THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 889/2019

In the matter between:

CATHERINE MAY CHURCHILL **APPELLANT**

and

THE PREMIER OF MPUMALANGA **FIRST RESPONDENT**

DIRECTOR-GENERAL: OFFICE OF THE PREMIER OF MPUMALANGA **SECOND RESPONDENT**

Neutral citation: *Churchill v Premier, Mpumalanga* (889/2019) [2021] ZASCA 16 (4 March 2021)

Coram: PONNAN, WALLIS and SALDULKER JJA and CARELSE and KGOELE AJJA

Heard: 19 February 2021

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Summary: Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) – plaintiff mistreated and injured in the course of a

protest by trade union members on premises where she was employed – whether her injuries an accident as defined in s 1 of COIDA – whether accident arising out of and in the course of her employment – whether liability of employer excluded by s 35 of COIDA.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Roelofse AJ, sitting as court of first instance):

Judgment reported *sub nom Churchill v Premier Mpumalanga and Another* 2020 (2) SA 309 (MN):

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the high court is set aside and replaced with the following order:

'(a) The special plea is dismissed.

(b) It is declared that the First Defendant is liable to compensate the Plaintiff for such damages as may be agreed or proved arising out of the injuries suffered by her in the course of the protest at the offices of the First Defendant on 5 April 2017.

(c) The matter is remitted to the high court for the determination of the nature and extent of any and all such injuries and the quantum of damages to which she is entitled in consequence thereof.

(d) The First Defendant is to pay the costs of the action up to 23 May 2019, being the date of judgment in the high court.'

JUDGMENT

Wallis JA (Ponnan and Saldulker JJA and Carelse and Kgoele AJJA concurring)

[1] On 5 April 2017 the appellant, Ms Catherine Churchill, went to work as usual at the offices of the first respondent, the Premier of Mpumalanga (the Premier), where she was employed as the Chief

Director: Policy and Research. During the morning, protest action over labour issues, organised by a trade union, the National Education, Health and Allied Workers' Union (NEHAWU), occurred at the premises and in the building where she worked. She became caught up with the protestors, was assaulted and mistreated by them and eventually evicted from the premises in a manner that was humiliating and degrading. An agreed medical report reflects that she suffered some physical injuries, in the form of bruises, scratches and a swollen foot. More importantly, she was shocked and humiliated and suffered psychiatric injury[1] that has left her with PTSD (Post Traumatic Stress Disorder) of significant intensity. She tried to return to work, but alleges that she found the situation intolerable and was compelled to resign at the end of June 2017.

[2] Ms Churchill sued the Premier and the Director-General in the office of the premier (the D-G), the first and second respondents respectively, alleging that her treatment by the protestors, including the assaults, was occasioned by their negligence. She contended that they took no steps, or alternatively inadequate steps, to ensure the safety of their employees in the workplace. Had they taken reasonable or adequate steps to do so she claimed that the assault on her would have been avoided. Her claim amounts to nearly R7.5 million for past and future medical treatment, general damages and past and future loss of income. The bulk of this is compensation for loss of income calculated up to her date of retirement on the basis that she will be unable to work again.

[1] A psychiatric injury is no different from a physical injury having outward manifestations in the body of the claimant. *Bester v Commercial Union Versekeringsmaatskappy van SA Beperk Bpk* 1973 (1) SA 769 (A); *Barnard v Santam Beperk* 1999 (1) SA 202 (SCA); *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA); *Komape and Others v Minister of Basic Education* [2019] ZASCA 192; 2020 (2) SA 347 (SCA) paras 25-32.

[3] The Premier and the DG raised a special plea, contending that her claim constituted an occupational injury for which she was entitled to compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 or 1993 (COIDA) and was therefore excluded by s 35(1) of COIDA. On the merits they denied the existence of any legal duty and the fact of negligence. They denied that they were vicariously liable for the behaviour of the protestors. At the trial the parties agreed that the judge (Roelofse AJ) should determine the merits of her claim, leaving the quantum to be dealt with separately. He upheld the special plea and concluded that there was no need to consider the remaining defences on the merits, whilst saying that he would have rejected them. The appeal is with his leave.

The ambit of the appeal

[4] The heads of argument before this court dealt only with the special plea and not negligence or vicarious liability. We asked appellant's counsel at the outset what order should be made if the appeal succeeded. It emerged from the discussion that there was confusion about the ambit of the appeal. Appellant's counsel took the view that the high court's judgment disposed of all issues of liability other than the special plea and therefore, if the appeal succeeded, a suitable declaratory order should be made in regard to liability. Respondents' counsel contended that the appeal was limited to the special plea and indicated that if it was upheld the case should be remitted to the high court to determine the issues of negligence and vicarious liability.

[5] An examination of the record showed the respondents' approach to be incorrect. Before the trial started the judge noted that the parties had agreed to separate the merits from issues of quantum and enquired

whether the special plea could be determined on the basis of the agreed facts. Counsel for the respondents, who was counsel before us, said this was not possible, because if the court rejected the special plea the remainder of the merits would need to be determined. He added that whether the plaintiff's injuries arose out of her employment could best be determined in the context of all the happenings on the day in question. The judge then made an order that the case would proceed on the merits, with the issue of damages and quantum to stand over until there had been a final resolution of the merits.

[6] The confusion over the ambit of the appeal appears to have arisen because the judgment does not deal in any detail with the issues of negligence and vicarious liability arising if the special plea was dismissed. After upholding the special plea, the judge said:

'There is accordingly no need to consider the defendants' other defences. However, I need to say this and no more. Having regard to the evidential material before me as set out earlier in this judgment, the defendants' delictual defence would have come to naught.'

This was an undesirable way in which to dispose of these matters given the distinct possibility that the decision on the special plea would prompt an appeal to this court. But it is clear that, had he taken a different view of the special plea, the plaintiff's claim would have succeeded. He should have given his reasons for that conclusion, notwithstanding his view on the merits of the special plea.

[7] Thus all the issues in respect of the merits were resolved. The parties had closed their cases on the merits and the trial on those issues was finished. No further evidence could be led on the merits unless the trial was reopened. The plaintiff's claim was dismissed without

qualification. Leave to appeal was sought and granted against the whole order. The notice of appeal asked not only that the special plea be dismissed, but that judgment on the merits be granted in favour of the plaintiff. The judge had expressed his view on the remaining issues, albeit without reasons. The respondents were entitled to resist the appeal by arguing that whatever the fate of the special plea, neither negligence nor vicarious liability for the actions of the protestors had been established. They did not do so and counsel did not seek an opportunity to supplement his argument in this regard.

[8] In the circumstances the appeal proceeded on the basis that, if the appeal in relation to the special plea succeeded, a suitable declaration should be made in regard to the liability of the Premier to compensate Ms Churchill for her damages and remitting the matter to the high court for the determination of the quantum of such damages if the amount thereof cannot be settled by agreement.

The law on the application of COIDA

[9] There is little point in yet again traversing the background and history of workmen's compensation statutes leading up to COIDA. Statutes, pre-dating the Union of South Africa in 1910, derived from English statutes, provided for workers to be compensated for injuries or illness suffered in the course of their work. The history was traced by the Constitutional Court in *Mankayi*.[2] The language of the relevant sections has remained largely unaltered over time and there are numerous cases dealing with whether particular injuries or illnesses fell within or outside the scope of the statute. Where an employee is entitled to compensation

[2] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC) paras 41-58.

under COIDA any right of action against their employer is excluded by s 35(1). The constitutionality of that provision has been upheld.[3]

[10] The right to compensation is established under s 22(1) of the Act, which provides that:

'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.'

The key word is 'accident', which is defined as meaning:

'. . . 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'.

The exclusionary provision in s 35(1), which is headed 'Substitution of compensation for other legal remedies' reads as follows:

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

[11] The fact that there are separate definitions of 'occupational disease' and 'occupational injury' shows that the word 'occupational' qualifies both injury and disease in s 35. Occupational illnesses are specified in some detail in Schedule 3 of COIDA.[4] An occupational injury is defined as:

'A personal injury sustained as a result of an accident.'

An occupational injury is therefore directly connected to the accident in which it was sustained. Presumably it was thought that 'disease' and 'illness' were equivalent, so that in the case of an occupational illness the

[3] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC).

[4] Some of the illnesses described in Schedule 3, for example, those in items 1.2 and 2.3, might in the past have been regarded as injuries.

requirement that it arise from an accident is maintained. Fortunately, that is not a drafting puzzle that needs to be solved in this case.

[12] Were Ms Churchill's injuries sustained in an accident as defined in COIDA? There are three elements to the definition of an accident, namely (a) an accident; (b) arising out of and in the course of an employee's employment; and (c) resulting in a personal injury, illness or the death of the employee. The duplication of the word 'accident' derives from historic usage in earlier statutes, both here and overseas. Longstanding authority shows that in the context of COIDA it bears a broader meaning than 'an unexpected or usual event or happening that is external to the [employee]'.[5]

[13] In *Nicosia v WCC*[6] Roper J traced the developments in English law from the time when the equivalent English statute provided that 'accident' was an accident resulting in personal injury. The cases originally said[7] that it was used in:

'The popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed'.

However, no doubt moved by a desire to assist workers to secure compensation, even where there was no negligence on the part of their employer, or where any claim they might have would have been defeated by the operation of the 'last opportunity' rule:

'… courts have strained to come to the rescue of particularly impecunious individuals and held them entitled to claim compensation from a fund established for that purpose.'[8]

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[5] *Air France v Saks* 470 US 392 (1985) a decision on the meaning of 'accident' in the Montreal Convention of 1999.
[6] *Nicosia v Workmens' Compensation Commission* 1954 (3) SA 897 (T) at 900D-902C.
[7] *Fenton v J Thorley & Co Limited* 1903 AC 443 at 448.
[8] *MEC for Health, Free State v DN* (*MEC v DN)*[2014] ZASCA 167; 2015 (1) SA 182 (SCA) para 33.

This benevolent approach to the meaning of an accident and personal injury led courts in England to extend the concept of an accident to include illness derived from an accident.[9] In addition they held that while an accident is frequently something external to the employee – such as an explosion or a fall from a ladder – it included internal injuries occasioned by performing the work of the employee, for example, a slipped disc when lifting something at work. Roper J cited the following passage from the speech of Lord Lindley in *Fenton v Thorley*:

'Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.'

[14] The resulting position is that almost anything which unexpectedly causes an injury to, or illness or death of, an employee falls within the concept of an accident. The result is that the focus of the cases is less on the first element of an accident, because almost anything unexpected can be an accident, but on whether the accident arose out of and in the course of the employee's employment. The two expressions are not coterminous so that an accident may arise in the course of, but not out of, the employee's employment. It is not necessary to consider whether the reverse is also true. Two judgments of this court set out the broad approach to be adopted to these expressions.

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[9] *Brintons Limited v Turvey* 1905 AC 230 (Anthrax); *Innes v Kynoch* 1919 AC 765 (Streptococcus). COIDA deals with this separately.

[15] The first, *Khoza*,[10] arose when a 19 year old police constable, playing with his service revolver in the back of a police van, in the presence of another constable and five arrestees, fired a shot and hit his colleague.[11] An action similar to the present one was met with a similar plea.[12] The court held that the requirement that the accident occurred 'in the course of' the employee's duties was satisfied if it occurred while the employee was engaged in their basic duties and responsibilities. That element was satisfied because both policemen were on duty and responsible for arresting and holding in safe custody the other people in the van.

[16] The more problematic element was whether Constable Khoza's injuries arose out of his employment. In the following passage,[13] the majority judgment by Rumpff JA emphasised that this required a causal connection between the employee's service and the accident

'When this undefined connection is viewed in the light of the purpose and inclusive scope of Act 30 of 1941, it must in my view be found that the causal connection between accident and service *in general* is fully satisfied when the accident occurs at the place where the workman is executing his duties.' (My translation and emphasis.)

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[10] *Minister of Justice v Khoza* 1966 (1) SA 410 (A).

[11] The judgment treated this as an accident arising from a show of bravado on the young man's part. The facts as set out in *Khoza v Minister of Police* 1965 (4) SA 286 (W) at 287A-E suggest that it was more than that and they provide an insight into the pervasive racism within the police force at the time.

[12] Under s 7 of the Workmen's Compensation Act 30 of 1941, which was in terms the same as s 35(1) of COIDA. Constable Khoza was faced with a dilemma in that he had not given notice of his claim as required by s 32 of the Police Act 32 of 1958. He was required to do so if the claim arose from anything done in terms of that Act. His claim against the Minister depended on his being able to show that the constable who shot him was acting in the course and scope of his employment, but not under the Police Act. Additionally, he had to show that his own injuries did not arise out of his employment. This meant that he had to thread an almost indiscernible path between these apparently mutually inconsistent contentions.

[13] *Khoza* at 417D-F, where Rumpff JA said:

'Wanneer hierdie onomskrewe verband gesien word in die lig van die doel en ingrypende omvang van Wet 30 van 1941, moet dit m.i. bevind word dat die kousale verband tussen ongeval en diens *in die algemeen* voldoende geskep word wanneer die ongeval plaasvind op die plek waar die werksman by die uitvoering van sy diens is.'

The nature and extent of the causal connection is not defined in the Act. Rumpff JA held that, given the statutory purpose, there would in general be a causal connection between the accident and the person's employment if the accident occurred at the place where the employee was performing their duties. On that basis the court held that constable Khoza was shot in an accident arising out of his employment and his claim was dismissed.

[17] The judgment was careful to point out that it was no more than a generalisation to say that a causal connection would ordinarily be established if the accident occurred at the employee's place of work. Whilst it was unnecessary to attempt to identify the exceptions, nonetheless the following was said:[14]

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

[18] Formulating a single test to determine whether an injury arose out of the injured party's employment is neither feasible nor desirable. The majority judgment in *Khoza* made it clear that mere presence at the workplace would not suffice, although in general the fact that the accident occurred at the injured person's place of employment pointed to it having arisen out of their employment. Nor is foreseeability of the risk definitive.

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[14] At 417F-I: 'Dis in elk geval duidelik dat hierdie kousale verband vir doeleindes van die Wet sou verdwyn, onder andere, indien die ongeval van so 'n aard is dat die werksman die beserings sou opgedoen het al was hy op 'n ander plek as wat sy diens sou vereis het of wanneer die werksman deur sy eie handeling die plaaslike verband tussen diens en ongeval uitskakel of *wanneer die werksman opsetlik beseer word deur 'n ander persoon en die motief van die aanranding geen verband hou met die werksaamhede van die werksman nie*.'

Even an entirely unforeseen and unforeseeable event may arise out of employment.[15] Williamson JA made this point in his concurring judgment saying that:[16]

'The decision is in essence in each case one of fact related only to the particular facts in issue. The enquiry on the particular issue is whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the action causing injury. If it was, the action arose 'out of the employment' …'

The fact that the course of employment brought the worker into the zone of the hazard may be a necessary condition of the injury arising out of the employment but, as the subsequent decision of this court demonstrated, it is not a sufficient condition.[17]

[19] In *MEC v DN*,[18] a doctor on night duty, walking along a passage between two wards, was assaulted by an intruder, who hit her with a brick and raped her. Her claim for damages against the MEC, on the basis that, through negligence, inadequate security precautions had been taken, was met with a plea based on s 35(1) of COIDA. The plea was dismissed and Navsa ADP said:[19]

'". . . the question that might rightly be asked is whether the act causing the injury was a risk incidental to the employment. There is of course, as pointed out in numerous authorities, no bright-line test. Each case must be dealt with on its own facts.

I am unable to see how a rape perpetrated by an outsider on a doctor – a paediatrician in training – on duty at a hospital arises out of the doctor's employment. I cannot conceive of the risk of rape being incidental to such employment.'

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[15] Instances drawn from the English cases are the wall of an adjacent building collapsing on to the building in which the claimant was working and causing her injuries (*Thom (or Simpson) v Sinclair* [1917] AC 127) and the fireman standing at the entrance to his engine who was struck by a pellet fired not at him, but at the engine (*Powell v Great Western Railway Co* [1940] 1 All ER 87 (CA)).

[16] *Khoza* op cit fn 10 at 419H-I.

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

[18] Op cit fn 8.

[19] Ibid, paras 31-32.

[20] The plaintiff in that case was at her place of employment and about her duties at the time of the assault. Her employment had brought her within the zone of the hazard giving rise to her injuries. That pointed to her injury arising out of her employment. But when the question was asked whether the risk was incidental to her employment, the answer was an emphatic 'No'. The only safe approach is to examine closely the facts of each case in order to decide whether the person's injuries arose out of their employment. The closer the link between the injury sustained and the performance of the ordinary duties of the employee, the more likely it will be that they were sustained out of their employment. The further removed from those duties, and the less the likelihood that those duties will bring the employee into a situation where such injuries might be sustained, the less likely that they arose out of their employment. In the case of Ms Churchill, it is common cause that her injuries were sustained in the course of her employment. The only issue is whether they arose out of her employment.

The facts

[21] These were fully canvassed in the judgment of the high court and again in the heads of argument. There is no dispute of any significance regarding them. Ms Churchill went to work that day and was attending to her duties. NEHAWU had called upon its members to demonstrate over certain labour-related issues. The demonstration should have taken place at a point outside the complex where the offices of the Premier were situated. However, some of the participants in the demonstration were employed in the building where Ms Churchill worked and by using their access cards about twenty or thirty of them obtained access to the foyer, which is on the upper ground floor. Ms Churchill encountered them when

she was returning with a colleague to her office on the lower ground floor from a meeting on the upper ground floor.

[22] After Ms Churchill returned to her office, her assistant, Ms Ngwambe, indicated that she was afraid of the protest. She was told that she would be able to lock up and go home after Ms Churchill had taken a document across the passage to Ms Mabaso's office. While Ms Churchill was in Ms Mabaso's office, three demonstrators, including the branch secretary of NEHAWU, entered the office, asked who was there, and left without an answer. Ms Churchill followed them to return to her office and discovered that it was locked. In frustration she swore and a man in the passage asked her what she had said. She apologised and tried to explain, but this individual regarded the expletive as being directed at the demonstrators and shouted at her demanding to know on what basis she had sworn at them. He repeatedly shouted at her saying: 'Who are you to call us an ****?' and 'How dare you swear at us?' This caused Ms Churchill to retreat to Ms Mabaso's office. The man followed and shouted at her: 'We're coming for you!'

[23] Ms Mabaso and Ms Mahlalela were also in the office when another official, Mr Bellim, came there and said that they should leave and work from home. He left to go back to his own office, but returned almost immediately as he saw fifteen or twenty protestors marching along the lower ground floor towards Ms Mabaso's office. He entered the office and tried to hold the door closed against the protestors, but to no avail. Ms Churchill tried to hide behind the door and telephoned her husband telling him she was not safe and asking him to come and fetch her. The protestors found her behind the door and one of them tried to take her cell phone. He also tried to pick her up with his arms around her. In the

confusion Ms Mahlalela managed to slip out of the office and phone both the D-G's office and the security office for help, but no assistance was forthcoming.

[24] Two other men joined the man trying to lift Ms Churchill. Together they lifted her above their heads, carried her out of the office and up two flights of stairs to the upper ground floor. Mr Bellim shouted at the men to put her down, but they disregarded him and three other men blocked him from going to her aid. She was carried up the stairs pleading to be put down, but there was no response and she heard someone calling her 'a piece of white s**t'. Mr Bellim heard one of the protestors say: 'This mlungu is not with us.'

[25] Once the men had carried Ms Churchill to the foyer she was put down in the middle of the crowd of protestors and her shoes removed. People in the crowd pushed, shoved and punched her, while jeering and shouting 'Voetsek' and 'Get out'. One of her shoes was thrown at her and she was chased out of the building and left to make her way to the entrance where her husband had arrived to collect her. He had heard everything, because she had kept her cellphone on throughout the incident. From the time she first encountered the protestors as she was making her way back to her office until she was collected by her husband about three quarters of an hour had passed.

Discussion

[26] Did this incident arise out of Ms Churchill's employment so that her injuries, both physical and psychiatric, were sustained in an accident for the purposes of COIDA? It was accepted that because it happened at her place of employment and while she was going about her duties it

arose in the course of her employment. Did it arise out of her employment? In other words, was it sufficiently closely connected to her employment to have arisen from it? The fact that it occurred in her workplace when she was going about her duties is undoubtedly a factor that connected it to her employment. In that sense her employment brought her within the zone of risk, but that is merely where the enquiry commences. Was the risk also incidental to her employment?

[27] The respondents argued that the risk was foreseeable, because it is a regrettable reality that protest action and industrial action can sometimes lead to incidents where people are pushed, shoved or attacked in a more aggressive fashion. They referred to a previous protest in 2016, where women members of the bargaining group who had remained at their posts were forcibly removed from their work stations. It was agreed that the employees not engaged in the protest were wary of intimidation by the protestors and realised that because feelings were running strong the protest might turn 'unpeaceful', that is, violent, with a risk of physical injury to those employees.

[28] It is not apparent to me why the possibility of protests or industrial action turning violent and resulting in assaults on non-participating employees, means that the assaults are risks incidental to the employment of those assaulted. The wider implications of this were explored with counsel. They appear to be far-reaching. Take the case of a non-striking employee who crossed a picket line to work and was condemned as a scab by the strikers. Would an aggravated assault aimed at persuading them to desist arise from their employment? Would it make a difference if the assault was an act of revenge after the strike ended? Neither situation seems to me to be closely connected to the performance of their

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

[29] Another example debated in argument was the conduct of disgruntled participants in a service delivery protest, who broke into the Premier's office building demanding to present a petition to the Premier in person and, on being rebuffed, took out their anger on the most senior employee present. That would be similar to the situation in this case, save that the perpetrators would not be employees engaged in protest action. It is hard to accept that such a situation would arise out of the injured person's employment. The only causal connection would be that the employee had the misfortune to be attending at their place of work when the incident occurred. The assault and the resultant injuries would have no connection, direct or indirect, with their duties in terms of their contract of employment. Yet there appears to be no basis for distinguishing it from the same events in the course of a protest by workers.

[30] The statutory compensation scheme was established, and employers granted immunity from claims by their employees, to provide compensation for workplace injuries and illnesses, whether due to misfortune, the fault of a co-employee, or the employer's or employee's fault. Compensation is payable irrespective of whether direct or vicarious liability would otherwise rest on the employer. The requirements that the accident occur in the course of and arise out of the injured party's employment circumscribe the liability of the compensation fund

established in terms of s 15 of COIDA. The purpose of the fund is to compensate for occupational injuries and disease. While long-standing authority dictates that social legislation of this type is given a generous construction, it is not directed at providing compensation and exempting employers from liability for injuries and diseases that are only tenuously and tangentially connected to the duties of the employee. Had that been the purpose the legislation could simply provide for compensation for all and any injuries or illnesses sustained when at work, or when working.

[31] The respondents also relied on the agreed fact that non-participants in the protest, including the plaintiff, 'formed part of the staff that were responsible for either formulating or implementing labour related issues of employment against which NEHAWU was opposed'. However, there was no evidence that Ms Churchill had any direct involvement in labour issues in her position as Chief Director Policy and Research in the office of the Premier. Beyond a speculative suggestion that she was possibly a member of staff involved in efforts by the office of the Premier to reconfigure regional services in the province that might possibly lead to job losses, no link was suggested between her duties as an employee and the issue in regard to which the protest action had been called. She was not responsible for the formulation of employment policy. Given that the respondents must have been fully aware of Ms Churchill's duties and would have been in a position to deal in detail with her involvement in these labour issues, if in truth her work was closely connected to them, it is safe to say that any connection must have been entirely peripheral.

[32] What is more, the incident was unrelated to the subject matter of the protest, much less to Ms Churchill's work. After her meeting, she had

walked through, or past, the group of protestors in the foyer without incident. When she was initially in Ms Mabaso's office and three of the protestors, including the branch secretary of the union, came in and asked who was there, they did not say or do anything in respect of Ms Churchill. The incident arose because of the unfortunate fact that, when she returned to her office and found it locked, she swore and this was taken amiss by one individual who thought it was directed at him and the protestors. Everything that happened after that was triggered by that incident, which had no connection at all with either the protest or Ms Churchill's employment.

[33] There are of course jobs the nature of which gives rise to a risk of assault by co-workers, outsiders or criminals arising from the performance of the worker's ordinary duties. Security personnel come to mind in that regard. Assaults sometimes occur in the context of employment and may arise from it, as in the case of the trammer in *McQueen*[20] assaulted by a miner after he tried to pull him to work at a different point in the mine. But assault on a co-worker is treated in many, if not most, workplaces as a serious disciplinary offence that may lead to dismissal. It is not something that ordinarily arises from a person's employment. Where the assault occurs in the workplace, but as a result of something external to the workplace and the duties of the person assaulted, it is difficult to see on what basis it can be said to arise out of their employment. That is why, when a policeman was shot and killed at the police station by another policeman, whom he had taunted about a relationship he was conducting with the latter's wife, it was held that this did not arise from his employment.[21]

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[20] *McQueen v Village Deep GM Co Ltd* 1914 TPD 344.
[21] *Twalo v Minister of Safety and Security* [2009] 2 All SA 491 (E).

[34] Cases where employees have been assaulted by criminals while on duty stand on a different footing.[22] But being assaulted as a consequence of something one says being misconstrued and offence being taken, is not ordinarily incidental to employment.[23] The fact that the place where that occurred was the workplace, and the perpetrator or perpetrators of the assault were co-employees, does not alter that. In the present case the assault took on racial and gendered overtones. The respondents' counsel was asked whether it would have made a difference to the argument if the assault on Ms Churchill had become overtly sexual. Other than saying that every case depends on its own facts, there was no answer, but the nature and severity of the assault and the extent of the incursion upon the dignity and bodily integrity of the victim, cannot be the factors that determine whether it arose out of their employment. As held in *MEC v DN* it is difficult to see on what basis, as a general proposition, attacks on a person's dignity and bodily integrity are incidental to their employment. In simple language they are not things that 'go with the job'.

[35] Emphasis was also placed on the fact that the protestors were protesting about workplace issues in support of colleagues in the social development area. But this falls into the very error identified in *MEC v DN*[24] of using the motive of the perpetrator to establish the requisite connection between the incident and the duties of the injured party.

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[22] The injuries of a cashier or messenger carrying money or valuables for deposit at a bank, or carrying the weekly wages to a payment point on a building site, who is assaulted and injured by robbers arise out of their employment. *Nisbet v Rayne and Burn* [1910] 2 KB 689 cited in *MEC v DN* para 29.
[23] The position in the case of an immediate physical response to an insult in the workplace, especially if the insult had arisen out of a work-related incident, might be different.
[24] Op cit, fn 8, para 31.

[36] It is necessary to repeat what has oft been said before in these cases, namely that there is no bright line test and the enquiry is always whether the statutory requirement that the accident arose out of the person's employment, as well as in the course of that employment, is satisfied. The court must analyse the facts closely to determine whether on balance the accident arose out of the person's employment. And in the last resort an employer seeking to rely on s 35 to avoid liability bears the onus of satisfying the court that the accident arose out of the claimant's employment. In this case the only connection between the incident and Ms Churchill's employment was that she was at work at the time. The incident bore no relation to her duties and was the result of misplaced anger directed at her because of a misunderstanding. She was not assaulted because of the position she held, or because of anything she had done in carrying out her duties, or for any reason related to the protest action that took place that day. She was assaulted because one individual mistakenly thought she had sworn at him and he, together with others, responded by assaulting and humiliating her. In my opinion her injuries did not arise out of her employment.

[37] The appeal must therefore succeed. I have adapted the following order slightly from that suggested by counsel for the plaintiff.

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the high court is set aside and replaced with the following order:

'(a) The special plea is dismissed.

(b) It is declared that the First Defendant is liable to compensate the Plaintiff for such damages as may be agreed or proved arising out of the

injuries suffered by her in the course of the protest at the offices of the First Defendant on 5 April 2017.

(c) The matter is remitted to the high court for the determination of the nature and extent of any and all such injuries and the quantum of damages to which she is entitled in consequence thereof.

(d) The First Defendant is to pay the costs of the action up to 23 May 2019, being the date of judgment in the high court.'

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	T J Bruinders SC (with him J L Basson)
Instructed by:	Du Toit-Smuts & Partners, Mbombela; Phatshoane Henney Attorneys, Bloemfontein
For respondent:	H van Eeden SC (with him T Mathopo and B Manning)
Instructed by:	Adendorff Theron Inc, Mbombela; Lovius Block Attorneys, Bloemfontein.