



UNIVERSITY OF THE WITWATERSRAND,
JOHANNESBURG

Insurance & Risk Management IIB

BUSE2008/9

Bonnita Modukanele

545962

14 August 2013

Introduction

A large mining group had a severe accident which occurred in one of their mine groups. Mine employees as well as employees of an independent contractor were killed as a result of the accident. From inspection it seems that some mine employees were negligent which led to the accident.

The assignment will be covering four components relating to the above situation these include legal liability of the mine, Compensation for Occupational Injuries and Diseases Act (COIDA), Employers' Liability Policies and General Liability Policy. The important question that needs to be asked is: what is the legal liability of the mine to the dependants of the mine employees and independent contractor?

Legal liability

Legal liability is the obligation in terms of law arising from delictual actions or under contract. Decisions taken with regards to legal liability are made in the court of law (business dictionary, n.d). Liability might arise if a delict is committed and individuals may claim against this. Havenga *et al.* (2007 p 35) stated that delict is an unlawful and negligent act where a wrongdoer causes harm or injury to another and that person is granted a right for damages or claim compensation from the wrongdoer. In order to claim for delictual damage there are certain requirements that need to be met these are, an act, unlawfulness, fault, causation and harm (Havenga *et al.* 2007 p 35). If dependants of employees of the mine have a common law action and may wish to pursue a claim against the employer for delictual liability but because of section 35 of COIDA the employer will be exempt from liability.

Dependants of deceased employees

COIDA (1993) defines an employee as a person who enters into a contract of service with an employer and this contract may be written or tacit. Employee includes the following types of people: a casual employee, a director or member of a body corporate, a deceased employees dependants to name but a few. Individuals such as domestic workers, independent contractors and the Police and Military Force are excluded (COIDA, 1993). With context to what has been mentioned the position of dependants is of interest to this essay.

A dependant claim is a claim brought about by dependants of the deceased employee seeking to be granted compensation. Vivian (2013 p 19 of 29) specified that although the compensation in terms of COID is substantial it does not provide for pain and suffering or material damage. There are different types of payment method that could be offered to dependants and it depends on the family structure of the employee. Some examples according to the amended COIDA (1993, section 54) includes, if a dependant is a widow or widower and there happens to be no children, then they get paid a lump sum amount. If the widow or widower has children then they get paid the pension which the employee would have gotten had he been permanently disabled. Anyone who can be determined to be an employee as defined by COIDA (1993, section 35) cannot sue his employer they being exempted from liability under this section.

Dependants of deceased employees of the contractor

Under section 89 of COIDA (1993) two issues are important about independent contractors:

1. Did the contractor register his employees with COIDA accordingly?
2. If the contractor did not register his employees, the mine is deemed to be the employer of the employees of the independent contractor.

If the contractor did indeed register his employees will be entitled to compensation in the usual manner. If he did not then the mine as the principal is considered as the employer and the dependants would be entitled to compensation.

There is no general vicarious liability under section 56 of COID entitling increased compensation. Example of vicarious liability is *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 it was found that MacDonald was an independent contractor therefore Colonial Mutual Life Assurance Society Ltd was not vicariously liable for his action. But some critics have argued that it possible that a principal may in certain circumstances be held vicariously liable for the actions of an independent contractor.

It is essential to establish if the dependants are employees of the mine as defined or not in order to determine whether the dependants are entitled to compensation or not. Where a person is hired as an independent contractor with respect to the Roman-Law of *locatio conductio operis* meaning the letting and hiring of work he will not be seen as an employee unless otherwise stated (Vivian, 2013 p 13 of 29).

COIDA (1993, Sections 22, 35, 36, 56)

The dependants of employees of independent contractors may under section 22 claim for compensation if they are able to prove the three following points (Vivian, 2013 p 19 of 29).

- Employee was in a contract of service with his employer
- The employee was involved in an accident (within or out of the scope of work) that
- Resulted in disablement/injury or even death

If the dependants are able to prove the above points then they are entitled to compensation. Negligence on anyone is not a prerequisite to get compensation. If by any chance the deceased employee contributed to the negligence that resulted in the accident this will not prohibit him from being awarded his compensation (Vivian, 2013 p 12 of 29). The dependants of the mine employees would be able to claim under this section regardless of contributory negligence.

Some academics criticise section 35 of COIDA saying that it is unfair. This could be supported by the case of *Jooste vs. Score Supermarket Trading Pty Ltd.* 1999 2 SA 1 CC. Jooste worked as a cashier at Score Supermarket, one day she fell and injured herself at work and according to her the injuries were a result of the negligence of the employer during their the scope of work, She then instituted a claim against the employer but because of section 35 of COID she was barred from doing so. Jooste, argued in the constitutional court that the section was unconstitutional but the court thought otherwise and the case was dismissed.

Although section 35 prohibits employees from suing the employer they may possibly use section 36 because anyone who is not an employer may be sued by virtue of, section 36 deals mainly with third party claims. If independent contractors are not employees of the mine they may subsequently claim workers compensation under section 22 and may sue the mine since it is not their employer under section 36. However if the employees were not registered in terms of section 89 of COID then employees' of the independent contractor are deemed to be employees of the mine and for that reason it is contended that the mine is protected by section 35.

Under section 56 of COID which deals with additional compensations, one of two requirements are needed to claim under this section i.e. the employer was negligent or there was patent defect, however since there was no negligence from the employer or patent defect which caused the accident and the facts state that fellow employees were negligent then section 56 is not triggered and the dependants cannot claim under this section.

Employers Liability Policies

Vivian (2013 p 3 of 6) points out that the operative clause of employers' liability policy is an indemnity policy. It will indemnify the employer if the employer legally is liable to compensate the employee for claims that may be made for personal injury or death of an employee. Even though worker's compensation and employer liability policy are similar, employer's liability responds to claim of employee to employer only. Employer liability policy requires the employer to pay only when it is legally liable but because he is protected by section 35 he is excluded from liability meaning that it is unlikely that he can be legally liable to pay. (Vivian, 2013 p 3 of 6). Furthermore, if the independent contractor pays assessment according to section 89 of COID then the employees of the independent contractors are not deemed employees of the mine and this precludes the employers' liability policy from responding to claims from these employees. These claims would thus be dealt with by the general liability policy.

General/Public Liability Policies

According to Vivian (2013 p 13.44.54) a relationship needs to exist between a third party (dependants) and the insured (mine), this is governed by the law of delict. The operative clause of public liability policy is to indemnify the insured (mine group) which becomes legally liable to pay as the result of accidental death or bodily injury or any damage to property that happened within or out of the scope of business. (Vivian, 2013 p 13.44.54).

A very important exclusion that Vivian (2013 p 13.49.54) deals with is one about liability to persons employed by the insured. He reasoned this is an exception because this liability can possibly be covered by other policies such as COIDA or by employer's liability policy. If the contractors are not registered by their company and are deemed employees of the mine it means that they cannot sue because of section 35 of COID and because of the exclusion of this policy will not indemnify the insured. If they are registered they may claim they are not employees and the exclusion will not apply and the general liability policy will respond.

Conclusion

Section 35 of COIDA (1993) prohibits any employee from claiming for compensation from the employer since provision has been made to deal with such claims in terms of COIDA. So if an independent contractor's dependant is deemed an employee of the mine then they may only claim under section 22 of COIDA. Nor can they get additional compensation under

section 56 since no employer negligence contributed to the accident, this also includes the actual mine workers. If the dependants are not employees of the mine but only of the contract company they may claim under section 22 and use section 36 to claim as a third party. The general/public liability policy will respond as a third party unless they are seen as employees because this is excluded.

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