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When will an employer not be excluded from section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993?



Who will be held liable for damages should an employee sustain injuries in the workplace especially if such injury is not related to the employee's position or workplace duties?

In a previously published article we discussed *the legislative requirements for the SA Construction Industry*, in this blog we will discuss who will be held liable for damages should an employee sustain injuries in the workplace if such injury is not related to the employee's position or duties at the workplace, with reference to the latest case law from *Churchill v Premier of Mpumalanga and Another (889/2019) [2021] ZASCA 16 (4 March 2021)*.

Caselaw - *Churchill v Premier of Mpumalanga and Another* (889/2019) [2021] ZASCA 16 (4 March 2021)

Highlights from the case:

- The appellant, Ms Catherine Churchill, was employed as the Chief Director: Policy and Research at her employer's offices, namely the Premier of Mpumalanga (the Premier). She went to work on 5 April 2017 and while attending to her duties, was caught up in protest action organised by a trade union, the National Education, Health and Allied Workers' Union (NEHAWU). It was established that some of the protestors were employed at the building where Ms Churchill worked, which allowed approximately 20 or 30 protestors access to the building.
- Ms Churchill delivered a document to a fellow employee and then returned to her locked office. She swore in frustration, which was overheard by a protestor. Ms Churchill apologised and explained that she swore out of frustration to her locked door. The protestor was of the opinion that her swearing was directed at them. Ms Churchill attempted to flee to a fellow employee's office and, while hiding, tried to contact her husband, explaining that she felt unsafe and that he should fetch her. A fellow employee of Ms Churchill contacted the Director-General's office and Security for help, to no avail.
- The protestors tried to take Ms Churchill's cell phone without success, and lifted and carried her to the upper ground level. Once on the floor, her shoes were removed by the protestors and she was pushed, shoved and punched, while degrading and racial terms were directed at her by the people in the crowd. She was then chased out of the building. Ms Churchill's call to her husband remained active throughout the incident and he heard the events taking place.

The medical report states that as a result of the above incident, Ms Churchill suffered physical injuries, such as bruises, scratches and a swollen foot. She was also diagnosed with PTSD (Post-Traumatic Stress Disorder) of significant intensity due to the shock, humiliation and psychiatric injury she experienced on 5 April 2017. Although Ms Churchill did return to work, she indicated that she found the situation intolerable which led to her resignation by end June 2017.

Ms Churchill sued the Premier and the Director-General in the office of the Premier, alleging that the assault occurred due to their negligence in that the employer failed to ensure the safety of the employees in the workplace. Her claim for past and future medical treatment, general damages and past and future loss of income nearly amounted to R7,5 million.

The Premier and Director-General denied liability and said the claim was for an occupational injury for which she was entitled to compensation in terms of the Compensation for Occupational Injuries and Diseases Act (COIDA). As the employer, they were excluded by section 35(1) of COIDA from any additional liabilities for injuries sustained by the employee:

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.*
- 2. For the purposes of subsection (1) a person referred to in section 56(1)(b),(c), (d) and (e) shall be deemed to be an employer.*

When an injury is sustained at the workplace, is an employee eligible to claim damages under COIDA?

The core issue that the Court had to decide in the above case was whether the injury had been sustained at the workplace and whether the employee was eligible for damages under COIDA, or whether the employer could be held liable given that COIDA indemnifies the employer. The Court held that this would indeed be the position if the injuries were sustained in the course of the employee's duties. There needs to be a direct nexus between the employee's injury(-ies) and the execution of his/her duties. However, the Court held that if the injury took place at the workplace but was not related to the employee's duties, then COIDA does not indemnify the employer and the employer is therefore liable.

The Court held as follows: *'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.'*

- The Supreme Court of Appeal of South Africa ruled that the respondent/employer was liable to compensate Ms Churchill 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 respondent/employer on 5 April 2017.
- When determining whether an incident resulting in an injury was linked to an employee's employment and/or duties, the courts will evaluate each case on its own merits. This case confirms that an employer can be held delictually liable should an employee injure himself/herself in the workplace if the injury is not related to the employee's position or duties at the workplace.

Any claims relating to an employer's failure to take reasonable and necessary steps to ensure the safety of the non-participating employees during a protest action in the workplace shall not be covered by COIDA.

In conclusion

SERR Synergy's *Labour Pro service* assist employers in understanding all elements of new employment-related legislation and case law whilst our *Occupational Health and Safety compliance service* continuously develop a health and safety culture and system within the business that aligns with the business's internal policies and goals.

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The following sources are acknowledged:

- *Churchill v Premier of Mpumalanga and Another* (889/2019) [2021] ZASCA 16 (4 March 2021) - <http://www.saflii.org/za/cases/ZASCA/2021/16.html>
- Compensation for Occupational Injuries and Diseases Act 130 of 1993.