladder on the truck. The elements that must be proved to succeed with a common law claim for damages are:

1) an act or omission;
2) wrongfulness;
3) negligence;
4) causation; and
5) harm.

### 3.3 DUTIES IN TERMS OF THE OHSA AND REGULATIONS

OHSA contains general duties as to the standards of safety an employer should maintain and also contains specific duties. These general and specific duties are designed to prevent accidents. Specific duties prohibit certain activities and on the other hand direct that certain steps be taken in relation to occupational health and safety. Examples are:

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26 S 8 of Act 85 of 1993.
i) plant machinery and equipment must comply with certain specifications;

ii) use of safety devices are required;

iii) use of protective equipment is required;

iv) use of lockout procedures are required;

v) biological monitoring is required;

vi) standards for light, noise and temperature is required;

vii) reasonable exposure to hazardous substances in those circumstances where it is not reasonably practicable to eliminate the substance either by engineering a different process or utilizing a different substance. There are regulated occupational exposure limits.

The standard of care is a common law duty of ‘reasonably care’. This will however be discussed in more detail in paragraph 5.2.3 herein below.

In relation to the steps that a reasonable employer should have taken to avoid an accident, same requires an analysis and balancing of a number of factors:

i) the seriousness of the harm;

ii) the chances of it happening;

iii) the degree of risk involved in taking the necessary precautions;

iv) the cost of taking precautions;

v) the difficulty of taking precautions.

In essence, the greater the seriousness of the potential harm or the greater the probability of its occurrence, the greater will be the necessity for taking safety precautions. The balancing process is a process that must be engaged upon at a point of time anterior to the accident.
It is important that an employer is proactive in conducting risk assessments and in conducting the balancing process as part of its health and safety programme(s).

An employer cannot therefore argue *ex post facto* (after the fact) that it would not have been reasonable to take the particular precaution. An *ex post facto* analysis may indicate an inadvertent approach to the proactive requirement in terms of OHSA.

In terms of the provisions of OHSA, employers are required to take all steps that are ‘reasonably practicable’. This means practicable having regard to:

a) the severity and scope of the hazard or risk concerned;

b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;

c) the availability and suitability of means to remove or mitigate that hazard or risk; and

d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.

The definition of ‘reasonably practicable’ marries that what has been set out herein before. It must however be noted that the regulations in terms of OHSA, in certain circumstances, stipulates a requirement of practicability as opposed to reasonable practicable. This implies a higher standard.

In addition to the above and particularly in relation to protective equipment, same must be suitable for its purpose. This requires a higher standard.

3.4 CONSEQUENCES OF BREACH OF A STATUTORY DUTY

3.4.1 CRIMINAL LIABILITY

Section 38 penalizes the contravention of certain provisions of OHSA. It makes provision for *any person* contraventions. Penalties in the form of R50 000.00 fines and/or one year imprisonment is provided for.
Section 38 also makes provision for employer offences in instances where any person has been injured at the workplace or an employee has been injured in the course and scope of his employment at any place. Penalties in the form of R100 000.00 fines and/or two years’ imprisonment is provided for. Charges of culpable homicide may also be relevant.\(^{27}\)

Section 37 also provides for vicarious liability at a level of criminal penalty. It is therefore possible for an employer to be held criminally liable for the acts/omissions of his employees and/or independent contractors and/or their employees.

### 3.4.2 CIVIL LIABILITY

A breach of a statutory duty may found and/or bolster an action for damages at civil law, however the following interesting situations arise:

#### 3.4.2.1 INJURY ON DUTY

In the event of an employee being injured in the normal course ad scope of events, which injury qualifies as an injury on duty as per the prescripts of COIDA, then such an employee is barred from instituting action against his employer as per the provisions of section 35 of COIDA.

This means that in relation to relief sought by the particular employee, that employee is confined to the provisions of COIDA and the relief provided therein. The employee will therefore be entitled to claim certain relief in the event of his injury being classified as an injury on duty. The employee will not be entitled to claim additional damages/compensation from his employer by virtue of the provisions of section 35 of COIDA. All damages are excluded including claims for pain and suffering and loss of amenities of life. This will be discussed and looked at in more detail herein below.

It should be mentioned that a lot of employers try and avoid this widened responsibility through admission passes and/or forms containing clauses indemnifying that particular

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\(^{27}\) *S v Russell* 1967 (3) All SA.
employer from any injury, harm or disease sustained by a person who enters the site of that particular employer. The validity, use and application of such indemnity forms/clauses will be discussed in more detail in chapter eight herein below.

I will now briefly discuss COIDA.
CHAPTER 4

THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 130 OF 1993

COIDA came into effect on 01 March 1994. The Act makes a number of significant changes to systems of statutory compensation. However, the retention of the structure of the previous Workmen’s Compensation Act (hereinafter referred to as ‘WCA’) as well as some of the previous wording used means that many of the decided cases under the WCA remain relevant.

COIDA provides a system of no-fault compensation for employees who are injured in accidents ‘that arise out of and in the course of their employment’ or who contract occupational diseases. However, negligence continues to play a role since an employee is entitled to additional compensation if he can establish that the injury or disease was caused by negligence of the employer or certain categories of managers and/or fellow employees. The Compensation Fund established by COIDA requires employers to contribute to a centralised state fund. There are, however, two (2) important exceptions:

i) the Rand Mutual Assurance Company Limited which operates in the mining industry; and

ii) Federal Employer’s Mutual Association which operates in the building industry.

Apart from the aforementioned and certain exceptions and certain exempted employers in terms of section 1 of the Act, all employers in South Africa must register and pay assessments to the fund.

COIDA provides for benefits to be paid to:

- employees who suffer temporary disablement;

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28 Act 130 of 1993. COIDA took effect in the former homelands that had worker’s compensation laws from 01 March 1995.
29 30 of 1941.
• employees who are permanently disabled; and

• the dependants of employees who die as a result of injuries sustained in accidents at work or as a result of an occupational disease.

The Act lists the more common diseases. If an employee contracts a disease that is not listed he must prove that the disease is related to his work in order to receive compensation. Problems with regard to access to medical facilities, the availability of specialists and other restraints regarding resources have led to an under-reporting of occupational diseases. The Act furthermore provides for the payment of medical aid received by disabled employees from the private medical profession at tariff rates.

The failure to comply with any of the obligations imposed by the Act amounts to a criminal offence and, in addition, the Commissioner has the power to penalise employers who do not comply with statutory obligations.

I will now look at the scope and application of COIDA in South Africa with specific attention being given to the position of ‘labour brokers’ employees as well as the importance of establishing and defining both ‘employee’ and ‘employer’ under various pieces of legislation.

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30 This is consistently easier than the previous requirement that employees must, in order to receive compensation, prove that the disease was contracted in circumstances amounting to an accident. In 1990 only 128 cases of occupational diseases was compensated (Accident Fund Annual Report (1993) 14). A significant increase in claims for Post Traumatic Stress Disorders, especially from the South African Police Service has also been reported since 2002. The major number of occupational diseases is in respect of Noise-Induced Hearing Loss.

CHAPTER 5
SCOPE AND APPLICATION OF COIDA

5.1 THE IMPORTANCE OF DRAWING A DISTINCTION BETWEEN EMPLOYEES, THIRD PARTIES AND EMPLOYEES OF LABOUR BROKERS

At the 2003 Annual ILO the fifth item on the agenda was entitled ‘The Scope of the Employment Relationship’. The conference resolved that the ILO should adopt a recommendation focused on what it termed the ‘disguised employment relationship’ and ‘on the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at national level’. It is concluded with the following somewhat cryptic sentence: ‘The issue of triangular employment relationships was not resolved.’

A triangular employment relationship occurs when ‘employees of an enterprise performs work for a third party to whom their employer provides labour or services’.

In relation to the aforementioned definition, the designation of the client as the third party is confusing. It suggests a primary relationship between the party providing the service and the worker. However, it is the client who determines what is required. If the client does not want the labour then there is no question of employment. The client therefore determines the relationship and is the dominant party. It is therefore odd to assume that the provider is the employer. On the face of it the identity of both employer and employee is clear and there is no need for talk of a ‘triangular employment relationship’ at all.

As of late one will find or be associated with the concept of ‘externalization’, in which business has structured its operations in such a way that labour is engaged through a third party. The benefit of this is that the client does not have to associate itself with risks of being an employer. A ‘delegation of employment’ so to speak. This means effectively that a business avoids the duties and responsibilities associated with being an employer in an employment relationship.

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32 Resolution on the Scope of the Employment Relationship 91st Session of the International Labour Conference.
In practice there is a diversity of ways in which employment can be delegated. Whether the party concerned is adequately described as a third party depends on the form of the employment relationship.

5.1.1 DIFFERENT FORMS OF ‘TRIANGULAR’ EMPLOYMENT RELATIONSHIPS

One can distinguish between three (3) forms of ‘triangular’ relationships:

(i) Franchising

Here a franchisor licenses a franchisee to operate a business under the franchisor’s trademark or brand, and the franchisee in turn employs workers to assist him. The franchisor retains control over key components of the business. On the other hand the franchisee constitutes an autonomous business, and the control exercised by the franchisor is generally not direct. This is because it does not employ and/or dismiss the workers of the franchisee. It also does not control the workplace where those employees work and as such the responsibility rests with the franchisee.34 Such responsibility ranging from the day-to-day functioning of the business to issues such as ensuring a safe and healthy working environment.

(ii) Contracting

The contractor normally provides goods or services to a core business. This gives rise to certain problems, both because of the diversity of forms this activity takes, and because it may or may not take place at the workplace of the core business. Contract cleaning, transport and security provide examples of contracts that constitute contracting conglomerates with their own high degree of autonomy and which provides services to a core business at its workplace.

(iii) Temporary Employment Services

Temporary Employment Services (‘TES’) procure labour to do the work for a client(s). This type of activity has led to the well known term of ‘broker’. Labour broking is therefore an

34 This is regardless of the fact that the premises may be leased by the franchisor to the franchisee.
accurate description of this exact type of activity. It is distinct from other triangular relationships for two (2) reasons:

i) it involves the provision of temporary workers to a client, or business;

ii) the employment is generally on the premises of the client which in turns implies and requires (in certain circumstances) a high degree of control over the workers.

Before continuing with this discussion it is important to firstly look at the various definitions of ‘employee’ and ‘employer’ under the different pieces of legislation as well as the different rights and duties associated with such definitions. Such rights and duties will differ depending on the act under which these definitions are established.

5.2 THE IMPORTANCE OF STATUTORY DEFINITIONS OF EMPLOYEES

An employee enjoys certain statutory rights and obligations.

These rights and obligations are set out in a number of statutes.

These statutes include:

• the Labour Relations Act;\(^\text{35}\) 66 of 1995.
• the Basic Conditions of Employment Act;\(^\text{36}\) 75 of 1997.
• the Occupational Health and Safety Act;\(^\text{37}\) 85 of 1993.
• the Compensation for Occupational Injuries and Diseases Act.\(^\text{38}\) 130 of 1993.

There are differences in the definition of ‘employee’ in those statutes.

If a particular individual does not meet the requirements of the particular definition of an employee, then and in that event, that individual will not enjoy the particular statutory rights

\(^{35}\) 66 of 1995.
\(^{36}\) 75 of 1997.
\(^{37}\) 85 of 1993.
\(^{38}\) 130 of 1993.
and will not be subject to whatever restrictions may be applicable to an individual who does meet those requirements.

Expositions of the definitions of ‘employee’ in relation to the various statutes are set out herein below:

### 5.2.1 THE LABOUR RELATIONS ACT 66 OF 1995

Section 213 of the LRA defines an employee as follows:

> ‘Employee is any person, excluding an independent contractor, who works for another and who receives, or is entitled to receive, any remuneration; and…

> any other person who in any manner assists in carrying on or conducting the business of an employer.’

Should an individual, therefore, not meet the requirements of the aforementioned definition, then and in that event, he will not enjoy the statutory rights that flow from the LRA.

The individual would, therefore, inter alia, be deprived of the right:

(a) not to be unfairly dismissed;
(b) not to be subjected to an unfair labour practice.
(c) to be entitled to participate in collective bargaining.

### 5.2.2 THE BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997

The BCEA defines an ‘employee’ as -

> ‘(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

> (b) any other person who in any manner assists in carrying on or conducting the business of an employer,’

An individual who does not meet the requirements of the definition will, therefore, not enjoy the rights pertaining to the regulation and enforcement of basic conditions of employment as set out in the aforementioned statute.
5.2.3 THE OCCUPATIONAL HEALTH AND SAFETY ACT 83 OF 1993

OHSA defines an ‘employee’ as-

‘sus[sic]ct to the provisions of subsection (2), any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person’

An ‘employer’ in terms of OHSA includes:

‘sus[sic]ct to the provisions of subsection (2), any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him, but excludes a labour broker as defined in section 1 (1) of the Labour Relations Act, 1956 (Act 28 of 1956)’

OSHA covers all areas of employment activity and the use of machinery except those specifically excluded from the Act. Unlike the LRA, it is not confined to an employment relationship.

In this regard the provisions of OHSA will also apply to:

• self-employed persons;

• persons engaged in the manufacture, production or sale of machinery;

• persons involved in the manufacture, production, sale and/or transport of substances used in the workplace.

Having regard to the aforementioned definition, it is clear that an individual, who would not meet the requirements of ‘employee’ for purposes of the LRA and the BCEA, may well meet the requirements of an employee for purposes of OHSA.

Reference to the words ‘... or works for ..., ... or works under the direction or supervision of an employer or any other person ...’ could well set the scene for an argument that
independent contractors, their employees, the employees of labour brokers, consultants and/or visitors or other parties to a work place may well meet the definition of ‘employee’.

This would mean that the client for whom the work is being performed would owe a duty of care towards those individuals.

This would mean that, for all intents and purposes, that particular client could be regarded as the employer of those individuals as set out herein before and those individuals could be the employee of that particular client.

The provisions of the OHSA would, therefore, be far reaching in relation to individuals who would normally not be regarded as employees.

The employer's and/or client’s standard of care would therefore be that as is set out in *Van Deventer v Workman's Compensation Commissioner*:\(^\text{39}\)

> ‘An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances of each particular case.’

In the event of an accident, the following arises:

(a) **Causality**

Is there a link between the employer's act (or omission) and the injury sustained?

(b) **Reasonable Care**

- Could the harm have been foreseen or predicted?
- Did the employer take reasonable steps to prevent the accident?

In the event that the harm was foreseen or foreseeable, the question must then be posed whether or not the employer and/or client took reasonable steps to prevent the accident.

\(^{39}\) 1962 (4) SA 28 (T) ad para 31B - C.
In applying the standard of reasonable care, the essential question is not whether or not the accident was, in fact, foreseen by the employer, but whether or not it should have been foreseen.\footnote{Ibid.}

It is in this regard, that the status of the particular individual plays an important roll.

If a client appoints an independent contractor to construct a store for housing flammable liquids on the basis that such independent contractor and/or its employees are specialists, then the duty of care that rests upon the client would be aggressively reduced. The particular independent contractor and/or the employees of that contractor would be best placed to determine what risks would associate with that project.

In relation to the steps that the reasonable employer should have taken to avoid an accident, same would require an analysis and balancing of a number of factors:

- The seriousness of the harm;
- The chances of it happening;
- The degree of risk involved in taking the precautions;
- The cost of taking the precautions;
- The difficulty of taking the precautions.

It is, however, important to note that, even should a particular individual not meet the definition of ‘employee’, then and in that event, the provisions of section 9\footnote{Ibid.} still place an obligation on the employer/client to safeguard the safety of others who may be exposed to that risk.

Apart from the duty of care, individuals would also receive the protection against victimisation. See \textit{Engineering Council of SA v City of Tshwane Metropolitan Municipality}.\footnote{[2008] 6 BLLR 571 (T) ad para 88ff.}
In conclusion, it is important to note that the OSHA provides for criminal liability in those circumstances where that duty of care is breached.

This means that employers and other parties, including traditional employees, may be exposed to the criminal justice system.

While the provisions of the OHSA are directed at criminalising non-compliance with statutory duties, non-compliance with the statutory duty gives rise to civil liability.

The fact that these statutory duties impact on criminal and civil liability is illustrated by the matter of *Vigalio v Afrox Ltd.*[^43^] A claim was brought for damages arising from the death of an employee allegedly caused by the negligence of the employer and/or its employees. Summonses had been issued for the contraventions of MOSA and admission of guilt fines had been paid. Noting the failure of the employee to apply the safeguards prescribed by MOSA, the court found that the reasonable employer *should have foreseen* the resultant possibility of fatal accidents and accordingly found for the plaintiff.[^44^] It is submitted that, on dealing with claims for damages arising from alleged violations of section 8 of the OHSA, the courts will similarly apply the test of *foreseeability* and *preventability* in determining the liability of the employer.

In normal circumstances, the civil liability that would follow an injury is governed by the provisions of COIDA.

There is limited compensation to an employee (as per definition of COIDA) for and in respect of an injury sustained whilst on duty.

The provisions of COIDA, and specifically section 35, however, prevent an employee, as per definition of COIDA, from taking action against his employer. It should be noted that this defence was not raised in *Vigalio v Afrox Ltd.*[^45^]

[^43^]: 1996 (3) SA 450 (W).
[^44^]: Ad para 466.
[^45^]: Ibid.
For those individuals who meet the requirements of the definition of ‘employee’ for purposes of the OHSA and/or ‘third party’ as per the provisions of section 9, but do not meet the requirements of the definition of ‘employee’ in terms of COIDA, would, therefore, be able to establish cause of action for civil liability based on the provision of the OHSA.

5.2.4 COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 130 OF 1993

COIDA has a history that stretches back over more than a century. The pre-Union statutes were consolidated in the Workman’s Compensation Act 25 of 1914, which entitled a workman or his dependant’s to receive compensation from his employer, in accordance with a tariff, in the event that the workman was accidentally incapacitated or killed in the course of his work. A person was a ‘workman in relation to work if he has entered into, or works under, a contract of employment ....’.\(^{46}\) On the other hand, a person ‘having a contract of employment with a workman to perform work’ was to be ‘regarded for purposes of this Act as the employer of that workman’.\(^{47}\)

These provisions, along with others, were retained in the Workmen’s Compensation Act 59 of 1934, which replaced the 1914 Act. The 1934 Act was in turn replaced by the Workmen’s Compensation Act 30 1941. The 1941 Act transferred the obligation to compensate workmen for workplace injuries from the employer (who until then had effectively been an insurer against workplace injuries) to a compensation fund to which employers were required to contribute. The material part of the definition of a ‘workman’ remained substantially unchanged.\(^{48}\) An ‘employer’ was redefined (in form but not in substance) to mean ‘a person who employs a workman’ (subject to certain provisions and extensions that are not material). In ordinary language that means the person with whom he has a contract of employment. Any doubt in this regard is once again removed by the express provision that if the services of the workman were temporarily lent or let on hire to another person then the employer would be ‘deemed to continue to be the employer of such a workman whilst the workman is working for that other person’. This was still the position when the 1941 Act was replaced by the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

\(^{46}\) S 2(1).
\(^{47}\) S 2(2).
\(^{48}\) S 3(1) ‘… any person who has entered into or works under a contract of service …’. 
The current Act defines an employee as:

‘a 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, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or kind’. 49

This definition is in light of the dominant impression test as adopted by our courts in *McKenzie v South African Broadcasting Company.* 50

This definition includes the following persons:

- a casual employee employed for the purposes of the employer’s business; 51

- a director or a member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, insofar as he acts within the scope of his employment in terms of such contract; 52

- *a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;* 53

- in the case of a deceased employee, his dependants; 54

- in the case of an employee who is a person under disability, a curator acting on behalf of that person. 55

49  S 1(xviii).
50  1999 20 ILJ 585 (LAC).
51  S1 (xviii)(a).
52  S1(xviii)(b).
53  S1 (xviii)(c).
54  S1 (xviii) (d).
55  S1 (xviii) (d).
The following persons are excluded:

- a person, including a person in the employ of the state, performing military service or undergoing training referred to in the Defence Act,\(^{56}\) and who is not a member of the Permanent Force of the South African Defence Force;\(^{57}\)

- a member of the Permanent Force of the South African Defence Force while on ‘service in the defence of the Republic’ as defined in section 1 of the Defence Act;\(^{58}\)

- a member of the South African Police Force while employed in terms of section 7 of the Police Act 7 of 1958 on ‘Service in defence of the Republic’ as defined in section 1 of the Defence Act;\(^{59}\)

- a person who contracts for the carrying out of work and himself engages other persons to perform such work;\(^{60}\)

- a domestic employee employed as such in a private household.

In terms of COIDA an employer includes:

‘any person controlling the business of an employer; if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person; and a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker’.

This definition is wider than the previous definition of employer which results in a wider scope of application for the prohibition of claims against individual employers as contained in section 35 of COIDA.

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\(^{56}\) Act 44 of 1957.

\(^{57}\) (S1 (xviii) (d) (i)).

\(^{58}\) S1 (xviii) (d) (ii).

\(^{59}\) S1 (xviii) (d) (iii).

\(^{60}\) (S1 (xviii) (d) (iv).
For informative purposes it should be noted that section 23(3) of COIDA makes provision for migrant workers in that while they are temporarily performing work inside the Republic they may be entitled to compensation provided arrangements have been made with the Compensation Commissioner. Where such a migrant worker performs work inside the Republic for more than 12 months, he is deemed to be employed in the Republic and therefore enjoys the protection of the Act. The same applies mutatis mutandis to persons who ordinarily work within the country, but who performs work on a temporary basis outside the country. The Act also applies to employees employed on South African aircrafts and ships.

As referred to herein before, Temporary Employment Services (‘TES’) in South Africa procure labour to do work for the client.

On the face of it, the notion of the temporary employment service as the employer seems incorrect and misconstrued. One would imagine that once the labour has been placed that the temporary employment service provider would fall away.

It is difficult to imagine that temporary employment services could have been designated as employers except through legislation. This is however exactly what has happened in South Africa.

COIDA provides that where a mandatory procures the services of a contractor/labour broker such contractor/labour broker must register with the Commission and pay assessments. Failure to register or pay the assessments means that the mandatory/client is deemed to be the employer of the contractor/labour broker’s employees. The mandatory in turn has a right to claim back from the contractor/labour broker or set it off against any debt owing.

Section 35 of COIDA does not bar the contractor/labour broker and/or the employees of such contractor/labour broker from instituting action against the mandatory. It can be argued that the mandatory is not the employer of the contractor/labour broker’s employees and in those circumstances section 36 would not constitute a bar to the institution of civil litigation against the mandatory.

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61 S 23 (3)(b).
62 S 23.
63 Act 130 of 1993.
Whether or not an individual is an employee or a third party has a bearing on the rights and obligations of that particular employee.

Many companies have chosen to outsource their labour production. They have either done so on the basis of appointing independent contractors and/or making use of labour broker employees. Those individuals who they have chosen to utilise may, therefore, not meet the requirements of a definition of ‘employee’ as set out in the LRA viz-a-viz, that company.

However, the choice to outsource in those circumstances may not be so attractive when regard is had to liability that may flow from other legislation. The choice of labour broker, in these circumstances, may be very important.

Labour brokers may specialise in the provision of labour in a variety of sectoral determinations or collective bargaining units. This may mean that the same labour broker may provide employees that fall within the jurisdiction of the MEIBC and employees who fall within the jurisdiction of MIBCO and/or any other bargaining council.

The company would, as per the provisions of the LRA, remain jointly and severally liable for any short payment by the labour broker.

The provisions of the OHSA, when read with the definition of ‘employee’ and when read with the provisions of section 9, place a duty of care upon the company towards those individuals.

Not only would a breach of that statutory duty constitute criminal liability, but also expose the company to civil liability. Those individuals may then take action against the company, without fear of the provisions of section 35. Those individuals would, therefore, enjoy an injury on duty claim via their employer.

In addition thereto, they would be at liberty to institute a claim against the company for the balance of their damages. Of course, they would have to establish causality and fault.

Two interesting issues, however, arise.
Firstly, it would be interesting to note whether or not that individual's claim, or at least the value of that claim, would be affected by his failure to timeously claim injury on duty benefits. In this regard, the RAF Act, in paying compensation, takes into consideration any amount that an individual would have procured from the Compensation Commissioner.

The present position should, therefore, be no different.

Should an individual, therefore, not claim his benefits in terms of an injury on duty; surely a company could deduct that from the compensation payable, in the circumstances.

Secondly, provision is made in COIDA for employees of contractors to piggy-back the company's registration with the Compensation Commissioner.

Does this mean that those employees of the contractor then waive their rights to independently institute action against the company?

Would this mean that the individual has to make an election?

The answer to this dilemma may well rest in the circumstances of each and every case.

5.3 CROWN CHICKENS (PTY) LTD T/A ROCKLANDS POULTRY v RIECK

This case was heard in the Supreme Court of Appeal. Here the Respondent (Rieck) claimed damages in the High Court for bodily injuries sustained as a result of a gunshot wound after being taken hostage by robbers. Employees of the Appellant fired shots at the fleeing vehicle in an attempt to stop it and in doing so injured the Respondent. After conclusion of the trial but before judgment, the Appellant filed a special plea relying on section 35(1) of COIDA to dismiss the Respondent’s claim. The Respondent had an employment contract with a labour broker who provided her services to the Appellant. The Appellant argued that on a proper construction of the definitions of ‘employer’ and ‘employee’ the Appellant was the employer of the Respondent and was thus indemnified against any action for damages by way of section 35(1).

64 2007 (2) SA 118 (SCA).
The court stated that on a correct interpretation of the definition of ‘employer’ and ‘employee’, an employer was the person with whom the employee had a contractual relationship, regardless of whether that employee might be performing contractual obligations for someone else. In this case the Respondent was not in a contractual relationship with the Appellant, and the Appellant was therefore not indemnified by section 35(1) for any action for damages.

It is also interesting to note that in this case the Appellant argued the existence of a triangular relationship, as discussed herein before, contemplated by subsection (b) of the definition of ‘employer’ as contained in COIDA. The Appellant submitted that in such a relationship, the client (Appellant) of the labour broker becomes the employer for so long as the employee’s services are made available to the client by such broker.

The court remarked as follows:

‘that assertion as to the meaning of subsection (b) is not correct. The words ‘such employer’ in subsection (b) refer back to the word ‘employer’ that immediately precedes it, and not to the phrase ‘some other person’. Apart from its inconsistency with the plain language of the subsection, the construction that was advanced on behalf of the Appellant would reverse the position that had prevailed for over a century, for which there is no apparent reason, and (which) would also be inconsistent with the scheme of the Act as a whole’. 65

The rationale for the aforementioned submission was to extend the definition of ‘employer’ to include labour brokers as the term ‘labour broker’ is not used in the opening phrase of the definition. It was submitted that where such a relationship exists, that the person referred to as the employer in the opening phrase of the definition must be the client of the labour broker.

The effect of such a construction of the definition would be that for the first time in a long history of workman’s compensation, a concept of two (2) simultaneous employers was introduced, for no apparent reason, and then only in relation to labour brokers. This will also have the effect that a person will receive the benefit of being an employer (who is exempted

65 Ad para G and H.
from civil liability by virtue of section 35(1)) but who will have no obligation(s) to contribute to the fund that compensates for such injuries.66

The court remarked that the proper meaning of the definition as contained in COIDA is consistent with the pattern of earlier legislation which is that an employee has only one employer at any time, which is the person with whom he is in a contractual relationship of employment, even when he performs his contractual obligations for some other person.

I will now look in more detail at the application of section 35 in South African case law.

66 Ss 82 and 83, contributions to the fund are assessed on the basis of earnings that are paid by an employer to the employee.
As discussed herein before, when an employee is injured in the normal course of events, which injury qualifies as an injury on duty as per the prescripts of COIDA, then such employee is barred from instituting action against his employer as per the provisions of section 35 of COIDA. This relates to instances where the injury results in disablement or death.

Section 35 of COIDA reads 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.

(2) For the purposes of subsection (1) a person referred to in section 56(1) (b), (c), (d) and (e) shall be deemed to be an employer.’

In relation to relief that the employee may therefore wish to seek from his employer, such employee is confined to the provisions of COIDA and the relief provided therein.

The employee will therefore be entitled to claim certain relief in the event of his injury being classified as an injury on duty.

He will not be entitled to claim any additional damages/compensation from his employer by virtue of the provisions of section 35 of COIDA. All claims for damages are excluded, including claims for pain, suffering and loss of amenities.\(^67\)

\(^67\)  *Mphosi v Central Board for Co-Operative Insurance* 1974 (4) SA 633 (A) at 644B.
There are however three (3) twists in this regard:

(1) The employee may institute action for the balance of his claim, whatever that may be, against any entity and/or third party who is not his employer within the meaning of that term as set out in COIDA. He therefore may institute action against any individual including co-employees and/or supervisors/foremen/managers of a certain level for the balance of his claim.68

The employee will however have to establish all the requirements for such a claim, fault being one of them.

(2) In those instances where the employer is at fault, then the employee may enjoy a claim for increased compensation in terms of section 56 of COIDA.

(3) To the extent that the employee may be injured on account of his serious and wilful misconduct, then and in that event the Compensation Commissioner is empowered by virtue of the provisions of section 22(3) (a) to reject the claim.

There appears to be authority supporting the notion that an employee can sue his employer for deliberate wrongdoing.69

There is furthermore the view that in those circumstances where an employer fails to institute a claim for compensation on behalf of an employee in circumstances arising out of an injury on duty, then and in that event the employee will enjoy a separate claim against the employer for his failure to do so.

The employer may still be held accountable from the perspective of criminal liability should he fail to report an incident within the prescribed 12 month period.70

The employer likewise will be exposed to hidden costs in replacing the employee pending the employee’s return to work.

68 See s 56.
69 Kau v Fourie 1971 (3) SA (T) 623 at 629-630; Mphosi v Central Board for Co-Operative Insurance Ltd 1974 (2) SA 19 (W) 22A.
70 S 39(6).
The employer will also be exposed to increased assessments and payments to the Compensation Commissioner on account of the increase in industrial accidents.

The High Court held in *Boer v Developments CC*\(^{71}\) that an employee cannot institute an action for damages for occupational injuries against an employer on the grounds that the employer had not registered and paid the prescribed amounts in terms of the Act. In such a case, the employee is an employee as defined by the Act and his right to compensation is governed by section 22.

A vexed question is whether ‘compensation’ in terms of the WCA and COIDA is limited to pecuniary loss and, therefore, does not prevent an injured employee from claiming general damages from an employer (damages falling outside the scope of the Act, in respect of which no compensation can be recovered from the Workman’s Compensation Commissioner). The Appellate Division in *Mphoi v Central Board for Co-Operative Insurance Ltd*\(^{72}\) ruled that the word ‘damages’ in section 7 of the WCA ‘clearly includes compensation for pain and suffering and loss of amenities’\(^{73}\) and that section 7 therefore ‘precludes a workman’s common law action for all damages, including damages for pain and suffering and loss of amenities, in respect an injury which is compensable under the Act’.\(^{74}\) The ruling was in contrast to an earlier line of decisions\(^{75}\) that the provisions of the 1941 WCA were ‘generally inconsistent with the contention that it covers factors like pain and loss of amenities’.\(^{76}\) In the later case of *Senator Versekeringsmaatskappy Bpk v Bezuidenhout*\(^{77}\) the Appellate Division ruled in the context of section 8(1)(a) of the WCA that awards under the Act relate solely to patrimonial loss. Although section 7 is concerned with limiting an employee’s right of action against an employer while section 8 regulates rights of action against third parties, the effect of the later decision would seem to be that an employee can claim general damages neither in terms of the Act nor from an employer but only from a third party. While an employee cannot claim damages from the employer for work related injuries, it was held in *Bhoer v Union*

\(^{71}\) (2004) 25 ILJ 1247 (T).
\(^{72}\) *Ibid.*
\(^{73}\) At 643C-F.
\(^{74}\) At 644B.
\(^{75}\) *South British Insurance Co Ltd v Harley* 1957 (3) SA 368 (A) and *Natal Provincial Administration v Buys* 1957 (4) SA 646 (A), following *Bhoer v Union Government* 1956 (3) SA 582 (C).
\(^{76}\) *South British Insurance Co Ltd v Harley* 1957 (3) SA 368 (A) at 373.
\(^{77}\) 1987 (2) SA 361 (A).
Government that the employee retained a right of action against a fellow employee whose alleged negligence had caused the injury. Nor was the employee debarred from claiming damages for shock, pain and suffering in terms of the Motor Vehicles Insurance Act.

In Road Accident Fund v Monjane, the appellant contended that it was not liable to compensate the respondent in terms of section 17 of the RAF Act because, by virtue of section 35 of COIDA the respondent’s employer, being the driver whose negligence caused the accident, would not have been liable to the respondent, and in terms of section 19(a) of the RAF Act the fund is not obliged to compensate a third party for loss or damage for which neither the driver nor the owner of the motor vehicle concerned would have been liable. The court agreed with the appellant that a claim is precluded when the wrongdoer is the third party’s employer, regardless of whether or not the third party is being conveyed in the motor vehicle concerned, provided only that the injury sustained by the third party is an ‘occupational injury’ as defined in COIDA.

In Vogel v South African Airways, however, it was held that section 7 of the WCA precluded an injured employee from suing his employer in its capacity as the employer of a fellow employee whose negligence had caused the plaintiff’s injuries ‘[E]ven if the claim is based on the defendant’s vicarious liability’, it was held, ‘it is and can be nothing more than a claim by the plaintiff at common law against his employer; and the fact that it is [the driver’s] negligence which is the cause of action, does not make the claim any less’ an action contemplated by section 7.

In Free State Consolidated Gold Mines Bpk h/a Western Holdings Goudmyn v Labuschagne the Labour Appeal Court held that section 35 of COIDA precluded an employee from claiming compensation from his employer in terms of the 1956 LRA for an alleged unfair labour practice that had resulted in the employee’s permanent disability.

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78 1956 (3) SA 582 (C) at 589G.
79 Act 29 of 1942.
81 56 of 1996.
82 1968 (4) SA 452 (E).
83 At 458 H.
The preclusion of claims against employers, however, does not extend to injuries falling beyond the scope of the Act. In *Kau v Fourie*\(^{85}\) it was held that an employer who had assaulted an employee was not protected by section 7 because the injury was not the result of the employment relationship. The employee was, therefore entitled to damages in addition to compensation received from the Workman’s Compensation Commissioner in respect of the accident that had given rise to the assault. Furthermore, in *Kadiega v North West Housing Corporation*\(^{86}\) the High Court stated *obiter* that ‘an employer and a former employee may enter into a valid contract in terms of which the employer will compensate the employee for injuries sustained in the course and scope of his or her employment’.\(^{87}\) For such a contract to be enforceable, it was added, it must be shown that the defendant waived the right which section 35 conferred on it.

In two (2) cases dealing with sexual harassment suffered in the workplace it was argued by the defence that the applicant’s claim for compensation for post-traumatic stress should have been dealt with in terms of COIDA. In both cases the defence was rejected. In *Ntshabo v Real Security*\(^{88}\) it was held that the applicant’s condition was caused by conduct that did not arise in the course and scope of her employment. In *Grobler v Naspers Bpk*\(^{89}\) the High Court, referring to the definition of ‘occupational injury’ and ‘accident’, stated that COIDA clearly envisages an ‘accident’ as consisting of a specific incident. The sexual harassment that gave rise to the claim, however, had been perpetrated over an extended period of time. Furthermore, the defence failed because the respondent was not the applicant’s employer.

On appeal *Media 24 Ltd v Grobler*,\(^{90}\) the Supreme Court of Appeal did not find it necessary to rule on the above finding because the incident that caused the respondent’s psychological disorder had occurred at her home and not in the course and scope of her employment. COIDA was, therefore, not applicable. The court, however, went on to state *obiter* that employees who contract psychiatric disorders as a result of sexual harassment in the course and scope of their employment may well be able to claim compensation under section 65 and that a claim against the employer would therefore be excluded by section 35.

\(^{85}\) 1971 (3) SA 623 (T).
\(^{86}\) (2006) 27 ILJ 89 (B).
\(^{87}\) At para 23, relying on *Jiya v Durban Roodepoort Deep Ltd* 2000 (1) SA 181 (W).
\(^{88}\) [2004] 1 BLLR 58 LC.
\(^{89}\) [2004] 5 BLLR 455 (C).
\(^{90}\) [2005] BLLR 649 (SCA) at para 77.
This approach was endorsed in *Urquhart v Compensation Commissioner* \(^{91}\) where the post-traumatic stress disorder suffered by an employee was found to be ‘the result of an accident which arose out of and in the scope of the appellant’s employment’, thus precluding a claim for damages. However, in *Odayar v Compensation Commissioner* \(^{92}\) the High Court emphatically rejected the Compensation Commissioner’s treatment of post traumatic stress disorder as an ‘occupational injury’, which must be based on an ‘accident’, and the Commissioner’s dismissal of the applicant’s claim because it was not possible to identify a specific incident as the cause of the post-traumatic stress disorder. The court held this to be a misinterpretation of the Act and dealt with the plaintiff’s claim as being one relating to an occupational disease.

In *Strauss v MEC for Education, Western Cape Province* \(^{93}\) it was argued by way of a special plea that the defendant was not liable in terms of the South Africa Schools Act 84 of 1996 for the damages suffered by the plaintiff, an educator, in the course of her employment because such liability was excluded by section 35(1) of COIDA. The Labour Court dismissed the special plea on the basis that section 60(1) of the South African Schools Act was not subject to section 35(1).

And interestingly in *Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd)* \(^{94}\) the High Court held that an injury sustained by an employee while leaving her employer’s premises after work was not an ‘occupational injury’ arising out of and in the course of her employment, within the meaning of COIDA.

*Jooste v Score Supermarket Trading (Pty) Ltd* \(^{95}\) is the leading authority on the operation and application of section 35 of COIDA in South Africa. This case is discussed in more detail herein below.

\(^{91}\) [2006] 1 BLLR 96 (E).
\(^{92}\) (2006) 27 ILJ 1477 (N).
\(^{93}\) (2007) 28 ILJ 375 (LC).
\(^{94}\) (2003) 24 ILJ 126 (W).
\(^{95}\) 1999 (2) SA 1 (CC).
CHAPTER 7

THE DEBATE AS TO WHETHER OR NOT SECTION 35 OF COIDA IS CONSISTENT WITH THE CONSTITUTION

For purposes of this discussion the case of Jooste v Score Supermarket Trading (Pty) Ltd is the leading authority in South Africa. In this case the Applicant was injured in the supermarket where she was employed and instituted action against her employer for damages sustained as a result of her injuries. The employer argued that section 35(1) of COIDA effectively bars an employee from bringing an action against an employer and that the employee was under the circumstances confined to bringing a claim only in terms of the Act, such claim would be confined to pecuniary loss i.e. actual loss and not include damages for pain and suffering.

The High Court found section 35(1) to infringe section 9(1) and section 9(3) of the Constitution and was ruled to be invalid. It was argued that the section violated the equality guarantee in that it denied an employee the right to claim general damages for pain and suffering against an employer while non-employees enjoyed such right at common law.

Ordinarily the common law allows an action for damages to be instituted in respect of any loss suffered as a result of the negligence of another. The Act, however, bars an employee from bringing an action for damages. Instead it provides and guarantees a mechanism by which such an employee may claim from a fund specially created for this purpose. The question in this case was whether such differentiated treatment of employees was a violation of the right to equality.

The Constitutional Court set aside the ruling of the High Court and proceeded to set out the test to be followed. Accepting that there was differentiation between employees and non-employees, the key question was whether there was a rational connection between the differentiation and a legitimate government purpose. It went on to find that there was such a legitimate government purpose, namely to regulate compensation for injury sustained while on duty. On that basis it found that the provisions were not unconstitutional.
Importantly in this case there was no evidence that the differentiation amounted to unfair discrimination. If that were the case, then the party seeking to rely on the measure would have to show it passed the limitation test.

On the question of whether the right to claim in terms of the Act should have existed together with, or as an alternative to, the common law right to claim damages, the court said that was a policy decision which the legislature must take.

This stance is strange especially given Yacoob J’s reasoning in Government of the Republic of South Africa v Grootboom where it was made clear that the court will not prescribe policy to the legislature and the executive, the difference between the decision in Grootboom and Jooste, where ‘the invitation … to make a policy choice under the guise of rationality review … was firmly declined’, is striking. In this case the court had to decide upon the rationality of an economic policy choice in view of the equality guarantee in section 9(1).

The notion of the acceptability of differentiated treatment was once again confirmed, the test being the existence of a legitimate government purpose. The differentiation could not be arbitrary, irrational or show naked preference.

The court displayed a marked reluctance to get involved in policy issues and clearly stated that its function was not to state whether the scheme chosen by government could be improved. As long as the test set out above was passed, the court would not interfere.

This was not a case of unfair discrimination on one of the listed grounds but one of differentiated treatment. The test laid out by the court presents useful and practical criteria or indicators in determining what differentiation is permissible. It may be said that this is a very easy test for government to pass to simply show the existence of a legitimate government purpose, something relatively easy to do as this case illustrated.

Purely from a practical point of view, and while understanding the legal basis of the court’s reasoning, there have been significant time delays in the processing of claims in terms of the Act. The result of this judgment is that the route of the Act is the only route for employees

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96 2001 (1) SA 46 (CC).
injured on duty. That being the case, measures must be taken to ensure that all claims are handled expeditiously. This is however not the case.

*The possibility exists, however, that provisions of the Act could be again challenged, not on the basis of differentiation, but on the basis that such differentiation amounts to unfair discrimination.*

Thus, for all intents and purposes, the developing jurisprudence on equality laws draws a distinction between differentiation based on grounds that affect a person’s dignity and worth as a human being and those based on grounds that do not have this effect. In instances where differentiation does not impact on dignity, the applicant is restricted to arguing that there is a violation of section 9(1).

A much more robust approach is adopted when the grounds of differentiation impact on human dignity. The court, by compartmentalising the equality right in this fashion, has clearly signalled that the primary thrust of the equality right is to carefully scrutinise differentiations that impact on dignity. Thus challenges to laws allowing differentiation on grounds that do not impact upon dignity will face strong presumption of constitutionality. Government decisions that do not impact upon dignity such as those that make choices and give effect to its economic policies will be subject to less exacting scrutiny.

It is argued to be the correct approach because a democratic government must be afforded the necessary space to fashion and implement policies aimed at improving the equality of life of people. Given the scope of the Bill of Rights and the many other constraints on the exercise of governmental power, it is probably appropriate that section 9(1) be assigned a quieter role.

*Jooste v Score Supermarkets Trading (Pty) Ltd*[^97] is an illustration of this attitude. Section 35(1) limits the common law right of employees to claim compensation for injuries sustained at the workplace. Claims have to be instituted within 12 months of the date of the accident and a limit is placed on the amount that could be claimed as compensation. The concern was that the law differentiated between employees and other persons suffering personal injuries and thus infringed section 9(1) of the Constitution.

It appears that the Constitutional Court in *S v Ntuli*\(^{98}\) is an example of the categorisation not being rationally linked to a government objective. The Constitutional Court had to consider the validity of sections of the Criminal Procedure Act 51 1977\(^{99}\) which differentiated between appellants in prison who were not represented and other appellants. Only the former had to obtain a certificate from a judge certifying that there are reasonable grounds for the review prior to pursuing an appeal. The court held that these provisions infringed both the right to have recourse by way of appeal or review to a higher court.\(^{100}\) The effect of requiring prisoners who were unrepresented to obtain a certificate and not requiring others to do so meant that prisoners who were represented or persons who had been fined or who had received suspended sentences were treated more favourably by the law. Didcott J found that this violated the right to equality; at the very least guarantees to everybody equal treatment by our courts of law. This guarantee was violated by the Act imposing greater burdens upon unrepresented prisoners in pursuing appeals.

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\(^{98}\) 1996 (1) SA 1207 (CC).

\(^{99}\) S 103 read with s 305 of the Criminal Procedure Act 1977.

\(^{100}\) S 25(3)(h) and the right to equality before the law, s 8(1).
Currently in South Africa, the only alternative to companies and businesses who are precluded from relying on section 35 of COIDA to escape liability from civil law suites from third parties is that of indemnity clauses/forms. This includes clients who procure the services of workers from TES.

This is done largely through indemnity clauses in contracts and/or indemnity forms which is provided to a person(s) upon access to a particular workplace.

Indemnity clauses or forms in South Africa can be associated with the term known as ‘good faith dealing’. Good faith is not a concept that can be adequately defined; it is generally regarded as a very wide doctrine.

In South Africa the doctrine of good faith has existed for quite some time, mostly referred to as *bona fides*, a doctrine which played a great role in the development of Roman contract law, and further influenced the development of the principle of equity in civil law. But this did not give the doctrine of good faith formal acceptance in the South African legal system; it has over the years been regarded as an elusive concept which could only destabilize well established legal rules. Most judges regard the doctrine as a threat to their views on freedom of contract being an absolute basis of the law of contract.\(^\text{101}\)

The concept was accepted in a couple of instances, for instance, in *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman*\(^\text{102}\) it was later dismissed in *Brisley v Drotsky*\(^\text{103}\) where it was held that the doctrine could not be accepted as a basis to set aside or enforce a contractual relationship. This was confirmed in *Afrox Healthcare Bpk v Strydom*\(^\text{104}\) it is now settled that in South Africa, the concept of good faith cannot be used in dealing with cases involving contractual unfairness that cannot be handled by pre-existing rules, but public policy can.

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\(^{102}\) [1997] 3 All SA 391 (SCA).
\(^{103}\) 2002 (4) SA 1 (SCA).
\(^{104}\) [2002] 4 All SA 125 (SCA).
As the concept of good faith was transplanted into the South African law, the uncertainty as to its existence and necessity came along too. The true meaning of the concept remained elusive for a while in South Africa, it raised a debate until an attempt to settle it by Olivier JA in the case of *Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman*\(^\text{105}\) In this case the essential question raised was whether the bank could enforce a deed of surety-ship and a cession which had been signed by an ageing, 85 year old woman to secure the debts of a company owned by her son. The court opined not to allow such an act, the decision was unanimous but it was based on the fact that she lacked contractual capacity. The most interesting reasoning was given by Olivier JA and was based on the concepts of good faith and public policy. In short he outlined the fact that there was a close relationship between the concepts of good faith, public policy and public interest in contracting, he said this was because the function of good faith in contract has always been considered as a tool to give effect to what the society regarded as just, reasonable and fair, for him the concept could be equated to an extension of the public policy principle which is only invoked on demands of public interest.

He counter argued against the notion that equitable principles are of force only if they are a part of substantive law, outlining that this would mean the legal system was inflexible, and unable to adapt to the ever-changing demands and views of society, which would ultimately render law a rigid system of rules that could not solve the problems of society reasonably.

Therefore he went on to hold that in that particular case, the creditor bank must have been aware that an elderly surety was incapable of fully comprehending the terms of the contract, and chances are, she was acting under the influence of her son. In such circumstances, the bank should have told her to get independent advice or explained to her the consequences of her actions, but since it failed to do so, it was not in the public’s interest to enforce such a contract, even good faith demanded that such contract should not be enforced.\(^\text{106}\)

His observations became the foundation for the new approach towards advocating the adoption of the concept of good faith in South Africa, there was a mass of cases that followed some adopting and others rejecting the concept, most decisions in lower courts, especially the High Court did recognize the concept, but the Supreme Court has proved to be stubborn.

\(^{105}\) [1997] 3 All SA 391 (SCA).
\(^{106}\) Brownsword, Hird and Howells *supra* 3 at 225-226.
This stubbornness can be evidenced in the decisions that followed the one above, for instance in the case of *Brisley v Drotsky*, it was stated that the view in *Saayman* was of a single judge and that good faith could not be accepted as an independent basis for setting aside or refusing to enforce provisions of contracts, but even then there was little support for the concept in the end in a short concurring judgment of Cameron JA which drew attention to the concept of public policy as a recognized basis:

"In its modern guise, “public policy” is now rooted in our Constitution and the fundamental values it enshrines. These include, human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism."\(^{107}\)

Later there was another attempt to persuade the Supreme Court of Appeal to set aside a contractual provision since it conflicted with the principle of good faith, the attempt was unsuccessful and the Supreme Court confirmed the decision laid out in *Brisley v Drotsky*, of course the appellant’s contention that the contractual provision was contrary to public policy was not dismissed in a similar way, but it simply failed on facts.\(^{108}\) In this case the court explained that although the concept of good faith serves as a foundation and justification for legal rules, the court cannot act on the basis of abstract ideas but only on the basis of established legal rules.

In *Afrox Healthcare v Strydom*, an exclusion clause in a hospital treatment contract was challenged as contrary to public policy and good faith by a patient who had suffered irreparable harm in a hospital operation as a result of a nurse’s negligence in dressing his wounds. The challenge was dismissed, the court finding that the contractual relationship was not an unequal one, that good faith was not in itself a ground for invalidating contracts\(^{109}\) and that the clause did not promote negligent conduct contrary to the respondent’s constitutional right of access to health care; other factors, such as the hospital’s need to maintain its


\(^{109}\) See also on this *Boe Bank Bpk v Van Zyl* 2002 (5) SA 165 (C): bank able to enforce surety against father-in-law of principal debtor; no duress or undue influence; and no overarching principle of good faith or improper procurement of consensus recognised in South Africa by SCA; a lower court would need direction before it could make the change.
professional reputation, would ensure to promote the right to health. Moreover freedom of contract had to be taken into account.\textsuperscript{110}

Since, \textit{Afrox Healthcare Bpk Strydom, Brisley v Drotsky} and \textit{South African Forestry Co Ltd York Timbers}, good faith as an abstract value cannot be used to intervene in contractual relationships, but public policy still can. He said that to achieve just results, there were advantages in using the concept of public policy which the law had developed over the centuries and linked to the Constitution, rather than the less familiar concept of good faith. But then went on to say, it would be a mistake to regard the door as forever closed, and self-isolate South Africa from many other legal systems in which good faith plays a prominent part.\textsuperscript{111}

From a health and safety perspective, one can accept that any clause and/or form indemnifying an employer/business from injury or loss sustained as a result of an accident in a workplace where that particular employer/business has failed and or refused to take all reasonable steps to safeguard against the possibility of any such harm or loss will be against public policy. However, as the discussion herein before illustrates, one will have to make an assessment of the particular clause/form based on the particular set of facts.

\textit{ER24 Holdings v Smith NO}\textsuperscript{112} dealt with the validity of a clause which indemnified ER 24 from liability towards the respondent for any injury sustained. The court expressed that the contract concluded between the respondent and ER24 was ambiguous, in that it was unclear whether the respondent indemnified ER24 for injuries caused by her to a third party, or for injuries sustained by herself. After considering the terms of the contract the court found the ambiguity to be fatal, and applied the \textit{contra proferentem} rule against ER24. The second special plea could therefore also not succeed. The appeal was dismissed with costs.

When looking at this judgment it appears as though indemnity clauses are alive and well from an employment perspective save to state that each case will have to be analyzed based on its

\textsuperscript{110} See also \textit{De Beer v Keyser} 2002 (1) SA 822 (SCA), where a bank’s method of recovering debts owed to it by customers to whom loans had been made, via direct deductions from salary pay-ins to the bank, was not against public policy; Constitution not considered.

\textsuperscript{111} Christie’s preface to \textit{The law of Contract in South Africa supra} 167 at 17.

\textsuperscript{112} (2007) 28 ILJ 2497 (SCA).
unique set of facts. Ambiguity was the overriding factor in nullifying the particular indemnity clause in this case.
CHAPTER 9
CONCLUSION

Major differences exist insofar as the various pieces of legislation regulating health and safety is concerned and it is submitted that there is a clear need for some degree of alignment of the different laws, and their integration within the broader occupational health and safety, and social security framework.

It is submitted that the protection of employee interests requires that significant steps be taken to enforce compliance by employers of their statutory duties, and that claims processing be streamlined in order to deal speedily and efficiently with claims by employees and their dependants.

The view is expressed that, unlike overwhelming precedent in this regard, no comprehensive strategy has yet been developed to incorporate prevention as part of the overall system of employment injury and disease protection. Prevention policies must be developed as part of a national strategy.

It is acknowledged that COIDA is not strong in reintegration measures. In contrast with the position elsewhere, there is no provision in COIDA, which specifically attempts to enforce reintegration measures such as compulsory rehabilitation or vocational training programmes. The current system is therefore particularly deficient in this department. It is recommended that policymakers should as a matter of priority; consider the introduction of measures, which would give effect to the principle of labour market integration.

There is an urgent need for a thorough investigation of benefits provided by the compensation system. This includes concerns related to the type of benefit, the basis for awarding compensation and access to benefits.

Another alternative to the current system of absolutely no claims against employers are suggested. This should allow tort-based civil claims to be brought in respect of the damages not covered in terms of the present compensation system. Workmen’s compensation schemes
by their nature do not provide full cover. In addition thereto, and only if fault can be established, employees and their dependants should be allowed to sue employers directly (also for general damages, such as for pain and suffering). This combination of workmen’s compensation and employer liability is common in Europe. Naturally, if the employer is sued directly, any amount paid out by the compensation system should be deducted from any damages awarded, as the principle should remain that the employee/dependant should not receive more than the actual loss/damage.

Compensation for occupational injuries and diseases is based on a system of no fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases. No fault continues to play a role since the employee is entitled to additional compensation if he can establish that the injury or disease was caused by the negligence of the employer (or certain categories of managers and fellow employees). Unfortunately, large numbers of persons are excluded from the operation of COIDA, namely domestic workers, the unemployed, the self-employed and the so called dependant contractors.

Currently provision is only made for employment – related and traffic – related social insurance systems. Persons who are injured outside the employment sphere and traffic context therefore enjoy no social insurance protection. No provision currently exists for voluntary registration under COIDA or ODMWA.

Legislation that deals with the prevention of and the compensation of relevant injuries and diseases in the workplace is fragmented. The different pieces of legislation are, moreover, not uniform and major differences are discernible regarding, in particular, benefit structures and entitlement. Labour market integration and/or reintegration and prevention issues are not a priority, as little general provisions exists in this regard. A lack of linkage with other social insurance and social assistance schemes often leads to duplication of payments, thereby seriously eroding the financial soundness of the respective public insurance funds and the revenues from which social grants are paid.

Although the Fund is operated in the interest of both employees and employers alike, it is noticeable that major steps should be taken to better compliance by employers and
streamlining the processing and payments of claims in order to address the peculiar needs of employees who have suffered an injury or disease in a workplace.

It has been expressed that the current compensation system results in a transfer of costs from employers to employees and society due to sub-optimal benefits accorded under this system. The system has also been criticized for using the level of wages as a basis for calculating compensation, as the system does not protect the position of workers earning very low wages, resulting in meagre compensation payouts.

113 Benjamin and Greef Report 171, 175; See Olivier and Klincke Coverage Against Employment Injuries and Diseases. Olivier and Klincke state that this is exacerbated by the fact that the right to claim civilly from the employer has been taken away by COIDA. 114 The consequences of this are more severe for manual and semi-skilled workers who may be rendered unemployable by a relatively minor permanent disability. It has also been noted that individuals, families and communities with environmentally acquired diseases due to exposure from industrial pollutants, asbestos contamination on mine dumps, industrial disasters are not covered under the current compensation dispensation. They consequently have to resort to common law civil action, but would not qualify for state support in order to bring their claim.
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