15 MARCH 2021

EMPLOYMENT LAW **ALERT**

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Who is liable? COIDA & injuries not incidental to performance of employee's duties

As a result of the protest action, the Appellant suffered physical and psychological injury, which resulted in her resigning from service citing that the work environment had become intolerable.

Has an employee, injured by fellow employees during an employment related protest, suffered an occupational injury, and so be barred from claiming against their employer in delict? This was the question the Supreme Court of Appeal (SCA) was called upon to decide in the recent appeal in *Churchill v Premier, Mpumalanga* (889/2019) [2021] ZASCA 16.

The Appellant, a senior employee in the office of the Premier of Mpumalanga, was assaulted by fellow employees during protest action at the Premier's offices which had been organised by the National Education, Health and Allied Workers Union (NEHAWU) and concerned labour issues. As a result of the protest action, the Appellant suffered physical and psychological injury, which resulted in her resigning from service citing that the work environment had become intolerable.

Following her resignation, the Appellant sued the Premier and the Director-General in the Office of the Premier (DG) (Respondents) alleging that her assault by the protesting colleagues was occasioned by the Respondents' negligence arising from a failure to take adequate steps to ensure her safety and that of other colleagues during such protest.

The Respondents denied liability and raised a special plea, contending that her claim constituted an occupational injury for which she was entitled to compensation under The Compensation for Occupational Injuries and Diseases Act (COIDA) and was therefore excluded by section 35(1) of COIDA, which prevents an employee from recovering damages from an employer for an occupational injury.

The *court a quo*, per Roelofe AJ, in dismissing the delictual claim and upholding the Respondents' defence held that the Appellant's personal injury had been the result of an accident 'arising out of' the Appellant's employment. The *court a quo* found the 'accident' had occurred at the Appellant's place of work, while she was going about her normal duties and further that the Appellant's role (formulating and implementation of Respondents' policies) and her non-participation in the protest increased the danger to her posed by protesting employees.

On appeal, the SCA was required to decide whether the assault of the Appellant arose out of the Appellant's employment and was accordingly sustained in an accident for the purposes of COIDA. An 'occupational injury' is defined as 'a personal injury sustained as a result of an accident'. Whereas, 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'. With these definitions in context, the SCA accepted that, since the accident occurred in the Appellant's workplace when she was discharging her duties, it undoubtedly arose out of her employment with her employer. However, it held that the real enquiry, the court needed to focus on was whether the risk (the assault in this case) was incidental to the Appellant's employment.

Despite, in relation to the risk, the Respondents arguing that it was a foreseeable, albeit regrettable, reality that protest action sometimes turned violent, with a risk of physical injury to other employees, the SCA dismissed this contention, holding that the possibility of

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Who is liable? COIDA & injuries not incidental to performance of employee's duties...*continued*

In reaching a decision on whether the accident arose out of an employee's employment, the courts are required to analyse the facts and determine whether on balance the accident arose out of the employee's employment.

protest action turning violent and resulting in assaults on non-participating employees, in no way meant that the assaults were risks incidental to the employment of those assaulted. It found that the assaults where connected to the non-participating employees' employment, but not to the performance of their duties.

In upholding the Appellant's appeal, the SCA reiterated that the test is whether the statutory requirement that the accident arose out of the employee's employment, as well as in the course of that employment, had been satisfied. In reaching a decision on whether the accident arose out of an employee's employment, the courts are required to analyse the facts and determine whether on balance the accident arose out of the employee's employment.

On an analyse of the facts, the SCA was of the view that the only connection between the incident and the Appellant's employment was that she was assaulted at work. It held that it was clear on the evidence, that the Appellant's assault had no correlation to her position or her duties or even the protest action by her colleagues, accordingly her injuries did not arise out of her employment.

It is clear from this case that employers can be held delictually liable for injury suffered by employees in the workplace where that injury is not related to the employee's position and/or performance of duties at the workplace. The courts will always have to consider each case on its merits to determine on a balance whether the accident which resulted in the injury was linked to the employee's employment and/or performance of duties. Employers need to be aware that the courts will likely find them liable where on the facts the injury sustained had no correlation to the performance of the employee's duties, notwithstanding the employee's presence at the workplace.

An employer's negligence in failing to take necessary and adequate steps to protect non-participating employees during protest action will not be covered by COIDA notwithstanding the incident arising at the workplace and in the course of the non-participating employees discharging their duties. As reiterated by the SCA, violence (attacks on a person's dignity and bodily integrity) cannot be said to be incidental to an employee's duties and accordingly cannot be held to be part of the job as was argued by the Respondents.

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Why SA employers should take a cue from the UK, and enforce COVID-19 testing in the workplace

This emphasises the importance of expanding COVID-19 testing to beyond just those employees who present with COVID-19 symptoms or those who, for other reasons, volunteer for testing.

The UK Government is taking the initiative and encouraging employers to increase workplace testing in sectors open during lockdown, to detect COVID-19 in people who are not showing symptoms. Perhaps this is something South African employers should consider.

The United Kingdom (UK) approach.

On 26 February 2021, The Department of Health and Social Care of the UK published a guideline titled, "*Why you should test your workforce*". In this guideline, employers are urged to initiate COVID-19 testing of employees at their workplaces.

In the guideline, a workplace testing programme is said to be crucial to reducing transmission of the COVID-19 virus in the workplace, particularly considering that one in three people who are infected with COVID-19, are asymptomatic. This emphasises the importance of expanding COVID-19 testing to beyond just those employees who present with COVID-19 symptoms or those who, for other reasons, volunteer for testing.

In Annexure A of the UK guideline, it is recommended that employers provide at least two lateral tests per week. Employers are also advised to clearly communicate to their employees the purpose of the testing programme and the results of the tests.

South African legislative framework

Section 8 of the Occupational Health and Safety Act 85 of 1993 (OHSA), places a general duty on employers to, as far as reasonably possible, provide and maintain a working environment that is safe and does not pose a risk to the health of their employees. Section 8(2)(b) of the OHSA places a duty on employers to take all reasonable steps available to eliminate or mitigate any health hazards or potential health hazards to the safety of their employees before resorting to the use of personal protective equipment (PPE). Accordingly, the elimination of hazards before resorting to the use of PPE is a primary obligation placed on employers by the provisions of the OHSA.

This obligation must, of course, be weighed up against the general prohibition against the medical testing of employees in the workplace contained in section 7 of the Employment Equity Act 55 of 1998 (the EEA). However, section 7 recognises two exceptions to the general prohibition on medical testing:

- Where the medical testing is permitted by legislation; or
- Where the medical testing is justifiable in the light of medical facts, employment conditions, social policy, or the inherent requirements of a job.

Analysis

In our view, a workplace testing programme would be in line with the primary obligation(s) placed on employers by section 8 of the OHSA because the detection of COVID-19 through testing allows for infected employees to be isolated from the workplace, which then reduces the risk of infection to other employees. Furthermore, we consider that such medical testing programme would also be in line with the exception to the prohibition on medical testing in that such a programme would be justifiable in light of the medical facts presently known by the world about COVID-19.

Importantly, South African employers must carefully consider the protection of such medical information which they will be processing as it constitutes special

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Why SA employers should take a cue from the UK, and enforce COVID-19 testing in the workplace...*continued*

A workplace testing programme could go a long way in decreasing the risk of business operations being halted by COVID-19 infections because it decreases the chances of asymptomatic carriers of COVID-19 being in the workplace and infecting others.

personal information in terms of the Protection of Personal Information Act 4 of 2013 (POPIA). Section 26(a) of POPIA states that a responsible party, in this case the employer, may not process information concerning the health of any data subject, in this case an employee, without their informed consent. However, section 27 of POPIA states that such processing may be permitted with the data subject's consent or if such processing is necessary to comply with a legal right or obligation imposed on the employer by law. It is advisable that consent is obtained from the employees in this regard.

Paragraph 5 of the Department of Health's Guidelines titled *"Guidelines for symptom monitoring and management of essential workers for COVID-19 related information (DOH Guidelines)"* provides that when an employee or health professional supporting the employee receives a positive COVID-19 test, they must notify their workplace so that the employee is effectively managed. Paragraph 7 of the DOH Guideline further states that a positive COVID-19 test by an employee will require all potential contacts in the workplace to be assessed. The employer, therefore, has an obligation to investigate who has been in contact with any COVID-19 positive employee. Businesses can and should notify the relevant employees when there is a positive COVID-19 diagnosis in their business.

Workplace testing can ensure that businesses stay open for longer as a case study in the UK has shown. Apetito, a UK-based food producer was an early adopter of workplace testing and its early engagement with employees on workplace testing ensured higher participation in testing and ultimately revealed 66 employees who were infected with COVID-19 but did not show any symptoms. This would mean that without a workplace testing programme or a programme that only tests employees who are symptomatic, these 66 infected employees would likely have gone undetected for COVID-19 for longer and infected a significant number of their colleagues, as a result.

Recommendations to South African employers

It is well known that many businesses suffered great financial loss due to the effects of COVID-19. A workplace testing programme could go a long way in decreasing the risk of business operations being halted by COVID-19 infections because it decreases the chances of asymptomatic carriers of COVID-19 being in the workplace and infecting others.

Furthermore, a better knowledge of the actual number of COVID-19 infections in any particular workplace and where exactly in the workplace these infections occur could help employers improve their COVID-19 prevention procedures.

The psychological effect on employee morale and productivity that comes with working in what should ultimately be a safe workplace should also not be underestimated. Increased certainty in these uncertain times could increase employee morale and, in turn, productivity.

Conclusion

In conclusion, it is recommended that South African employers implement workplace testing as this method would go a long way in not only ensuring the health of employees but also the health of the business.

Bongani Masuku, Kgodisho Phashe and Ntobeko Rapuleng

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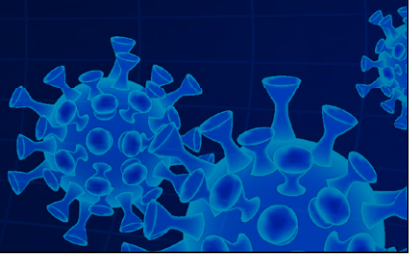

A CHANGING WORK ORDER

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The LEGAL 500 EMEA

POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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