

# MEC liable for damages after doctor's rape

An employee, who suffered the horrendous ordeal of being raped whilst on duty, is not precluded from suing her employer for damages.

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The Supreme Court of Appeal (SCA), handed down judgment on 8 October 2014 which stated that the employer (the MEC for the Department of Health, Free State Province) did not escape liability for damages by relying on the Compensation for Occupational Injuries and Diseases Act, (COIDA).

While the Compensation Commissioner stands in the shoes of the employer for claims in terms damages by an employee in terms of COIDA, that Act does not relate to claims that are unrelated to the employee's employment with the employer.

The SCA confirmed that the statutory regime dealing with claims by employees for accidents in the workplace are governed by the provisions of COIDA. That Act aims to create a framework whereby employees could recover damages from their employer where they had an accident in the workplace. The employees are thus able to obtain relief without expensive litigation.

In addition, the employees are able to obtain compensation from the Compensation Commissioner, including loss of future earnings, where the employer may not have been able to satisfy such a claim due to the significant financial burden such payment may represent to an employer.

## Limited rights

COIDA limits the employee's common law rights to sue the employer, though. The employee is precluded by COIDA from bringing a claim against the employer (under circumstances covered by the Act) and must bring the claim against the Commissioner in terms of COIDA.

Section 35(1) of COIDA, which was at the centre of the appeal to the SCA in this case, stated that "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".

'Occupational injury' is defined in s1 of COIDA as "... a personal injury sustained as a result of an accident", with an accident 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".

Thus, for the employer to escape liability (by relying on COIDA) for a claim for compensation brought by an employee, there must be a personal injury sustained as a result of an accident arising out of or in the course of the employee's employment.

In the present case, the employee (a medical doctor) was raped by an intruder whilst she was on duty at the hospital. She instituted a claim for damages from the MEC, electing not to seek compensation from the Compensation Commissioner.

under COIDA. The MEC raised a special plea, claiming that the employer cannot be held liable as the employee ought to bring the claim under COIDA.

## Relation to employment

The SCA considered the injury suffered by the employee. It stated that, for the MEC's plea to succeed, the injury (rape) must bear relation to her employment. The Court held that the risk of rape is not incidental to employment. It held that limiting the employee's right to seek redress from her employer would not be in the interest of employees. The Court stated as follows:

"Dealing with a vulnerable class within our society and contemplating that rape is a scourge of South African society, I have difficulty contemplating that employees would be assisted if their common law rights were to be restricted as proposed on behalf of the MEC. If anything, it might rightly be said to be adverse to the interest of employees injured by rape to restrict them to COIDA. It would be sending an unacceptable message to employees, especially women, namely, that you are precluded from suing your employer for what you assert is a failure to provide reasonable protective measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our Constitution will countenance."

The judgment sends a strong signal to female employees that employers will not be able to escape liability for negligent acts where employers fail to take reasonable measures to protect their employees from harm whilst on duty. Failure to repair security fencing, not replacing broken light bulbs or otherwise ensure walkways are lit or neglecting to implement proper access control to a workplace could see more employees relying on their common law rights to institute action against the employers where they suffer damage attributable to the employer's negligence.

Employers should take heed of the judgment and ensure that precautions are taken to prevent foreseeable harm that may befall employees on duty.

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