THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case no: 506/2013

In the matter between:

LIESL-LENORE THOMAS **APPELLANT**

and

THE MINISTER OF DEFENCE AND MILITARY VETERANS **RESPONDENT**

Neutral citation: *Thomas v Minister of Defence* (506/2013) **[**2014] ZASCA 109 (11 September 2014)

Coram: Mpati P, Lewis, Cachalia and Mbha JJA and Gorven AJA

Heard: 22 August 2014
Delivered: 11 September 2014

Summary: An employee of the Western Cape Provincial Department of Health is not precluded by s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 from claiming damages sustained by her as a result of slipping and falling on stairs under the control of the Minister of Defence and Military Veterans. Different entities of the State are to be recognized as such under the Act.

ORDER

On appeal from: Western Cape High Court, Cape Town (Saldanha J sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel where two counsel were employed.

2 The order of the trial court is set aside and replaced by the following order:

'The special plea is dismissed with costs.'

JUDGMENT

Gorven AJA (Mpati P, Lewis, Cachalia and Mbha JJA concurring)

[1] The crisp issue in this appeal is whether, for the purposes of s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the COIDA), the words 'including the State' so qualify the word 'employer' that all persons employed by any component of the State are regarded as having a single employer or whether those words simply indicate that persons employed within the component parts of the State are brought under the umbrella of the COIDA. The first of these is the contention of the Minister of Defence and Military Veterans (the Minister) in resisting a claim for damages by Dr Thomas.

[2] The factual matrix on which this appeal was argued is a simple one. Dr Thomas, who is the appellant, says she suffered damages arising from a bodily injury. This was caused by her falling down some stairs at 2 Military Hospital. At the time, she was employed as a medical registrar. Her employment arose

from an offer in a letter typed on the letterhead of the Western Cape Department of Health signed by the Chief Executive Officer of that department. A written contract of employment followed this offer. In that contract the employer is reflected as being the 'Western Cape Provincial Government: Department of Health'. At the time of her fall she had been seconded to work at 2 Military Hospital. These premises were under the control of the Minister. After her fall, Dr Thomas lodged a claim with the Western Cape Provincial Department of Health under the COIDA.[1]

[3] In addition to lodging that claim, Dr Thomas claimed damages from the Minister and one other in the high court. A special plea was entered by the Minister. In it, the Minister contends that Dr Thomas is not entitled to claim such damages because of the provisions of s 35(1) of the COIDA. This section provides as follows:

'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.'

[4] The argument of the Minister is that, for the purposes of the COIDA, the State must be regarded as a single employer. It is submitted that the component parts of the State are not themselves regarded by the COIDA as employers. Therefore, in the action in question, Dr Thomas is suing her employer and s 35(1) precludes such an action. The case of Dr Thomas is that the Western Cape Provincial Department of Health is itself an employer for the purposes of the COIDA.

[1]The COIDA repealed and replaced the Workmen's Compensation Act 30 of 1941 (as amended).

[5] The special plea was adjudicated as a separate and initial issue in the action. The high court upheld the special plea, finding that the State is a single employer for the purposes of s 35(1), and dismissed the claim of Dr Thomas with costs, including the costs of two counsel. It is this order against which Dr Thomas appeals, with the leave of that court.

[6] In *Jooste v Score Supermarket and Trading (Pty) Ltd (Minister of Labour intervening)*,[2] the Constitutional Court held that s 35(1) passed constitutional muster, dealing with it as follows:

'The Legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The scheme is financed through contributions from employers. No doubt for these reasons the employee's common-law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.'[3]

[7] In arriving at this conclusion, the Constitutional Court dealt with the purpose of the COIDA saying the following:

'The purpose of the Compensation Act, as appears from its long title, is to provide compensation for disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. The Compensation Act provides for a system of compensation which differs substantially from the rights of an employee to claim damages at common law.'[4]

Having stated this to be the purpose, the position under the common law was contrasted with that under the COIDA. Part of the rationale was that the COIDA does not only limit the rights of employees, it accords them other rights. An example of this is that under the COIDA, if the employee qualifies for compensation, no negligence need be proved unlike under the common law

[2]1999 (2) SA 1 (CC).
[3]Paragraph 17.
[4]Paragraph 13.

action for damages for injury. Where negligence is a factor, however, increased compensation can be applied for.[5] Further, in addition to compensation under the COIDA, an employee retains the right to sue third parties which can include a co-employee.[6] All that s 35(1) seeks to achieve is to limit the liability of an employer to amounts claimable under the COIDA for all matters which fall within its ambit.

[8] As mentioned, s 35(1) precludes an action by an employee against an employer. It is thus necessary to determine what is meant by the word 'employer' in that section. Majiedt AJ, in the majority judgment in *Cool Ideas 1186 CC v Hubbard & another*,[7] succinctly set out the approach to interpretation as follows:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[8]

In addition, this court has said that the process of interpretation is objective and '[t]he "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[9]

[9] Section 1 of the COIDA defines employer as meaning 'any person, including the State, who employs an employee…'. It is the words 'including the

[5] Section 56(1).
[6] Section 36(1).
[7] 2014 (4) SA 474 (CC) para28.
[8] References omitted.
[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 (references omitted).

State' on which the Minister bases the special plea. The COIDA does not define what is meant by 'the State'. The definitions therefore do not themselves assist in resolving whether the State or a component of the State, such as a provincial department or provincial government as a whole, is regarded as an employer under s 35(1) of the COIDA.

[10] In *Holeni v Land and Agricultural Development Bank of South Africa*[10] this court considered whether 'the Land Bank [can] be considered to be 'the State' as referred to in s 11*(b)* of the Prescription Act 68 of 1969'.[11] Navsa JA held that '[t]he State as a concept does not have a universal meaning. Its precise meaning always depends on the context within which it is used.'[12] What is clear from this is that the term 'the State' may have different meanings in different contexts and in different legislation. This is borne out by various cases which need not be dealt with here.

[11] It is therefore appropriate to deal with the context within which this provision, and the definition of employer, is located. The provisions of the COIDA provide the immediate context and must now be considered against the backdrop of its purpose.

[12] As already indicated, the COIDA provides for 'a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment'.[13] To this end, it requires employers to pay assessments into a fund. There is a category of employer which is exempt from doing so. The COIDA refers to this category as an employer individually liable. This is dealt with in s 84. If an employee of such an employer becomes entitled to

[10]2009 (4) SA 437 (SCA).
[11]Paragraph 10.
[12] Paragraph 11.
[13]*Jooste loc cit.*

compensation, the employer individually liable must pay the compensation.[14] Section 84(1) reads as follows:

'No assessment in favour of the compensation fund shall be payable in respect of employees —

(*a*) in the employ of—

(i) the national and provincial spheres of government, including Parliament and provincial legislatures;

(ii) a local authority which has obtained a certificate of exemption in terms of section 70 (1) (*a*)(ii) of the Workmen's Compensation Act and has notified the Director-General in writing within 30 days after the commencement of this Act that it desires to continue with the arrangements according to the said certificate of exemption; and

(iii) a municipality contemplated in section 10B of the Local Government Transition Act, 1993 (Act No. 209 of 1993), to which exemption has been granted in terms of subsection (2);

(*b*) whose employer has with the approval of the Director-General obtained from a mutual association a policy of insurance for the full extent of his potential liability in terms of this Act to all employees employed by him, for so long as he maintains such policy in force.'[15]

[13] It goes without saying that employers individually liable are, first and foremost, employers as defined in the COIDA. They constitute a subset of employers singled out for specific treatment. Subsection 84(1)(*a*)(i) makes it clear that certain employees are 'in the employ of the national and provincial spheres of government, including Parliament and provincial legislatures'. Subsections 84(1)(*a*)(ii) and (iii) make it clear that there are persons who are 'in the employ of' certain local authorities or municipalities.[16] The latter are therefore regarded as employers by these subsections.

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[14]Section 29. Otherwise, it is paid from the compensation fund.

[15]Section 84(1)(*b*) deals with a second group of employers individually liable. This subsection provides for employees:

'whose employer has with the approval of the Director-General obtained from a mutual association a policy of insurance for the full extent of his potential liability in terms of this Act to all employees employed by him, for so long as he maintains such policy in force.'

Their presence in subsection (1)(*b*) does not have any direct bearing on the interpretation arising in this appeal and nothing more will be said about them.

[16]It must be borne in mind that the COIDA was promulgated during the transition to democracy. This is why local authorities from the pre-democratic era which had been exempted under the Workmen's Compensation Act are referred to as well as municipalities brought into being under the Local Government Transition Act 209 of 1993.

[14] A number of consequences flow from this conclusion. At the very least, the former local authorities which are exempted are seen to be different employers to the municipalities which are exempted. By parity of reasoning, the local authorities and municipalities which are not exempted, and are therefore not employers individually liable, are also employers under the COIDA. They are liable to make contributions to the compensation fund and their employees are compensated from the fund. They are also entitled to apply for exemption from making contributions in terms of s 84(2).[17] This leads to the ineluctable conclusion that each local authority and each municipality is considered to be an individual employer under the COIDA. In addition, each of these is a different employer to 'the national and provincial spheres of government, including Parliament and provincial legislatures'.

[15] It can therefore hardly be contended that all the entities referred to in s 84(1)(*a*) must be regarded as a single employer in the form of the State. To add grist to the mill, s 88(1) requires 'the *employers* individually liable'[18] to make payments towards the administration of the COIDA. This suggests a number of employers individually liable rather than the State as a single entity. This is also true of s 31(1) which allows the Director-General to order 'an employer' individually liable to provide security. If the State is regarded by the COIDA as a single employer, none of these entities could be regarded as 'an employer' for this purpose; the reference would be to 'the employer'. It is also hardly conceivable that the State, as a whole, could be ordered to provide security.

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[17]This reads as follows:
'The Director-General may upon application exempt any local authority referred to in subsection (1) *(a)* (ii) or any municipality referred to in subsection (1) *(a)* (iii) from the obligations of an employer in terms of this Act on such conditions as he or she may think fit.'
[18]My emphasis.

[16] I did not understand counsel for the Minister to submit that entities within the sphere of local government are not part of 'the State'. In fact, the heads of argument filed on behalf of the Minister make the submission that 'the State as an employer in terms of [the COIDA] includes all spheres of government'. The Minister further accepts that, under the Constitution, 'government is constituted as national, provincial and local spheres of government'.[19] Apart from government, the Constitution provides for Legislative authorities at national and provincial levels.[20] These are also specifically referred to in s 84(1)(*a*)(i). It is clear from the Constitution that local government, which is given legislative and executive powers,[21] is considered to be part of the State. The Constitution thus provides that the legislative and executive authorities in each of the spheres of government form part of the State.

[17] If local government is part of the State, because each municipality and local authority is regarded as a separate employer, this can only mean that 'the State' is not regarded by the COIDA as the employer of the employees working in all of its component parts. This, to my mind, is in itself dispositive of the point at hand.

[18] It is fair to say, however, that the thrust of the submissions made on behalf of the Minister was directed at the proposition that persons employed at national and provincial levels must be regarded as being employed by a single employer referred to as the State. During the hearing, the inconsistency of excluding local government from the State was not pertinently raised. In the light of this, it is appropriate to consider whether the phrase in s 84(1)(*a*)(i) 'the national and provincial spheres of government, including Parliament and provincial legislatures' refers to a single employer or more than one employer.

[19]Section 40(1) of the Constitution.
[20]Chapter 4 deals with Parliament, Chapter 5 with the President and National Executive and Chapter 6 with provincial legislatures and executives.
[21]Section 151(2).

[19] At the level of grammar, it is possible to construe s 84(1)(*a*)(i) as referring to a single employer when it is considered in isolation. However, other provisions in the COIDA militate against such a construction. The key provision in this regard is s 39(2) which reads as follows:

'For the purposes of subsection (1) an employer referred to in section 84 (1) (*a*) (i) means, in the case of—

(a) the national and provincial spheres of government, the respective heads of departments referred to in section 7(3) of the Public Service Act, 1994 (Proclamation No. 103 of 1994);

(b) Parliament, the Secretary to Parliament;

(c) a provincial legislature, the Secretary of the provincial legislature in question.'

The word 'respective' is of crucial importance here. It means that the heads of departments within the executive are not lumped together as a single employer. If 'an employer' is a head of department, employees working in one department are not employed by another department, whether at national or provincial level, or by the State as a whole. In addition, subsections (*b*) and (*c*) provide that Secretaries to Parliament and the provincial legislatures, which are included in s 84(1)(*a*)(i) as part of 'the national and provincial spheres of government', are different employers to the executive authorities at the national and provincial levels.

[20] This interpretation is buttressed by the reference, in s 39(2) of the COIDA, to s 7(3) of the Public Service Act (the PSA). Section 7(3) of the PSA provides that each department shall have a head with the designation in the relevant schedules to the PSA. The schedules list each department and their heads at national and provincial levels. At national level, the heads of these departments are in most cases designated as Directors-General. At provincial level, the heads are all designated as 'Head' followed by the name of the provincial department. In the case of the Western Cape Province, that for the department of health is designated 'Head: Health'.

[21] It is thus clear that each head of each department in 'the national and provincial spheres of government' in s 84(1)(*a*)(i) is 'an employer' for the purposes of the COIDA. In addition, an employer who is a head of department in the national and provincial spheres of government differs from an employer in the case of Parliament which is, in turn, different to an employer in the case of the nine provincial legislatures. The COIDA thus envisages multiple employers in each of the various spheres of government as opposed to treating the State as a single employer.

[22] As I have said above, for Dr Thomas to succeed in this appeal, it is only necessary to find that the phrase 'the national and provincial spheres of government' does not refer to a single employer under the COIDA. It would ordinarily not be necessary to find that, within each of these spheres, there are multiple employers in the form of the heads of departments. However, in arriving at the conclusion that the phrase does not refer to a single employer, it has been necessary to make the finding as to multiple employers on each of the national and provincial levels.

[23] In summary, therefore, the significance of s 84(1) read with s 39(2) is as follows. A clear distinction is drawn between the heads of the listed departments who are the employers in the national and provincial spheres of government. These are distinguished from the employers in the legislative bodies in these spheres. These are in turn distinguished from the employers in the sphere of local government. If, for the purposes of the COIDA, all of these entities were regarded as a single employer, s 84(1) would read very differently. All that it would need to say is that the State, regardless of whether it is the national, provincial or local sphere and regardless of whether it is the executive or

legislative entity, would not be assessed for the purposes of the COIDA in respect of its employees. It does not say this.

[24] A submission made on behalf of the Minister was that, because s 197(4) of the Constitution requires provincial employees to belong to a single public service, the State as a single entity is their employer. It is so that they are required to belong to a single public service. This does not mean, however, that all members of the public service are employed by a single employer. Section 197(4) of the Constitution accords to provinces power to carry out all the actions usually associated with employers, including 'recruitment, appointment, promotion, transfer and dismissal'. In *Premier, Western Cape v President of the Republic of South Africa*,[22] the Constitutional Court dealt with a challenge to national legislation which sought to restructure the public service as a single entity, including the provincial spheres. The court held that s 41 of the Constitution[23] was not infringed saying the following:

'Functionaries in the provincial administration of the public service are appointed by the provincial government, are answerable to it and can be promoted, transferred or discharged by it. The right of the Premier and Executive Council to co-ordinate the functions of the provincial administration and its departments has been preserved.'[24]

[25] Although *Premier, Western Cape* stops short of specifically saying that a provincial government, or head of department in a provincial government, is the employer of public servants within its administration, various sections of the PSA make this clear. These include sections 14, 14A, 15(3), 16A(2)(*a*), 16B(4) and 17(2) which provide that different departments, whether at national or provincial level, are employers of members of the public service. These sections variously refer to 'an employee of the department' or 'the employee of the

[22]1999 (3) SA 657 (CC).
[23]Particularly s 41(1)(*e*) which requires all spheres of government to 'respect the constitutional status, institutions, powers and functions of government in another sphere'.
[24]Paragraph 91.

department’. The PSA is thus consistent with my interpretation of what is meant by an employer under the COIDA and destructive of the submission to the contrary made on behalf of the Minister.

[26] All of this means that, for the purposes of the COIDA, and in particular s 35(1), the employer of Dr Thomas was not the State as a single, overarching entity, but the Head: Western Cape Department of Health. It further means that s 35(1) does not find application in the action and Dr Thomas is entitled to pursue her claim against the Minister. It follows that the special plea was incorrectly upheld and her claim incorrectly dismissed.

[27] For these reasons, the conclusion arrived at by the high court is incorrect. In the result, the appeal must succeed.

The following order issues:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel where two counsel were employed.

2 The order of the trial court is set aside and replaced by the following order:

‘The special plea is dismissed with costs.’

T R Gorven
Acting Judge of Appeal

Appearances

For Appellant: M H van Heerden SC
Instructed by:

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Honey Attorneys, Bloemfontein

For Respondent: M A Albertus SC, with him R Jaga
Instructed by:
The State Attorney, Cape Town
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