REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 30085/2015

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

29/01/2019
DATE

CHJ BADENHORST AJ

In the matter between:

DE GEE, GARETH EVERISTE **Plaintiff**

and

TRANSNET SOC LTD **Defendant**

J U D G M E N T

Summary

Occupational injury - section 35 (1) of the Compensation for Occupational Injuries and Diseases Act ('COIDA').
Employee injured on his way to work on 48th floor of Carlton Centre, a building owned by his employer, Transnet, when elevator boarded by employee fell 7 floors.
The question arising in a stated case is whether in terms of COIDA, at the time when the accident occurred, the employee was within the sphere or area of his employment.

South African and foreign case law reviewed in which the same question was considered and guidelines extracted but recognizing that there is no bright-line test. Each case must be decided on its own facts.
In the present matter the facts provided in the stated case do not establish that plaintiff was acting within the course and scope of his employment when the accident occurred.
Defendant's special plea dismissed.

BADENHORST AJ:

[1] This is another case where the question to be determined is whether an accident arose out of and in the course of an employee's employment. In terms of Section 35 (1) of the Compensation for Occupational Injuries and Diseases Act ('COIDA'), an employee who suffers an "o*ccupational injury*" has no action for the recovery of damages against his/her employee. In terms of the definitions in COIDA, an "occupational injury" is one that is sustained as a result of 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. The phrase "arising out of and in the course of an employee's employment" is common to COIDA and preceding legislation and also appears in similar legislation in foreign jurisdictions which explains why the Courts in this and other jurisdictions have frequently been required to determine the answer to the same question.

[2] The accident which caused the plaintiff (employee's) injury occurred when the lift in which he was travelling fell about 7 floors. At the time of the accident plaintiff was *en route* to his office in a high rise building where he is employed by defendant, who is the owner of the building.

[3] I was informed, when this matter was called, that the parties had reached agreement on a stated case and that it would be convenient for those issues to be

separated. Counsel accordingly requested the Court to issue a directive in terms of Rule 33 (4).

[4] After considering the application for separation of issues, I directed that the questions as set out in the stated case be separated and that all further proceedings be stayed until such questions have been disposed of.

[5] The agreed stated case reads as follows:

"*1.*

Introduction

The Plaintiff instituted this action against the Defendant for damages arising from personal injuries he sustained whilst travelling in a lift at the Carlton Centre. The Defendant raised a Special Plea that such claim is statutorily barred as the Defendant is indemnified by section 35 of Act 130 of 1993 ("COIDA"). The parties request the adjudication of this Special Plea.

2.

Facts agreed upon

2.1 The Defendant is TRANSNET SOC LTD a state owned company with limited liability duly incorporated and registered according to the laws of the Republic of South Africa with its principal place of business situated at 35th Floor, Carlton Centre, 150 Commissioner Street, Johannesburg.

2.2 The Defendant was at all relevant times an employer recognised and registered as such in terms of COIDA, neither exempt nor individually liable and not a mutual association as contemplated in COIDA, and was an employer insured in terms of COIDA.

2.3 The Plaintiff is GARETH EVERISTE DE GEE, a major male, born on 10 December 1982.

2.4 The Plaintiff at all relevant times was an employee of the Defendant and employed by the Defendant as an Executive Support Manager at the 48th Floor of the Defendant's Carlton Centre Offices and the Plaintiff's working hours were weekdays from 07h30 am until 16h00 pm and the Plaintiff was accordingly an employee contemplated in section 1 of COIDA. In terms of his contract of employment, the Plaintiff could work flexi-hours and on the day in question he was required to come in early to prepare for a meeting.

2.5 The Defendant was at all relevant times the owner of the Carlton Centre.

2.6 The incident occurred whilst the Plaintiff was standing (in) a lift in the Carlton Centre (being elevator 017) travelling up to the Plaintiff's office situated on the 48th floor, when it fell about 7 floors on Monday 12 January 2015 before 06h25 am and the Plaintiff in the process sustained an injury to his lumbar spine.

2.7 The injuries suffered by the Plaintiff are the sort of injuries covered by COIDA.

2.8 As soon as the Defendant on 12 January 2015 at 06h30 am was notified of the incident, the Defendant duly and timeously complied with its obligation in terms of COIDA to report the incident within the 7 day period, more specifically did so on 14 January 2015 and thereafter received the incident report number 419273 from the Compensation Commissioner and thereafter printouts of the incident report particulars and status of the claim at the Compensation Fund. Copies of the relevant documentation completed and submitted by the Defendant as well as same received in this regard, are attached as annexures "TP1", "TP2", "TP3" and "TP4" to the Special Plea and are hereby incorporated herein.

3.

Question of law in dispute
Does section 35 of COIDA prohibit the Plaintiff's claim herein against the Defendant?

4.

Parties' contentions

4.1 Defendant: The incident occurred whilst the Plaintiff was at the premises owned by the Defendant and during the course and scope of employment of the Plaintiff. The Plaintiff thus was at the relevant and material times an employee and was acting within the course and scope of his employment with the Defendant. For the injuries suffered by the Plaintiff no claim lies against the Defendant either in terms of section 35(1) or section 56 of COIDA. In the premises, the Plaintiff was an employee covered in terms of COIDA and cannot thus claim against the Defendant as is stipulated in section 35 of COIDA. Therefore the Plaintiff's claim against the Defendant in this matter is either misdirected or ill-conceived, but definitely statutorily barred as the Defendant is indemnified by section 35 of "COIDA".

4.2 Plaintiff: This was not an injury on duty arising out of or in the course of Plaintiff's employment and when the incident occurred Plaintiff was not executing his contract of employment but was on his way to his place of work. "

[6] Section 35 (1) of COIDA provides as follows, in relevant part:

> "***35. Substitution of compensation for other legal remedies***. – *(1) No action shall lie by an employee ... for the recovery of damages in respect of any occupational injury ... resulting in the disablement ... 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 ....*"

[7] The following definitions in s 1 of COIDA are applicable:

7.1. '*Occupational injury*' is defined as '*a personal injury sustained as a result of an accident*' and '*accident*' is defined as '*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*';

7.2. '*Disablement*' means '*temporary partial disablement, temporary total disablement, permanent disablement or serious disfigurement, as the case may be.*'

[8] An action against an employer is accordingly excluded by Section 35 (1) of COIDA under the following circumstances relevant in the present case (which must all be established on the facts for the defendant's special plea to succeed):

8.1. the plaintiff is an employee of the defendant (or a dependant of such employee);

8.2. the plaintiff is claiming damages in respect of an "occupational injury", which means a personal injury sustained as a result of an accident arising out of and in the course of an employee's employment.

[9] It is common cause that the first requirement for exclusion under Section 35 (1) is satisfied on the basis of the agreed facts, in that plaintiff was "*at all relevant times ... an employee of the (d)efendant*" – see paragraph 2.4 of the stated case.

[10] The contentious issue is whether the accident arose out of and in the course of plaintiff's employment.

[11] In MEC for Health, Free State v DN 2015 (1) SA 182 (SCA), the case of a State employed paediatrician who was raped by an intruder while she was on duty at the Pelonomi Hospital, the SCA proposed in paragraph [31] of its judgment that the relevant question to be asked when applying Section 35 (1) of COIDA is: "*whether the wrong causing the injury bears a connection to the employee's employment. Put differently, the question that might rightly be asked is whether the act causing the injury was a risk incidental to the employment.*" But the SCA pointed out in the same paragraph that *"(t)here is of course, as pointed out in numerous authorities, no bright-line test. Each case must be dealt with on its own facts.*"

[12] In the same judgment the SCA remarked that:

> "[11] Courts in this country and elsewhere have over decades grappled with the enduring difficulty of determining, for the purposes of similar preceding and present legislation, whether an incident constitutes an accident and arose out of and in the course of employment of an employee. They also discussed the policy behind employee-compensation legislation and the approach to be adopted in interpreting the legislation. In McQueen v Village Deep GM Co Ltd 1914 TPD 344 De Villiers JP at 347, in relation to the prevailing employee-compensation scheme, said the following at the commencement of the judgment:
>
> 'The most difficult question which arises in the present case is whether the facts as stated by the magistrate can be said to constitute an accident within the meaning of the law.' De Villiers JP took the view that it was perfectly plain that an 'accident' in the legislative context was not an accident in the ordinary

acceptance of the word, which, in general terms, is 'an effect which was not intended'. He had regard to developments in English law in which an 'accident' for the purposes of the legislation there in force had been given an extended meaning beyond an 'unlooked for mishap' and 'an untoward event which is not expected or designed'. He recorded in his judgment that our then Workmen's Compensation Act derived directly from the English Act and, as discussed above, considered that it ought to be interpreted beneficially for an employee. De Villiers JP went on to the next critical question: whether it could be said that the injury arose out of the employee's work? With reference to Mitchinson v Day Brothers [1913] KB 603 (CA), he reasoned that what fell to be decided is whether the event is a risk which can be reasonably held to be incidental to the employment. On that aspect he concluded as follows at 349:

'If it be such a risk, and if the injury flows from that risk, it must be held to be an injury arising out of the employment.' "

[13] A wealth of precedent exists in the decisions of our Courts and elsewhere, as pointed out by the SCA, which offers guidance for determining the question whether, at the time of the accident, the employee was acting "*within the orbit of his employment*". This is a phrase coined by Mr Justice Vieyra in Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk 1965 (2) SA 193 (T) at 196F. In that decision and the earlier one in Human v Workmen's Compensation Commissioner 1956 (2) SA 461 (T) by Ramsbottom J (as he then was) with whom Hill J agreed, contain comprehensive reviews of the relevant legal principles. Both these cases were decided under the Workmen's Compensation Act 30 of 1941 in terms of which the course and the scope of an employee's employment arise as a decisive question.

[14] Based on the authorities cited in these two leading decisions, the following guidelines can be distilled to determine whether, at the time of an accident, the employee was acting within the orbit of his employment:

14.1. The general principle is stated as follows in St. Helen's Colliery Co v Hewitson, 1924 A.C. 59 at p 70 by Lord Atkinson:

"The difficulty of reconciling all the authorities on this question as to the course of a workman's employment arises, I think, from the omission on the part of some of the Courts to frame some test which must be satisfied in order to bring an accident within the course of a workman's employment. . . . I myself have been rash enough to suggest a test - namely, that a workman is acting in the course of his employment when he is engaged 'in doing something he was employed to do.' Or what is, in other and I think better words, in effect the same thing - namely, when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word 'employment' as here used covers and includes things belonging to or arising out of it."

And after considering a number of cases LORD ATKINSON continued, at pp. 75 and 76: -

"I think the words 'arising out of' suggest the idea of cause and effect, the injury by accident being the effect and the employment, i.e. the discharge of the duties of the workman's service, the cause of that effect, and that the words 'in the course of his employment' mean while the workman is

doing what he is employed to do, i.e. discharging the duties to his employer imposed upon him by his contract of service. The word 'employment' in this connection must cover and include the things necessary and incident to the employment . . .".

14.2. It is pointed out in Human's case at p 469B that the general test stated by LORD ATKINSON was approved by the House of Lords in Newton v Guest, Keen and Nettlefolds, 19 B.W.C.C. 119, and has been applied in numerous cases in England and Scotland. The test was adopted and applied in Leemhuis and Sons v Havenga, 1938 T.P.D. 524 per Schreiner J (as he then was) at p. 526 where he referred to St. Helen's Colliery Co. v. Hewitson and said:

"There can in my opinion, be no doubt that we should take advantage of and adopt the lucid exposition of the law contained in the case which has been repeatedly applied in the same tribunal. I propose merely to refer to the judgment of LORD ATKINSON."

After quoting the passage from LORD ATKINSON'S judgment at p. 75 of the report, SCHREINER, J., continued: -

"Although the test is the duty of the employee to the employee this does not prevent 'things necessary and incidental to the employment' being covered by the language. So, if an employee is accidentally injured while eating his lunch on his employer's premises he may not strictly be performing any duty at the precise moment, but what he was doing is not separable from his work and the accident is deemed to have arisen in the course of the employment. Where, however, the employee is proceeding to or from his place of work the journey is dissociated from the

employment unless in travelling the employee was fulfilling an obligation to his employer imposed by the contract of service. The mere fact that the employer has provided the means of transport because he is obliged to do so in terms of the contract is not material if there is no obligation on the employee to use such means. The effect of the English cases is not correctly given in Ackron's case, 1912 T.P.D. 401 at p. 406, the decision of course being anterior to that of Hewitson, supra. Unless the employee would be breaking his contract of employment if he travelled by some other means he is not, in utilising the means provided by the employer, 'doing something he was employed to do' or 'doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service'."

14.3. The Atkinson test received attention, again, in Blee v London and North-Eastern Railway Co [1937] 4 All ER 270 (HL) in which the decision of the Court of Appeal was reversed by the House of Lords and that of a County Court Judge was restored. Lord Atkin in his speech at p 273 stated the general rule laid down in Hewitson's case and after referring to that and to other cases said:

'The question is whether the employment had begun in the sense of the decisions I have cited. The respondents say that this is the ordinary case of a man making his way to work. It matters not what the particular hours are. Normally he would have to present himself at 7.20 a.m. On emergency he has to present himself also at 8 p.m., 10 p.m., or whatever the emergency time may be. The contractual position remains the same. The employment does not begin until he has reached his work. On the

other hand the appellant says that whatever be the true result in other cases, in this case there was evidence upon which the Judge could find that the workman was 'doing something that was part of his service to his employer'; something 'in discharge of a duty to his employer directly imposed upon him by his contract of service'; was 'actually engaged in the performance of his contract of service'; was engaged 'in the discharge of a contractual duty to the employer.' In my opinion the case is not free from doubt; but I have come to the conclusion that there were special facts in this case in the special duty to obey the emergency call at any hour and the fact that the workman was paid from the time he left the house so that the time was his master's time and he was under an obligation to proceed with reasonable dispatch by the reasonably shortest route, which afforded evidence from which the Judge could infer that from the time the workman started from his house he was 'actually engaged in the performance of his contract of service.' It does not appear that the learned and very experienced arbitrator . . . in any way misdirected himself; and as there was evidence to support his finding I think it should stand. This decision has no general application to cases where workmen are employed to work at hours which differ from their normal hours of labour, though they are discontinuous. Any such case must be decided on its own facts."

LORD MAUGHAM said at p 274:

"The employment of the workman on the occasion of the accident was on emergency work. There is no evidence as to its precise nature, and it might of course have been work of great urgency and importance. The

fact that the payment of the workman was calculated from the time when he left home is not, I think, alone a sufficient reason for holding that his employment began at that time; but in the case of an emergency call it is, I think, a sufficient ground for taking the view that he was bound as from the moment when he left his house to proceed with all reasonable expedition by the nearest available route to the place to which he had been summoned. We can test the view of the arbitrator by supposing that a superior officer of the company happened to meet the workman loitering on his way to the place or diverging from the proper route. Could not the officer properly have ordered the workman to proceed direct to the place to which he has been called? The circumstance as to payment affords, I think, a decisive answer in the affirmative. The case of a workman going to his ordinary daily work is plainly quite different."

LORD ROCHE said at 274 - 275:

"A workman may be acting in the course of his employment or, put more shortly, he may be on duty, when in a public street. Ordinarily he is not so acting when proceeding to the place where his work proper begins. But he may be so if he is proceeding to that place by a prescribed route or by a prescribed means of conveyance. The circumstances here are different in that neither the route nor conveyance were prescribed; but when Blee was summoned from his bed and was directed to proceed in his employers' time, for which he was paid, to Hornsey sideing, he was in my opinion bound to so proceed with all possible speed by the shortest possible route. His time was not his own. A servant carrying a message of his employer through the public streets may be on duty or in the

course of his employment while so doing. He is usually under no control exercised immediately; but ordinarily he owes a duty to his employer as to the manner in which he proceeds. He is on duty. Similarly in this case the special circumstances to which I have referred constitute, as I think, evidence to support the conclusion that the appellant was on duty at the time of the accident."

14.4. I refer to the following passages in the Human decision by Ramsbottom J:

"Dunn v Lockwood and Co., 1947 (1) A.E.R. 446, was a case in which a workman, who was employed by a firm of builders and decorators who carried on business at Margate, lived at Whitstable. He was paid as from 8 a.m., but by agreement with his employers he was allowed to travel by the 7.40 a.m. train from Whitstable which arrived at Margate at 8.15. One morning, after reaching Margate and while he was walking from the station to his work, he slipped and injured himself. The County Court Judge considered that the case was covered by Allen v Siddons (1932) 25 B.W.C.C. 350, and refused an application for compensation. The Court of Appeal reversed the decision of the County Court Judge, holding that the case fell within the principle of Blee v London and North Eastern Railway, supra. In Allen v Siddons the facts were that a workman had to be at his work at 7.30 a.m. He was paid as from 7 a.m. but like any other workman he could go to his work by any route and, by any means he chose. He was injured while on his way to work, and it was held that he was not entitled to compensation. In Dunn v Lockwood and

Co. the Court of appeal distinguished Allen v Siddons. LORD OAKSEY L.J. said:

'In my opinion, this case falls within the principle of Blee's case and the principle which has been laid down in a great number of other cases namely, that it was in the course of the workman's employment because at the time he was performing a duty which he owed to his employer by virtue of his contract. There was an element present involving the discharge of a contractual duty to the employer. The permission to use the 7.40 a.m. train, although he was to be paid from 8 a.m. and the 7.40 a.m. train only arrived at 8.15 a.m., was a permission which involved the obligation to proceed as quickly as possible to his work by the most expeditious route after he had arrived at Margate at 8.15 a.m. It was in the performance of that duty of getting from Margate station to his work as quickly as possible that the workman was injured.'

The learned Lord Justice referred to Allen v Siddons and said that in that case the workman

'had no duty to proceed by any particular route, or particular way, or at a particular pace. Therefore at the time he was injured there was no contractual obligation imposed on him.'

He continued:

'In the present case there was a contractual obligation imposed by the concession of going by the 7.40 a.m. train to go to his work as quickly as possible when he arrived at Margate station.'

MORTON L.J., who concurred, quoted the words of LORD MAUGHAM in Blee's case that I have set out above and said:

'So here, I think, it is clear that it would have been within the powers of the employers to direct the workman, if he was diverging from his route to proceed to his place of work by the most expeditious route.'

I think that the principle to be derived from those two cases is that in certain circumstances a contractual obligation may arise, without an express agreement or an order given by the employer, by which a duty is imposed upon the workman to travel by a particular route or in a particular way and as the result of which his employer is entitled to direct him during the course of his journey, and that in such circumstances the journey is made 'in the course of' the employment.

In Blee's case an important factor was that the workman had been summoned from his home to perform an emergency duty and his position was therefore similar to that of a servant who has been sent on an errand. In Dunn v Lockwood and Co. an important factor was that the workman had been given the concession of going by the 7.40 train and of arriving at his work after 8 a.m. In both cases there was the factor that the workman was paid while on the journey. The fact that the workman is being paid while he is on his journey is not in itself conclusive as was shown in Allen v Siddons. But that fact coupled with the fact that the workman was on emergency duty and had been sent for (Blee's case) or with the fact that he had been granted a concession (Dunn's case) imposed a contractual duty upon the workman to take

the most expeditious route to his work and entitled the employer to give him orders during the course of the journey."

14.5. In the Ongevallekommisaris case, Vieyra J cites the following English cases at p 196B – D:

14.5.1. Weaver v Tredegar Iron Company, (1940) 3 All E.R. 157 (House of Lords) at p. 175 C - E where Lord ROMER says:

'My Lords, in view of these cases, it must, in my opinion, be taken to have been settled by the authority of this House that, after a workman has finished his day's work and started out on his way home, his employment continues while he is traversing the premises on which he has been working and any private means of access thereto which he is entitled to use by reason only of his status as a workman, but that, unless engaged on some special errand for his employer, which necessitates his being there, his employment ceases when he reaches a place to which the public have a right of access, such as the public street. From that moment, he loses his identity as a workman, and becomes one of the general public. A similar principle, of course, applies to a workman on his way to work.'

14.5.2. Netherton v Coles, (1945) All E.R. 227 (C.A.) at p. 228 E - F, where FINLAY, L.J., says:

'Travelling to and from work is prima facie not within the course of employment.'

14.6. Vieyra J in Ongevallekommisaris then stated at 196F – 197B:

"It will be readily appreciated that normally travel to and from the premises of the employer is not within the orbit of the employment. But of course

there may be circumstances of the employment which in a particular case may lead to an opposite conclusion. Thus SCHREINER, J. (as he then was), says in the Leemhuis case, supra at p. 526:

'Where, however, the employee is proceeding to and from his place of work the journey is dissociated from his employment unless in travelling the employee was fulfilling an obligation to his employer imposed by his contract of service.'

So also Halsbury, 3rd ed., vol. 27 para. 1419, says as follows:

'The course of employment normally begins when the employee reaches his place of work. To extend it to the journey to and from work it must be shown that, in travelling by the particular method and route at the particular time, the employee was fulfilling an express or implied term of his contract of service.'

Lord ROMER in Weaver's case, supra at p. 175 H, puts it thus:

'In all cases, therefore, where a workman, on going to, or on leaving, his work suffers an accident on the way, the first question to be determined is whether the workman was at the place where the accident occurred in virtue of his status as a workman or in virtue of his status as a member of the public.'

There is a useful passage in Lord PARKER'S judgment in the same case at p. 179 H which in my view must be borne in mind:

'In some cases, no doubt, it may be helpful to consider whether the man owed a duty to his employers at the time of the accident, and indeed if duty be construed with sufficient width, it may be a decisive test, but so construed, to say that the man was doing his duty means no more than that

he was acting within the scope of his employment. The man's work does not consist solely in the task which he is employed to perform. It includes all matters incidental to that task.'

And again at p. 180 A:

'The question is not whether the man was on the employer's premises. It is rather *whether he was within the sphere or area of his employment.'*

[15] The following guidelines are distilled from the authorities to determine whether an employee was within the sphere or area of his employment when an accident occurred:

15.1. a workman is acting in the course of his employment when he is engaged *'in doing something he was employed to do'* or 'when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service';

15.2. where the employee is proceeding to or from his place of work the journey is dissociated from the employment unless in travelling the employee was fulfilling an obligation to his employer imposed by the contract of service. The mere fact that the employer has provided the means of transport because he is obliged to do so in terms of the contract is not material if there is no obligation on the employee to use such means;

15.3. the employment does not begin until the employee has reached his work, unless it is found that the workman was 'doing something that was part of his service to his employer'; something 'in discharge of a duty to his employer directly imposed upon him by his contract of service'; was 'actually engaged in the performance of his contract of service'; was engaged 'in the discharge of a contractual duty to the employer';

15.4. special facts may give rise to an obligation to proceed with reasonable dispatch by the reasonably shortest route, which may justify a finding that from the time the workman started from his house he was 'actually engaged in the performance of his contract of service';

15.5. in the case of an emergency call it is a sufficient ground for taking the view that an employee was bound as from the moment when he left his house to proceed with all reasonable expedition by the nearest available route to the place to which he had been summoned;

15.6. a workman may be acting in the course of his employment or, put briefly, he may be on duty, when in a public street. Ordinarily he is not so acting when proceeding to the place where his work proper begins. But he may be so if he is proceeding to that place by a prescribed route or by a prescribed means of conveyance;

15.7. in certain circumstances a contractual obligation may arise, without an express agreement or an order given by the employer, by which a duty is imposed upon the workman to travel by a particular route or in a particular way and as the result of which his employer is entitled to direct him during the course of his journey, and that in such circumstances the journey is made 'in the course of' the employment;

15.8. after a workman has finished his day's work and started out on his way home, his employment continues while he is traversing the premises on which he has been working and any private means of access thereto which he is entitled to use by reason only of his status as a workman, but that, unless engaged on some special errand for his employer, which necessitates his being there, his employment ceases when he reaches a

place to which the public have a right of access, such as the public street. From that moment, he loses his identity as a workman, and becomes one of the general public. A similar principle, of course, applies to a workman on his way to work.

15.9. The course of employment normally begins when the employee reaches his place of work. To extend it to the journey to and from work it must be shown that, in travelling by the particular method and route at the particular time, the employee was fulfilling an express or implied term of his contract of service.

15.10. In all cases, therefore, where a workman on going to or on leaving his work, suffers an accident on the way, the first question to be determined is whether the workman was at the place where the accident occurred by virtue of his status as a workman or by virtue of his status as a member of the public.

[16] The relevant information provided in the stated case of the place where, the circumstances in which and the time when the accident occurred is as follows:

16.1. the plaintiff was employed as an Executive Support Manager at the 48th Floor of the Defendant's Carlton Centre Offices;

16.2. the plaintiff's working hours were weekdays from 07h30 am until 16h00 pm;

16.3. in terms of his contract of employment, the plaintiff could work flexi-hours and on the day of the accident he was required to come in early to prepare for a meeting;

16.4. the incident occurred whilst the plaintiff was standing (in) a lift in the Carlton Centre (being elevator 017) travelling up to his office situated on

the 48th floor, when it fell about 7 floors on Monday 12 January 2015 before 06h25 am and the plaintiff in the process sustained an injury to his lumbar spine.

[17] The question is whether upon the true construction of COIDA and the facts in the stated case, it can be found that the accident arose out of and in the course of the plaintiff's employment as pleaded in defendant's special plea.

[18] Mindful of the guidelines, the Court must consider what the answers are to the following questions:

18.1. Was plaintiff doing something he was employed to do at the time when the accident occurred?

18.2. In travelling on elevator number 017 of the Carlton Centre to reach his office on the 48th floor of the building, was the plaintiff fulfilling an obligation to his employer imposed by the contract of service? In other words, in doing so was plaintiff 'doing something that was part of his service to his employer'?

18.3. Was elevator 017 the "nearest available route to" plaintiff's office? Or was elevator 017 the prescribed route or prescribed means of conveyance for plaintiff to reach his office?

18.4. Was there a duty imposed upon the plaintiff to travel on elevator 017?

18.5. Was elevator 017 a private means of access to plaintiff's office which he was entitled to use by reason only of his status as an employee or was that lift accessible to the general public?

18.6. In travelling on elevator 017, was plaintiff fulfilling an express or implied term of his contract of service?

[19] Plaintiff relies on Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd) 2002 (6) SA 693 (W) where the facts closely resemble what occurred in the present matter. The plaintiff in that case was employed by defendant. Her place of work was on the 7th floor of a building with a basement and eight floors. The building was fully occupied, partly by other tenants. The defendant was the owner of the building. The incident happened shortly after the end of plaintiff's working day at 16:30 on a Friday afternoon while on her way home. She had left the office suite in which she was employed and had passed through glass doors to a passage where there were three lifts alongside a stairway. The lift which plaintiff boarded went up to the 8th floor where it became stuck before it abruptly fell two floors to the 6th floor. In the process she was injured. The issue before the Court was also whether plaintiff suffered an 'occupational injury' for the purposes of Section 35 (1) of COIDA.

[20] The following passages of the Court's reasoning are instructive:

At page 699 C-F:

"[13.1] The question is whether plaintiff was within the sphere of her employment while going home and not whether she was still on a site of which the employer is the owner. (Compare the Weaver case[1], quoted in para 11(3) above at 180A), or whether the public had access.

[13.2] It would follow that an accident can happen 'in the course of employment' even if it happens at the place where everyone may be. Thus during the travel of an employee who is tasked to deliver a parcel from Johannesburg to Pretoria. It is then immaterial that the risk is higher or lower for the employee than for a member of the public who is in no way related to employment. Although I need

[1] Weaver v Tredegar Iron Co [1940] 3 All ER 157 (HL).

not comment on the correctness of the application of that approach to the facts, I think that the approach is borne out by some decisions. In Xakaxa v Santam Insurance Co Ltd 1967 (4) SA 521 (E) the plaintiff was under a duty to the employer to travel to work by specific means. In Workers' Compensation Commissioner v F A Stuart (Pvt) Ltd 1991 (3) SA 830 (ZS) the deceased was at a particular place because he was under a duty to his employer to be at the time and place where the risk prevailed. See also Ex parte Workmen's Compensation Commissioner: In re Manthe 1979 (4) SA 812 (E).

[13.3] It follows that the matter cannot be determined along defendant's line of reasoning which seems to entail that as long as plaintiff had not yet reached the street downstairs, she was not yet a member of the public and therefore something different and therefore she was there still qua employee. And whatever happens 'arises out of' that involvement. The image which I reject is that employment sticks to the employee like a giant toffee until the general public is able to bump into plaintiff. That would ignore the need to look at the duties as employee and to ask in what sense the accident arose out of employment."

And the conclusion at 700 in fin – 701C:

"It is true that, if plaintiff had not been employed in her specific capacity, she would not have been on the specific premises on the specific day just after 16:30. It is true that if she went home a minute earlier or a minute later she would perhaps not have been in the one lift which malfunctioned. The question, again inaccurately stated for the purposes of simplification, is rather whether she was in the course of going about what her employer expected from her in her capacity as employee. In this case she had already terminated her working

day, her day's involvement in doing what she was paid for (beyond merely turning up for work and staying there until permitted to leave).

[15] The finding is made that the incident to which the action relates was not an accident as intended by s 35."

[21] Counsel for the defendant's argument remained, in essence, what is contended in the stated case namely that:

"*The incident occurred whilst the Plaintiff was at the premises owned by the Defendant and during the course and scope of employment of the Plaintiff. The Plaintiff thus was at the relevant and material times an employee and was acting within the course and scope of his employment with the Defendant.*"

[22] As appears from the authorities, Defendant's observation that the incident occurred whilst plaintiff was at "premises owned by the Defendant" is not decisive for purposes of the enquiry under Section 35 (1) of COIDA – the relevant and important question is whether the injury was sustained as a result of an accident "*arising out of and in the course of an employee's employment*". Even if the accident occurred at a place which is not owned by the employer it could still give rise to an occupational injury. An example is the one given by the Court in the Rauff case, of injuries sustained by an employee in a motor car accident on a public road while he or she was driving the vehicle in the course of performing the duties of the employee.

[23] As it has been emphasized by the Courts over many years, there is no bright-line test: each case must be decided on its own facts.

[24] The facts provided in the stated case are woefully inadequate to support a finding, on the balance of probabilities, that at the time of the incident, plaintiff was acting within the course and scope of his employment.

[25] None of the following essential questions can be answered on the stated case - could plaintiff only access elevator 17 by virtue of his status as an employee of the plaintiff, for example because of an access control procedure which was in operation before elevator 17 could be accessed? Such fact would have supported a conclusion that plaintiff had entered the orbit of his employment by the time the accident occurred; similarly, did only employees (like plaintiff) have access to the 48th Floor, a fact which might also have supported defendant's special plea; since there appears to be several lifts (an inference which the Court is entitled to draw from the stated case), it would be important to know if the defective elevator 017 was used by plaintiff (as opposed to any other elevator) because only it was dedicated to an area of the building occupied by defendant or the only available one at the time when it was boarded by plaintiff; the stated case also does not provide any information as to whether the entire Carlton Centre is occupied by the defendant or whether there are tenants in the Carlton Centre who are not associated with defendant's business (and plaintiff's employment) who share the same lifts with defendant's employees.

[26] The stated case requires adjudication of defendant's special plea that section 35 of COIDA prohibits the plaintiff's claim against the defendant. The answer to this question is that the special plea must fail on the basis of the facts in the stated case, in that defendant has failed to prove on a balance of probabilities that the accident which resulted in plaintiff's injury, arose within the course and scope of plaintiff's employment with defendant. I find on the basis of the stated case that section 35 of COIDA does not prohibit the plaintiff's claim against defendant.

[27] In the result, I make the following orders:

(a) Defendant's special plea is dismissed;

(b) The answer to the question in the stated case is that section 35 of the Compensation for Occupational Injuries and Diseases Act does not prohibit the plaintiff's claim against defendant;

(c) Defendant is ordered to pay the costs.

CHJ BADENHORST AJ
Acting Judge of the High Court of South Africa,
Gauteng Local Division

APPEARENCES

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For the defendant:	L T SIBEKO, SC
Instructed by:	MFINCI BAHLMANN INC
Date of hearing:	5 December 2019
Date of judgment:	29 January 2019