

## DUTY OF CARE IN SOUTH AFRICA: A legal perspective

“ Employer duty of care obligations in South Africa are provided for statutorily, which legislative requirements enact the common law position in either specific or general circumstances. To the extent that the relevant statutes do not cater for a particular situation, an employee may be able to rely on the underlying common law position to hold an employer liable for its failure to adequately discharge its duty of care. ”



The primary piece of legislation which generally regulates and provides for an employer's duty of care in respect of its employees is the Occupational Health and Safety Act, 85 of 1993 ("OHSA"). The OHSA places an obligation on employers to identify and reduce risks to health and safety in the workplace and provides for the regulation and monitoring of workplaces in order to protect the health and safety of employees and other persons in the workplace and in the use of plant and machinery. The employer has a duty to provide and maintain a working environment that is safe and without risk to the health of employees. This general duty includes the duty of an employer to inform employees of the hazards to health and safety associated with any work performed, and to inform the employees of the necessary precautions which must be taken to mitigate against these identified risks. Once hazards have been identified, the employer has a duty to provide and maintain safe systems of work, and to take steps and make arrangements to eliminate or mitigate hazards and ensure the safety of employees.

In terms of the OHSA, the chief executive officer of every employer is liable for contraventions of the OHSA. As such, any contravention of the OHSA can result in criminal convictions and / or up to one year's imprisonment of the CEO of the employer, and / or fines imposed on the employer of up to R50 000, or R100 000 or two years imprisonment if the injury caused to the employee or any other person in the workplace would have resulted in the employer being found guilty of culpable homicide. The OHSA provides for general safety regulations which expand on the above duties, and also provides specific regulations for particular work environments.

It is of particular importance to note that the term 'workplace', for the purposes of an employer's duty of care in the workplace, is defined in the OHSA as being 'any premises or place where a person performs work in the course of his employment'. As such, there is no requirement that the workplace should be located in South Africa in order for the employer to have a duty of care in respect of its employees in such workplace.

Business travellers and expatriates who perform work outside of South Africa for a South African employer will therefore still be entitled to protection afforded to employees in terms of the common law and the OHSA. The OHSA, however, limits the right of the employee to claim compensation when working outside of South Africa for more than 12 months. This limitation would affect the employee's right to lodge a claim in terms of OHSA, and would not detract from his rights in terms of the employer's common law duty of care. In such a case, where the compensation fund would not be liable to compensate an employee, the employee's claim could lie directly with the employer. It is therefore critical for South African employers to ensure that their non-South African workplaces are safe for their business traveller and expatriate employees.

In terms of the OHSA, an employer may not only be liable to third parties and employees for damages caused by sub-contractors performing work for the employer, but the employer may also be liable to the sub-contractor for any harm suffered by the sub-contractor and its employees while performing work at the employer's workplace (which can include non-South African workplaces). The employer could be liable to any person who is exposed to harm at the employer's workplace. The OHSA in particular provides that every employer is obliged to conduct its undertakings in such a manner so as to ensure, as far as is reasonably practicable, that persons other than those in its employ who may be directly affected by its activities are not exposed to hazards. 'Undertakings' is not defined in the OHSA but should be broadly understood to include the employer's workplaces (which can once again include non-South African workplaces). As such, harm to persons other than employees or sub-contractors — which may include visitors, clients, and customers — at an employer's workplace, could attract liability on the part of the employer.

Due to the inherent danger of the industry, specific legislation applies in the mining industry. Both the Mine Health and Safety Act, 29 of 1996 ("MHSA") and the Occupational Diseases in Mines and Works Act 78 of 1973 ("ODIMWA") provide for the protection of the health and safety of employees and other persons at mines as well as the regulation of payment of compensation in respect of certain diseases contracted by persons employed in mines, respectively.

The MHSA requires employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines, to provide for employee

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participation in matters of health and safety through health and safety representatives and health and safety committees at mines, and to provide for the effective monitoring and enforcement of health and safety conditions and measures at mines. In addition the MHSA details the procedures for investigations and enquiries to improve health and safety at mines and to investigate health and safety incidents. In terms of the MHSA every employer must take reasonably practicable measures to ensure that the mine is designed, constructed and equipped to operate safely and with a healthy working environment. Every chief executive officer of the mine is obliged to take reasonable steps to ensure that the functions of the employer, as set out in the MHSA are complied with. The chief executive officer is criminally liable for any contraventions of this duty, notwithstanding the fact that the chief executive officer may entrust any function contemplated in the MHSA to any person under his control.

The ODIMWA provides for the establishment of a Mines and Works Compensation Fund which is controlled and managed by a Commissioner. Owners of a controlled mine are required to pay a prescribed levy for the benefit of the Compensation Fund for each shift worked by an employee. Compensation is only provided to those individuals who have contracted diseases, specifically those listed as compensatable, attributable to work at a mine. Individuals compensated in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1998 ("COIDA") are prohibited from being compensated under ODIMWA.



Where an employee has contracted an occupational disease, or been injured or been killed as a result of a workplace incident, COIDA provides statutory relief in respect of any compensation claims by employees or their estates in circumstances where the act causing the injury was a risk incidental to employment. In terms of COIDA, all employers must register and pay contributions in respect of their employees to entitle employees to be able to claim from a fund established in terms of COIDA ("the compensation

fund"). This compensation is payable irrespective of any negligence on the part of the employer.

Notably, COIDA allows that the employees of an employer which carries on business chiefly in South Africa, and who normally work in South Africa but who perform services outside of South Africa for less than 12 months, will still be covered by COIDA in the event of any workplace accident or injury. Workplaces are understood, for the purposes of determining an employer's duty of care, to include any location outside of South Africa. The above restriction only imposes a time limit on the right of an employee to claim under the OHS Act when the workplace is outside of South Africa.



For an employee who works outside of South Africa for more than 12 months, coverage can only be extended with the agreement of the Director General of the Department of Labour. The same coverage can be extended to employers which do not ordinarily conduct business chiefly in South Africa whose employees ordinarily work outside of South Africa, when such employees work in South Africa, provided that a similar agreement is reached with the Director General of the Department of Labour. As indicated above, where such coverage is not extended, the compensation fund would disclaim liability for the payment of compensation. However, to the extent that the employee could prove that the employer was in breach of its common law duty of care, the employer may nevertheless be liable for any harm suffered by the employee. This is a particularly invidious position for the employer and therefore appropriate steps should be taken by the employer to firstly ascertain hazards in its workplaces and secondly to prevent accidents or injury to employees or third parties at its workplaces.

COIDA also caters for accidents by employees on South African ships and aircraft, or employees performing work on the continental shelf. The Unemployment Insurance Act 63 of 2001 ("UIA"), also entitles an employee to unemployment benefits if his employment is terminated as a result of illness. Although it is the compensation fund, in terms of COIDA, that

is liable to pay compensation to injured employees, COIDA provides for indirect liability and a duty of care on the part of the employer, in that where a workplace incident or injury is attributable to the negligence of the employer, the employee may apply to the compensation for increased compensation, and the Director General of the Department of Labour can increase the assessments to be paid to the compensation fund. The Director General of the Department of Labour may also do so if the employer's accident record is less favourable than other employers in the same industry. Also, in terms of COIDA, if an employee meets with an accident which requires his conveyance to a hospital or medical practitioner or from a hospital or medical practitioner to his residence, the employer must make the necessary conveyance available.

The question then arises, would an employee be entitled to institute delictual proceedings against an employer in circumstances where he / she has a claim against a compensation fund?

Common law damages against an employer are specifically excluded by section 35(1) of COIDA. However, claims in respect of damages caused by a third party at the workplace are permitted. This principle was confirmed in the recent Constitutional Court decision of *Minister of Defence and Military Veterans v Liesl-Lenore Thomas* [2015] ZACC 26. Although this case primarily considered the distinction between different spheres of government, the court held that an individual's fundamental right to bodily integrity and security of one's person underlies the common law claim for workplace damages. This then entitles one to claim such damages from a third party not being the employer as well as from a compensation fund created in terms of legislation.

The question of whether employees compensated in terms of ODIMWA are subject to the same restrictions found within section 35(1) of COIDA, was considered in the Constitutional Court case of *Mankayi v AngloGold Ashanti Limited* [2011] JOL 27008 (CC). The court held that section 35(1) of COIDA indicates clearly that it covered only employees entitled to claim under COIDA. Consequently, the prohibition to claiming delictual damages from an employer does not apply to those employees excluded from COIDA. The Court held that

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employees claiming under ODIMWA have the right under the common law to sue their employers for delictual claims. One of the grounds that the Court relied on in this regard was that a person compensated under COIDA for an occupational disease is in a much better position than another person suffering from the same disease compensated under ODIMWA.

The Employment Equity Act No. 55 of 1998 ("EEA"), provides for liability of an employer in the specific circumstances where an employer fails to provide a workplace that is free of discrimination or harassment. The damages which an employer may be ordered to pay if it fails to discharge this duty are unlimited. An employer's common law duty of care may become relevant in such an enquiry to determine whether the employer took reasonable measures to prevent harm to the employee by these prohibited forms of conduct.

In addition to the specific pieces of legislation referred to above, the South African common law position is that an employer owes its employees a duty of care to ensure their safety and health in the workplace. As such, if an employee is not able to frame a claim against an employer in terms of the legislation referred to above, he would still be entitled to frame his claim in terms of this common law duty.

Under the common law, employers are obliged to provide their employees with safe and healthy working conditions. The scope of this duty extends to, without limitation, providing proper machinery and equipment, properly trained and competent supervisory staff and safe systems of working. If the employer fails to comply with this obligation or meet the necessary standards of safety, any affected employees are not in breach of their contracts of employment if they refuse to work until the dangerous situation is corrected.

An employer will breach its duty of care in respect of its employees where the employer's conduct causes harm to an employee in circumstances in which a reasonable person would foresee the likelihood of injury and would have taken steps to guard against it. Therefore, in terms of common law, in order to discharge its duty of care in respect of its employees, the employer must assess the reasonable likelihood of its employees being exposed to danger or hazards, and assess the potential for an employee being injured or harmed as well as the nature of the injury likely to be suffered. If the employer assesses that any such danger or injury is likely, it must take adequate steps to prevent such danger or injury to its employees. A failure to do so will result in the employer having failed to discharge its duty of care, thereby exposing it to liability.

It is also critical for employers to note that the Constitution of the Republic of South African, 1996, ("Constitution") also gives effect to the constitutional right of South African citizens, as employees, to their health and safety in the workplace. The right of employees to health and safety and the concomitant duty of care imposed on employers to ensure health and safety is provided for in by section 23(1) of the Constitution, in terms of which everyone has the right to fair labour practices. Fair labour practices impliedly include the right of employees to working environments which are safe and free from dangers to health or the likelihood of injury; case law confirms that the right to fair labour practices is wide enough to include an employer's duty of care and duty to provide a safe working environment to its employees. If an employer is found to be in breach of its duty of care as imposed in terms of the Constitution, employees may be entitled to constitutional damages.



# CASE LAW TABLES

CASE (NAME-DATE)	DESCRIPTION	DECISION
<i>Silva's Fishing Corporation (Pty) Ltd v Maweza 1957 (2) SA 256 (A)</i>	Common law claim for damages. The widow of a deceased seaman instituted proceedings against the owner of a fishing fleet for damages alleged to have been caused to her through the owner's negligence which allegedly resulted in the death of her husband.	The court held that the employer was under a legal obligation to maintain both the boat and the engine in a proper condition.  The court further held that it was the duty of the employer either to have taken such steps as were reasonably in its power to restore the boat to a state of navigability where it might have been found at sea, or to have had it brought back to the shore with the crew. Its failure to do so amounted to negligence.
<i>Piliso v Old Mutual Life Assurance Co (SA) Ltd &amp; Others [2007] JOL 18897 (LC)</i>	An employee was a victim of sexual harassment at the workplace by another employee, and brought claims against the employer in terms of the EEA, the Constitution and common law.	It was held by the Labour Court that the employer had violated the employee's right to fair labour practices in terms of section 23 of the Constitution.  The employer was ordered to pay the employee an amount of R45 000 as constitutional damages.
<i>Media 24 Ltd and Another v Grobler [2005] 3 All SA 297 (SCA)</i>	The employee sought damages in terms of common law which she had suffered as a result of sexual harassment to which she alleged she had been subjected by another employee of the employer ("the perpetrator").  The employer had been sued in its capacity as the perpetrator's employer.	The court found that the employee had succeeded in establishing a negligent breach by the employer of a legal duty to its employees to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in their working environment.  The court found that the employer's duty of care cannot be confined to an obligation to take reasonable steps to protect them from physical harm, and also included a duty on the part of the employer to protect them from psychological harm caused, for example, by sexual harassment by co employees.
<i>Buitendag and Others v Government Employees Pension Fund and Others [2006] 4 BPLR 297 (T)</i>	The dependants of an employee claimed in terms of common law that the employer had committed a delict in not establishing that the information supplied to a retirement fund was correct, resulting in the incorrect payment to the dependants by the fund.	The court held that there could be no doubt that the employer owed its employees a duty of care to see that their interests were properly cared for, in this case that proper information was transmitted by it to the fund. On principle, the duty of the employer to ensure that an employee's interests are properly catered for can extend to health and safety concerns.



CASE (NAME-DATE)	DESCRIPTION	DECISION
<i>Mankayi v AngloGold Ashanti Limited [2011] JOL 27008 (CC)</i>	The applicant sued the respondent mining company for damages on the basis that during his employment, the respondent negligently exposed him to harmful dust and gases. The issue to be determined was whether section 35(1) of COIDA extinguishes the common law right of mineworkers to recover damages against the mine owners if such employees are covered by ODIMWA and are as such not entitled to claim under COIDA.	The Constitutional Court held that section 35(1) of COIDA indicates clearly that it was directed to, and covered, employees entitled to claim under COIDA. Therefore the prohibition to claim delictual damages from an employer in terms of section 35(1) of COIDA does not apply to those employees excluded from COIDA.  It was held that employees claiming under ODIMWA still have the right under common law to sue their employers for delictual claims.
<i>Minister of Defence and Military Veterans v Liesl-Lenore Thomas [2015] ZACC 26</i>	The respondent, a medical doctor employed by the Western Cape Provincial Government ("Provincial Government") was injured while on secondment to a military hospital under control of the applicant, the Minister of Defence and Military Veterans ("the Minister"). The respondent had lodged a claim in terms of COIDA against the provincial government as well as delictual damages against the Minister as a third party.	The Minister argued that all organs of state fell under one umbrella and therefore the Minister could not be sued as a third party as it was to be considered the employer excluded in terms of section 35(1) of COIDA. The Constitutional Court confirmed that each sphere of government is separate from the others, even though they are interdependent and interrelated. On looking at the spirit, purport and objects of the Bill of Rights the Court held that the respondent had a fundamental right to bodily integrity and security of her person, and therefore she had a right that underlies her common law claim for workplace damages. The Court found in favour of the respondent's common law entitlement to sue the Minister for delictual damages suffered as a result of her injury.
<i>Member of the Executive Council for the Department of Health, Free State Province v EJM [2015] 1 All SA 20 (SCA)</i>	While on duty at a provincial hospital, the respondent was raped by an intruder. The respondent, a doctor, claimed damages from the appellant, the MEC representing the relevant provincial Department of Health as a result of the rape. The MEC filed a special plea in which he asserted that the doctor's claim was barred by section 35(1) of COIDA.	The Supreme Court of Appeal confirmed that in order for a common law damages claim against an employer to be precluded, the injury must have occurred during the course of an employee's employment and it must also arise out of that employment.  According to the Court the question to be asked is whether the act causing the injury was a risk incidental to the employment. The Court could not see how a rape perpetrated by an outsider on a doctor while on duty at a hospital could be said to have arisen out of the doctor's employment.  The appeal was therefore dismissed.

*The legal information in this paper has been prepared by Werksmans Attorneys (South Africa) for the International SOS Foundation. This article only provides a brief summary of the legal position relating to the work place safety and health laws in South Africa, with a discussion on the potential implications for employers where their employees are required to travel for work. This article is not legal advice and cannot be viewed as a substitute to obtaining proper legal or other professional advice.*

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