THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 126/2009

In the matter between:

THEMBEKILE MANKAYI **Appellant**

and

ANGLOGOLD ASHANTI LTD **Respondent**

Neutral citation:	***Mankayi v Anglogold Ashanti* (126/2009) [2010] ZASCA 46**
	(31 March 2010)
Coram:	HARMS DP and CLOETE, HEHER, MALAN and LEACH JJA
Heard:	**4 March 2010**
Delivered:	**31 March 2010**
Summary:	Section 100(2) of Occupational Diseases in Mines and Works Act 78 of 1973 – whether common-law claim for damages of employee entitled to benefits under this Act against employer for negligence excluded by s 35(1) of Compensation for Occupational Injuries and Diseases Act 130 of 1993.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Joffe J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

MALAN JA (Heher and Leach JJA concurring):

[1] This is an appeal with the leave of Joffe J in the Johannesburg High Court against his judgment upholding an exception against the appellant's particulars of claim. The appellant who was employed as a mine worker by the respondent sought payment from the respondent, a public company engaged in mining operations, for damages amounting to some R2,6 million with interest and costs based on the latter's alleged breach of a duty of care owed to him.

[2] The appellant alleged in his particulars of claim that he was employed by the respondent as a mine worker underground during the period January 1979 to September 1995 and was as such exposed to harmful dusts and gases, including silica dust, at his workplace and in the work environment. As a consequence of this exposure, he alleged that he contracted an occupational disease or diseases in the form of silicosis, pulmonary tuberculosis and obstructive airways disease resulting in his suffering adverse physical and mental consequences, having a reduced life expectancy and being unable to work whether as a mine worker or otherwise. His claim is framed in delict and includes amounts claimed on account of his past and future loss of earnings, future medical expenses as well as general damages. The basis of the appellant's claim is that the respondent owed him a duty of care arising under both the common law and

statute to provide a safe and healthy environment in which to work. He averred that the respondent, in breach of this duty, and when it was aware or ought reasonably to have been aware that he would be exposed to harm, failed to apply appropriate and effective control measures. Each of the mines he worked in was a 'controlled mine' as contemplated in Chapter 11 of the Occupational Diseases in Mines and Works Act 78 of 1973 ('ODIMWA') and the respondent was and is deemed to be the 'owner' of those mines. The work he performed was 'risk work' as defined in s 13 of ODIMWA and the diseases he contracted 'compensatable diseases' as defined in ODIMWA. He was certified in terms of s 48(1) as suffering from a compensatable disease and received compensation from the Compensation Commissioner in terms of s 94 of ODIMWA in the amount of R16 320. He alleged that he was precluded by s 100(2) of ODIMWA from receiving any benefits in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA') and that by reason of his exclusion from the benefits payable in terms of COIDA, he was not an 'employee' as contemplated in s 35 of COIDA and accordingly not precluded by that section from bringing the action against the respondent.

[3] The respondent excepted to the particulars of claim as lacking averments necessary to sustain a cause of action. The essence of the exception is that the appellant is defined as an 'employee' and the respondent as an 'employer' by COIDA and that s 35(1) of COIDA barred the appellant's claim. Section 35(1) reads:

'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.'

Section 35 (1) must be read with s 100(2) of ODIMWA which bars a person entitled to its benefits from claiming any benefit under COIDA. The latter section provides:

'Notwithstanding anything in any other law contained, no person who has a claim to benefits under this Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or

was employed at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under [COIDA], or any other law.'

[4] The learned judge in the court a quo held that the appellant's common-law claim against the respondent was excluded by the clear wording of s 35(1) of COIDA. The central theme of the judgment is that because there was no limitation in the language of the subsection there was no reason to restrict its provisions to injuries and diseases dealt with in COIDA. The express words of s 35(1) applied to any occupational injury or disease 'no matter how arising'. COIDA, he said, was intended to apply also to employees employed at mines. It would be irrational to protect employers from common-law liability in return for funding the statutory compensation scheme under COIDA but not under ODIMWA. ODIMWA was amended after COIDA had been enacted by the Occupational Diseases in Mines and Works Amendment Act 208 of 1993 with the imposition of liability on the owners of mines for the medical costs of employees without any amendment to s 35(1) of COIDA or to ODIMWA. Hence, he said, it had to be assumed that it was intended that this provision would be applicable to claims by employees under ODIMWA. Both statutes had to be construed in a manner so as to be consonant and inter-dependent. Because he found the legislative intention apparent from s 35(1) to be manifestly clear and unambiguous the maxim *generalia specialibus non derogant* relied upon by the appellant had no application. Nor did s 39(2) of the Constitution entitle him to adopt the construction of s 35(1) of COIDA advanced by the appellant because such an interpretation would be 'unduly strained'. He did not regard his construction of s 35(1) as being in conflict with s 9 of the Constitution: inasmuch as there was no identifiable class of persons unfairly discriminated against. If there is discrimination it relates to the benefits the claimants may claim under the two enactments. The scale of benefits, however, was not challenged.

MINERS' PHTHISIS

[5] The history of the legislative response to miners' phthisis commenced, after unification, with the Miners' Phthisis Act 34 of 1911. This enactment set the pattern of future legislation by providing for the creation of a compensation fund or funds to which

mine owners contributed and which was to be used to compensate miners suffering from miner's phthisis and related diseases and their dependants. The Act established a fund 'consisting of all moneys appropriated by parliament for the purpose of and of an amount, not less than the sum so appropriated, to be levied by the board in manner prescribed by regulation from the owners of mines in the Union wherein the mineral dust produced by mining operations is of such a nature as to cause miners' phthisis' (s 2(1)). The board created was authorized to grant allowances 'to persons who are or have been employed in the mines … and who shall be wholly or partially incapacitated by the disease known as miners' phthisis …' (ss 1, 2 and 3).[1] The Miners' Phthisis Act 19 of 1912 followed. It established the Miners' Phthisis Compensation Fund and provided for contributions to the fund by employers and a specified single payment by the Union Government. A further fund, the Miners' Phthisis Insurance Fund, was funded by contributions made by employers. A person claiming benefits arising from miners' phthisis (ie 'silicosis of the lungs') had to satisfy the board that he had been employed underground on any of the listed mines (s 16). This Act was amended by the Miners Phthisis Amendment Act 29 of 1914. The Miners' Phthisis Act 44 of 1916 supplemented the 1911 Act and provided for relief and assistance of (and the grant of benefits by the statutory Miners' Phthisis Board to) persons employed in mines who suffered from miners' phthisis or other lung diseases contracted during underground work (s 21).

[6] The comprehensive Miners' Phthisis Consolidation Act 35 of 1925 replaced the earlier legislation but was itself repealed by the Silicosis Act 47 of 1946. The latter enactment made provision for the establishment of two funds, the Scheduled Mines Compensation and Outstanding Liabilities Fund and the Registered Mines Compensation and Outstanding Liabilities Fund (ss 30 and 31). Benefits were paid from these funds by the Silicosis Board (ss 2 and 94) to miners and 'native' labourers. The Board had to 'levy from all owners of scheduled mines and from all owners of registered mines such sums of money as the Board, in its opinion, is likely to need to meet the liabilities payable in terms of this Act' out of the funds (s 33(1)). The state, in addition,

---

[1] See the *Report of the Commission of Inquiry into Compensation for Occupational Diseases in the Republic of South Africa* (1981) electronic copy by David W Stanton RP 100/81.

contributed to enable the last mentioned fund to meet its obligations for the payment of benefits in respect of miners and 'native' labourers 'who are or were suffering from silicosis or from tuberculosis as well as silicosis and whose employment in dusty occupations' before the commencement of the Act caused or contributed to the said disease or diseases (s 96 and ss 71 ff). The benefits payable under this legislation were in respect of 'silicosis', ie 'any form of pneumoconiosis due to the inhalation of mineral dust' (ss 1(1) and 59 to 61) and 'tuberculosis', ie 'tuberculosis of the respiratory organs' (ss 1(1) and 62) and for a combination of the two diseases (s 63). A 'dusty occupation' was defined as, inter alia, 'any mining operation performed by a person, in the service of another person, while he is working below the natural surface of the earth, or any duty performed at a mine below the natural surface of the earth by a servant of the State, or any mining operation performed by a person in the service of another person on or above the natural surface of the earth at a place where rock, stone, ore or any mineral is ordinarily reduced in size or classified by any dust-producing process . . .' (s 1(1)). The costs of the increased benefits payable under the Silicosis Act were to be defrayed from the profits of the scheduled mines (s 95). The Silicosis Act operated concurrently with the Workmen's Compensation Act of 1941. Section 84 of the Silicosis Act provided:

'When a miner or a dependent of a deceased miner who is entitled to a monthly allowance or to a pension, is also entitled to a pension under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), the Board may (after consulting with the Workmen's Compensation Commissioner . . .) . . . reduce the amount of the said monthly allowance or the first mentioned pension (whether before awarding it or after having allowed it) by a fraction thereof not exceeding one third.'

[7] The Silicosis Act of 1946 was succeeded by the Pneumoconiosis Act 56 of 1956. A Pneumoconiosis Certification Committee was established (s 8) which was empowered to certify whether a person was suffering from pneumoconiosis and tuberculosis and to certify the relevant stage of the disease (s 9). Restrictions were placed on the employment of persons in a dusty atmosphere (s 15), and provision was made for the declaration of certain mines as 'controlled mines' (s 54) in which work in a dusty atmosphere was prohibited without a prior medical examination and the issuing of a certificate of fitness (s 15). The Controlled Mines Compensation Fund (s 55) was

funded by levies on owners of controlled mines (s 56). Provision was made for the payment of benefits to persons suffering from pneumoconiosis and tuberculosis and their dependants (ss 75 ff, 83-7, 90 ff: a distinction was drawn between benefits payable to 'miners', 'coloured labourers' and 'native labourers').

[8] The Pneumoconiosis Compensation Act 64 of 1962 replaced the 1956 Act. It provided for the establishment of a hierarchy of institutions administering the Act such as the Miners' Medical Bureau (s 3), the Miners' Certification Committee (s 7), the appointment of the Pneumoconiosis Compensation Commissioner (s 46) as well as the General Council for Pneumoconiosis Compensation (s 48) and the Pneumoconiosis Risk Committee (s 64). It imposed restrictions on the employment of persons in a dusty atmosphere (ss 18 and 19); regulated the examination of miners and the issue of certificates of fitness (ss 20 to 42); and provided for the declaration of mines as 'controlled mines' (ss 43 and 44) and the estimation of the pneumoconiosis risk at controlled mines and notification thereof (ss 66 to 68). The Act provided for the payment of pensions and other benefits to miners, 'coloured labourers' (ss 71 ff) and 'Bantu' labourers (s 79 ff) suffering from pneumoconiosis or tuberculosis from the Pneumoconiosis Compensation Fund (s 108) which was funded by levies paid by the owners of controlled mines (s 119).[2] Provision was also made for compensation payable to the dependants of the miners and labourers who had passed away. Section 97(4) provided that where a 'miner' or a 'coloured labourer' or a dependant received a monthly allowance or pension and was also entitled to a pension under the Workmen's Compensation Act 30 of 1941,[3] the council

'may after consultation with the Workmen's Compensation Commissioner . . . reduce the amount of the said monthly allowance or the firstmentioned pension, whether by awarding it or after having awarded it, by any fraction thereof not exceeding one-third.'

---

[2] 'Pneumoconiosis' was defined as a 'permanent disease of the cardio-respiratory organs . . . which has been caused by the inhalation of mineral dust' (s 1(xliii). 'Tuberculosis' was described as 'tuberculosis of the cardio-respiratory organs, or sequelae thereof . . .' (s 1(lvi)) and 'mineral dust' as 'dust derived from any mineral, including coal and soil, in the course of mining operations' (s 1(xxxvi)).

[3] See also s 101.

[9] None of the above legislation relating to pneumoconiosis or miners' phthisis referred to excluded, or even mentioned, the employee's right to proceed at common law against his or her employer for damages arising from the contracting of these diseases at the workplace. This absence of any specific reference to a miner's common-law claim for damages against his employer also occurs in ODIMWA.

ODIMWA

[10] ODIMWA repealed previous legislation and consolidated the law relating to compensation for certain diseases contracted by persons employed in mines and works (s 136(1)). It continued the pattern established in the earlier legislative measures referred to: 'owners' of 'controlled mines' are required to pay a prescribed levy to the Compensation Commissioner for Occupational Diseases for the benefit of the compensation fund established by ODIMWA (s 62(1)). It provides for the payment of compensation in relation to compensatable diseases contracted by persons performing 'risk work' in mines and works. The Minister of National Health and Welfare is empowered by s 13 to declare any particular type of work performed at any mine or works to be 'risk work', and may do so if satisfied that any person performing the work in question is exposed to dust of which the composition and concentration are such that it is harmful or potentially harmful (s 13(2)). A mine at which risk work is being performed must be declared a 'controlled mine' (s 10 and see also s 9). It established a committee called the Medical Certification Committee for Occupational Diseases which considers reports from medical practitioners in respect of persons found to be suffering from a 'compensatable disease', and determines the presence, nature and degree of the compensatable disease (ss 44 and 46). The Mines and Works Compensation Fund is controlled and managed by the Commissioner (s 61). The owner of a controlled mine (or works) is required to pay a prescribed levy for the benefit of the compensation fund in respect of each shift worked by any person at the particular mine while performing risk work (s 62). When the Committee determines that a person is suffering from a compensatable disease which he or she contracted as a result of risk work at or in connection with a controlled mine, the Commissioner must award to him or her a one-

sum benefit calculated in accordance with a formula which takes into account the person's earnings (ss 80(2) and see ss 80A and 80B).

[11] A 'compensatable disease' is defined as

'(a) pneumoconiosis;

(b) the joint condition of pneumoconiosis and tuberculosis;[4]

(c) tuberculosis which, in the opinion of the certification committee, was contracted while the person concerned was performing risk work, or with which the person concerned was in the opinion of the certification committee already affected at any time within the twelve months immediately following the date on which that person performed such work for the last time;

(d) permanent obstruction of the airways which, in the opinion of the certification committee, is attributable to the performance of risk work;

(e) any other permanent disease of the cardio-respiratory organs which in the opinion of the certification committee is attributable to the performance of risk work; or

(eA) progressive systemic sclerosis which, in the opinion of the certification committee, is attributable to the performance of risk work; or

(f) any other disease which the Minister, acting on the advice of a committee consisting of the director and not fewer than three other medical practitioners designated by the Minister, has, subject to the provisions of subsection (2), by notice in the *Gazette* declared to be a compensatable disease and which, in the opinion of the certification committee, is attributable to the performance of risk work at a mine or works'.

[12] Section 100 of ODIMWA is headed 'No person entitled to benefits from more than one source in respect of same disease' and provides:

'(1) No person shall be entitled to benefits under this Act in respect of any disease for which he or she has received or is still receiving full benefits under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941).

---

[4] 'Tuberculosis' is defined as 'tuberculosis of the cardio-respiratory organs of a person who has worked at least 200 shifts in circumstances amounting to a risk and where silica dust or any other injurious dust was present, or any sequelae, complication or manifestation thereof, but does not include inactive or calcified foci'.

(2) Notwithstanding anything in any other law contained, no person who has a claim to benefits under this Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or was employed at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), or any other law.'

The reference to the Workmen's Compensation Act 30 of 1941 must be understood to be a reference to COIDA,[5] and the mention of 'any other law' as a reference to other statute law, excluding the common law.[6]

[13] In January 1994 ODIMWA was amended by the Occupational Diseases in Mines and Works Amendment Act 208 of 1993.[7] The amending Act did away with all the provisions of ODIMWA which differentiated between persons on the grounds of sex or population group and added other provisions relating, inter alia, to the issuing of certificates of fitness and the extent and determination of benefits payable under the Act. A new s 36A dealing with medical expenses was inserted providing for the liability of the owner of a mine or controlled works to pay the reasonable costs incurred by or on behalf of a person in his service in respect of medical aid necessitated by such disease for a period not exceeding two years from the date of commencement of the disease.[8] COIDA came into operation on 1 March 1994 without any amendment of ODIMWA.

WORKMEN'S COMPENSATION LEGISLATION

[14] The liability of an employer for injuries suffered by a workman arising from and in the course of his or her employment underwent considerable change during the last century. The Transvaal Workmen's Compensation Act 36 of 1907 expressly preserved a workman's common-law right to institute proceedings against his or her employer for damages arising from personal injury (s 32(1)). However, the workman had to make an election whether to claim compensation from the employer as calculated in terms of the Act or to proceed at common law. After making an election, the workman was debarred

---

[5] Section 12(1) of the Interpretation Act 33 of 1957.
[6] Section 2 of the Interpretation Act 33 of 1957 and see *R v Detody* 1926 AD 198 at 201; S I E van Tonder, N P Badenhorst, C H J Volschenk and J N Wepener *L C Steyn Die Uitleg van Wette* (1981) 5 ed p 154.
[7] *GG* 15449, 28 January 1994.
[8] Section 36A(1) of ODIMWA was amended again in 2002 without any amendment of COIDA.

from proceeding on the other cause of action (s 32(2)). Liability to pay compensation was imposed on the employer by the Act (s 3) which contained a formula for its calculation (ss 7 and 17).

[15] A similar approach was followed in the Workmen's Compensation Act 25 of 1914. Section 1 imposed liability on the employer to pay compensation for personal injury resulting in incapacity or death caused by an 'accident'. However, s 1(1)(b) expressly preserved the workman's common-law right to claim damages 'if such accident was caused by an act or default of the employer or of some person for whose act or default the employer is responsible . . . '.[9] The workman had to elect which remedy to pursue. By electing to enforce either his common-law rights or his statutory claim to compensation he became debarred from pursuing the other. Where a workman met with an accident resulting in injury or death in, at or about any mine or works while being trained or engaged in first aid, ambulance or rescue work the injury or death was deemed to have arisen out of and in the course of his work (s 1(2)). The Workmen's Compensation (Industrial Diseases) Act 13 of 1917 amended the 1914 Act to provide for compensation also for the industrial diseases listed in the Schedule, viz cyanide rash, lead and mercury poisoning (s 1). Prior to its enactment compensation was limited to personal injury caused by the accident.

[16] The Workmen's Compensation Act 59 of 1934 provided for a system of compensation to be paid by the employer in respect of the disablement or death of a workman if an accident arising out of and in the course of employment happened to him or her (s 2(1)). Fault on the part of the employer was no requirement for liability but, in return, the workman lost his or her common-law remedies against the employer. Section 4 provided:

---

[9] Cf s 22(5) of the Native Labour Regulation Act 15 of 1911 which provided: 'Nothing in this section shall be taken to debar any native labourer from claiming compensation under his rights at common law or under law relating to the payment of workmen's compensation in force within the Union or any part thereof: Provided that if compensation has been recovered by a native labourer or dependent under this section no action shall lie against the employer for the recovery of damages or compensation in respect of the same accident.'

'(1) No action at common law shall lie by a workman or any dependant of a workman against such workman's employer or the principal as defined … to recover any damages for and in respect of any injury resulting in the disablement or death of such workman caused by any accident happening after the commencement of this Act; and any claim for damages shall be determined under and in accordance with this Act.

(2) No liability for compensation shall arise save under and in accordance with the provisions of this Act in respect of any such injury.'

Chapter V dealt with industrial diseases and specifically with compensation in respect of 'scheduled diseases'. Section 60 imposed liability for compensation on the employer to a workman or his or her dependants where the workman was suffering from a scheduled disease causing disablement or where his or her death was caused by such disease and the disease was due to the nature of the workman's employment as if his or her disablement or death had been caused by an accident. The diseases were specified in the Second Schedule as cyanide rash, lead poisoning or its sequelae, mercury poisoning or its sequelae and ankylostomiasis (hookworm). The employer's liability was limited to the payment of compensation as determined by the Act. However, s 5 provided for the payment of increased compensation where the accident was due to the employer's negligence. Moreover, s 46 provided that if the accident arose in circumstances creating a legal liability in a third party to pay damages, the workman was entitled to take proceedings against both the third party for damages and against the employer for compensation.

[17] The Workmen's Compensation Act 30 of 1941, replacing the 1934 Act, introduced a new system of compensation by the establishment of a compensation fund to which employers contributed and from which workmen were to be compensated. The scheme of the Act included an indemnity for the employer against any common-law claim the employee may have had against him (s 7). Section 27 provided that 'if an accident happened to a workman resulting in his disablement or death, the workman shall be entitled to benefits under this Act'. An 'accident' was described as 'an accident arising out of and in the course of a workmen's employment and resulting in a personal injury' (s 2). An 'accident fund' was established (s 64) consisting, inter alia, of contributions by employers based on the total amount of the wages of the workmen

employed by them (ss 68 ff) which became liable for the payment of compensation unless the employer was 'individually liable' for payment (s 37). Section 7 provided:

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

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

[18] Chapter X dealt with compensation for 'industrial diseases' and followed the pattern of the 1934 Act.[10] Section 89 provided:

'Where it is proved to the satisfaction of the commissioner . . . that the workman is suffering from a scheduled disease due to the nature of his occupation and is thereby disabled for employment, or that the death of the workman was caused by such disease, the workman shall be entitled to compensation as if such disablement or death had been caused by an accident, and the provisions of this Act shall, subject to the provisions of this Chapter, mutatis mutandis apply . . . '.

The 'scheduled diseases' referred to in the Second Schedule originally included ankylostomiasis (hookworm) arising from the occupation of 'mining carried on underground' in workmen other than 'Asiatics' or 'natives'; arsenical poisoning; benzene poisoning; dermatitis due to dust; halogen poisoning; lead poisoning; pathological manifestations due to radium or X-rays and 'silicosis' due to the 'excavation of works'. The Second Schedule was, however, often amended[11] and in 1952,[12] the occupation relating to 'silicosis' was changed from 'excavation works' to

'Any occupation (not being a "dusty occupation" as defined in section one of the Silicosis Act, 1946) in which workmen are exposed to the inhalation of silicon dioxide'.

In 1959 the Second Schedule was amended again by the insertion of the words 'asbestosis or other fibrosis of the lungs caused by mineral dust' after the word 'silicosis' and the description of the related occupation changed to

---

[10] Para 16 above.
[11] See eg RG 147 *GG* 4644, 29 June 1951 inserting 'anthrax'; RG 90 *GG* 229, 27 April 1962 inserting 'benzene'; RG 98 *GG* 3856, 13 April 1973 inserting 'Byssinosis'.
[12] RG 63 *GG* 4817, 3 April 1952.

'any occupation (other than in a "dusty atmosphere" as defined in the Pneumoconiosis Act, 1956), in which workmen are exposed to the inhalation of silica dust, asbestos dust or other mineral dust.'

A 'dusty occupation' was defined in the Silicosis Act 46 of 1946 as 'any mining operation performed by a person . . . while he is working below the natural surface of the earth, or any duty performed at a mine below the natural surface of the earth by a servant of the State, or any mining operation performed by a person . . . on or above the natural surface of the earth at a place where rock, stone, ore or any mineral is ordinarily reduced in size or classified by any dust-producing process . . . '.[13]

COIDA

[19] COIDA came into operation on 1 March 1994. It repeals the Workmen's Compensation Act 30 of 1941 (s 100(1)) and provides for the compensation for employees injured in accidents that arose out of and in the course of their employment or who contracted occupational diseases. A compensation fund was established (s 15) to which employers are required to contribute (s 87) and from which compensation and other benefits are paid to employees (s 16). The compensation fund is funded by assessments paid by employers and calculated by the Director-General on a percentage of the annual earnings of employees of employers carrying on business in the Republic. The other income of the compensation fund consists of interest on investments, amounts transferred from the reserve fund, and contributions paid by employers individually liable and by mutual associations (ss 15, 80, 82, 86 and 88). Assessments payable by employers are determined by two principal factors: the remuneration of the employees and the class of industry in which the employer operates. An employer's assessment is based on an annual statement of earnings that all employers must submit to the commissioner. Earnings must be calculated in terms of s 63 of COIDA and the commissioner may prescribe a maximum amount on which the

[13] A 'dusty atmosphere' was defined in the Pneumoconiosis Act 57 of 1956 as a 'place where dust occurs or is produced which causes or is likely to cause pneumoconiosis in persons employed in mining operations therein or thereat, if such place is (a) below the natural surface of the earth; or (b) a place on or above the natural surface of the earth – (i) where rock or stone or any mineral is ordinarily reduced in size or classified or moved or handled by any dust producing process …'. See also s 1(xxi) of the Pneumoconiosis Compensation Act 64 of 1962 and paras 7 to 8 above.

assessment must be calculated (s 83(8)). The commissioner determines the amounts payable according to a tariff of assessment. This is done on the basis of a percentage of the annual earnings of the employees of an employer with regard to the requirements of the compensation fund for the year of assessment (s 83(1)). The class of industries covered is divided into 23 classes with 102 sub-classes and the assessment rates vary according to the class.[14] Assessments may also be made by the commissioner on any other basis deemed equitable (s 83(2)(a)). There are detailed provisions for the calculation of compensation payable based principally on the earnings of the claimant and the degree of injury or disablement (ss 53, 63 and 67). Pensions are increased annually to keep track of inflation (s 57). Special provision is made for the calculation of compensation payable to employees under the age of 26 and those undergoing training who have been permanently disabled by an occupational disease or injury: their compensation is calculated on the basis of the earnings a recently qualified person with five more years' experience than the employee or of the earnings of a 26 year old person with five more years experience than the employee (s 51).

[20] COIDA allows employees to obtain limited compensation from a fund to which employers are obliged to contribute. The Act 'supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which the employers are obliged to contribute.'[15]

[21] Section 35(1) of COIDA abolished an employee's common-law right to claim damages from the employer. Section 36 regulates and preserves an employee's rights against a third party who may incur liability to the employee. Of significance is s 56(1) which provides that if a person has met with an accident or contracted an occupational disease owing to his or her employer's negligence, the employee may apply to the commissioner to receive 'increased compensation in addition the compensation normally payable in terms of this Act'. The amount of additional compensation is

---

[14] M P Olivier, N Smit and E R Kalula (eds) *Social Security; A Legal Analysis* (2003) p 468.
[15] *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) para 15.

determined by the Director-General in an amount deemed equitable but which may not exceed the amount of pecuniary loss the claimant has or will suffer (s 56(4)).[16] Where increased compensation is payable in terms of s 56, the negligent employer may be assessed at a higher tariff than the tariff for the assessment of employers in a like business (ss 56(7) and 85(2)).

[22] Where an employee meets with an accident resulting in his or her disablement or death (s 22(1))[17] or contracts an occupational disease (s 65), he or she is entitled to the benefits provided for by COIDA. Section 65 deals with compensation payable for occupational diseases:

'(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General -

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or

(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.'

An 'occupational disease' is defined as 'any disease contemplated in section 65(1)(a) or (b)'. The diseases referred to by the appellant in his particulars of claim are 'silicosis, pulmonary tuberculosis and obstructive airways disease'. As pointed out in paragraph 2

---

[16] In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) para 14 the effect of COIDA was summarised: 'An employee who is disabled in the course of employment has the right to claim pecuniary loss only through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled. The procedure provides for speedy adjudication and for payment of the amount due out of a fund established by the Compensation Act to which the employer is obliged to contribute on pain of criminal sanction. Payment of compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee's contributory negligence. The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant's actual pecuniary loss. An employee who is dissatisfied with an award of the Commissioner has recourse to a Court of law which is, however, bound by the provisions of the Compensation Act. That then is the context in which section 35(1) deprives the employee of the right to a common-law claim for damages.'

[17] Section 22(1): 'If an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.' An 'accident' is defined as 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee'.

above, he alleged that his exposure to harmful dusts and gases, including silica dust, in the workplace during his period of employment contributed materially to his developing pulmonary tuberculosis and silicosis and to his contracting obstructive airways disease. These diseases are either 'occupational diseases' under s 65(1)(a) read with the first column of Schedule 3 that arose out of and in the course of the appellant's employment or, they are diseases under s 65(1)(b), namely 'diseases' other than those contemplated by s 65(1)(a) that arose out of and in the course of the appellant's employment. The intention of the legislature was clearly to cast the ambit of an employee's entitlement to compensation as widely as possible. Section 65(1)(b) makes this clear.

INTERPRETING SECTION 35(1) OF COIDA

[23] This appeal concerns the proper interpretation of s 35(1). It was contended on behalf of the appellant that s 35(1) did not contain a general ouster of liability and that it did not apply to persons who did not fall within the definition of 'employee' or who did not qualify for compensation under COIDA. The submission was that persons having claims under ODIMWA had no claims under COIDA and could therefore not be regarded as 'employees' falling under the compensatory scheme of COIDA. Section 100(2) of ODIMWA, it must be recalled, excludes a person who has a claim under its provisions from any entitlement to the benefits under COIDA. Section 35(1) of COIDA is headed 'Substitution of compensation for other remedies'. This, it was submitted, gave some indication of the legislature's intention to extinguish only the common-law claims of those employees who qualify for compensation under COIDA. The use of words such as 'occupational injury', 'occupational disease', 'disablement' and 'compensation' in the subsection pointed to that conclusion. In developing the argument, Mr Marcus, who appeared for the appellant, called for an interpretation to 'promote the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution. A court, of course, must interpret legislation in this manner.[18] Moreover, it must 'prefer

---

[18] *Phumelela Gaming and Leisure Ltd v Gründlingh & others* 2007 (6) SA 350 (CC) para 27; *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) para 21; *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) para 47; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another* [2008] ZACC 12; 2009 (1) SA 337 (CC) para 49.

interpretations that fall within constitutional bounds over those that do not'.[19] A court must therefore ascertain whether it is reasonably possible to interpret the legislation in a manner that conforms to the Constitution, ie 'by protecting the rights therein protected.'[20] It was submitted that three constitutional rights of the appellant were involved, ie the right to equality (s 9), the right of access to the courts (s 34) and the right to property (s 25).[21]

[24] In formulating the constitutional approach to interpretation in *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others*[22] Langa DP added:

'Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.'

[25] Interpretation seeks to give effect to the object or purpose of legislation. It involves an inquiry into the intention of the legislature. It is concerned with the meaning

---

[19] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) para 24.
[20] *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) para 11.
[21] The right to property identified is the appellant's common-law claim against his employer. See *Logan v Zimmerman Brush Co* 455 US 422; *Hewlett v Minister of Finance & another* 1982 (1) SA 490 (ZSC) at 494B-E and 497H-498E; *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301 para 31.
[22] 2001 (1) SA 545 (CC) paras 23 and 24. See further *De Beer NO v North-Central Local Council and South-Central Local Council & others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) para 11; *National Director of Public Prosecutions & another v Mohamed NO & others* 2002 (4) SA 843 (CC) para 33; *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC) para 31.

of words without imposing a view of what the policy or object of the legislation is or should be.[23] In *Dadoo Ltd & others v Krugersdorp Municipal Council*[24] Innes CJ said:

'Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognized rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure.'

It is therefore with the meaning of the words of s 35(1) that I am concerned.

[26] Section 35(1) follows the same pattern as s 4 of the 1934[25] and s 7 of the 1941[26] Workmen's Compensation Acts. Although it does not contain two sub-paragraphs as the earlier legislation did, it deals with the same two aspects. The first part of s 35(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 …') corresponds with s 4(1) of the 1934 Act and s 7(a) of the 1941 Act. It extinguishes the employee's common-law rights against the employer. The second part ('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') corresponds with s 4(2) of the 1934 Act and s 7(b) of the 1941

---

[23] *Standard Bank Investment Corporation v Competition Commission Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) para 16. In *Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) para 9 Schutz JA stated: 'The difficulty, which faces any argument which claims better knowledge of what the legislature intended than what the legislature itself appears to have had in mind when it expressed itself as it did, is to establish with reasonable precision what the unexpressed intention contended for, was.'

[24] 1920 AD 530 at 543 cited with approval in *Standard Bank Investment Corporation v Competition Commission Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) para 16.

[25] Para 16 above.

[26] Para 17 above.

Act. Under the 1934 Act, the employer's liability was limited to the payment of compensation as calculated under that enactment. Under the 1941 Act, compensation was payable from the compensation fund and an employer was liable to pay compensation only under limited circumstances. This is also the position under COIDA. Compensation is payable by the Director-General from the compensation fund but only in a few instances by the employer, eg where the employer is an 'employer individually liable'.[27]

[27] In support of its construction of s 35(1) that only persons having claims under COIDA could be regarded as 'employees' the appellant relied on *Small v Goldreich Buildings Ltd and Reid & Knuckey (Pty) Ltd*.[28] This case concerned s 45(1) of the 1934 Workmen's Compensation Act which deemed the main contractor, the 'principal', to be the employer of workmen of a sub-contractor 'unless and until such [sub]contractor is … in possession of a policy of insurance or indemnity'. Section 4 of the 1934 Act also excluded the liability of a 'principal as defined' in s 45. Section 45, however, contained no definition ('omskrywing') of 'principal' and Schreiner J held that, because the sub-contractor was in possession of a policy of insurance, the main contractor did not fall within that description.[29] This judgment provides no support for the appellant's construction. *Mphosi v Central Board for Co-Operative Insurance Ltd*[30] was also referred to. The court stated that the word 'damages' in s 7 of the 1941 Workmen's Compensation Act was unqualified and 'must necessarily refer to all damages suffered in respect of such an injury as is described in that passage.'[31] The court added that the words 'resulting in the disablement or the death of such workman' were included

'to tie up with the provisions of sec. 27 … which sets out the circumstances in which a workman is entitled to compensation under the Act, in order to limit the operation of sec. 7(a) to the recovery of damages in

---

[27] See s 1: an 'employer individually liable' is 'an employer who in terms of section 84(1)(a) is exempt from paying assessments to the compensation fund'. Further ss 29, 54(2), 61, 72, 73, 78. ('Compensation' is defined in s 1 of COIDA to include, where applicable, 'medical aid or payment of the cost of such medical aid'). Cf *Rand Mutual Assurance Company Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA) paras 4 ff.
[28] 1943 WLD 101.
[29] At 109-110.
[30] 1974 (4) SA 633 (A).
[31] At 643G-H.

respect of an injury which is compensable under the Act. If the words in question were omitted from sec. 7 the result could be that a workman might be deprived of his common law action for damages also in respect of an injury which, though due to an "accident", did not result in the disablement of the workman, and was therefore not compensable under the Act'.[32]

The point is that, had those words been omitted, other claims by the employee against the employer might also have been excluded by s 7(a) of the 1941 Act. This case is no authority for the proposition that a workman had to have an enforceable claim for compensation under the 1941 Act before s 7(a) became applicable. There is hardly any other way to formulate the substitution of remedies than in the manner set out in s 35(1) of COIDA or s 7 of the repealed 1941 Act.

[28] *Pettersen v Irvin & Johnson Ltd*[33] is of more relevance. It concerned the question whether s 7 of the 1941 Workmen's Compensation Act 'precludes an action against the employer for general damages, i.e. for damages which have been held to fall outside the scope of this Act and in respect of which no compensation can be recovered against the Workmen's Compensation Commissioner'. The court stated:[34]

'The words employed by the Legislature are of the widest connotation. The words "no action shall lie" and the words "to recover any damages" are as widely framed as they could be. The "damages" must of course be in respect of an injury, which must be due to an accident that in turn results in disablement or death.'

This means that an employee's common-law claim for general damages was excluded by s 7 even though the 1941 Workmen's Compensation Act did not provide for compensation for such damages.[35]

[29] The same reasoning applies to s 35(1) of COIDA. The employee's action for the 'recovery of damages in respect of an occupational injury or disease resulting in the disablement or death' of the employee is extinguished. The subsection does not require that the employee must be entitled to receive compensation under COIDA. It refers to

---

[32] At 643H-644A. See para 17 above.
[33] 1963 (3) SA 255 (C) at 256G-7A.
[34] At 256H-257A.
[35] See *Mphosi v Central Board for Co-Operative Insurance* 1974 (4) SA 633 (A) at 642-4; *Mlomzale v Mizpah Boerdery (Pty) Ltd* 1997 (1) SA 790 (C) at 793I-J.

an action for the recovery of damages which is abrogated. This right is qualified with reference to 'an occupational injury or disease' and to 'disablement' and 'death'. Section 35(1) uses the words and expressions occurring in COIDA. However, it does not follow that it is implied that the employee must also be entitled to compensation under COIDA. Nor does the word 'substitution' used in the heading of the section lead to the conclusion that the employee must be entitled to compensation under COIDA: where the words in the text of the provision are clear, they cannot be overridden by the words used in the heading.[36]

[30] The remedies provided for by COIDA relate to an 'employee' and his or her dependants (s 1 sv 'employee'). ODIMWA, on the other hand, deals with a variety of matters including the control of mines (Chapter 1); the inspection of mines and the determination of risk (Chapter 2); the medical examination of miners and their certification (Chapters 3 and 4); and the compensation fund and compensation payable (Chapters 5 ff). Its benefits are payable not to an 'employee' as such but rather to a person performing 'risk work' and his or her dependants (eg ss 13(7), 62(1), 80(1), 80(2), 80A and 99). The 'concept of 'risk work' replaced that of work performed in a 'dusty atmosphere' used in previous legislation.[37] Although there are persons entitled to benefits other than employees under ODIMWA, it obviously also applies to employees (s 16 and cf ss 23; 36 A, B and C; 80A).

[31] COIDA has a wider ambit of application than the repealed Workmen's Compensation Act of 1941. This is so because it expands the definition of 'employee' in s 1 to include also 'casual workers' and removes the earnings limit of R 55 068 per annum provided for in s 3(2)(b) of the 1941 Act. Employees employed at 'controlled mines' or 'works' are not excluded from the ambit of COIDA.[38] This is clear from the reference in s 25(b) to an employee being engaged in 'his employer's mine'. Section 25(c) deals with an employee being engaged with the consent of his or her employer in any of the emergency services referred to 'or other emergency service on any mine,

---

[36] *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431 and see Steyn above p 147-8.
[37] See paras 6 and 7 above.
[38] Para 7 above.

works or premises other than his employer's'. COIDA thus applies to both employees normally employed on a mine but engaged in emergency services on a mine other than their employer's, and to employees engaged in emergency services in or about the employer's mine. Moreover, s 56(1)(d) refers to an engineer appointed under the regulations made under the Minerals Act 50 of 1991, showing an intention to include mine employees within the ambit of COIDA. The same conclusion can be drawn from s 81(4) of COIDA that refers to a health and safety representative elected under the Mine Health and Safety Act 29 of 1996 which applies to mines only. Section 100(1) of ODIMWA itself recognises the possibility of mine employees being entitled to compensation under COIDA. It reads:

'No person shall be entitled to benefits under this Act in respect of any disease for which he or she has received or is still receiving full benefits under [COIDA].'

Section 99(3) of ODIMWA also envisages that compensation may be claimable by mine employees under COIDA. It provides:

'When the certification committee has found that any person is suffering from a compensatable disease which, in the opinion of that committee, is attributable partly but not mainly to work at a mine or works, the commissioner may in his discretion award to or in respect of such person who is not in receipt of full benefits in respect of that disease under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), or any other law, benefits not exceeding one-half of the benefits provided for in this Act.'

[32] The delicate relationship between COIDA and ODIMWA is regulated by s 100(2) of ODIMWA:

'Notwithstanding anything in any other law contained, no person who has a claim to benefits under this Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or was employed at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under [COIDA], or any other law.'

This section precludes a person entitled to benefits under ODIMWA from receiving compensation under COIDA only in respect of a 'compensatable disease' as defined in ODIMWA. It does not affect any other claim to compensation an employee such as a mine employee may have in other respects under COIDA. In other words, s 35(1) of COIDA abrogates an employee's common-law claim against his or her employer in

respect of an 'occupational disease' even where the claim for compensation is required by s 100(2) of ODIMWA to be lodged under ODIMWA. Where two enactments are not repugnant to each other, they should be construed as forming one system and as re-enforcing one another.[39] The interrelation between ODIMWA and COIDA is apparent from s 100(2) of ODIMWA. Just as their precursors,[40] they comprise one system of compensation and should be interpreted as such.

[33] The two acts must be harmonized. Together they cover the whole field of compensation for damages arising from injury or diseases contracted at work, with ODIMWA providing for injuries and diseases in a specific area and COIDA being of more general application. Judging from the words of s 35(1) of COIDA it is unlikely that the legislature intended to have different policies to apply to employer's liability under the two enactments. The exclusion of liability in s 35(1) of COIDA is thus not limited to employees with claims under COIDA. It would be irrational not to extend the protection against the common-law liability of employers also to the owners of mines. Historically all employers, whether under COIDA or ODIMWA, fund the compensation funds under the two enactments.[41] It follows that the legislature in enacting COIDA and ODIMWA intended s 35(1) to apply also to employees with claims under ODIMWA. The court a quo was thus correct in holding that 'there is no rational basis for protecting the employer from common law liability in return for funding statutory compensation for diseases contracted by mine employees in COIDA but not in ODIMWA.'

[34] There is another reason why the uniform application of s 35(1) of COIDA to all employees is called for. In terms of s 69 of COIDA the Minister of Labour may amend Schedule 3, also with retrospective effect, in respect of both the description of the diseases and the work involved. Under ODIMWA the Minister of National Health and Welfare may in terms of paragraph (f) of the definition of 'compensatable disease' in s 1 declare a disease to be a compensatable disease. However, he may make no such

---

[39] *Petz Products v Commercial Electrical Contractors* 1990 (4) SA 196 (C) at 204H-I; *R v Maseti & others* 1958 (4) SA 52 (E) at 53H; *Nkabinde v Nkabinde and Nkabinde* 1944 WLD 112 at 122; *Johannesburg City Council v Makaya* 1945 AD 252 at 257 and 259; *Chotabhai v Union Government & another* 1911 AD 13 and see Steyn above p 153 188 ff.
[40] See paras 6, 8 and 12 above.
[41] See paras 5, 6, 7, 8, 10, 17 and 19 above.

declaration in respect of a disease which is compensable under COIDA except after consultation with the Minister of Labour (s 1(2)(b) of ODIMWA). If the appellant's interpretation of s 35(1) is correct the effect of such a declaration could be that an employer's common-law liability could depend on not the terms of the statute but on a ministerial decision. A uniform application of s 35(1) of COIDA to all employees would prevent this result.

[35] It was submitted on behalf of the appellant that s 100(2) of ODIMWA removed a person from consideration under COIDA where his or her claim might otherwise be brought under both COIDA and ODIMWA, thereby enforcing the exclusivity of the regimes under the two enactments to prevent double compensation. By doing so, ODIMWA provided for benefits to all persons falling within its ambit. The benefits under ODIMWA, it was submitted, may be supplemented by a common-law claim for damages.[42] COIDA, it was contended, is a regime of statutory compensation that includes enhanced statutory compensation on showing that the employer had been negligent[43] with a concomitant exclusion of a common-law claim.

[36] I do not agree. All employees falling within the ambit of COIDA are entitled to its benefits. An employee who contracted a disease at a controlled mine or controlled works which qualifies both as a 'compensatable disease' and as an 'occupational disease' is, by virtue of s 100(2) of ODIMWA, obliged to claim compensation under ODIMWA. It was suggested that persons having a claim under ODIMWA but not under COIDA could not be regarded as 'employees' under COIDA. This submission, however, would entail reading into the text of s 35(1) words qualifying the 'employee' to the effect that the employee must have a valid claim under COIDA or words excluding

---

[42] Indeed in the 1981 *Report of the Commission of Inquiry into Compensation for Occupational Diseases in the Republic of South Africa* it was said: '2.4.1.15 The Occupational Diseases [in Mines and Works] Act [78 of 1973] contains no provision comparable to section 43 of the Compensation Act. Since the common law remains applicable until it is amended or set aside by legislation, and since the Occupational Diseases Act contains no such provision, no worker is denied the right to recover full indemnification from the employer under the common law in appropriate circumstances. The Occupational Diseases Act therefore has no real shortcoming in this regard, except in so far as it, unlike the Compensation Act, contains no provision for a shorter and less complicated procedure for enforcing the law.' For the reasons set out in this judgment this view is not correct.

[43] Section 56 of COIDA.

'employees' with claims under ODIMWA. The suggested construction offends the plain wording of s 35(1) which excludes an employer's liability where the prescribed circumstances are present without regard to whether or not the employee has a valid claim under either of the two Acts. A person qualifies as an 'employee' within the meaning of s 35(1) if he or she complies with the requirements of the definition in s 1 of COIDA. When the 1941 Workmen's Compensation Act was considered,[44] it was pointed out that the Second Schedule was amended in 1952 and 1959 to exclude from the occupation in respect of 'silicosis' any occupation other than a 'dusty occupation' or one in a 'dusty atmosphere' as defined in the 1946 Silicosis Act and the 1956 Pneumoconiosis Act respectively. The implication is that a person employed in that way was a 'workman' as defined in the 1941 Workmen's Compensation Act. COIDA defines an 'employee' in very much the same, although expanded, terms. Persons employed at mines are comprehended within the definition of 'employee'.[45] Whereas the scheduled diseases under the 1941 Workmen's Compensation Act in the context of this case referred only to 'silicosis', the occupational diseases scheduled under COIDA includes those referred to in the appellant's particulars of claim and, in any event, include occupational diseases other than the scheduled ones which 'has arisen out of and in the course of [the employee's] employment' (s 65(1)(b)).[46] Section 35(1) of COIDA extinguishes all common-law claims for damages 'in respect of any occupational injury or diseases resulting in the disablement or death' of the employee. It follows that the claim of the appellant is excluded by s 35(1) of COIDA. Any other interpretation would be 'unduly strained'.

PRESUMPTION AGAINST HARSH CONSEQUENCE

[37] It was suggested on behalf of the appellant that s 35(1) of COIDA be construed in a manner avoiding hardship on the part of the appellant and those in a similar position. In particular, reference was made to s 56 of COIDA which makes provision for increased claims by an employee where the occupational injury or disease was caused

---

[44] See para 18 above.
[45] Para 31 above.
[46] Para 22 above.

by the negligence of, for example, the employer. ODIMWA has no such provision. In addition, it was submitted that COIDA provided for the calculation of more generous benefits payable to the employee than does ODIMWA. Whether this is so is not a matter that can be determined on exception.[47] The appellant or a person in his or her class that falls under the provisions of ODIMWA can neither claim under COIDA nor pursue his or her common-law remedy against the employer. The appellant relies on a series of presumptions calling for a construction that would avoid hardship.[48]

[38] There are two relevant presumptions, 'namely that the legislature does not intend that which is harsh, unjust or unreasonable; and that in case of doubt, the most beneficial interpretation should be adopted'.[49] The policy of COIDA, it was also said, is to assist employees as far as possible, and it should 'not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.'[50] However, this does not mean that 'other well-recognised canons of construction should be disregarded in the search for the Legislature's intention. They must be accorded due weight and, ultimately, may be decisive.'[51] The common law may be altered expressly or by implication.[52] To my mind, the clear provisions of s 35(1) of COIDA show that there is an intention to alter the common law and to make inroads into

---

[47] See s 49 of COIDA read with Schedule 4; s 80 of ODIMWA in regard to permanent disability. Further s 47(1) of COIDA read with Schedule 4 in regard to temporary disability; s 54(2) of COIDA read with Schedule 4 in regard to funeral expenses. The method of compensation provided for by ODIMWA is set out in s 80. Section 36A, B and C of ODIMWA, however, contains special provisions regarding the payment of medical expenses of persons suffering from compensatable diseases mine owners. A comparison of the benefits can only be made after evidence quantifying them has been led.

[48] *Veldsman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) para 26. Further *Barlow & Jones Ltd v Elephant Trading Co* 1905 TS 637 at 648; *Transvaal Investment Co Ltd v Springs Municipality* 1922 AD 337 at 347; *Rossouw v Sachs* 1964 (2) SA 551 (A) at 562C-E; *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 164C-D; *Government of the Islamic Republic of Iran v Berends* 1998 (4) SA 107 (Nm) at 118J–119C; *Arenstein v Secretary for Justice* 1970 (4) SA 273 (T) at 281A-E; *Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd* 2007 (2) SA 570 (SCA) para 14.

[49] *Government of the Islamic Republic of Iran v Berends* 1998 (4) SA 107 (Nm) at 118J–119C; *Principal Immigration Officer v Bhula* 1931 AD 323 at 336-7 and see Steyn p 101 ff.

[50] *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C) at 694F-G and see *Workmen's Compensation Commissioner v Van Zyl* 1996 (3) SA 757 (A) at 764F-G; *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 424D-F.

[51] *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 424E-F.

[52] *Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd* 2007 (2) SA 570 (SCA) para 14; *Casserly v Stubbs* 1916 TPD 310 at 312 and cf *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 164C-D.

existing rights: its plain meaning is that it bars claims by all employees as defined, including those with claims under ODIMWA. It could well be that the provisions of s 35(1) of COIDA affect the appellant harshly. But it would be equally unfair or 'harsh' to require mines to pay levies to a compensation fund without receiving some of protection against delictual claims by employees. It would be particularly 'harsh' where such protection is extended under COIDA to all employers other than the owners of controlled mines and works for the identical diseases.

GENERALIA SPECIALIBUS NON DEROGANT

[39] It is a general principle that where a later statute is irreconcilable with an earlier one, the latter must be regarded as having been impliedly repealed.[53] However, the position may be different where the later statute is general, and the earlier one special.[54] In such a case the earlier special statute remains in force. This presumption of construction is referred to as *generalia specialibus non derogant*, and it was contended that the appellant's interpretation of s 35(1) of COIDA accorded with it. But the maxim does not always find application 'and the cardinal question is whether the Legislature intended that its later general Act should alter its own earlier special enactment . . . '.[55] It was submitted that because s 35(1) of COIDA did not repeal s 100(2) of ODIMWA expressly it could not be construed as repealing or amending the latter section implicitly so that it remained applicable. Section 100(2) of ODIMWA, however, does not give an employee a common-law right to claim damages from his employer. The question is not whether s 35(1) of COIDA impliedly repealed s 100(2) of ODIMWA but whether s 35(1) of COIDA abrogated the common-law cause of action of employees who have a claim under ODIMWA.

[40] As I have said, the provisions of ODIMWA apply not specifically to 'employees' but to those persons performing 'risk work' in mines. COIDA is of more general

---

[53] Steyn p 188 ff.
[54] *Khumalo v Director-General of Co-Operation and Development & others* 1991 (1) SA 158 (A) at 163B-D.
[55] *Khumalo v Director-General of Co-Operation and Development & others* 1991 (1) SA 158 (A) at 163D-E; *S v Mseleku* 1968 (2) SA 704 (N) at 707C-E. See *Sasol Synthetic Fuels (Pty) Ltd & others v Lambert & others* 2002 (2) SA 21 (SCA) paras 17 and 18; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) paras 101 and 102.

application applying to all 'employees'. Section 35(1) of COIDA was intended to protect all employers against common-law liability. In this sense it was 'meant to cover, without exception, the whole field or subject to which it relates' refuting the presumption created by the maxim *generalia specialibus non derogant*.[56]

EQUALITY

[41] It was contended that if the respondent's construction of s 35(1) of COIDA were to be accepted it would violate the appellant's right to equality. The appellant relied on an arbitrary differentiation in contravention of s 9(1). It follows that the appellant must show that the respondent's construction of s 35(1) of COIDA gives rise to differentiation that is not rationally connected to a legitimate governmental purpose. The appellant relies on two forms of differentiation. The first is between those employees who give up their common-law claim but who may receive increased compensation if their disease was caused by their employer's negligence (ie those employees entitled to compensation under COIDA) and those employees who give up their common-law claim but may not receive increased compensation even if the disease was caused by their employer's negligence (ie those employees entitled to compensation under ODIMWA). The second is between those employees who give up their common-law claims in exchange for the benefits provided for by COIDA and those employees who give up their common-law claims but must settle for the inferior benefits provided for by ODIMWA.[57] Whether a particular measure constitutes unfair discrimination must be

---

[56] *Khumalo v Director-General of Co-Operation and Development and Others* 1991 (1) SA 158 (A) at 163D-E; *New Modderfontein Gold Mining Company v Transvaal Provincial Administration* 1919 AD 367 at 397. Cf *Principal Immigration Officer v Bhula* 1931 AD 323 at 336.

[57] Section 9 of the Constitution provides: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.' Section 9(3) is the equivalent of s 8(2) of the interim Constitution.

determined by a consideration of the principles set out in *Harksen v Lane NO & others*.[58]

[42] However, the scope of rationality review is narrow. As Yacoob J said in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)*:[59]

'It is clear that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the Legislature could be improved in one respect or another. Whether an employee ought to have retained the common-law right to claim damages, either over and above or as an alternative to the advantages conferred by [COIDA], represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the Legislature and not a court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined. The Legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The scheme is financed through contributions from employers. No doubt for these reasons the employee's common-law right against an employer is excluded. Section 35(1) . . . is therefore logically and rationally connected to the legitimate purpose of [COIDA].'

[43] The law differentiates between employees who have claims under COIDA and persons, including employees, who have claims under ODIMWA. The question is whether this form of differentiation is rationally connected to a legitimate governmental purpose. If such a connection exists there is no arbitrary differentiation for the purposes of s 9(1) of the Constitution. In the circumstances of this case such a connection exists. The legislature adopted the view that there should be two statutory schemes that are separately funded and administered to provide different compensation for the different claimants. The existence of two historical schemes of compensation is a legitimate governmental purpose and the two enactments are rationally connected to this purpose. The question is not whether it is rational for employees who have claims under COIDA to forsake their common-law claims against the employers but irrational for others with

---

[58] 1998 (1) SA 300 (CC) para 53 with reference to s 8 of the interim Constitution. See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) para 11; *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) paras 58-64; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

[59] 1999 (2) SA 1 (CC) para 17. See also *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) paras 41-46; *New National Party of South Africa v Government of the Republic of South Africa & others* 1999 (3) SA 191 (CC) paras 24-25.

claims under ODIMWA to do so. The question of rationality is directed at the legislature. The legislature has resolved that persons engaged in risk work on controlled mines are required to claim under ODIMWA rather than under COIDA in circumstances where concurrent claims would otherwise exist. This is not an arbitrary differentiation. To hold otherwise would lead to arbitrary differentiation between employers in the mining industry. Some employers would be protected against common-law claims falling under COIDA but not where they fall under ODIMWA. There can be no rational basis for protecting employers from common-law liability in return for funding the statutory compensation scheme for miners under COIDA but not under ODIMWA.

[44] The appellant submitted that to single out those performing risk work underground on controlled mines and who, as a result of having done so, acquired an occupational lung disease, is patently unfair. It was submitted that to single out this 'already vulnerable group' and limiting their claims for compensation would impair their fundamental human dignity. The appellant's particulars of claim contain no allegation to the effect that the benefits under ODIMWA are inferior to those claimable under COIDA and it is not possible to venture into this question in these proceedings on exception. The different levels of compensation are the result of the differentiation between claimants who have claims under COIDA and those with claims under ODIMWA. If there are unequal benefits payable the discrimination complained of would be remedied by an equalization of those benefits under the two schemes.

ACCESS TO COURT

[45] It was submitted that the interpretation of s 35(1) of COIDA by the court a quo limited the right of access to court under s 34 of the Constitution[60] by preventing those with claims under ODIMWA from pursuing a claim that would otherwise have existed. This contention is directed at the substantive rules of law and not at the right of access in terms of s 34 of the Constitution. In *Montgomery v Daniels*[61] it was stated with

---

[60] Section 34 provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[61] 340 NE 2d 444 at 456.

reference to a no-fault statute which restricted a victim's right to claim for non-patrimonial loss that the section (article 18) 'denies no one access to the courts; it merely alters the substantive law, partially eliminating the right of an automobile accident victim to judicial recovery for injuries suffered.'

RETROSPECTIVITY OF COIDA

[46] The appellant filed supplementary heads of argument raising a legal issue that was not dealt with by the court a quo. The appellant had amended his particulars of claim in order to meet the respondent's exception by pleading specifically, as I have said, that '[b]y reason of the Plaintiff's exclusion from the benefits payable in terms of [COIDA], the Plaintiff is not an employee as contemplated in section 35 of the Act. Accordingly the Plaintiff is not precluded by section 35 from bringing the action against the Defendant.' This was the issue that had to be determined and not the point now raised that COIDA by implication operated with retrospective effect. The argument was that s 35 provided a defence to the respondent only if it operated retrospectively. COIDA came into force on 1 March 1994. Since the greater part of the period when the appellant was employed (January 1997 to September 1995) was before 1 March 1994, it was contended that there was a reasonable prospect that the appellant would prove facts establishing that his cause of action arose prior to COIDA's coming into force. For that reason it was argued that the exception had to be dismissed: it was not possible before evidence is led to determine whether s 35 is applicable and, if it does apply, it would only be for the limited period from 1 March 1994, when the legislation came into force, to 11 September 1995, when the appellant was dismissed.

[47] It is clear that COIDA is not a retrospective statute in the strong sense,[62] ie 'retroactive', 'where an Act provides that from a past date the new law shall be deemed to have been in operation'.[63] This is not the issue. The question to be posed is rather

---

[62] Cf s 100(3) of COIDA.

[63] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission & others* 1999 (4) SA 1 (SCA) para 13 and see para 14. See *Adampol (Pty) Ltd v Administrator Transvaal* 1989 (3) SA 800 (A) at 811D-E; *National Director of Public Prosecutions v Carolus* 2000 (1) SA 1127 (SCA) paras 34-35; *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 423F-H.

whether s 35 of COIDA was intended to interfere prospectively with rights that existed on the day it came into force.[64] It seems to me that COIDA is a statute that 'operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted.'[65] Section 35 was intended to interfere prospectively with rights that existed on the day it commenced operation. It does not distinguish between common-law causes of action arising before and after 1 March 1994. It ousts all claims for damages and operates so as to interfere with rights that may have existed at its commencement date. For these reasons the issue raised by the appellant in his supplementary heads of argument must fail.

[48] The parties are in agreement that no order as to costs need to be made. I concur in the separate judgments of Harms DP and Cloete JA. Accordingly the following order is made:

The appeal is dismissed.

_____
F R MALAN
JUDGE OF APPEAL

---

[64] See the distinction drawn in *Adampol (Pty) Ltd v Administrator Transvaal* 1989 (3) SA 800 (A) at 811D-E and 812E-H; *National Director of Public Prosecutions v Carolus* 2000 (1) SA 1127 (SCA) paras 34-35; *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) at 548I-549B; *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 423G-H.

[65] Cited in *National Director of Public Prosecutions v Carolus* 2000 (1) SA 1127 (SCA) para 34.

HARMS DP:

[49] This appeal deals with the question whether a mineworker who contracted miners' phthisis during the course of his employment is entitled to claim damages from his employer, the mine. The judgment of Malan JA deals in detail with all the submissions presented to us, including the history of the legislation concerned and many rules of interpretation, and also the impact of the Constitution on interpretation. Little of this has had any significant impact on the ratio of his judgment with which I concur. What follows does not add or detract from what Malan JA has said but contains a more direct approach to the matter.

[50] The plaintiff seeks damages from the defendant. The plaintiff was an employee (referred to in the past as a workman) and the defendant (the mine) his employer. During the course of his employment, the plaintiff contracted occupational diseases which, for the sake of ease, I shall refer to as miners' phthisis. He is as a result unemployable and has suffered damages. He alleges that the occupational diseases were caused by the mine's breach of its common-law duty of care to have provided him with a safe and healthy work environment, and also breach of a number of statutory duties of care relating to work conditions at mines.

[51] Section 35(1) of the Compensation for Occupational Diseases Act 130 of 1993 (COIDA), on its plain wording, excludes the type of relief sought by the plaintiff. It reads:

> '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.'

[52] In order to avoid the effect of the provision and in an attempt to meet an exception raised by the mine, the plaintiff amended his particulars of claim and alleged that he had not been an 'employee' for purposes of COIDA of the mine. The plaintiff justified the allegation that he was not an employee falling under COIDA on the

following basis: he was employed at a mine by the defendant; he contracted a 'compensatable disease' as defined in the Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA); he received compensation under ODIMWA; he was therefore not entitled to compensation under COIDA; and, consequently, he was not an 'employee' within the meaning of COIDA.[66]

[53] The plaintiff's case is based on a misconception, which became apparent during argument, namely that a person's status as employee depends on the nature of the occupational disease he contracts during the course of his employment. An employee is, according to the introductory part of the definition of 'employee' in COIDA, 'a person who has entered into or works under a contract of service . . . with an employer'. An employee is not divisible and the definition is not related to the nature of the injury or disease but depends on the contract. The misconception becomes apparent if regard is had to the interaction between COIDA and ODIMWA.

[54] COIDA entitles an employee to compensation for occupational injuries and occupational diseases. 'Employee' as defined includes employees at all mines. This means that mines, as employers, have to contribute to the COIDA fund. If an employee working at a mine sustains an occupational injury, the employee is entitled to the prescribed compensation under COIDA.[67] And, importantly, the employee is not entitled to recover damages from the employer because of s 35(1).

[55] The same applies if an employee at a mine contracts an occupational disease: the employee is entitled to compensation under COIDA and is subject to the limitation under s 35(1). Section 65(1) of COIDA divides occupational diseases into two classes. The one class consists of the diseases listed in Schedule 3. If an employee contracts one of these, there is a presumption that the disease arose out of and in the course of his employment (s 66), which means that the employee is entitled to compensation under COIDA. The second class is open-ended: it includes any disease that has arisen

---

[66] COIDA is of a later date than ODIMWA but it merely replaced and in most respects re-enacted the Workmen's Compensation Act 30 of 1941, which was the main Act dealing with occupational diseases and injuries. References in ODIMWA to the 1941 Act must, because of the repeal, be read as references to COIDA.

[67] For an example: *Rand Mutual Assurance Co Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA).

out of and in the course of employment of the employee (s 65(1)(b)). This class differs from the Schedule 3 class because, if contracted, the presumption does not apply and the employee has to satisfy the Compensation Commissioner that the disease arose out of and in the course of employment before the employee can become entitled to compensation. To summarize: COIDA covers all occupational injuries suffered and diseases contracted by all employees employed by mines.

[56] ODIMWA is different in scope but this does not affect any of the principles set out. It recognises that certain works at controlled mines and works (see the wide definitions of 'mine' and 'works' in s 1) may cause a small number of high risk occupational diseases, primarily miners' phthisis. Because of the increased risk these employers have to carry certain medical costs and provide medical aid (s 36, 36A and 36B), and have to contribute (in addition to their contributions under COIDA) to another compensation fund, the Mines and Works Compensation Fund, to compensate employees who contract one of these 'compensatable' diseases (sections 60 and 61).

[57] Because ODIMWA's benefits are limited to the defined compensatable diseases, OIMWA does not cover most occupational diseases contracted by miners. It also does not cover any occupational injuries sustained at mines and works as defined. As mentioned, the employee has to look to COIDA in those circumstances.

[58] To prevent double compensation, sections 99 and 100 of ODIMWA provide inter alia that

(a) an employee is not entitled to any benefit under ODIMWA in respect of any compensatable disease which is attributable exclusively to work other than work at a mine or works (as defined);

(b) if an employee suffers from a compensatable disease, which is attributable partly but not mainly to work at a mine or works, the Compensation Commissioner for Occupational Diseases may in his discretion award to such person, who is not in receipt of full benefits in respect of that disease under COIDA, benefits not exceeding one-half of the benefits provided for under ODIMWA;

(c) a person is not entitled to benefits under ODIMWA in respect of any disease for which he has received or is still receiving 'full benefits' under COIDA; and

(d) a person who has a claim to benefits under ODIMWA in respect of a compensatable disease is not entitled, in respect of such disease, to benefits under COIDA.

[59] It follows from this brief analysis that COIDA is the principal Act which sets out the generally applicable provisions. ODIMWA deals with special circumstances without affecting those principles. The limitation contained in s 35(1) of COIDA is therefore of general application.

[60] I revert to the misconception referred to above. The effect of the plaintiff's argument is that his employment at the mine was divisible: he was an employee for purposes of occupational injuries and most occupational diseases under COIDA but in relation to compensatable diseases he was an employee under ODIMWA. Apart from the fact that this result is illogical, it flies in the face of the clear wording and purpose and structure of the two statutes, and it avails not to have regard to diverse rules of interpretation or to add oblique references to the Constitution.

[61] I should in conclusion add some comments. The plaintiff made it clear that he was not attacking the constitutionality of any of these Acts in these proceedings. The discrimination complaint was based on the submission that the benefits under ODIMWA were less than under COIDA but I gained the impression that counsel did not press the point because the alleged discrimination does not appear from the Acts themselves but if present may be due to problems in the regulations. In any event, the plaintiff did not plead facts on which a comparison could have been made.

_____
L T C HARMS
DEPUTY PRESIDENT

CLOETE JA:

[62] I have had the advantage of reading the judgments of my colleagues Malan JA and Harms DP. I respectfully agree with both. However, because of the importance of this matter, I wish to deal in my own words with one of the principal arguments advanced on behalf of the appellant in the heads of argument filed in this court. Before doing so, it would be convenient to quote s 35(1) of COIDA,[68] together with the heading to that section:

'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.'

[63] The submission on behalf of the appellant was that the key to interpreting s 35(1) is the word 'compensation' in the heading which is defined in s 1, the relevant part of the definition reading: '"Compensation" means compensation in terms of this Act . . ..' Therefore, went the submission, as the appellant is not entitled to compensation under COIDA (but only under ODIMWA),[69] he is not bound by what counsel termed the 'legislative bargain' contained in s 35(1) and compensation under COIDA is not substituted for his right to claim compensation at common law.

[64] The fallacy in this submission is that s 35(1) is clear in its meaning and 'Where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overwritten by the words of a heading.'[70] The section must be read as containing two discrete provisions (previously contained in separate paragraphs in s 7 of the Workmen's Compensation Act 30 of 1941)[71] conjoined by the word 'and' in the middle of the section. Although both deal with occupational injury or disease resulting in disablement or death of an employee, they are not opposite sides of the same coin. The

---

[68] Compensation for Occupational Injuries and Diseases Act 130 0f 1933.
[69] Occupational Diseases in Mines and Works Act 78 of 1973.
[70] Per Innes CJ in *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431.
[71] Quoted by Malan JA in para 17 above.

first provision, which is in wide and general terms, excludes an action at common law against an employer for damages. The second provision excludes all liability on the part of an employer to pay compensation (not damages), 'save under the provisions of this Act'; and an employer is liable to pay compensation under COIDA eg where it is an employer individually liable under s 84(1)(a) and where in terms of s 73(1) it is obliged to pay the reasonable costs incurred by an employee in respect of medical aid. (Payment of the cost of medical aid is, in terms, included in the definition of 'compensation' in s 1.)

[65] The provisions of ODIMWA are therefore not excluded by s 35(1) of COIDA, inasmuch as ODIMWA confers no right to damages on an employee, nor does it place any obligation on an employer to pay compensation ─ the employee is compensated from one of the two funds established in terms of that statute. There is no conflict between the two Acts: although ODIMWA confers a right to benefits on inter alios persons who fall within the definition of 'employees' under COIDA, ODIMWA (in s 100(2))[72] excludes the right to obtain compensation under COIDA if and to the extent that there is a right to compensation under ODIMWA.

_____
T D CLOETE
JUDGE OF APPEAL

[72] Quoted by Malan JA in para 32 above.

APPEARANCES:

For Appellant: Gilbert Marcus SC
Alan Dodson
Adrian Friedman

Instructed by:

Abrahams Kiewitz Attorneys
Cape Town
C/o Honey Attorneys
Bloemfontein

For Respondent: Chris Loxton SC
Mark Antrobus SC
Alfred Cockrell

Instructed by:

Brink Cohen Le Roux Inc
Johannesburg
c/o Claude Reid
Bloemfontein