THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 924/2013

Reportable

In the matter between:

MEC FOR THE DEPARTMENT OF HEALTH, FREE STATE PROVINCE **Appellant**

and

DR ELIZABETH JOHANNA DE NECKER **Respondent**

Neutral Citation: *MEC for the Department of Health v De Necker* (924/2013) [2014] ZASCA 167 (8 October 2014).

Coram: Navsa ADP, Brand, Pillay & Mbha JJA and Schoeman AJA

Heard: 29 August 2014

Delivered: 8 October 2014

Summary: Whether claim for damages by a doctor against the hospital where she was employed based on her being raped whilst on duty was excluded by the provisions of s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 – whether rape arose out of her employment – held that the rape bore no relation to her employment – was not incidental to such employment – egregious nature of rape discussed – policy of Act restated.

ORDER

On appeal from: The Free State High Court, Bloemfontein (Mocumie J sitting as court of first instance).

The following order is made:

1 The appeal is dismissed with costs.

JUDGMENT

Navsa ADP (Brand, Pillay & Mbha JJA and Schoeman AJA concurring):

[1] The question in this appeal is whether the Department of Health, Free State Province, represented by the appellant, the responsible Member of the Executive Council of the Free State Government (the MEC), is notionally liable to the respondent, a female medical doctor, for damages sustained as a result of her being raped, at approximately 02h00 on 30 October 2010, by an intruder who had gained access to the hospital premises. Put differently, the question is whether the respondent's claim is precluded by s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). The incident occurred at a time when the respondent was discharging her duties as a Registrar in order to specialise as a paediatrician. I shall for convenience refer to the respondent as 'the doctor'.

[2] In 2012 the doctor instituted an action in the Free State High Court against the MEC in his representative capacity to recover damages she alleged she sustained as a result of the incident referred to in the preceding paragraph. The MEC filed a special plea in which he asserted that the doctor's claim was barred by s 35(1) of COIDA. I

shall, in due course, deal with the provisions of the legislation. It is common cause that the doctor did not submit a claim for compensation under COIDA.

[3] The judgment in terms of which the special plea was decided records the following as having been agreed by the parties for the purposes of the adjudication of the special plea:

'1. Plaintiff was employed by defendant as a paediatric registrar.

2. Plaintiff was on duty from 07:30 on 29 October 2010 until 13:00 on 30 October 2010 at the Pelonomi Hospital.

3. Plaintiff was the only paediatric registrar on night duty on 30 October 2010.

4. She was on duty with two interns who were doctors doing house jobs.

5. Plaintiff was responsible for paediatric patients in the Paediatric ICU, Paediatric Isolation Ward, Neonatal High-Care unit, Ward 3A and 3B and Ward 4A.

6. The Neonatal High Care Unit and Ward 3A are in different buildings, but the buildings were connected by a walkway.

7. After treating a patient in the Neonatal High Care Unit, plaintiff took the most direct route to Ward 3A which is on the third floor, to treat other patients at about 02:00 on 30 October 2010.

8. While on her way back to Ward 3A, plaintiff was attacked by being struck with a brick, rendered unconscious and raped on the first floor of the same building in which Ward 3A is situated.

9. Plaintiff's assailant –

9.1 was a 16/17 year old man;

9.2 was not a patient or employee at the Pelonomi Hospital;

9.3 was not authorized or permitted to be within the confines of the hospital;

9.4 was convicted of rape and sentenced to 15 years' imprisonment.

10. At the time –

10.1 there was building construction work being carried out at the hospital;

10.2 the defendant admits that a portion of the parameter fencing was under temporary repair, but not missing;

10.3 the elevator between the ground and first floor where the incident occurred was not working.

10.4 the lights on the first floor where the incident took place were not working.

11. Defendant alleged that the attack and rape were not foreseeable to the defendant.'

[4] The high court (Mocumie J) set out what it thought the issues were that had to be determined:

'(a) whether the incident in this case was an "accident" as contemplated in s 35 of COIDA; and

(b) Whether the incident arose out of and in the course of employment?'

[5] After considering s 35 of COIDA and a host of authorities, Mocumie J held that the incident did not arise out of and in the course of the doctor's employment as a Registrar and that consequently the rape was not an accident contemplated by s 35. In essence, she held that the attack on the doctor bore no relationship to her employment. In the result, the high court dismissed the appellant's first special plea with costs. The question in the present appeal that is before us with the leave of that court, is whether those conclusions and order are correct.

[6] At the outset it is necessary to consider that COIDA is, as described by the Constitutional Court, in *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC); 'important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large'.[1] The purpose of COIDA was described in that judgment at para 13 as follows:

' The purpose of the Compensation Act, as appears from its long title, is to provide compensation for disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.'

The Constitutional Court went on to examine the difference between compensation in terms of COIDA and at Common Law.

'The Compensation Act provides for a system of compensation which differs substantially from the rights of an employee to claim damages at common law. Only a brief summary of this common-law position is necessary for the purpose of this case. In the absence of any legislation, an employee could claim damages only if it could be established that the employer was negligent. The worker would also face the prospect of a proportional reduction of damages based on contributory negligence and would have to resort to expensive and time-consuming

[1] Para 9.

litigation to pursue a claim. In addition, there would be no guarantee that an award would be recoverable because there would be no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were lost. *On the other hand, an employee could, if successful, be awarded general damages, including damages for past and future pain and suffering, loss of amenities of life and estimated "lump sum" awards for future loss of earnings and future medical expenses, apart from special damages including loss of earnings and past medical expenses.*' (My emphasis.)

[7] In Joubert (ed) *The Law of South Africa* (2ed) vol 13(3) para 114, M P Olivier stated:

'[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 or she can establish that the injury or disease was caused by the negligence of the employer (or certain categories of managers and fellow employees). The compensation fund established in terms of the Act requires employers to contribute to a centralised state fund.

. . .

The Act provides for benefits to be paid to employees who suffer a temporary disablement, 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 learned author correctly points out that courts have consistently held that the provisions of COIDA have to be generously construed in favour of employees. In *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C), at 694F the following appears:

'The policy of the Act is to assist workmen as far as possible. See *Williams v Workmen's Compensation Commissioner* 1952 (3) SA 105 (C) at 109C. The Act should therefore not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.'

[8] In a nutshell, the Act provides 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 was 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. It also has to be borne in mind that the Act sets minimum and maximum amounts of compensation for temporary total or partial disablement and for permanent disablement. For a most comprehensive history and analysis of Workers' Compensation Legislation in this country, dating back to 1907, see *Mankayi v Anglogold Ashanti Ltd* 2010 (5) SA 137 (SCA) paras 14 to 21.

[9] That then gives some context to what is now necessary, namely, a perusal of the relevant provision of COIDA. Section 35(1) of COIDA, which is at the centre of this appeal, reads 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.' (My emphasis.)

'Occupational injury' is defined in s 1 of COIDA as follows:

'**"occupational injury"** means a personal injury sustained as a result of an accident.'

'Accident' is defined in the Act as:

'**"accident"** means 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.' (My emphasis.)

[10] Thus, as can be seen, in order for COIDA to operate and preclude a common law claim, the facts must show that the employee either contracted a disease or met with an accident arising out of and in the course of his or her employment. This requires a determination of whether the respondent's rape constituted an 'accident' for the

purposes of COIDA and arose out of and in the course of her employment by the appellant. If that is answered in the affirmative, the special plea should succeed.

[11] 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 G.M. Co Ltd* 1914 TPD 344 De Villiers JP at 347, in relation to the then 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.'

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 Bros*. (1913, 1 KBD 602), 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.'

[12] The facts in *McQueen*, discussed in the preceding paragraph were as follows: The employee in question was a trammer in a mine in charge of a gang of employees

who were doing shovelling work in one of the stopes underground. He grabbed one of them by the wrist in an attempt to take him to a particular spot where he thought work should be done. In retaliation, the labourer concerned struck him on the head with a stone. In a patronising tone and language typical of the times, the court concluded as follows:

'It seems to me that it can fairly be said that this is a special risk which is incidental to the employment of a man in charge of a gang of uncivilised natives underground in a mine.'

Thus, the court held that the said injuries were caused by an accident which arose out of and in the course of the plaintiff's employment.

[13] In *Nicosia v Workmen's Compensation Commissioner* 1954 (3) SA 897 (T) Roper J, like De Villiers JP in *McQueen*, recorded that the origin of our then Workmen's Compensation Act lies in the then British Employee Compensation Act. In *Nicosia* what had to be determined was whether an employee, a fitter and turner, required to work on a drilling machine who had hurt himself whilst picking up an instrument to insert into the machine, was entitled to claim compensation due to the injuries suffered by the slipping out of one of his intervertebral discs. Predictably, a decision was made in favour of the workman and it was held that the injury the employee sustained was due to an accident within the meaning of the legislation.

[14] In *Langeberg Foods Limited & another v Tokwe* [1997] 3 All SA 43 (E), the court was dealing with a labourer who had been assaulted by a security officer because he was found smoking dagga on his employer's premises. The employee, whilst fleeing, had sustained bodily injuries when the security officer tumbled and fell onto him. The employee instituted a claim for damages. As in the present case, the defence was raised that the equivalent of the legislation under consideration precluded the employee from proceeding with the damages claim against the employer. The trial court dismissed the defence and found the employer and the security guard jointly and severally liable for the damages sustained by the employee. On appeal, the question that arose was whether the incident, which resulted in a personal injury, was an accident arising out of

and in the course of the workman's employment and resulting in a personal injury. In *Langeberg* at 49 the following appears:

'In terms of section 2 of the Workmen's Compensation Act 30 of 1941 an accident means an accident arising out of and in the course of a workman's employment and resulting in a personal injury. That second appellant's actions were deliberate in the sense that they constituted an assault does not detract from the notion that respondent was injured as a result of an accident because "even where the act is intentional as regards third parties, as long as it was not intended so far as the workman was concerned it must be taken to be an accident *qua* the workman" – *per* De Villiers JP in [*McQueen*] at 348. The question is therefore whether the accident arose out of and in the course of respondent's employment. The fact that respondent was at the time on a tea break and not actually working does not mean that he was not injured during the course of his employment cf. *Beukes v Knights Deep Ltd* 1917 TPD 683. Indeed it is not in issue that respondent was injured during the course of his employment so that the crucial question to be answered is whether the incident "arose out of" respondent's employment.'

[15] In *Langeberg* the court, with reference to authorities, reminded itself that a decision in each case is to be made with reference to its particular facts.[2] In considering the facts before it, the court said the following:

'Respondent in the present case was employed as a labourer. The incident giving rise to his injuries was an assault upon him and although this occurred during a tea break in the course of his employment, it did not arise out of his employment. It arose out of the fact that respondent was seen to be smoking dagga which had nothing whatsoever to do with his employment. In other words it was respondent's smoking of dagga and not that he was in the course of his employment that brought respondent within the range or zone of a possible assault upon him. The distinction accords in my view with the decision in *Kau v Fourie* 1971 (3) SA 623 (T) and it is a distinction well illustrated in *Fried v SA Iron Works Ltd* 1919 CPD 253 where the head note reads:

"Where a workman in order to perform certain work on a ship climbed up a prop which was used to support the ship in dry dock, instead of proceeding along a gangway which was provided for the purpose, and fell and was killed.

Held, on appeal, that the accident occurred 'in the course of' but did not arise 'out of' the employment in terms of section 1 of Act 25 of 1914, as it was attributable solely to an added and

[2] *Langeberg* supra at 50d to f.

unnecessary risk outside the sphere of employment and that the deceased's widow was therefore not entitled to recover compensation under Act 25 of 1914."'

[16] In *Minister of Justice v Khoza* 1966 (1) SA 410 (A), this court had to wrestle with the vexed question of whether an accident arose out of an employee's employment. That question is at the heart of the present case. The passage in *Khoza* in which the relevant principles appear, bears repeating in its entirety. In the paragraph succeeding this one, there is a summary in English of the relevant parts of that dictum. At 417D-H Rumpff JA said:

'Luidens Wet 30 van 1941 moet die ongeval uit die werksman se diens ontstaan en in die loop daarvan plaasvind. "In die loop daarvan" beteken dat die ongeval moet plaasvind terwyl die werksman besig is met sy werksaamhede en dit onstaan "uit sy diens" as die ongeval in verband staan met sy werksaamhede. Die Wetgewer het daardie verband nie omskryf nie en eis alleen in breë sin 'n kousale verband tussen diens en ongeval. Wanneer hierdie onomskrewe verband gesien word in die lig van die doel en ingrypende omvang van Wet 30 van 1941, moet dit m.i. bevind word dat die kousale verband tussen ongeval en diens in die algemeen voldoende geskep word wanneer die ongeval plaasvind op die plek waar die werksman by die uitvoering van sy diens is. Omdat 'n werksman in die uitvoering van sy diens altyd êrens moet wees, hetsy hy staan, loop, ry of vlieg, sal hy – behoudens sekere uitsonderings – weens sy diens, en dus uit sy diens, beseer word, indien hy beseer word waar hy is wanneer hy sy werksaamhede verrig. 'n Fabrieksarbeider wat beseer word omdat 'n sterk wind 'n sinkplaat van die dak op hom gooi, en 'n werksman wat in die loop van sy diens langs die straat wandel of in 'n motorkar ry en beserings opdoen weens nalatigheid van iemand anders, blote ongeluk of weersomstandighede, doen nietemin die besering op weens sy diens en dus uit sy diens. Vir doeleindes van hierdie uitspraak is dit nie nodig om die uitsonderings te probeer opspoor nie. Dis in elk geval duidelik dat hierdie kousale verband vir doeleindes van die Wet sou verdwyn, onder andere, indien die ongeval van so 'n aard is dat die werksman die beserings sou opgedoen het al was hy op 'n ander plek as wat sy diens sou vereis het of wanneer die werksman deur sy eie handeling die plaaslike verband tussen diens en ongeval uitskakel of wanneer die werksman opsetlik beseer word deur 'n ander persoon en die motief van die aanranding geen verband hou met die werksaamhede van die werksman nie.'

[17] In order for a common law claim against an employer to be precluded, the accident must have occurred during the course of an employee's employment and it must also arise out of that employment. In *Khoza* this court considered the sole difficulty in that case to be whether the accident it was considering arose out of the respondent's employment. That is also the sole problem present in this case. In *Khoza*, the respondent was injured as a result of a fellow-policeman discharging his firearm whilst playfully waving it about at a time when they were transporting arrested persons in the back of a police van. In the passage set out in the preceding paragraph, this court noted that the then prevailing Employee Compensation legislation did not circumscribe the expression 'arising out of an employee's employment'. Rumpff JA stated that what was required in the broad sense was a causal connection between employment and the accident. He went on to state that, in general, the causal connection between the accident and employment is met when the accident occurs at the place where the employee works. The learned judge of appeal took into account that an employee, in the execution of his duties may be at various locations but that an accident could notionally be said *to arise out of an employee's employment* if it occurred and the workman was injured whilst he was busy executing his duties. As examples he considered the position of a labourer at a factory who is injured when a gust of wind dislodged a sheet of roof iron which strikes him, whilst he is walking in the street or riding in a motor vehicle going about his duties as an employee. Rumpff JA went on to consider instances in which the causal connection for the purposes of the Act could be said to have been severed. He held that it was clear 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. More significantly, for the purposes of the present case, he considered the causal connection to be severed when the employee was intentionally injured by a stranger and the motive for the assault bore no connection to the injured person's employment. I shall, in due course, return to this important aspect.

[18] In *Van De Venter v MEC of Education: Free State Province* (3545/2010) [2012] ZAFSHC 185 (4 October 2012), the Free State High Court, without reference to *Khoza,* said the following concerning an injury that an employee sustained during the course of a robbery:

'The injury which the applicant sustained during the course of the robbery was and remains an occupational injury. It seemed to be of little moment whether a particular injury was causatively brought about by a criminal act or not . . . .

It follows, therefore, that any personal injury sustained by an employee caused by any criminal act arising out of and during the course of an employee's employment amounts to an accident as defined in section 1 [of the COIDA] . . . .

In our law, therefore, an employee who sustains a compensatable injury or personal injury or occupational injury as envisaged in s 3(1) of [the COIDA] is legislatively barred from claiming further compensation in delict, by way of common law action, from her employer, on the ground that her employer had breached a duty to provide her with a safe working environment and on the ground that her employer had breached a duty to provide her with a safe working environment and on the ground that her criminal assault rendered her personal injury so unique that it fell outside the cadre of occupational injury . . . .

. . . .

The fact that the applicant was injured by criminal outsiders and not by fellow employees made no difference.'

[19] In *Ex Parte Workmen's Compensation Commissioner: In Re Manthe* [1979] 4 All SA 885 (E), the court was dealing with an assault on an employee and the question it was called upon to determine was whether the assault was an 'accident' as defined by s 2 of the Workmen's Compensation Act 30 of 1941. The Commissioner had decided that compensation was not payable on the basis that although the employee was injured in the course of his employment, the injuries did not arise out of his employment and consequently it was not an accident as defined. That decision led to the litigation before the Eastern Cape High Court. In determining whether there was a causal connection between the accident and the respondent's employment, the high court said the following:

'In a consideration as to whether or not that causal connection exists, a number of factors, variable in each case, must play a part. It seems to have been accepted in past decisions that

the Act, as remedial legislation, should be given a broad and commonsense interpretation on this issue. That approach appears in such diverse authorities as *Beukes'* case *supra* at 690 – 691 where reference is made to a risk "inherent or incidental to the employment"; [*McQueen*]; and in the abovementioned *dicta* of RUMPFF and WILLIAMSON JJA in *Khoza's* case. Thus, factors such as time, place and circumstances of the accident must all be given due weight in determining whether it can reasonably be said that,

"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 . . ."'

[20] Addleson J, in *Manthe* held that the passage from *Khoza* quoted above was obiter and doubted that Rumpff JA intended to 'lay down' any principle of invariable application to all possible combinations of circumstances. That would have been in conflict with his own earlier statement that the facts must rule the decision in each case; and that the Act has not circumscribed the causal relationship between the employment and the accident 'en eis alleen in breë sin 'n kousale verband'.

[21] The court in *Manthe* doubted the wisdom of the commissioner's conclusion set out at the end of para 20 on the following basis:

'If the commissioner's contention is correct, the situation must then be formulated as follows: It is admitted that the workman was on his employer's premises, at a place where a robbery could occur, carrying out his employer's instructions, in the course of his employment, during working hours, when he was injured; but he is not entitled to compensation solely because the attack which caused his injury was not aimed directly at him *as a workman*, but simply at a member of the public who could also have been at that place. The permutations of such an argument by the applicant are interesting and illustrative. For example, a workman employed to deliver money to a bank (a so-called "security guard") would presumably be entitled to compensation if he were robbed in the street and injured by a person who knew he was a security guard; but he would receive no compensation if his assailant did not know the nature of his employment. A workman instructed to deliver money to the bank would apparently be entitled to compensation if we were robbed and injured by a person with the specific intention of robbery but he would receive no compensation once he stepped outside his employer's gate and was robbed in the public street.'

[22] However, in *Twalo v The Minister of Safety and Security & another* [2009] 2 All SA 491 (E), Y Ebrahim J, appears to have adopted in some measure the reasoning set out in the dictum from *Khoza* which is set out earlier in this judgment. In *Twalo* the employee was a policeman who had been shot and killed at a police station by a fellow officer. The plaintiff, in that case, in her personal capacity and in her capacity as the mother and natural guardian of the deceased employee's three minor children, sued the Minister of Safety and Security and the policeman who had shot the employee, for loss of support. In a special plea, the Minister sought refuge in s 35(1) of COIDA. Y Ebrahim J said at paras 18, 19 and 21:

'. . . The second defendant's actions in shooting the deceased were premeditated and carried out with the intention to kill him. The second defendant was motivated by personal malice towards the deceased who had taunted him about the relationship the deceased had with his wife.

In addition to the fact that the intentional shooting of the deceased was not an accident he was not, as said by Zulman AJ in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*, "about affairs, or business, or doing the work of, the employer" namely the first defendant. The sole reason for the second defendant shooting the deceased was the existence of a private dispute between them. The fact that it took place while both of them were on duty as policemen and at their workplace was entirely coincidental. The shooting could have occurred, for that matter, at any other place entirely unrelated to their work environment as the motive for the shooting bore no causal relationship with their work.

. . .

I am accordingly satisfied on the facts, as presented, that the intentional shooting of the deceased was not an accident and that the deceased did not sustain an occupational injury that resulted in his death. The provisions of section 35 of COIDA are accordingly not applicable and the plaintiff is not precluded from claiming damages from the first defendant.'

[23] 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. Internationally the position is often dependant on prevailing Employee Compensation Legislation. In New Zealand, the compensation scheme that came into effect in 1974

was one of the most comprehensive schemes at that time.[3] Section 25 of the Injury Prevention, Rehabilitation and Compensation Act 2001 contains an extensive definition of 'accident' which outlines both those circumstances that are encompassed therein as well as certain exclusions. Oliphant[4] notes '[I]t has always been the case . . . that intentional acts like battery and rape are covered [by New Zealand's personal injury scheme], being an "accident" to the victim'. See also *G v Auckland Hospital Board* [1976] 1 NZLR 638 (SC).

[24] Markesinis and Unberath[5] explore the nature of Germany's 'gesetzliche Unfallversicherung' (statutory accident insurance), and note that '[a] basic assumption of the system is that if an employee is entitled to compensation under [the German code] (for an accident suffered at work), *save in cases of intentionally inflicted injury*, the injured victim cannot claim any further compensation by relying on the ordinary tort rules of the [code]: the *employer* . . . enjoy[s] an immunity . . . .' (My emphasis.)
It is thus clear that intentional acts, which of necessity include sexual harassment and rape, would not constitute an accident for the purposes of German workmen's compensation law, and thus claims arising from such acts are pursuable under tort law.

[25] In England the system of non-tort compensation is separated by way of various statutes, two of which are relevant. The first, the Industrial Injuries Scheme,[6] provides for compensation for injuries and certain prescribed diseases where such were caused by an accident arising out of and in the course of employment. Second, the Criminal Injuries Compensation Scheme provides for compensation for personal injury 'caused by a crime of violence broadly in line with common law damages for tort',[7] and thus does not govern accidents.

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[3] B Atkin, K Evans, G McLay, S Petersson and D Carter *Torts in New Zealand* 3ed(2003) at 143.
[4] K Oliphant *Private and Social Insurance* in C Sappideen & P Vines (eds*) Fleming's The Law of Torts* 10ed (2011) at 481-482.
[5] B S Markesinis and H Unberath *The German Law of Torts: A Comparative Treatise* 4 ed (2002) at 725-726.
[6] Which has nevertheless been referred to as a 'misnormer since there is no separate fund nor even, now, a separate Act'. See W V H Rogers *Winfield & Jolowicz on Tort* 17 ed (2002) at 26.
[7] WVH Rogers *Winfield & Jolowicz on Tort* 17 ed (2002) at 37.

[26] There does not appear to be a case in which a rape or sexual harassment gave rise to a claim under the Industrial Injuries Scheme, which appears to be a direct consequence of this clear separation and the provision for such claims under the criminal scheme.[8]

[27] American courts have largely held that claims arising from rape and/or sexual assault fall within the definition of an 'accident' in the governing workmens' compensation scheme and are thus barred at common law by way of application of the exclusivity doctrine.[9] However, and importantly for our purposes, the judgment of the Supreme Court of Arizona in *Ford v Revlon Inc.* 153 Ariz. 38 (1987) 734 P.2d 580, is instructive. In that case the employee worked for Revlon and was subjected to continued sexual harassment by a supervisor. Her repeated complaints over several months to Revlon went unheeded. As a result of the supervisor's behaviour, she developed symptoms of emotional stress. A year and one month after the first act of sexual harassment, the supervisor was issued with a letter of censure. Shortly thereafter the employee attempted suicide. Later she sued Revlon and the supervisor for assault and battery, and for intentional infliction of emotional distress. A jury found the supervisor liable for assault and battery but not for the intentional infliction of emotional distress. It found Revlon liable for intentional infliction of emotional distress. Only Revlon appealed. The only issue on appeal was whether Revlon was liable for intentional infliction of emotional distress. The court of appeals reversed the judgment of the trial court, holding that, since the supervisor was not found guilty of the intentional infliction of emotional distress, Revlon as principal could not be found guilty. The Arizona Supreme Court granted a review because it disagreed with that limitation of liability of Revlon. Although not considered by the court of appeals, the parties raised the question whether the matter was controlled by Arizona's Worker's Compensation Act and it was considered by the Supreme Court. It disagreed with the contention on

[8] W V H Rogers *Winfield & Jolowicz on Tort* 17 ed (2002) at 39 notes that
'Because injury arising from an intentional act is "accidental" as far as the victim is concerned, there is no need for a separate criminal injuries compensation scheme in New Zealand.;
See also A J Rycroft and D Perumal 'Compensating the Sexually Harassed Employee' (2004) 25 *ILJ* 1153 at 1168.

[9] In addition to those cases discussed above, see *Driscoll v. Gen. Nutrition Corp*., 752 A.2d 1069, 1076 (Conn. 2000); *Rogers v. Burger King Corporation*, 82 P.3d 116, 121 (Okla. 2003).

behalf of Revlon that the matter was controlled by the legislation. The Supreme Court held that since the jury found the severe emotional distress to be essentially non-physical in nature, it fell outside the legislation which regulated claims for physical injuries. The Supreme Court, considered the original purpose of workmen's compensation was, namely, to compensate workers for injury which had its origins in a risk 'connected with the employment'.

[28] In *Revlon*, The Arizona Supreme Court noted that some courts have provided a tort remedy instead of workers' compensation to employees injured by wrongs that are not 'a necessary risk or danger' of their employment. Other courts have invoked the bar of exclusivity and have refused to recognise a tort remedy. The same could be said of our courts. Importantly, in *Revlon* the Supreme Court said the following:

'By law, exposure to sexual harassment is not an inherent or necessary risk of employment, even though it may be or may have been endemic. The cost of such conduct ought not to be included in the cost of the product and passed to the consumer. If my employer invades my right to privacy by tapping my telephone, it is my employer who should pay the piper for such wrong, not his compensation carrier.

Given the substantive nature of the wrong committed here, I believe that this form of the action falls outside the compensation system. The action for outrage, now called infliction of emotional distress, was first recognized as a remedy for emotional injury caused by outrageous conduct and as a response to the doctrine that, unaccompanied by preceding physical harm, such injury was noncompensable.'

[29] In England, in *Nisbet v Rayne & Burn* [1910] 2 KBD 689 the court considered the question whether the murder of a cashier while traveling in a railway carriage to a colliery with a large sum of money for the payment of his employers' workmen, was an accident within the meaning of that expression in the Workers' Compensation Legislation. Farwell LJ in considering whether the accident arose out of the cashiers employment said the following:

'It is plain that it arose in the course of his employment; it was part of his regular duty to take the money required for the wages on pay day by train to the colliery; it was his duty to carry it safely and to protect it from thieves and robbery . . . I have come to the conclusion that there is a

distinct and well-known risk run by cashiers and the like who are known to carry considerable sums in cash on regular days by the same route to the same place, of being robbed and, if they do their duty by defending their charge, murdered, and that such a risk is as incidental to their employment as the risk from missiles from bridges is to the employment of engine-drivers or the risk of injury by poachers to that of gamekeepers.'

[30] By employing terms such as 'necessary risk of employment' or 'risk incidental to employment', courts have attempted to determine whether the cause of injuries sustained by employees was related to the employee's employment. The latter part of the quote from *Khoza* set out in para 17 and summarised in English in para 18, in similar fashion, sought to provide some guidance in determining whether an accident 'arose out of employment'.

[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 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 well-being 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.

[33] I can understand that courts have strained to come to the rescue of particularly impecunious individuals and have held them entitled to claim compensation from a fund established for that purpose. I also understand that courts have done this by adopting a position in line with the policy behind the Workers' Compensation Legislation, namely, that workers should as far as possible be assisted to claim compensation that is their due under the Act and which flow from incidents connected to their employment and which can rightly be said to be a risk attendant upon or inherent to the employment. Dealing with a vulnerable class within our society and contemplating that rape is a scourge of 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. If anything, it might rightly be said to be adverse to the interest of employees injured by rape to restrict them to COIDA. It would be sending an unacceptable message to employees, especially women, namely, that you are precluded from suing your employer for what you assert is a failure to provide reasonable protective measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our Constitution will countenance.

[34] For the reasons stated above, the following order is made:

1 The appeal is dismissed with costs.

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MS NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

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