CONSTITUTIONAL COURT OF SOUTH AFRICA

Mankayi v Anglogold Ashanti Ltd

[2011] ZACC 3; 2011 (5) BCLR 453 (CC); 2011 (3) SA 237 (CC); [2011] 6 BLLR 527 (CC); (2011) 32 ILJ 545 (CC)

Case CCT 40/10

In the matter between:

THEMBEKILE MANKAYI Applicant

and

ANGLOGOLD ASHANTI LIMITED Respondent

Heard on : 17 August 2010

Decided on : 3 March 2011

JUDGMENT

KHAMPEPE J:

Introduction

[1] The issue to be decided is whether section 35(1) of the Compensation for Occupational Injuries and Diseases Act (COIDA) extinguishes the common law right of

mineworkers to recover damages for occupational injury or disease from negligent mine owners notwithstanding that they are not entitled to claim compensation under COIDA but only under the Occupational Diseases in Mines and Works Act (ODIMWA). Both the South Gauteng High Court (High Court) and the Supreme Court of Appeal interpreted section 35(1) of COIDA as extinguishing the mineworkers' common law claim and extending the protection against common law liability to mine owners. Mr Thembekile Mankayi (Mr Mankayi) attacks these findings on the basis that, because he is precluded by section 100(2) of ODIMWA from claiming compensation under COIDA, section 35(1) of COIDA does not apply to him.

Factual background

[2] The applicant is Mr Mankayi, who is currently unemployed. In 2006, Mr Mankayi instituted an action for delictual damages against the respondent mining company, AngloGold Ashanti Limited (AngloGold). In his particulars of claim, Mr Mankayi asserted that he was employed by AngloGold as an underground mineworker during the period January 1979 to September 1995. He stated that during his employment, AngloGold negligently exposed him to harmful dusts and gases as a result of which he contracted diseases in the form of tuberculosis and chronic obstructive airways which have rendered him unable to work as a mineworker or in any other occupation. As a result, he claimed damages in the sum of about R2,6 million. This comprised past and

future loss of earnings of R738 147, 14, future medical expenses of R1 374 600 and general damages of R500 000.

[3] The basis of his claim is that AngloGold owed him a legal duty arising under both common law and statute to provide a safe and healthy environment in which to work. In breach of this duty, AngloGold failed to apply appropriate and effective control measures.

[4] Mr Mankayi averred that AngloGold and its predecessors were the owners of a "controlled mine" as contemplated in Chapter II of ODIMWA. He performed "risk work" as defined in section 13 and contracted "compensatable diseases" as defined in ODIMWA. After being certified in 2004 as suffering from a compensatable disease, he received compensation of R16 320 under ODIMWA from the Compensation Commissioner. The thrust of Mr Mankayi's case is that in terms of section 100(2) of ODIMWA he is entitled to and did receive compensation under ODIMWA, but is not precluded from suing the mine at common law. Given that section 100(2) barred him from claiming benefits under COIDA, he contends that the prohibition in section 35(1) of COIDA does not apply to him. There is no provision in ODIMWA excluding a common law claim. Section 100(2) of ODIMWA reads:

> "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 . . . or any other law."

[5] AngloGold excepted to the particulars of claim as lacking averments necessary to sustain a cause of action. It contended that, because Mr Mankayi is an "employee" and AngloGold an "employer" under COIDA, section 35(1) presents a statutory bar to Mr Mankayi's claim. Because of the form in which AngloGold's challenge to Mr Mankayi's claim is cast, the Court is required to assume that the facts set out in his particulars of claim are true. The question is whether, on those assumed facts, he has a claim in law.

Main issues

[6] The main issues that arise for consideration are whether:

[6.1] the word "employee" in section 35(1) of COIDA includes employees covered by ODIMWA, notwithstanding that they are barred from claiming benefits under COIDA; and

[6.2] the abrogation of the common law right of action envisaged by section 35(1) of COIDA applies to Mr Mankayi.

Preliminary issues

[7] Before considering the main issues, it is necessary to deal with two preliminary questions. The first is whether condonation for the late submission of Mr Mankayi's written argument should be granted and the second is whether leave to appeal should be

granted.

Should condonation be granted?

[8] The test for the grant of condonation is whether the interests of justice permit. Factors relevant to this inquiry include, but are not limited to, the extent and cause of the delay, the prejudice to the opposing litigant, the reasonableness of the explanation, the importance of the issues to be decided and the prospects of success. The inquiry entails weighing each factor against the others and determining where the interests of justice ultimately lie. Mr Mankayi's written submissions were filed six days late. Mr Spoor, who appeared on his behalf, has ascribed his failure to lodge the written submissions timeously to lack of funds. AngloGold does not oppose the application for condonation. There is, in my view, a satisfactory explanation for the delay. The delay was minimal and there was no prejudice to AngloGold. The issues raised in the application for leave are important and it cannot be said that the application has no prospects of success. In these circumstances, it is in the interests of justice to grant condonation.

Should the application for leave to appeal be granted?

[9] It is axiomatic that leave to appeal will be granted by this Court only if the application raises a constitutional matter and only if it is in the interests of justice to grant it.

[10] The key question whether the threshold requirement for jurisdiction has been satisfied in an application for leave is dependent upon the constitutional character of the issue. This Court has recognised that, in a system of constitutional supremacy, it is inappropriate to construe the concept of what is a "constitutional matter" narrowly.

[11] The decisions of this Court reveal that a constitutional matter has been held to be raised where the matter involves the following:

> " . . . (a) the interpretation, application or upholding of the Constitution itself . . . ; (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights; (c) a statute that conflicts with a requirement or restriction imposed by the Constitution; (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so); (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the Legislature's constitutional responsibilities; or (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution." (Footnotes omitted.)

[12] By contrast, this Court has refused to entertain appeals that seek to challenge only factual findings or incorrect application of the law by the lower courts.

Does this matter raise a constitutional issue?

[13] The issue that the High Court was required to decide was whether section 35(1) of COIDA extinguishes the common law claim of an employee who is not entitled to claim

for compensation under COIDA but only under ODIMWA. If AngloGold's contention is correct then this provision extinguishes Mr Mankayi's common law right to sue it for negligence. This issue ineluctably implicates the right to freedom and security of a person as enshrined in section 12 of the Constitution. The right in section 12(1)(c) confers on everyone the right to be free from all forms of violence from either public or private sources. This section states that:

> "Everyone has the right to freedom and security of the person, which includes the right—
>
> . . .
>
> (c) to be free from all forms of violence from either public or private sources."

[14] In *Law Society of South Africa and Others v Minister for Transport and Another* (*Law Society*), this Court held that the abolition by the legislature of the common law claim to sue a driver of a motor vehicle for negligent injury implicated the right enshrined in section 12(1)(c) and had to pass muster under the limitations provision of the Bill of Rights. This same constitutional right finds expression in the legislation that seeks to regulate the safety of the mining industry, the Mine Health and Safety Act 29 of 1996 and the regulations prescribed thereunder. Were the exception to be sound – in other words, were Mr Mankayi's common law claim to be extinguished – section 12(1)(c) would likewise be implicated.

[15] The protection of the right to the security of the person may be claimed by any

person and must be respected by public and private entities alike. Neither counsel addressed specific argument on whether the alleged extinction of a common law right infringed upon section 12(1)(c). Despite the absence of pointed argument on this issue, in my view the question whether this Court entertains jurisdiction to decide a case does not depend on counsels' approach. What is evident is that the right to security of the person is engaged whenever a person is subjected to some form of injury deriving from either a public or a private source. This is because the common law right to claim damages for the negligent infliction of bodily harm constitutes an effective remedy required by section 38 of the Constitution in order to protect and give effect to the section 12(1)(c) right, as in *Law Society.*

[16] In *Fose v Minister of Safety and Security*, this Court recognised that "appropriate relief" may entail any relief that is required to protect and enforce the Constitution, and that an order for payment of damages qualifies as appropriate relief for purposes of section 38.

[17] Delictual remedies protecting constitutional rights may thus constitute appropriate relief for purposes of section 38 of the Constitution.

[18] In this matter, section 100(2) of ODIMWA precludes Mr Mankayi from claiming

compensation under COIDA. If section 35(1) of COIDA removes Mr Mankayi's common law right to claim compensation for negligence, employees in his position, who are not entitled to claim compensation under COIDA (and who are entitled to claim seemingly paltry and inadequate compensation only under ODIMWA), would be left without an effective remedy to rectify the harm caused by the negligence of their employers. By abolishing the common law right to claim damages, the legislature would have deprived the victim of an appropriate and effective remedy.

[19] Counsel for AngloGold conceded during oral argument, correctly so in my view, that the proper interpretation of a statute that is alleged to extinguish a common law right of action that gives effect to a constitutional right raises a constitutional issue. It is common cause that, on the approach that found favour with the High Court and the Supreme Court of Appeal, section 35(1) of COIDA has this effect. I would add that AngloGold, in its papers, rightly conceded that the application for leave raised a constitutional matter. A constitutional matter thus arises for consideration.

Is it in the interests of justice for this Court to hear the matter?

[20] The question whether it is in the interests of justice to hear the matter depends on many factors. These include, but are not limited to, the importance of the issues raised in the intended appeal and the prospects of success. AngloGold opposes the application for

leave to appeal on the basis that it is not in the interests of justice to grant leave because the application has no prospects of success. I am unpersuaded by this argument.

[21] It is in the interests of justice that an authoritative interpretation be given to a statutory provision that is claimed to curtail an employee's common law right to recover compensation for the harm suffered in consequence of an employer's negligence. This is particularly so where the employee is not entitled to claim the benefits under that statute and can only claim seemingly paltry benefits under a different statute. The importance of determining this issue manifestly goes beyond the parties to the present application.

[22] The effect of the construction of section 35(1) of COIDA adopted by the Supreme Court of Appeal is to extinguish the common law right of employees even when they are not entitled to benefits under COIDA. There are prospects that an interpretation that preserves these rights may be preferred.

[23] As far as I have been able to establish, there are no reported cases that deal with the aspect of the interpretation of section 35(1) at issue in this case. This is the first case involving the interpretation of a statute that is claimed to extinguish a common law remedy available to mineworkers given that section 100(2) of ODIMWA bars them from claiming compensation under COIDA. As the history of this country painfully reminds

us, mineworkers, African mineworkers in particular, have contributed enormously to this country's economic wealth and prosperity, at great cost to themselves and to their health. The impugned legislation affects many vulnerable members of society. The determination of this issue is therefore significant and would give certainty to the all-important question of the interpretation of section 35(1) of COIDA, not only to Mr Mankayi, but also to others similarly situated. For these reasons, I find that it is in the interests of justice to decide this application.

Merits of the appeal

[24] What remains is to determine whether the construction of section 35(1) of COIDA, adopted by the Supreme Court of Appeal and supported by AngloGold in this Court, is correct. This will require us to ascertain the proper meaning of section 35(1). Before embarking upon this inquiry, it is necessary firstly to set out the legislative history and then the findings of the courts below.

Legislative history

[25] South African legislation on compensation for occupational diseases has been developed along two parallel lines to provide for two different categories of workers. One is concerned primarily with the interests of mineworkers, namely ODIMWA and its antecedent legislation, whilst the other, COIDA and its antecedent legislation, relates to

the interests of all workers in industry including commerce and services.

Mining legislation (ODIMWA and its predecessors)

[26] The legislative response to the deleterious diseases contracted by mineworkers commenced with the Miners' Phthisis Allowances Act of 1911 (1911 Act). This Act was the first milestone in the field of statutorily enforceable compensation for mining-specific occupational diseases and set the tone for future legislation. The 1911 Act created a Miners' Phthisis Fund, to which mine owners contributed, to compensate mineworkers suffering from miners' phthisis and related diseases. A board was appointed to administer the fund. The board was entrusted with the power to grant an allowance, in its own discretion, to the affected mineworker or to any persons dependent on him for maintenance.

[27] The Miners' Phthisis Act of 1912 (1912 Act) succeeded the 1911 Act. The 1912 Act established both the Miners' Phthisis Compensation Fund and the Miners' Phthisis Insurance Fund. In terms of the 1912 Act, a board was appointed by the Minister and it was responsible for the administration of the funds. Parliament contributed to the Compensation Fund, while the Insurance Fund was financed by levies contributed by employers.

[28] The 1912 Act was amended by the Miners' Phthisis Act of 1914. In terms of this Act, a board was again entrusted with the responsibility for distributing compensatory awards to mineworkers and dependants.

[29] The Miners' Phthisis Act of 1914 was succeeded by the Miners' Phthisis Act of 1916 (1916 Act). It repealed parts of the 1912 Act and the whole of the Miners' Phthisis Act of 1914. The 1916 Act provided for payment of compensation to a mineworker who had contracted miners' phthisis. The miner had to make a prescribed claim and satisfy the board that he was suffering from miners' phthisis and that he had been employed underground for at least two years.

[30] The Miners' Phthisis Acts Consolidation Act of 1925 consolidated and amended the laws relating to miners' phthisis. This Act was in turn repealed by the Silicosis Act of 1946 (Silicosis Act). In terms of the Silicosis Act, a silicosis board was established. Two funds were established, the Scheduled Mines Compensation and Outstanding Liabilities Fund (Fund A) and the Registered Mines Compensation and Outstanding Liabilities Fund (Fund B).

[31] Section 33 of the Silicosis Act empowered the board to collect a levy from all owners of scheduled mines and registered mines, to enable the board to meet the

liabilities payable out of Funds A and B, in terms of this Act. Section 96 obliged the State to contribute towards Fund B in respect of "miners and Native labourers who were suffering from silicosis or from tuberculosis . . . ."

[32] Section 84 of the Silicosis Act provided for the board to reduce, by any fraction not exceeding one-third, monthly allowances or pensions payable to persons who were also entitled to pensions under the Workmen's Compensation Act of 1941 (1941 Act).

[33] The Pneumoconiosis Act of 1956 (1956 Act) superseded the Silicosis Act. The Pneumoconiosis Certification Committee was established. It was empowered to determine, by reference to reports on the results of medical or other examination and other information available to it, whether any person who worked in a dusty atmosphere at a controlled mine was suffering from pneumoconiosis or tuberculosis. Where the person was suffering only from pneumoconiosis, the Committee was to determine the stage of the disease. The Controlled Mines Compensation Fund was established and was financed by funds levied from owners of controlled mines to provide compensation.

[34] The 1956 Act was superseded by the Pneumoconiosis Compensation Act of 1962 (1962 Act). It introduced a number of institutions that were directed at administering the 1962 Act. These were the Miners' Medical Bureau, the Miners' Certification Committee,

the Pneumoconiosis Risk Committee, and the General Council for Pneumoconiosis Compensation. It also established the appointment of the Pneumoconiosis Compensation Commissioner. Notably, section 19 provided that "[n]o person (other than a Bantu person) shall perform work in a dusty atmosphere at a controlled mine, unless he holds a current initial or other certificate of fitness . . . ." In terms of the 1962 Act, "[e]very mine which was a controlled mine of group A and B in terms of the 1956 Act became a controlled mine under this Act.

[35] Section 108 of the 1962 Act provided for the establishment of the Pneumoconiosis Compensation Fund which was credited with all the assets and debited with all liabilities devolving upon the council as read with section 61(1).

ODIMWA

[36] In 1973, ODIMWA repealed previous legislation and consolidated the law relating to the payment of compensation in respect of certain diseases contracted by persons employed in mines and works.

[37] Section 39(1) provides for the establishment of a Medical Certification Committee for Occupational Diseases, which considers reports from medical practitioners in respect of a mineworker who works in a controlled mine, and is found to be suffering from a

compensatable disease.

[38] Section 61(1) provides for the establishment of a Mines and Works Compensation Fund which is controlled and managed by a commissioner. Owners of a controlled mine or works are required to pay a prescribed levy for the benefit of the Compensation Fund for each shift worked by an employee.

[39] Section 78(1) provides for the benefits to be awarded by the commissioner. Section 99(1) provides that no compensation shall be payable to persons who have contracted diseases that are attributed exclusively to work other than work at a mine or works. Section 94 provides for compensation to be paid by the commissioner to the mineworker who contracted compensatable diseases. Section 100(2) prohibits compensation to a person who has received or is still receiving full compensation under the 1941 Act. Its object is to prevent double compensation ("double-dipping") in respect of diseases covered by both these pieces of legislation.

[40] ODIMWA was amended in 1993 by the Occupational Diseases in Mines and Works Amendment Act (ODIMWA Amendment Act). The ODIMWA Amendment Act removed all the offending racial characterisations and differentiations in ODIMWA. Section 36A provides for the payment, by the owner of a controlled mine or a controlled

work, of legitimate and proven costs incurred by or on behalf of the employee in his or her service in respect of medical expenses necessitated by the disease.

Compensation legislation (COIDA and its predecessors)

[41] This line of compensation legislation commenced with the Workmen's Compensation Act of 1907 (1907 Act). The purpose of the 1907 Act was to provide for and regulate the liability of employers to make compensation for personal injuries to workmen.

[42] Section 17 of the 1907 Act provided that if an employee met an accident that resulted in permanent disability, in addition to compensation under the 1907 Act, he retained a right of action for damages against the employer. Notably, section 32(1) and (2) expressly preserved an employee's right to institute a common law claim against the employer. However, the workman had to elect whether to claim under common law or in terms of the Act.

[43] The Workmen's Compensation Act of 1914 Act (1914 Act) followed. It consolidated, amended and extended the law with regard to compensation for injuries suffered by workmen in the course of their employment or for death resulting from such injuries.

[44] Section 1 of the 1914 Act provided for the liability of the employer to compensate a workman who met an accident that resulted in incapacity or death. Section 1(c) allowed employees to elect between compensation in terms of the 1914 Act and compensation under the common law. The employer and the workman could agree on an amount to be paid by the employer as compensation in respect of the permanent partial incapacity or permanent total incapacity of the workman resulting from that injury.

[45] The 1914 Act also expressly preserved a workman's 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 . . . ." It was amended by the Workmen's Compensation (Industrial Diseases) Act of 1917 (1917 Act).

[46] The purpose of the 1917 Act was to amend the 1914 Act to provide compensation for industrial diseases, including cyanide rash, lead poisoning or its sequelae and mercury poisoning or its sequelae. Section 1 of the 1917 Act provided for the entitlement of a workman to claim compensation if it appeared from a certificate granted by a medical practitioner that he is suffering from a scheduled disease causing incapacity or where the disease is due to the nature of his work. Section 6 of the 1917 Act provided that nothing in this Act shall affect the rights of a workman to recover compensation in respect of a

disease, other than a scheduled disease, in the contracting of that disease is a personal injury caused by accident within the meaning of the principal Act.

[47] The 1917 Act was repealed by the Workmen's Compensation Act of 1934 (1934 Act). The purpose of the 1934 Act was to consolidate, amend and extend the law with respect to compensation for disablement caused by accidents to or industrial diseases contracted by workmen in the course of their employment, or for death resulting from such accidents or diseases. Sections 13(1) and 14 provided for a workman to submit to the employer information about the accident and for the employer if so satisfied to admit liability in writing and thereafter require the workman to submit himself to a medical practitioner of the employer's choice for examination.

[48] In terms of the 1934 Act, a workman and an employer could, after the injury in respect of which the claim for compensation had arisen, agree in writing as to the compensation to be paid by the employer. The compensation paid in the case of permanent disablement, including permanent injury or serious disfigurement, was according to the degree of disablement of the workman. The dependants of the workman could obtain a determined amount if the workman died as a result of an injury or an accident.

[49] Section 4(2) of the 1934 Act provided that no liability for compensation shall arise save under and in accordance with the provisions of the Act in respect of any such injury. This was significant since it was the first time the common law right of an employee was extinguished. Section 5 of the 1934 Act provided for increased compensation in instances where the employer was negligent and a magistrate had the power to determine the additional compensation, in an amount deemed "equitable." Diseases compensatable under this Act were: cyanide rash, lead poisoning or its sequelae, mercury poisoning or its sequelae, and ankylostomiasis.

[50] The 1941 Act repealed the 1934 Act. The purpose of the Act was to amend and consolidate the laws relating to compensation for disablement caused by accidents to or industrial diseases contracted by workmen in the course of their employment, or for death resulting from such accidents and diseases.

[51] Section 7(a) and (b) provided that:

> "From and after the fixed date:
>
> (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 consideration on the part of such employer shall arise save under the provisions of this Act in respect of any such disablement or death."

[52] Section 27(1) provided that:

> "If after the fixed date an accident happens to a workman resulting in his disablement or death, such workman shall be entitled to compensation in accordance with the provisions of this Act . . . ."

[53] Section 50 of the 1941 Act provided for the submission of a written notice by or on behalf of a workman to the employer, as soon as reasonably possible, after the accident. Section 51 provided for the reporting of the incident by the employer to the commissioner.

[54] Section 43(1) provided for increased compensation in cases where:

> " . . . a workman meets with an accident which is due: (a) to the negligence— (i) of his employer; or (ii) of a person entrusted by such employer with the management, or in charge of the business or any branch or department thereof . . . ."

Diseases compensatable under this Act included silicosis.

[55] The 1941 Act was repealed in 1993 by COIDA.

COIDA

[56] This Act follows the same pattern as the 1934 and the 1941 Acts. Its purpose is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death

resulting from such injuries or diseases, and to provide for matters connected therewith. Section 10 provides for the establishment of the Compensation Board. Section 15(1) provides for the establishment of a Compensation Fund which will be funded, inter alia, by contributions levied from employers. Section 22(1) provides for the compensation to be payable to an employee who meets with an accident that caused his disablement or death if the accident has arisen out of or in the course of his employment.

[57] As already indicated, section 35(1) bars damage claims against employers and limits compensation to that payable under COIDA.

[58] Section 56(1) provides for increased compensation. This applies if the employee meets with an accident or contracts an occupational disease, which is due to, amongst others, the negligence of the employer or an employee charged by the employer with the management or control of the business. Section 67(1) provides for the calculation of compensation for a disease. This may be based on earnings at the time of the commencement of the disease.

[59] It is against this background that I now turn to consider the findings made in the High Court and the Supreme Court of Appeal about the interpretation of section 35(1) of COIDA.

High Court proceedings

[60] The High Court held that Mr Mankayi's common law claim against AngloGold was barred by the clear wording of section 35(1) of COIDA. It reasoned that because there was no limitation in the language used by the Legislature, there was no basis for restricting its provisions to injuries or diseases dealt with in COIDA. It found that the express words would be applied to "any occupational injury or disease no matter how arising." The High Court also found that 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 and that the legislature intended section 35(1) to apply to claims covered by ODIMWA, because the ODIMWA Amendment Act was enacted after COIDA without any amendment of section 35(1) or of ODIMWA.

[61] The High Court found, concerning the interrelation between COIDA and ODIMWA, that the maxim that a general enactment does not derogate from a special provision is of no application because section 35(1) is manifestly clear and unambiguous in its general application.

[62] The High Court further found that section 39(2) of the Constitution does not assist the interpretation advanced by Mr Mankayi, because that construction would be unduly

strained. It found that its interpretation of section 35(1) of COIDA does not infringe upon the right of access to courts protected by section 34 of the Constitution. In relation to the equality protections in section 9, it found that:

> "Clearly there is no class of persons against whom there has been unfair discrimination. If there is discrimination it relates to the benefits the various claimants can claim. The scale of benefits has not been challenged."

Supreme Court of Appeal

[63] The findings of the Supreme Court of Appeal and its approach broadly accord with those of the High Court. The main judgment was delivered by Malan JA, in which, Heher and Leach JJA concurred. Harms DP set out his reasons for dismissing the appeal separately, while Cloete JA delivered a separate judgment, concurring with both Malan JA and Harms DP, underscoring the conclusions in the main judgment.

[64] The Supreme Court of Appeal held that an "employee" in section 35(1) is one who falls within the definition of "employee" in section 1 of COIDA; the employee's action for the recovery of damages in respect of an occupational injury or disease resulting in disablement or death is extinguished. The Court further held that the provision does not require the employee whose common law claim is barred to be entitled to receive compensation under COIDA.

[65] It found that the ambit of COIDA does not exclude employees employed at controlled mines or works and noted that, "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." The Supreme Court of Appeal noted further that section 100(1) of ODIMWA, which precludes a person who has or is still receiving full benefits under COIDA from being entitled to benefits under ODIMWA, recognises the possibility that mine employees may be entitled to compensation under COIDA.

[66] It found that there was a "delicate relationship" between the statutes. Section 100(2) of ODIMWA sets out the interrelation between COIDA and ODIMWA. It further held that "[j]ust as their precursors, they comprise one system of compensation and should be interpreted as such." (Footnote omitted.) It held that these two Acts "must be harmonized" for together they cover the entire field of compensation for damages arising from injury or diseases contracted at work, with ODIMWA providing for injuries and diseases in mines and COIDA being more of a general application.

[67] The Supreme Court of Appeal also found that the exclusion of liability in section 35(1) of COIDA is not limited to employees who are eligible to claim under COIDA. It further held that it would be irrational for the protection against the common law liability

of employers not to extend to mine owners, since historically both COIDA and ODIMWA compensation funds are funded by levies contributed by employers whether under COIDA or ODIMWA. In enacting COIDA and ODIMWA, the legislature thus intended section 35(1) of COIDA to apply to all employees, including those with claims under ODIMWA.

[68] It held that if an employee contracts a disease at a controlled mine, which is compensatable under both COIDA and ODIMWA, by virtue of section 100(2) of ODIMWA, that employee is obliged to claim compensation under ODIMWA. It also held that 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 and therefore the claim of Mr Mankayi is excluded by section 35(1) of COIDA. It further held that any other construction would be "unduly strained."

Does COIDA apply to those covered by section 100(2) of ODIMWA?

[69] Mr Mankayi conceded that "employee" in terms of section 1 of COIDA is broad enough to include him. This is plainly so, he argued, since a mine employee who suffers injury or illness that is not compensatable under ODIMWA has a COIDA claim. His essential submission was that the exclusionary and extinguishing effect of section 35(1) applies only to employees who have a claim for compensation under COIDA in respect of

the occupational disease concerned. AngloGold argued that, on plain reading, section 35(1) excludes the employee's common law right of action against the employer when that claim arises in respect of any occupational disease causing disablement or death, including ODIMWA-compensatable diseases. Both parties urged that their interpretation is the one required by section 39(2) of the Constitution. AngloGold adopts the reasoning and the interpretation favoured by the Supreme Court of Appeal. In my view, that interpretation cannot be sustained.

The plain meaning of section 35(1) of COIDA

[70] While language cannot always have a perspicuous meaning, the elementary rule and starting point in an interpretive exercise entails a determination of the plain meaning of words in the relevant statutory provision to be construed.

[71] In doing so, caution must not be thrown to the wind, because words can never attain precision since they are as intrinsically dynamic as they are inexact. T. S. Eliot in *Burnt Norton* eloquently stated:

> ". . . Words strain,
> Crack and sometimes break, under the burden,
> Under the tension, slip, slide, perish,
> Decay with imprecision, will not stay in place,
> Will not stay still . . . ."

[72] With this caution in mind, I, like the High Court and Supreme Court of Appeal before me, accept that the meaning of the word "employee" in section 1 of COIDA covers employees like Mr Mankayi who are entitled to claim for occupational diseases under COIDA and who may become entitled to claim benefits for compensatable diseases under ODIMWA. I also accept that various provisions indicate that COIDA also applies to employees in "controlled mines and works." The definitions of the words "employee" and "employer" respectively do not expressly exclude employees who could have a claim for compensation under ODIMWA.

[73] ODIMWA provides statutory compensation for designated "compensatable diseases" contracted at "controlled mines" and "works." Apart from occupational injuries, COIDA also provides for statutory compensation in respect of a number of listed occupational diseases contracted by employees in the course of their employment and resulting in disablement or death. The diseases that constitute "compensatable diseases" under ODIMWA overlap with the diseases that constitute occupational diseases under COIDA. In the case of Mr Mankayi, the disease which he has contracted could fall within both COIDA and ODIMWA, but section 100(2) of ODIMWA precludes him from claiming under COIDA. For the disablement set out in his particulars of claim he is confined to his ODIMWA remedy, and is not entitled to a COIDA claim.

[74] It was argued on behalf of AngloGold that, given this lack of any coherent distinction between ODIMWA and COIDA diseases, a failure to apply section 35(1) of COIDA to exclude all employees' common law claims would mean that the legislation created a wholly irrational distinction between the two sets of statutory compensation systems. Counsel further urged that an interpretation of section 35(1) of COIDA, which excludes from its ambit diseases compensatable under ODIMWA, would result in an entirely casuistic distinction between: (i) cases in which an employee working in the mining industry enjoys the right to claim damages at common law for incapacity resulting from the contraction of a listed disease; and (ii) cases where an employee employed outside the mining industry would not. Counsel submitted that this is unlikely to have been the intention of the legislature and that this is not a result the legislature would have intended.

[75] This contention reflects the observation in the judgment of Harms DP to the effect that, if Mr Mankayi's argument is correct, it would mean that his employment at the mine was divisible. Harms DP stated:

> " . . . 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."

[76] I accept that the word "employee" in section 35(1) has the same meaning as it bears in the definition. However, it seems plain that both the definition and section 35(1) refer to "employees" that are covered by COIDA and cannot refer to employees who cannot benefit under that legislation. Indeed, the definition of employee was widened to ensure that a larger category of employees would benefit from COIDA. So section 1 defines the categories of employees who, as COIDA demonstrates, would benefit from its provisions. The definition cannot be said to refer to employees that do not benefit from the provisions of COIDA. The way to avoid confusing interpretational consequences is to imagine, in the first place, the existence of COIDA without ODIMWA. No one would have suggested that the definition in COIDA was intended to embrace workers who would not or could not benefit from COIDA. I therefore proceed on the basis that the definition and section 35(1) refers to employees who have the potential to benefit from COIDA. The next issue relates to the impact of section 100(2) of on the definition of "employee" and the use of that word in section 35(1).

[77] In my view, the respondent's approach insufficiently estimates the impact of section 100(1) and (2) of ODIMWA. These provisions expressly insulate or separate those employees who are entitled to benefit under the compensation provisions of ODIMWA from those entitled to benefit under COIDA. The two compensation schemes are contiguous, but separate. Whilst section 100(1) of ODIMWA precludes "double-

dipping" on the part of employees who qualify for compensation because of having contracted a disease that is listed under both ODIMWA and COIDA, section 100(2) of ODIMWA goes further, and specifically precludes employees with claims in respect of compensatable diseases under ODIMWA from claiming any COIDA benefits in respect of the same disease. It is difficult to see how section 100(2), while removing employees from COIDA compensation, could at the same time render section 35(1) applicable to them. The Supreme Court of Appeal tries to resolve this conundrum on the basis that COIDA is the principal Act, which sets out the generally applicable provisions, while ODIMWA deals with special circumstances without diminishing those principles, and that the limitation contained in section 35(1) is of general application.

[78] In my view, this is no answer. First, section 100(2) of expressly removes the employee concerned from COIDA benefits in respect of the disease concerned. It is difficult to see how a general principle can apply to a person who has, in relation to a particular claim, been removed from the ambit of legislation said to contain the general principle. Second, the two Acts deal with different things in very different ways, as I show below. The third reason relates to the clear wording of section 35(1) of COIDA.

[79] The comparison between ODIMWA and COIDA compensation is aimed at illustrating the fact that a person compensated under COIDA for an occupational disease

is in a much better position than another person suffering from the same disease but who is compensated under ODIMWA for a compensatable disease. I first deal with the relevant provisions of COIDA, followed by the ODIMWA provisions, before making the comparison.

[80] An employee who suffers from an occupational disease is entitled to compensation in terms of Chapter VII of COIDA which is headed "Occupational diseases". However, this Chapter does not exclusively concern itself with the mechanism for compensation, but sets out general principles. Section 65(6) of COIDA provides that the sections of COIDA regarding an accident apply "*mutatis mutandis*" to any occupational disease in relation to which there is a right to compensation in terms of COIDA. It is therefore necessary to revert to Chapter VI of COIDA which is concerned with compensation for accidents. I will however use the term "occupational disease" as used in Chapter VII.

[81] Employees who suffer occupational diseases are not compensated in respect of the disease itself, but for temporary total disablement, temporary partial disablement and permanent disablement.

[82] An employee who incurs temporary total disablement as from 1 April 2010 would be entitled to receive up to 75% of her monthly earnings subject to a maximum of R16

400 and a minimum of R2 100 per month. The employer must pay this amount for the first three months of disability after which the Fund or the mutual association concerned takes over. The employee is entitled to 75% of monthly earnings for a maximum period of 24 months, but this period may be extended in certain circumstances. It is particularly relevant to the ODIMWA comparison, which is made later, that an employee who receives 75% of monthly earnings for 24 months will in effect receive a total of one and a half times her annual earnings and will return to work after that.

[83] Employees who suffer permanent disability for the purposes of COIDA as a result of an occupational disease are in a much better position than the ones restricted to ODIMWA compensation. They are compensated depending on the degree of their disability. I give two examples:

(a) Employees who have permanent disability of 30% are entitled to a lump sum of 15 times their monthly salary, that is to say one and a quarter times their annual salary subject, as at 1 April 2010, to a minimum lump sum of R45 800 and a maximum of R183 400. I may repeat here that, by contrast, Mr Mankayi, who was diagnosed as suffering from a compensatable disease which rendered him completely unemployable, received a total of R16 320 under ODIMWA as calculated in 2005. Under COIDA he would have received R24 480 if he had been found to have been permanently disabled

to a degree of 30% in 2005.

(b) Employees who suffer a 100% permanent disability are entitled to a monthly pension of 75% of their monthly salaries, subject, as at 1 April 2010, to a minimum monthly pension of R2 300 and a maximum of R16 400. Mr Mankayi would have received a minimum monthly pension of R1 224 under COIDA from 2005 and would by now have received in excess of R70 000 if he had been found to have been permanently disabled in 2005. There is also a provision for the payment of a lump sum to this category of employee in certain circumstances.

[84] The dependant of an employee who dies as a result of an occupational disease would essentially receive in effect a lump sum of twice the monthly pension (a minimum of R4 600 as at 1 April 2010). The dependants would secondly benefit from a monthly pension of 40% of the amount that would have been payable to the employee had the employee been 100% permanently disabled. Thirdly, the Director-General has to pay the employee's funeral costs subject to a maximum of R12 300 as at 1 April 2010.

[85] Moreover, if the employer was negligent, the employee would receive more money and could in fact be compensated for her total financial loss. This concludes the

overview of COIDA benefits in respect of occupational diseases.

[86] I now turn to ODIMWA to the extent that it relates to COIDA. I emphasise that ODIMWA becomes applicable when an occupational disease is classified as a "compensatable disease." One would have expected the benefits under ODIMWA to be more or less the same or somewhat more than under COIDA, but the opposite is the case. Except for a person suffering from tuberculosis who is entitled to 75% of his monthly earnings when ill, the only benefits payable to a person who is suffering from a compensatable disease contracted as a result of risk work is a lump sum which amounts to approximately one and one third of his annual salary if that employee suffers from a compensatable disease in the first degree, and about three times his annual salary if the compensatable disease is in the second degree.

[87] There is no provision for payment of funeral expenses, or any lump sum or pension for dependants. The statute does however provide that the dependants of a person who died of a compensatable disease would receive the lump sum that would have been payable to that person had he not died. In other words, where the person suffering from a compensatable disease has been paid the lump sum, the dependants get nothing even if they are children. To make matters worse, the person who finds himself afflicted with a compensatable disease merely because of legislative classification, has no right to claim

additional damages even if the employer was negligent, a right that is preserved for employees who suffer occupational diseases.

[88] All this is contained in legislation at issue in the exception. The Supreme Court of Appeal therefore erred in concluding that it is not possible to compare the two provisions on exception. The differences between the compensatory regimes of COIDA and ODIMWA are quite apparent. A person whose disease is certified as a compensatable disease loses all the benefits of COIDA and receives much less under ODIMWA. The purpose is obviously to reduce the burden on the COIDA fund by converting an occupational disease into a compensatable disease. This means that the person benefits to a considerably lesser degree from another fund to which the employer makes a contribution and a much smaller contribution at that, because of the smaller benefits payable. The saving to the employer arising out of the redefinition of the disease amounts to a reduction in the contribution to the COIDA fund, which exceeds the amounts to be paid to facilitate the lesser compensation under ODIMWA. It must be emphasised that an employee who has a claim under ODIMWA has to be excluded. The drastic reduction in his compensation is obligatory. It is therefore no surprise that ODIMWA is silent on the issue of common law liability.

[89] The third reason relates to the plain language of section 35(1). It is necessary to

pay close attention to its provisions. Before I embark upon this analysis, it is necessary to set out its provisions.

[90] Section 35(1) of COIDA provides:

> "**Substitution of compensation for other legal remedies** . . .
> 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."

[91] What is striking in this provision is that there is no reference at all to ODIMWA, notwithstanding that COIDA was enacted more than twenty years after ODIMWA. Had the legislature intended for ODIMWA to entitle employees to be covered under COIDA, it would have been easy for it to have included references to ODIMWA, but it has not done so.

[92] It is, of course, important to be attentive to the precise language of the provision. What section 35(1) does, in one extended sentence, is two interrelated things. Firstly, it expunges the common law claims of employees against the employer and, secondly, it limits an employer's liability to pay compensation save for under the Act. It expressly mentions that "no liability for compensation on the part of such employer shall arise save

under the provisions of this Act . . . .” It limits the employer’s liability to pay compensation to liability under COIDA alone. That, in my view, is an indication that both parts of the provision apply only to those employees covered by “the provisions of this Act”; namely, COIDA.

[93] But AngloGold would have us hold, as the Supreme Court of Appeal did, that the first part of section 35(1), namely the expungement of common law claims, also applies to those who have been stripped of compensation under COIDA and who have been awarded inferior compensation under ODIMWA instead. Such a reading requires that two parts of section 35(1) be severed from each other, the first part applying only to the expungement of an employee’s right to claim damages, and the second part applying only to employers who are liable to pay compensation under COIDA itself.

[94] This, in my respectful view, is to apply wholly unnecessary force to the plain language of section 35(1). That language, in my reading, indicates clearly that it was directed only at and intended to cover only COIDA entitled employees.

[95] It is correct, as the Supreme Court of Appeal found, that section 35(1) of COIDA deals with substantially the same aspects as section 4 of the 1934 Act and section 7 of the 1941 Act.

[96] The Supreme Court of Appeal found that just as under the 1941 Act, where it was held that employees' common law right to claim for general damages was excluded notwithstanding that the 1941 Act did not provide compensation for general damages; so too section 35(1) of COIDA does not require that the employee must be entitled to receive compensation under COIDA for the expungement of a claim under the common law to take effect. It found that the words in the text were clear, the ambit of "employee" untrammelled, and that the effect of the provision could not be overridden by the words used in the heading.

[97] In reaching this conclusion, the Supreme Court of Appeal placed reliance on *Pettersen v Irvin and Johnson Ltd* (*Pettersen*). *Pettersen* involved the question of whether section 7 of the Workmen's Compensation Act of 1941 precluded an action against the employer for general damages that fell outside the scope of this Act and in respect of which no compensation could be recovered against the Workmen's Compensation Commissioner. The court held that:

> "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."

[98] In my view, the guidance to be obtained from *Pettersen* is limited. That decision

found that an employee who was entitled to workmen's compensation was not entitled, in addition, to sue his or her employer for general damages, and that the expungement of the common law action applied even though the statute did not provide the employee with compensation in general damages. The decision did not entail that the claim of an employee, whose disease was not compensatable at all under the statute, was expunged. That is the question this case raises, and in my view *Pettersen* is not useful in answering it.

[99] Some care must be taken when locating COIDA and ODIMWA in the context of the legislation that preceded them. It deserves emphasis that section 7 of the 1941 Act operated concurrently with the Silicosis Act of 1946 and the Pneumoconiosis Compensation Act of 1962. There were no provisions in any of these mining statutes that prohibited "double-dipping" and went on to preclude claimants from claiming benefits in respect of the diseases covered by the 1941 Act. The express proscription against "double-dipping" was an ODIMWA innovation.

[100] As far as the heading of section 35(1) of COIDA is concerned, the Supreme Court of Appeal found that because the words in the text of the provision are clear, the words used in the heading do not override them. In reaching this finding, it sought reliance on *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* (*Turffontein*). In my view, it is not possible to lay down any general rule as to the weight that the heading of a

section attaches in a given statute. I defer to the observation of Innes CJ in *Turffontein* that:

> "Where the intention of the lawgiver as expressed in any particular clause is quite clear, it cannot be overridden by the words of a heading. But where the intention is doubtful, whether doubt arises from ambiguity in the section itself or from other consideration, then the heading may become of importance. The weight to be given must necessarily vary with the circumstances of each case."

[101] If the language of section 35(1) is unclear, this Court would be entitled to have regard to the heading to determine its meaning. However, in my view the language is clear, even without the heading. Section 35(1) substitutes COIDA compensation for other legal remedies and no more. Neither this provision nor any other in the relevant statute refers to compensation under ODIMWA. It is in my view plainly intended to bar the common law claims of only those employees who have COIDA claims.

[102] ODIMWA and its antecedent legislation are entirely silent about the exclusion or otherwise of an employee's common law right to claim delictual damages against an employer arising from contracting diseases at the workplace. On the reading endorsed by the Supreme Court of Appeal, upon the enactment of COIDA in 1993, twenty years after the enactment of ODIMWA, section 35(1) suddenly, silently – and, I would add, obliquely – expunged the ODIMWA-entitled employee's common law claim. This seems to me a most improbable consequence, and nothing in the wording of section 35(1) lends

sustenance to it. To import ODIMWA compensation into this provision is not only extraneous and cumbersome, but constitutes an unjustified imposition on the wording.

[103] There is a further compelling reason why section 35(1) cannot bear the meaning for which AngloGold contends. It is the cluster of provisions within which section 35(1) is located. Chapter I of COIDA deals with interpretation of the Act, and consists only of section 1. Chapter II (sections 2-14) deals with the administration of the Act. Chapter III (sections 15-21) sets up the Compensation Fund and the Reserve Fund. The provisions of Chapter IV (sections 22-37) expressly regulate the manner with which compensation obtained under the provisions of COIDA is to be dealt. It is plain from Chapter IV as a whole that its provisions deal solely with occupational injuries and diseases compensatable under COIDA. None of the provisions in this entire Chapter deal with ODIMWA compensation, or with ODIMWA-compensatable diseases.

[104] Almost all the detailed provisions in Chapter IV of COIDA deal with the impact COIDA compensation has on common law remedies. All these provisions deal only with COIDA compensation. These include the following sections:

[104.1] In terms of section 31, where the employer is individually liable for payment of compensation the Director-General may order that it

deposit sufficient securities to cover its liabilities "in terms of this Act."

[104.2] Section 32 prohibits compensation to be amongst others ceded or pledged, capable of attachment or any form of execution under judgment or order of a court of law and to be set off against any debt of the person entitled to the compensation.

[104.3] In terms of section 33, a cession of any right to benefits "in terms of this Act" is void.

[104.4] In terms of section 34, compensation "in terms of this Act" owing to the death of an employee does not form part of his or her estate.

[104.5] In terms of section 37, any person who issues threats directed at depriving an employee of benefits "in terms of this Act" shall be guilty of an offence.

[105] Plainly, none of these provisions can be made to stretch to cover ODIMWA employees as well. In short it would be strange indeed if, in the midst of a group of provisions plainly regulating COIDA compensation alone, section 35(1) inexplicably regulated something beyond COIDA compensation. That would apply unnecessary force not merely to the words of section 35(1) itself, but to the context in which the provision finds itself.

[106] And it is notable that the legislature has, to the extent it deemed necessary, legislated comparable provisions in ODIMWA so as to regulate how compensation obtained under ODIMWA must be dealt with. Thus, section 131 of ODIMWA precludes cession and attachment of compensation and further protects against insolvency. This provision of ODIMWA makes it absurd to suggest that section 32 of COIDA – which contains comparable provisions prohibiting cession, attachment and set-off – applies to ODIMWA compensation. The same applies to the other provisions of Chapter IV of COIDA. Why then should section 35(1) suddenly reach out to clasp ODIMWA compensation in its grasp? Nothing in its wording suggests that it should, and the statutory setting incontrovertibly indicates that it should not.

[107] This is more so when one takes account of the enhanced compensation for which section 56 of COIDA provides where an employee contracts an occupational disease due to the negligence of the employer or other specified categories of related persons. ODIMWA has no comparable provision. This leaves those entitled only to ODIMWA compensation at a severe disadvantage. The argument that section 35(1) must be interpreted to exclude mineworkers' common law claims so as to create a just and sensible parity in the two statutes' compensation systems is thus without merit.

[108] Although there are provisions in ODIMWA and COIDA that interlock, the two statutes remain distinct. AngloGold urged that, since ODIMWA-compensatable diseases fall within COIDA's definition of disease, section 35(1) should be held to expunge the common law claims of all those with ODIMWA claims, even though they have no COIDA claims. This cannot be. The golden thread that runs throughout ODIMWA and its antecedent legislation is that they address and limit the impact and spread of infectious diseases contracted in mines. It is not anomalous or surprising that mineworkers are treated separately. Nor is the conclusion surprising that the legislation deals distinctly with their claims to compensation.

[109] The reason for the special statutory treatment is historical. These diseases have been treated distinctly because they merited distinct treatment. They exacted their toll on not only the health of mineworkers and their families, but have posed and continue to pose a danger to the health and welfare of the public. To this extent, the two Acts dealt with the payment of compensation for diseases contracted by a mineworker arising from the hazardous conditions in mines. Our singular history of mining, with the massive contribution of this sector to the country's wealth and the corresponding massive toll on mineworkers' health, justifies the distinct treatment. This history also explains why section 35(1) does not apply to mineworkers with compensatable diseases under ODIMWA.

[110] ODIMWA makes special provision for a category of employment that historically has played an exceptional role in our country. ODIMWA provides for the particular risks and dangers associated with mining, which still employs a significant portion of the country's workforce.

[111] Given the singular risks of mining, and its unique historical role in our country's wealth, there is nothing irrational in preserving employees' common law claims against their employers in respect of ODIMWA-compensatable diseases.

[112] For these reasons the appeal must, in my view, succeed.

Conclusion

[113] In my view, section 35(1) must be read in the context of the other provisions of COIDA. The "employee" referred to in section 35(1) whose common law claim is expunged is limited to an "employee" who has a claim for compensation under COIDA, in respect of occupational diseases mentioned in COIDA. It is this "employee" that section 35(1) of COIDA excludes from instituting a claim for the recovery of damages against the employer for occupational diseases resulting in disablement or death. The expungement does not extend to an "employee" who is not entitled to claim

compensation in respect of "occupational diseases" under COIDA.

[114] The corollary is that section 35(1) does not cover an "employee" who qualifies for compensation in respect of "compensatable diseases" under ODIMWA. The exclusion of liability in section 35(1) is therefore limited to "employees" who are entitled to compensation in respect of "occupational diseases" under COIDA. The exception should therefore have been dismissed.

Costs

[115] Mr Mankayi has been successful in vindicating his rights in this Court and AngloGold should pay his costs in this Court, in the Supreme Court of Appeal and in the High Court.

Order

[116] The following order is made:

(1) Condonation is granted.

(2) Leave to appeal is granted.

(3) The appeal is upheld.

(4) The order of the Supreme Court of Appeal is set aside.

(5) The exception is dismissed.

(6) The respondent is ordered to pay the applicant's costs in the High Court, in the Supreme Court of Appeal and in this Court, including the costs of two counsel.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Khampepe J.

FRONEMAN J:

[117] I respectfully concur in the judgment of Khampepe J, except that my reasons for granting leave and hearing the appeal are slightly different to hers. In my respectful view the mere fact that the present case concerns the interpretation of a statute is sufficient to bring it within this Court's jurisdiction.

[118] In terms of the provisions of section 39(2) of the Constitution, a court must, when interpreting any legislation, promote the spirit, purport and objects of the Bill of Rights. This constitutional injunction makes it impossible to interpret any legislation other than through the prism of the Bill of Rights. Statutory interpretation is thus inevitably a constitutional matter. It is a legal issue which necessarily involves the evaluation of

social and policy choices reflected in legislation.

[119] It is not, however, too difficult to imagine a situation where, after interpreting legislation in accordance with section 39(2) for Bill of Rights compatibility, the result that it yields is one that is 'neutral' as far as that compatibility is concerned, in the sense that the interpretation given to it does not offend any provisions or values of the Constitution. This 'neutrality', however, always remains constitutionally permitted neutrality. Purely by virtue of this, the jurisdictional requirement in terms of section 167(3) of the Constitution would be satisfied in an application for leave to appeal a particular interpretation of legislation to this Court. But it is difficult to see why it would be in the interests of justice for this Court to hear that kind of appeal if there is nothing plausibly suggestive of anything other than a constitutionally permitted 'neutral' interpretation of the legislation.

[120] What is thus required from an applicant who seeks leave to appeal to this Court is the plausible assertion of some constitutional value or right which is implicated in the case, something beyond 'mere' constitutionality in the sense of it being a question of law and constitutional interpretation, and that it is in the interests of justice to hear the matter because there are reasonable prospects that the Supreme Court of Appeal erred in not giving proper effect to that value or right. And that is the case here. The interpretation

given to section 35(1) of the Compensation for Occupational Injuries and Diseases Act (COIDA) in the High Court and Supreme Court of Appeal has the effect of abolishing a common law right which protected and provided an appropriate remedy to the fundamental right to freedom and security of the person in terms of section 12(1) of the Constitution.

[121] I thus agree with Khampepe J that leave to appeal should be granted because it is in the interests of justice to do so, but I would merely include the factors dealt with by her in paragraphs [14] to [19] of her judgment under the 'interests of justice' discussion, and not as part of whether a constitutional issue has been raised.

[122] It is with considerable hesitation and respect that I also suggest that general consideration should be given to whether the time has not arrived to shift the question of whether to grant leave to appeal in matters where questions of law are involved, more to a debate on what kind of constitutional matters this Court should hear, rather than on whether these issues of law are constitutional matters in the jurisdictional sense.

[123] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* this Court unequivocally stated:

> "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is

subject to constitutional control."

[124] There is an impossible tension between asserting the fundamental supremacy of the Constitution as the plenary source of all law, and nevertheless attempting to conceive of an area of the law that operates independently of the Constitution. The perceived necessity for the attempt to do so arises from the provisions in the Constitution that provide that this Court "is the highest court in all constitutional matters" and that the Supreme Court of Appeal "is the highest court of appeal except in constitutional matters". The suggestion advanced in this judgment is to acknowledge frankly that this jurisdictional tension cannot be overcome by conceptual separation of certain areas of the law from the Constitution, but rather on a practical and functional arrangement based on a shared constitutional endeavour between all courts. The shift would mean moving the debate in relation to appeals to this Court on legal questions from "what is a constitutional matter" to, "which constitutional matters will this Court hear".

[125] This Court has, in *S v Boesak* and *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae*), set out non-exhaustive instances of what constitutes constitutional matters over which this Court exercises jurisdiction. It seems to me that, having regard to the acceptance of the Constitution as the plenary source of all our law, it would not be in conflict with *Boesak* and *Fraser* to state that all questions of law are constitutional matters over which this Court may exercise jurisdiction.

Reviewing only findings of fact are not. Of course this statement does not exclude potentially difficult issues of when a matter is one of law, or of fact, or a mixed question of fact and law, but at least it is a kind of conceptualisation that our law is familiar with. Certain matters traditionally regarded as matters of fact may however no longer be regarded as matters of fact, because they involve the evaluation of social and policy choices, or are inextricably linked to legislation which seeks to give expression to fundamental rights in the Bill of Rights.

[126] Acknowledging that all questions or issues of law are indeed constitutional matters does not in my view offend the wording of sections 167(3)(b) or 168(3) of the Constitution. As importantly, it does not deny the very important role that other courts, and particularly the Supreme Court of Appeal, have to play in the shared constitutional enterprise of shaping our legal and societal landscape to conform to the fundamental values of the Constitution. It has the advantage, I would venture to suggest, of transforming a potential or perceived jurisdictional rivalry into a pragmatic and functional search for an approach which would ensure relatively secure roles for different courts in order best to give effect to this shared constitutional commitment. As can be seen from this matter, generally speaking, it would only be in the interests of justice to hear a constitutional matter if the legal issue at stake involves a plausibly contested vision of the content or reach of constitutional values or rights.

For the Applicant: Mr Richard Spoor from Richard Spoor Attorneys.

For the Respondent: Advocate CDA Loxton SC, DM Antrobus SC with Advocate Cockrell instructed by Brink Cohen Le Roux Inc.