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Fwd: South African Court Cases

From: **Joost Kooijmans** (kooijmans@ilo.org)
Sent: Mon 8/24/09 6:01 AM
To: Charles Bolland (bolland98403@hotmail.com); Charles Bolland (g1ipec@ilo.org)

>>> "Faldielah Khan" <Faldielah.Khan@uct.ac.za> 19/08/2009 08:31 >>>
Dear Mr Kooijmans

In response to your fax sent to Prof Kalula last month, below find some cases which might be of assistance.

I am sorry that I cannot be of more assistance.

Regards.

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pls see attached case

Van Wyk obo Van Wyk v Daytona Stud Farm (Pty) Ltd & others
[2007] JOL 20730 (C)

Reported in
(Butterworths)
Not reported in any LexisNexis Butterworths printed series.

Case No:
9668 / 02

Judgment Date(s):
28 / 07 / 2006

Hearing Date(s):
None Indicated

Marked as:
Unmarked

Country:
South Africa

Jurisdiction:
High Court

Division:
Cape of Good Hope

Judge:
Louw J

Bench:
WJ Louw J

Parties:
Sarah van Wyk obo Waronice van Wyk (P); Daytona Stud Farm (Pty) Ltd (1D), Daytona Stud (2D), Martiens Abrahams (3D)

Appearance:
Adv JA van der Merwe, Sohn Gordon Martins Branford (P); Adv B Acker SC, Barkers Attorneys (D)

Categories:
Action Civil Substantive Private

Function:
Confirms Legal Principle

Key Words
Delict Personal injury Claim for damages Compensation for Occupational Injuries and Diseases Act 130 of 1993 Applicability Employment of children Prohibition against Effect of prohibition
Mini Summary
The plaintiff's minor daughter was injured in an incident which occurred while she was being conveyed on a trailer drawn by a tractor driven by the third defendant on the first respondent's farm. The child was at the time, working in the orchard with other children who lived on the farm.
In a special plea to the plaintiff's claim for damages, the first respondent contended that the child was an employee at the material time, and that the injury sustained by her was an occupational injury as defined in section 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, and that by virtue of the provisions of section 35(1) of the Act, the plaintiff was precluded from recovering any part of the damages claimed from the first defendant.
Held that the first and third defendants were both negligent in allowing the children to be conveyed on the tractor in a manner which was dangerous. The court declined to attribute any contributory negligence to the child as she lacked the maturity to know any better.
Turning to the question of whether the plaintiff's claim against first defendant was excluded by the provisions of section 35(1), the court questioned whether the child was capable of and did conclude a valid contract of service and, secondly whether, if she did conclude a contract of service, such contract was void ab initio by reason of the statutory prohibition against the employment of a child under the age of 15 years or school-leaving age. Those questions were answered in the affirmative, with the result that the special plea could not be upheld.
The defendants were thus declared liable for the plaintiff's proven damages.
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LOUW J
[1]At approximately 12:30pm on Monday, 20 December 1999, Waronice van Wyk (who is also known as Land and to whom I shall refer by that name), a minor child who was born on 24 November 1988, was injured in an incident which occurred while she was being conveyed on a trailer drawn by a tractor driven by the third defendant on the farm Daytona Stud ("Daytona") in the district of Ceres ("the incident"). As a result of the injuries she sustained, Land's right leg was amputated below the knee.
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[2]At the time of the incident, the first respondent was the owner of Daytona where it carried on farming operations, including a horse stud and the production of fruit. The third defendant was at the time employed by the first defendant as a tractor driver. The incident occurred while Land and other children who live on Daytona were working in an orchard on Daytona.
[3]As a result of the incident and the injuries sustained by Land, the plaintiff, who is Land's mother, instituted an action for damages against the defendants. She sues both in her personal capacity and on behalf of Land,

alleging that the first defendant is liable for such damages on two bases. First, that the first defendant was causally negligent in failing to ensure that proper procedures were in place to provide adequate supervision over the children to ensure their safety while working in the orchard. Secondly, that it is vicariously liable for the negligent conduct of the third defendant, who it is alleged, was causally negligent in a number of respects and thus personally liable for the damages suffered by Land and the plaintiff.

[4]The first defendant has raised a special plea and the defendants have, in addition, pleaded to the merits. The first defendant avers in its special plea that at the time of the incident, Land was an "employee" of

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the first defendant; that the injury sustained by her was an "occupational injury" as defined in section 1 of the Compensation for Occupational Injuries & Diseases Act 130 of 1993 ("COIDA"), and that by virtue of the provisions of section 35(1) of COIDA, the plaintiff in her personal capacity and in her capacity as mother of Land is precluded from recovering any part of the damages claimed from the first defendant.

[5]It is common cause that the first defendant did institute a claim on behalf of Land under the provisions of COIDA and that she has been awarded and has been paid some compensation in terms of COIDA. The final determination of the amount of the award of compensation is still pending.

[6]The plaintiff has filed a replication to the special plea, to which the first defendant has filed a rejoinder. Further issues have been raised in particulars sought and answers provided in terms of rule 37(4). The plaintiff denies that Land was an "employee" as defined in COIDA for two reasons. First, that as an 11-year-old child at the time, she could not validly conclude a contract of employment, to which the defendants retorted that the contract of employment was concluded with the assistance of the plaintiff as the natural guardian of Land, or was expressly or impliedly ratified by the plaintiff. Secondly, that, in terms of

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section 43(1)(a) of the Basic Conditions of Employment Act 75 of 1997 ("BCEA"), it is illegal and a criminal offence to employ a child who is under 15 years of age and that any contract of employment Land may be found to have entered into with the first defendant was, as a result, void ab initio. A further point raised is that reliance on COIDA, in the circumstances of this case, is against public policy. During argument it was further contended that the first defendant's reliance on the provisions of COIDA offended against the provisions of section 28 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

[7]The defendants' plea on the merits denies that the first and third defendants were causally negligent and, in the alternative, avers that Land was causally negligent and that if the claim should succeed, the damages recoverable by the plaintiff and Land fall to be apportioned.

[8]In terms of an order made by Traverso DJP on 3 February 2006, I am required at this stage to determine only the issues raised in the special plea, the issues relating to the defendants' and Land's negligence and any apportionment of liability for such damages as the plaintiff may in due course prove to be recoverable.

[9]At the time of the incident Land was 11 years and 1 month old. She lived on Daytona with her mother and maternal grandparents

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and had then just successfully completed Grade 5 at the Morrisdale Primary School in Ceres. She is presently (2006) in Grade 12. She is and has always been a good student. She has been chosen to further her studies next year (2007) at the University of the Western Cape.

[10]At the time of the incident at the end of 1999, Daytona and Aurora, a neighbouring farm, were farmed by the first defendant as one unit. During 1997 and 1998, Land worked with other children during the fruit picking season in the apple and pear orchards on Aurora. In September 1999, the ownership of the two farms was split up. Although Land's grandfather thereafter worked on Aurora, the family remained living on Daytona until early in 2000.

[11]The events of Monday, 20 December 1999 are largely common cause. Since the previous Monday, 13 December 1999, the workers on Daytona were engaged in harvesting the nectarine crop in one of the orchards on the farm. Adult workers removed the fruit by hand from the trees, while the children who had been engaged to help, followed the adults from tree to tree holding small wooden crates, referred to in evidence as "kissies", into which the adult pickers

placed the nectarines. As soon as the kissies were full, the children carried the kissies to two flatbed trailers drawn in tandem by a tractor driven by third defendant in
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the rows between the trees as the picking progressed. Adults, referred to as "klassers", stood on the trailers and received the kissies from the children and handed each child an empty kissie in return. The trailers were equipped with narrow steps running the length of both sides of the trailers with gaps for the wheels of the trailers. The worker stood on these steps when delivering and receiving the fruit. The klassers inspected the fruit, removing all the bruised and damaged fruit (uitskot), which was placed in separate kissies. The remaining fruit was placed in large wooden crates, each holding 25 kissies, on the flatbed trailers. The front trailer held three crates and the second trailer held two crates. Once all the crates were full, the third defendant drove the tractor drawing the two trailers out of the orchard, through a gate onto a tarred farm road to the fruit store which is situated behind the main house on the farm. After offloading the fruit, the third defendant returned with the tractor and trailers to the orchard to pick up the next load of fruit.
[12]The children worked a full day on the Monday and half days on the Tuesday and the Thursday of the week that commenced on 13 December 1999. On the Friday, at the end of that week, the children were each paid R27, being R15 for the full day and R6 for each half day. The money was placed in envelopes that were handed out to the
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children by Mr Karel Jooste ("Jooste"), the foreman, who supervised the workers in the orchard.
[13]Jooste, who was 69 years old at the time of the trial, was born and grew up on a fruit farm near Prince Alfred Hamlet in the Ceres district. He has worked on fruit farms in the district from the age of 9 years and has been working on Daytona for about 50 years, having moved there when he was approximately 15 years old. For the last approximately 10 years, he has been the foreman on Daytona and has supervised the workers in all their activities except the work related to the stud horses. He is a figure of authority and respect among the workers, both by reason of his position as foreman and because he is the pastor of a local church. He is known to them as "pastoor". He grew up with the common practice on fruit farms in the area of using children to work during the picking season. As the foreman on Daytona, Jooste knew all the workers and their families on the farm and he recruited the older and bigger children on the farm to work during the picking seasons December for nectarines and January/February for pears and apples. The work differed according to the fruit being picked. To pick the nectarines the kissies were used. To pick apples and pears, the workers used bags to gather the fruit and the children followed them to pick up the fruit under the trees that had dropped in the process of picking.
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[14]The incident occurred soon after Jooste, who was present and supervised the work in the orchard on Monday, 20 December 1999, had announced the lunch break at approximately 12:30pm and while the workers were on their way to their homes a couple of minutes walk away from the orchard. At the same time, the third defendant was on his way to offload a full load of fruit. It is common cause that an adult worker known to the children as ant Hannie had received permission to ride on the trailer up to the gate with uitskot fruit she wanted to take home. Louise Jooste, who was 14 years old at the time (20 years old at the time of the trial), was one of the children who worked in the orchard that morning. She testified that ant Hannie had asked her to help with the uitskot. Louise Jooste remained standing on the trailer and rode with ant Hannie up to the gate. Geraldine Roberts, who was 19 years old at the time (25 years old at the time of the trial), also remained standing on the trailer and according to her Rosie Beukes, another one of the adult workers, also got onto the trailer. There were therefore four persons (one of whom was a child) on the two trailers being drawn by the tractor as it made its way through the orchard and up to the gate leading from the orchard into the tarred farm road. The tractor stopped at the gate and ant Hannie alighted with her uitskot fruit, it was at this point that Land and six of the seven boys who had been working in the orchard that morning, joined Louise Jooste,
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Geraldine Roberts and Rosie Beukes on the two trailers for a ride closer to their homes. In the result, there were eleven people, of which nine were children, standing on the narrow steps on both sides of the two trailers as the

tractor moved off from the gate and turned right into the tarred farm road. Land stood on the step on the left side of the second trailer (which is also the shorter of the two trailers). She stood facing the crate and held on to the upper rim of the crate with both hands. It is common cause that the road was not in a good condition. The surface was uneven and there were potholes in the road. According to Land the tractor and trailers were moving quite fast, she stated that the third defendant "het bietjie vinnig gery" and Geraldine Roberts testified that the third defendant "het taamlik vinnig gery". It is clear that Land began to feel unsafe as the trailer moved along the uneven road. She felt that her foothold on the step was not good. In an attempt to improve her position on the step, she attempted a perplexing manoeuvre. She let go of her left hand and attempted to turn around so that her back would be towards the crate. What happened next is a tragedy. Her right foot slipped off the front edge of the step and was caught between the wheel of the trailer and the edge of the step. Her right foot and leg were drawn down and under the wheel of the trailer. She hung on with her left hand and called out. The other passengers became aware of her plight and shouted to the third defendant to stop. It took some time for them to attract his attention (one

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of the boys threw a peach at him) and in the process Land's right foot was held down by the wheel and scraped on the far surface of the road. Geraldine Roberts, who was travelling on the front trailer looked and saw that she was in trouble. S stopped. Land was sitting on the road with her right leg under the wheel of the trailer and her left leg stretched out. The third defendant reversed the tractor to release her right leg. Land was taken to the home of Salomien where her mother was working as a domestic servant. From there she was taken by ambulance to the Ceres hospital, whereafter she was immediately referred to the Tygerberg Hospital in Bellville where her right leg was amputated below the knee a few days later.

[15]Lande's grandfather, Mr Nicolaas Bezuidenhoudt, saw her for the first time after the incident on Christmas day, 25 December 1999 in the Tygerberg Hospital. She was not in a state to explain what had happened during the incident. He saw her on two further occasions in the hospital. She did not explain what had happened. It was only approximately three months later that she spoke about the incident. It was suggested during argument that in testifying in court, Land was to some extent reconstructing the events of the day because of statements in the records of Tygerberg Hospital that she was injured when she fell off, or was run

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over by a tractor and because she is reported in the records of the physiotherapist at Tygerberg Hospital, to have stated on 4 January 2000 that she did not remember how she was injured. In my view, very little weight can in the circumstances of this case, where a young girl had gone through a very traumatic experience be given to these statements as well as to the averments in the plaintiff's pleadings that (as an alternative) Land had been injured by the tractor as opposed to the trailer. It is not clear at all what the source of the information is. It is not unlikely that the ambulance personnel spoke to persons who were at the scene and in this manner had got the wrong impression of what had occurred. It is noteworthy that during the course of the evidence some of the witnesses inadvertently spoke of Land having fallen off the tractor. It is also known that sometimes medical staff take over the history of an event from earlier statements in the file and that an incorrect statement is in this manner perpetuated in the medical documents and sometimes end up in the pleadings.

[16]Land had ridden on the trailers before the incident when she worked on Aurora during 1997 and 1998, but then only in the orchard as they moved from point to point where they were required to work. She had also ridden on the trailer on two of the three days during the week of 13 December 1999. She denied that they were told by Jooste not to ride

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on the trailers. She says that Jooste did supervise the work in the orchard and that on the morning of the first Monday when they started work, he did no more than to explain what they were required to do, although, not surprisingly, she could not remember all the details of what Jooste had told the children. She says that if Jooste had forbidden the children to ride on the trailers, she would have obeyed. The other witnesses were vague about what Jooste said about riding on the trailers. This is not surprising since Jooste himself did not testify that he gave a general warning that the workers were not to ride on the trailers. According to him, he warned the children not to step on the narrow

steps on the side of the trailer while it was in motion when they were delivering the nectarines to the adults working on the trailers. He explained that it was especially dangerous as they would be holding out the kissie to the adult to take it from them. He did not testify that he had warned the children that they were allowed to ride on the trailers only in empty crates. He did state, however, that as the workers were breaking up for lunch on 20December, he announced that they were all to walk home and that no one was allowed to ride on the trailers. He concedes that when he made this announcement, the workers were spread out over three rows in the orchard. He clearly intended everyone to hear his announcement and while he may be certain in his own mind that they would all have heard his announcement, he obviously could not say that they all did hear the announcement. After he had

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made the announcement, Jooste did not stay behind to make certain that his instruction was carried out by all, especially by the children. He and some of the workers moved off through the orchard towards the end of the orchard where the gate is situated in order to use the narrow bridge over a stream to walk home. The tractor and trailers in tow first moved in the opposite direction to get out of the row of trees it was in at the time. It then proceeded around the far end of the orchard and then back up alongside the orchard towards the gate at the top end of the orchard. Land testified that she did not hear Jooste's announcement. I am satisfied that it is more probable that Land did not, as she testified, hear the announcement. Neither did the third defendant hear the announcement, it seems, because he did not tell the children to get off the trailers when they got on at the gate. Land testified that she moved through the trees towards the gate where she and the other children got onto the trailers. Although she does not know whether the third defendant had seen them get onto the trailer at the gate, she thinks that he was aware of them because they were talking amongst themselves and he must have heard them. I am satisfied that the third defendant was aware of the children on the trailer as he moved off from the gate. First, because it is extremely unlikely that he would not have been aware of the children on the trailers and, in any event, because it was put to Land in cross-examination that the third defendant would testify that he had told them

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to get off because they were not allowed to be on the trailers. In the event, the third defendant was not called to give evidence. None of the other witnesses testified that he had told them to get off. There is no suggestion that the third defendant was not available to testify. Although it was so stated in cross-examination, on the evidence, he did not warn them to get off. It is consequently common cause during the course of argument that no one told the children to get off once they got onto the trailer at the gate.

[17]In the circumstances, Mr Tobias correctly conceded in argument that both the first and third defendants were negligent and that their negligent conduct caused or contributed to the injuries sustained by Land. It is common cause that it was very dangerous for the children to travel on the trailers while standing on the steps. The first defendant' was negligent because he failed to ensure that proper procedures were in place to provide adequate supervision over the children to ensure their safety. Mr Tobias also, correctly in my view, conceded that the first defendant is vicariously liable for the negligent conduct of the third defendant. It is common cause that at the time, he was doing the first defendant's work and was pursuing its ends. It was not suggested that because he did so negligently, he was not acting within the course and scope of his employment with the first defendant. The third defendant

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was negligent in driving the tractor off from the gate while the children were standing on the trailers. He should have ensured that they were not on the trailers. In addition, he drove the tractor in a manner that was dangerous to the children, given the state of the road.

[18]I turn to consider whether Land was causally negligent. The first question is whether Land was culpae capax at the time of the incident. She was then 11 years and 1month old and is rebutably deemed to have been culpae incapax.1 The test is a subjective one and must relate to the facts of the particular incident. While it is common cause that it was dangerous for a con the trailers that she did not at the time think of it as being dangerous. She also stated that no one had warned her about the dangers of doing so. No one had previously been injured on the farm in a similar fashion. The more plausible and likely conclusion is that, as the youngest child working in the orchard, she followed

the lead of the older children. Did she have the insight, maturity and intelligence to appreciate the danger and resist the impulse to follow the older children? Land's father died when she was very young and she grew up in the home of her grandparents and although her mother, the plaintiff, has since married another man and has moved away to live with her husband some
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distance away in the Koue Bokkeveld, Land has remained living with her grandparents. Mr Bezuidenhoudt has, for intents and purposes, been in the position of her father. He describes her as a conscientious and obedient child. He considered her general conduct at the time to be appropriate to that of a child of the age of 11 years she played the games of a child, but, at the same time, she impressed with the amount of time and attention she gave to her school homework. The records of the schools that Land attended show that she was at the time and still is a good student. She impressed me as a bright young woman who is facing adversity with fortitude. She did break down briefly while reliving the incident during the course of testifying, but soon regained her composure. The evidence shows her at the time, to have been an intelligent child for her age. She has always been and remained hardworking, conscientious and obedient. Land had in previous years travelled on the trailers, but then only in the crates. On the fateful day Land joined the older children and adults on the trailers and while travelling along the uneven road, soon found herself in danger of being dislodged. Despite her background of growing up and working on a fruit farm and her undoubted intelligence, it has not been shown that she was aware, in the circumstances of this case, of the danger involved in riding on the steps of the trailer and of attempting the manoeuvre to improve her hold. She thought that by changing her position on the trailer in the manner she attempted to do
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would somehow improve her hold. This is a strong indication of the fact that she was not able to appreciate the nature and the real cause of the danger in which she found herself, nor what she should do to remedy the situation. It has not been shown on a balance of probability that she was possessed of the maturity and insight and thus the capacity based on experience and knowledge to appreciate the danger involved and to resist following the lead of the others to ride on the steps of the trailer and once it materialised, to deal with the precarious situation when she found herself in danger of being dislodged. In my view, the defendants have not discharged the onus resting on them to prove that Land was culpae capax at the time of the incident. It follows that the question of whether she was herself guilty of contributory negligence, does not arise.
[19]I turn to consider whether the plaintiff's claim against first defendant is excluded by the provisions of section 35(1) COIDA which provides:
"35Substitution of compensation for other legal remedies
(1)
No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."
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Section 1 of COIDA provides the following definitions of relevant terms:
"In this Act, unless the context indicates otherwise
'accident' means an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee;
'employee' means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes
(a)
a casual employee employed for the purpose of the employer's business;
(b)
...
(c)
...
(d)
... in the case of an employee who is a person under disability, a curator acting on behalt of that employee
(the balance of the provisions are not relevant)

'employer' means any person, including the State, who employs an employee, and includes
(the balance of the provisions are not relevant)
'occupational injury' means a personal injury sustained as a result of an accident;
'person under disability' means a minor ..."
[20]It appears to be clear that if Land was an "employee" as defined, she did suffer an "occupational injury" because the incident does appear to have been an "accident" as defined, thus ruling out any claim by her or her mother under the provisions of section 35(1). It is not necessary to decide the
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latter two issues since, in my view, the first defendant's special plea falters on the first issue, namely on whether Land was an "employee" of the first defendant, that is whether she had entered into or worked under a contract of service with the first defendant. This involves two questions. First, whether she, as a minor, was capable of and did conclude a valid contract of service and, secondly whether, if she did conclude a contract of service, such contract is void ab initio by reason of the provisions of section 43(1) of the BCEA which prohibits the employment of a child under the age of 15 years or school-leaving age.
[21]The evidence in regard to the first of these questions, is as follows. Jooste testified that he approached the parents of some of the children living on the farm for permission to employ them. He did not approach Land's mother because he did not think that Land was old and physically big enough and therefore, that she was suitable to work in the orchard. Land testified that she had heard from two friends approximately one week before 13 December 1999 that work was available for children in the orchard and that they were going to work in the orchard. Although she had not been approached to work, Land reported for work on Monday, 13 December. Her version tallies with the evidence of Jooste that Land presented herself for work unsolicited. He says that although he thought she was older than 11 years, she
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appeared rather small physically and that he did not think that she should be engaged to work. However, she was quite adamant and insisted that she wanted to work and he relented and agreed to allow her to work. It is common cause that Land commenced working pursuant to this agreement between her and Jooste and that it was clearly understood between them that she would be paid for the work. Since the plaintiff was not involved in the conclusion of this agreement, a contract of employment was not concluded with Land's mother on her behalf. There was some debate during the course of argument as to the legal effect of a contract entered into by a minor unassisted by a guardian and whether such "limping" contract2 constituted a "contract of service" within the meaning of section 1 of COIDA. It is not necessary, in my view, to decide this issue because I have come to the conclusion that after Land commenced working on Monday, 13 December 1999, the plaintiff (Land's mother and guardian) consciously consented to and/or ratified the conclusion of the contract of employment.3 Land confirms that it came to her mother's knowledge before the incident, that she was working in the orchard and that her mother did not forbid her to continue working. Since she had already worked during the previous two years, it is unlikely that Land's mother (who did not testify) would have objected to her working in the orchard during December 1999. Land's mother was
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probably not aware prior to the incident of exactly what amount the children would be paid during that season. She would have known, however, from the previous two years that Land would be paid the going rate for pocket money. In addition, the plaintiff received the money due to Land on the Friday after the incident. It follows that Land's mother, with knowledge of the terms of the contract, either impliedly approved and authorised Land's employment or ratified her contract of employment.
[22]I turn to the second issue raised by the special plea, namely whether the contract of employment is void by reason of the provisions of section 43(1) of the BCEA. Section 43(1) forms part of Chapter 6 of the Act in which chapter is set out the provisions that prohibit the employment of certain children and the provisions that prohibit forced labour. Section 43 of BCEA provides as follows:
(C4)
Prohibition of employment of children
(1)
No person may employ a child
(a)

who is under 15 years of age; or
(b)
who is under the minimum school-leaving age in terms of any law, if this is 15 or older.
(2)
No person may employ a child in employment
(a)
that is inappropriate for a person of that age;
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(b)
that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.
(3)
A person who employs a child in contravention of subsection (1) or (2) commits an offence.
46Prohibitions
It is an offence to
(a)
assist an employer to employ a child in contravention of this Act; or
(b)
discriminate against a person who refuses to permit a child to be employed in contravention of this Act."
The provisions that "no person may employ a child" (the contravention of which is an offence) and the separate provision that it is an offence "to assist an employer to employ a child" does not expressly refer to the underlying contract of employment. The verb "employ" is used only in sections 43 and 46 of COIDA, but is not defined in section 1. The Concise Oxford Dictionary4 gives the following meaning to the verb employ "1, give work to (someone) and pay them for it make use of" This meaning, as well as its subsense, suggests that to employ someone means more than to conclude a contract of employment. Section 1 of the Act gives definitions of associated words and reads as follows:
"1Definitions In this Act, unless the context indicates otherwise
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'employee' means
(a)
any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
(b)
any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have a corresponding meaning."
It is prohibited is for a person to employ a child below 15 years or under school leaving age. An offence is committed by the person who employs the child and anyone who assists the employer in doing so. These offences carry penalties of a fine or imprisonment not exceeding three years.5 The child who is employed does not commit an offence. Employment is defined in wide terms, but the definition appears to require more than the mere conclusion of a contract of employment. The conclusion of a contract of employment per se, is not expressly prohibited. Section 43(1) is a penal provision and must be interpreted restrictively. By virtue of the definition of employee, employment and employed, it may therefore be argued that the employer and the person who assists the employer, commit the offences only once the child works and receives, or is entitled to receive, any remuneration or the child in any manner assists in carrying on or conducting the business of an employer. Thus, it may be
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argued that, to conclude the contract of employment, does not contravene the prohibition and that the prohibited employment occurs only once the child starts to work. I assume, without deciding that such a restrictive interpretation is correct. Against this background, I consider the question whether on a proper interpretation of the enactment, the contract of employment in terms of which the prohibited employment occurs, is itself void. This requires one to establish the intention of the Legislature. The position in this regard [has] been stated as follows by Corbett JA in Swart v Smuts:6
"Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in stryd met 'n statutre bepaling of met verontagsaming van 'n statutre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien Standard

Bank v. Estate Van Rhyn, 1925 AD 266; Sutter v. Scheepers, 1932 AD 165; Leibbrandt v. South African Railways, 1941 AD 9; Messenger of the Magistrate's Court, Durban v. Pillay, 1952 (3) SA 678 (AD); Pottie v. Kotze, 1954 (3) SA 719 (AD), Jefferies v. Komgha Divisional Council, 1958 (1) SA 233 (AD); Maharaj and Others v. Rampersad, 1964 (4) SA 638 (AD)). Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word 'n handeling wat in stryd met 'n statutre bepaling verrig is, as 'n nietigheid beskou, maar
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hierdie is nie 'n vaste of onbuigsame rel nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie. Daar is in hierdie verband verskeie indiciae en interpretasierels wat van diens is om die bedoeling van die Wetgewer vas te stel. Dit is bv. beslis, na aanleiding van die bewoording van die wetsvoorskrif self, dat die gebruik van die woord 'moet' (Engels 'shall'), of enige ander woord van 'n gebiedende aard, 'n aanduiding is van 'n nietigheidsbedoeling; en dat 'n soortgelyke uitleg van toepassing is in gevalle waar die wetsbepaling negatief ingeklee is, d.w.s. in die vorm van 'n verbod. Selfs in sodanige gevalle kan daar ander oorwegings wees wat desondanks tot 'n geldigheidsbedoeling lei. As 'n strafbepaling of soortgelyke sanksie ten opsigte van 'n oortreding van die statutre bepaling bygevoeg word, dan ontstaan natuurlik die vraag of die Wetgewer dalk volstaan het met die oplegging van die straf of sanksie dan wel daarbenewens bedoel het dat die handeling self as nietig beskou moet word. Soos Bowen, L.J., die saak in 'n Engelse gewysde, Mellias and Another v. The Shirley and Freemantle Local Board of Health, (1885) 16 QBD 446 te bl. 454, gestel het 1971 (1) SA p. 830
'... in the end we have to find out, upon the construction of the Act, whether it was intended by the legislature to prohibit the doing of a certain act altogether, or whether it was only intended to say that, if the act was done, certain penalties should follow as a consequence'.
In hierdie verband moet die doel van die wetgewing, en veral die kwaad wat die Wetgewer wou bestry, in oorweging geneem
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word. Aandag moet ook gewy word aan die volgende vraag: verg die verwesenliking van die Wetgewer se doel die vernietiging van die strydige handeling, of sal die oplegging van die straf of sanksie daardie doel volkome verwesenlik? Die volgende uitlating van Hoofregter Fagan in Pottie v Kotze, supra te bl. 726H, is hier tersake:
'The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the legislature wishes to prevent.'
Nog 'n belangrike oorweging wat hier ter sprake kom is die feit dat nietigheid soms groter ongerief en meer onwenslike gevolge ('greater inconveniences and impropriety' soos die gewysdes dit stel) kan veroorsaak as die verbode handeling self."
[23]Against the background of these principles, I return to section 43(1) which forbids any person to employ a child below 15 years of age or under the school leaving age. While the validity of the contract of employment in terms whereof a child is employed is not expressly stated to be void, it is generally accepted that conduct which is forbidden by an enactment is in itself void, although this is not an invariable conclusion. To determine whether the Legislature intended the contract underlying such conduct to be void, regard must be had to the wording of the enactment, the purpose and import of the enactment and the mischief it is intended to
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combat. In this case, the prohibition is expressed in the negative "no person may employ". This is in itself an indication of an intention to render the contract in terms whereof the child is employed void and unenforceable. The long title of the BCEA states that the enactment was passed:
"To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith."

Section 2 of the BCEA spells out the purpose and primary objects of the enactment.
"2Purpose of this Act
The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are
(a)
to give effect to and regulate the right to fair labour practices conferred by s 23(1) of the Constitution
(i)
by establishing and enforcing basic conditions of employment; and
(ii)
by regulating the variation of basic conditions of employment;
(b)
to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation."
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A primary object of the BCEA is to give effect to Conventions of the International Labour Organisation ("the ILO"). These conventions include7 the ILO Minimum Age for Admission to Employment Convention which requires ratifying states to"
"... pursue a national policy designed to ensure the effective abolition of child labour and progressively raise the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons."
And the Worst Forms of Child Labour Convention which calls upon ratifying states to:
"... take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency."
The question is whether the Legislature intended the imposition of a criminal sanction to be sufficient to achieve the purpose and objects of the BCEA and whether it is intended that the contract underlying the employment itself be void. A consideration in this regard is whether holding the contract of employment to be valid would promote, rather than avoid, the situation the Legislature intended to prevent.
[24]Mr Acker, on behalf of the defendants, submitted that it is not necessary to hold the contract of employment itself to be void in order to
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achieve the legislative purpose and objects. To the contrary, he submitted, holding the contract itself to be void, would lead to "greater inconvenience and impropriety"8, "serious inequities" and "capricious effects ... [and] ... inequitable results as between the parties concerned".9 He submitted that the provisions of section 43(1) were enacted for the protection and for the benefit of the children referred to therein and contended that, in prohibiting the employment of children under the age of 15 years or under the minimum school leaving age, the Legislature could not have intended to deprive them of the benefits conferred upon them under COIDA and thereby to differentiate between the children younger than and those older than 15 years or the minimum school leaving age. With reference to paragraphs [12][15] of the judgment in Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening),10 he drew attention to the benefits derived from the provisions of COIDA. The principal benefits he referred to are the right COIDA affords an employee to compensation for pecuniary loss and for the payment of medical expenses irrespective of whether the employer was negligent. In addition, under the provisions of COIDA, there is no prospect of a proportional reduction of damages based on the contributory negligence of the employee, which would be the case in an action for damages under the common law. The right to
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payment of medical expenses and to compensation for pecuniary loss under COIDA is exercised through an administrative process and does not require the claimant to resort to litigation under the common law, a process which could be expensive and time consuming. Under COIDA, compensation at an increased level under the provisions of section 56 of COIDA up to the claimant's actual pecuniary loss may be awarded if the employer was negligent. Further, because the compensation is paid out of fund, a claim under COIDA does not involve the inherent risk arising from an action instituted under the common law that the employer may not be able to pay the amount of the damages awarded to the successful plaintiff. Mr Acker further submitted that, should the contract of employment itself be void, it would put the child below 15 years or under school leaving age at a disadvantage

compared with the position of children above that age. Unlike the older child, the younger child would be deprived of the right to compel the employer to comply with the provisions of the contract of employment and to sue for the payment of his agreed remuneration or for any other benefits he may be entitled to under his employment. In addition, the younger child would have no protection against unfair dismissal under the Labour Relations Act 66 of 1995.
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[25]I agree with Mr Van der Merwe, who appeared on behalf of the plaintiff, that there are also disadvantages to the system under COIDA. The compensation recoverable in terms of COIDA excludes general damages and is generally limited to compensation calculated on the basis of the current income of the employee. It also excludes, by virtue of the provisions of section 35(1), any recourse against the employer by way of an action in terms of the common law. Finally, the disadvantages of holding the contract to be void are ameliorated by the provisions of section 27, which read:
"27Special circumstances in which the Director-General may make award
If in a claim for compensation in terms of this Act it appears to the Director-General that the contract of service or apprenticeship or learnership of the employee concerned is invalid, he may deal with such claim as if the contract was valid at the time of the accident."
[26]I have been referred to a number of decisions in which the validity of contracts of employment was considered in the context of other enactments prohibiting the employment of the employee concerned. In Lende v Goldberg11 this Court held that a contract of employment concluded in contravention of the express prohibition to employ specified persons in section 10bis of the Black (Urban Areas) Consolidation Act 25 of 1945 was, on a proper interpretation of the to be a nullity ab initio. The judgment was criticised by academic writers.12 In my view, it would serve no real purpose to discuss the ratio and merits of this judgment and of the judgments of the Industrial Court in Norval v Vision Centre Optometrists13 and Dube v Classique Panelbeaters14 to which I was referred. Each case must be decided on its own facts in the light of the principles laid down by the Appellate Division in the cases referred to above.15
[27]In my view, the purpose and objects of BCEA and of the provisions of section 43(1) cannot effectively and completely be achieved if the underlying contract to the employment of a child which is prohibited in terms of that provision, is not itself void. The recognition of such a contract as valid would, in my view, bring about the very situation which the prohibition seeks to prevent. Although [it] is both illegal and an offence to employ the child, holding the contract of employment of the child to be valid renders it capable of enforcement. The enactment clearly seeks to protect the child below the age enacted, but, as is clear from the purpose and primary objects of the Act, it seeks to do more. One of the objects is the introduction of effective measures to combat the scourge of
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the practice of child labour and to ensure the effective abolition of child labour and to provide measures to secure the prohibition and elimination of the worst forms of child labour. The enactment seeks to go beyond the interest of the individual child and the benefits that such child might in the circumstances of a particular case derive from a particular contract of employment entered into by it. The achievement of the objects and purpose will, in my view, be achieved only if the contract itself is void ab initio and is not enforceable by any one of the sides, that is, by neither the employer nor the child.
[28]It follows that the special plea does not succeed.
[29]The first and third defendants were causally negligent and are consequently liable for such damages as the plaintiff may in due course prove that she and Land suffered as a result of the incident and the injuries Land received.
[30]In the result, I make the following order:
1.
The first defendant's special plea is dismissed.
2.
The defendants are declared to be liable to the plaintiff for such damages that she may prove in due course to have been suffered by her in her personal capacity and by her child, Waronice van Wyk
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(without any apportionment), as a result of the injuries sustained by Waronice van Wyk in the incident which took place on Daytona farm on 20 December 1999.
3.
The defendants are ordered to pay the plaintiff's cost of the trial to date.

Footnotes
1
Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A); Eskom Holdings Ltd v Hendricks 2005 (5) SA 503 (SCA) [also reported at [2005] 3 All SA 415 (SCA)Ed].
2
Edelstein v Edelstein NO & others 1952 (3) SA 1 (AD) at 13FH.
3
Belinda van Heerden et al Boberg's Law of Persons and the Family (2ed) at 78894.
4
10th Revised Edition, 2002.
5
S 93 of the BCEA.
6
1971 (1) SA 819 (A) at 829C830C.
7
D du Toit et al Labour Relations Law: A Comprehensive Guide (4ed) 2003.
8
Swart v Smuts, supra, at 830C.
9
Pottie v Kotze 1954 (3) SA 719 (A) at 727B, EF.
10
1999 (2) SA 1 (CC) [also reported at [1998] JOL 4158 (CC)Ed].
11
1983 (2) SA 284 (C).
12
Kaganas (1983) 4 ILJ 254 and Jordaan (1984) 5 ILJ 61.
13
[1995] 2 BLLR 135 (IC).
14
[1997] 7 BLLR 868 (IC) [also reported at [1997] JOL 1503 (IC)Ed].
15
Pottie v Kotze, supra, and Swart v Smuts, supra.

Faldielah Khan
Administrative Assistant
Institute of Development and Labour Law
Room 6.23 Kramer Law Building Campus, University of Cape Town
Private Bag X 3, Rondebosch, 7701
Tel: +27 21 650 5634
Fax: +27 21 650 5660 or 086 523 7008
Email: faldielah.khan@uct.ac.za