IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 15790/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

11/6/2019
DATE

SIGNATURE

In the matter between:

B.E. MSIZA PLAINTIFF

and

ASOLUTIONS t/a ADVOCATE SOLUTIONS (PTY) LTD DEFENDANT

JUDGMENT

NEUKIRCHER J:

1. In this matter the pleadings set out the following facts:

1.1. that on 7 December 2015, at around 08h45 the plaintiff arrived at the defendant's premises to report for duty, opened the main gate and entered the premises, which is situated in Centurion;

1.2. that whilst in the premises, the plaintiff was attacked by three dogs belonging to one Johan Engelbrecht;

1.3. that the defendant was grossly negligent by allowing employees to work in an unsafe working environment in the presence of loose dogs;

1.4. that the employer/defendant is by law required to ensure that the working environment/conditions are safe for the employees to work;

1.5. that, as a result of the attack the plaintiff sustained certain injuries and as a result she demanded damages from the defendant for pain and suffering, trauma and medical expenses.

2. The defendant has filed a plea in response to the plaintiff's allegations. Amongst its various allegations, the following special point of law emerged:

"12.2. ... the defendant pleads that in any event the

plaintiff has no claim at all or in fact against the plaintiff (sic)[1] under the following circumstances:

12.2.1. During and at the time of the incident, the plaintiff was acting within the course and scope of her employment when attending at Johan Engelbrecht's house/premise;

12.2.2. In the premises, the provisions of the Compensation for Occupational Injuries and Deceases (sic) Act (130 of 1993) ("the Act") are applicable;

12.2.3. Section 35(1) of the Act provides

'no actions 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 employees' 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

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1 Which is clearly a typographical error and should read "*the defendant*".

disablement.'

12.2.4. As a result, the plaintiff has (sic) precluded from claiming damages in this court as a result of the alleged injury sustained during and arising out of her employment with the defendant; and

12.2.5. The plaintiff's recourse lies within the provisions of the Act."

3. There is no replication on this issue at all.

4. On 5 May 2019, Rabie J granted the following order:

"1. That the question whether section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 applies as a result of which the plaintiff is precluded from claiming damages from the defendant be determined separately;

2. That the remainder of the issues between the parties be stayed and postponed sine die; ..."

5. The matter came before me in the trial court on 7 June 2019 on the separated issue alone.

6. Mr Van der Merwe, who appears for the defendant, informed me that the parties had prepared an extensive list of common cause issues and issues in dispute. The relevant portions of that document[2] read as follows:

> *"1.4. That the parties entered into a written contract of employment – internship programme on 14 September 2015;*
>
> *1.5. That the terms and conditions contained in the written contract of employment – internship programme (the contents thereof) correctly reflect the agreement of employment and will be considered prima facie proof thereof;*
>
> *1.6. That the plaintiff was bitten by dogs on the property of Mr Johan Engelbrecht situated in Centurion ("the premises") on 7 December 2015 at approximately 08h45 ("the incident");*
>
> *1.7. That the dogs belonged to Mr Johan Engelbrecht;*
>
> *1.8. That the plaintiff's presence on the premises was authorised whereas:*

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2 Which are an addendum to the minutes of the second pre-trial signed on 30 May 2019 by plaintiff and 3 June 2019 by defendant

1.8.1. *the plaintiff had been temporarily relocated to the premises to work there in accordance with the terms and conditions of the written contract of employment – internship programme;*

1.8.2. *The plaintiff attended Work in Place Learning ("WIL") at the premises from approximately four weeks prior to the incident;*

1.9. *The premises was not accessible to the public in general;*

1.10. *The plaintiff attended the premises solely for the purposes of complying with the written contract of employment – internship programme;*

1.11. *The premises was considered the plaintiff's place of work at the time;*

1.12. *The plaintiff sustained injuries as a result of the incident;*

1.13. *The plaintiff received medical treatment for the injuries so sustained.*

2. *Issues in dispute:*

2.1. *Whether the plaintiff was within the sphere or area of her employment vis-à-vis the defendant at the time of the incident.*

2.2. *Whether the injuries so sustained by the plaintiff are considered occupational injuries as contemplated in the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ("the Act").*

2.3. *Whether section 35(1) of the Act applies as a result of which the plaintiff is precluded from claiming damages from the defendant.*

2.4. *Whether the plaintiff and other employees of the defendant were issued with access codes or not."*

7. With this in mind, the defendant assumed the *onus* and the duty to begin and **Mr Johannes Petrus Engelbrecht** was called. His evidence was that:

7.1. he is a subcontractor of the defendant and that he manages and trains the interns who work for the defendant. The plaintiff was employed by the defendant for a period of 12 months from 1 August 2015 and her

working hours during the week were from 08h00 until 17h00;

7.2. the interns employed by the plaintiff may have to work at premises other than the defendant's actual premises;

7.3. he had been working on a project and the plaintiff had asked to be relocated to work on the project with him – she had sent him an e-mail to this effect and he had agreed and so the defendant relocated the plaintiff to work at his office in Centurion;

7.4. his office is on the same property as his residence, i.e. it is a residential property with only one access point via a gate. The training facility is at the front of the main house;

7.5. the gate is electronic with pedestrian access. One either enters a pin-code which allows the gate to open for pedestrian access or if the remote control is used, the gate opens for motor vehicle entry;

7.6. each intern had a key-code which they would enter on the keypad on the gate to gain access to the premises – there was no other method of entry for them;

7.7. the gate closes after 15 seconds and the general public has no access to the property.

8. It appears that Mr Engelbrecht was actually in Cape Town when the incident took place and was informed about it by one Anthony who had contacted him. Engelbrecht then instructed that plaintiff was to be taken to his personal doctor for treatment. He returned to Centurion on the following day on 8 December 2015.

9. The next time he heard from the plaintiff was on 14 December 2015 when he received an e-mail from her in which she submitted her resignation. He offered to relocate the plaintiff instead of accepting her resignation, but the next communication he received from the plaintiff was that she had commenced proceedings in the CCMA, where she alleged that she had been constructively dismissed. The eventual award in the CCMA was that the plaintiff had not been constructively dismissed and the case was dismissed on 20 May 2016.

10. As to the issue of the dogs, Engelbrecht testified that there "*was a possibility*" he told plaintiff about the dogs but that in any event there was a "*Beware of the Dogs*" sign on the front gate. The dogs are kept inside the yard and do not roam the street and that on 7 December 2015, the plaintiff had been working at his

premises for approximately five weeks already, and thus she knew that the dogs were kept at the premises.

11. It was specifically put to Engelbrecht that it was not part of the plaintiff's job to have anything to do with the dogs – which he admitted, and that the plaintiff's version was that there was no access control or lock on the gate – the plaintiff simply opened the gate to gain access to the premises. This was denied by Engelbrecht.

12. **The plaintiff** herself then gave evidence. She testified that:

12.1. she cannot specifically recall what time she arrived at work on 7 December 2015, as it was a long time ago but she thinks it was between 07h30 and 08h00;

12.2. her duties at the time were research and software development;

12.3. when she arrived at the premises, there is a gate with a chain around it and a padlock, which is unlocked. She would take the padlock off and take the chain off, open the gate, gain access and then close it again;

12.4. she never received an access-code and testified that none of the other interns ever used or received an

access-code to gain entry to the property;

12.5. Engelbrecht did not tell them (meaning any of the interns) about the dogs;

12.6. she was inside the premises and about to enter the office[3] when she was attacked by the dogs;

12.7. the dogs had nothing to do with her occupation.

13. The important and relevant admissions made by the plaintiff during her cross-examination were that:

13.1. her working hours commenced at 08h00;

13.2. her instructions to her legal representatives when issuing the summons were that she arrived at work at "*around 08h5am*" as is evidenced by her particulars of claim and that it was possible that she had arrived at that time;

13.3. the sole reason for her to be on the premises was for purposes of doing her work;

13.4. there were no general members of the public that she had seen on the premises or that had access to the premises;

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3 Which is 8 to 10 metres from the gate

13.5. that she had seen the dogs in the yard where she worked from the window of her office, and had heard them barking during the past four to five weeks that she had been working there. She had also heard them bark when someone was at the front gate;

13.6. that was as a result of her request that she was relocated to Engelbrecht' s premises to work on a specific project.

14. The plaintiff then testified that she had never seen a vehicle pass through the main gate. She testified that she always had access to the premises through a smaller pedestrian gate but she had never had an access-code and there was no access panel on the main gate – at some stage she testified that there were, in fact, two gates through which one could access the premises but she could not remember where the second gate was located.

15. She admitted that:

15.1. she was at Engelbrecht' s premises only to work and the dogs were part of the premises;

15.2. the gate was closed unless someone used it;

15.3. when she arrived at the gate, she had control of it, i.e. she would open and close it;

15.4. except for Engelbrecht' s employees, family and interns, there were no members of the public that came or went from the premises;

15.5. the incident occurred as she was about to enter the office and had it not been for the fact that she was there to work, the incident would not have occurred.

16. It bears mentioning that Mr Sehunane, who appeared for the plaintiff, throughout cross-examination of Mr Engelbrecht, examination in chief of the plaintiff and re-examination of the plaintiff, placed much emphasis on the fact that the plaintiff's job never had anything to do with the dogs or the residence on the premises, that the dogs were kept in the main house[4] and the dogs were not at the office.

17. That then concluded the plaintiff's case.

18. In analysing the issue before me, it is in my view apposite to set out Mr Sehunane's argument first: his argument is not that the Act is not applicable, but that (in his precise words) to expect the plaintiff to claim from Workmen's Compensation is "*unfair*", as the defendant should have known that there is a possibility that the

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4 Although he never had any direct evidence of this as he failed to cross-examine Mr Engelbrecht on this and evidence by the plaintiff is simply hearsay as she testified she never actually saw where the dogs were kept – she saw cages and "*assumed*"

dogs would attack the plaintiff, which in fact occurred.

19. Mr Sehunane emphasised the fact that:

19.1. the dogs have nothing to do with the plaintiff's occupation;

19.2. Engelbrecht should have known of the danger of placing his dogs near the employees;

19.3. any evidence given in relation to whether the plaintiff entered the gate *via* access pin or otherwise is irrelevant;

19.4. the time of the plaintiff arriving at work is irrelevant as the plaintiff's testimony was that she had arrived between 07h30 and 07h40, but before 08h00 and that her plea used the words "*around 08h45 am*" (his emphasis) and thus the time was not precise;

19.5. section 16 of the Act provides that the Compensation Fund is under control of the Director-General and its monies are applied by the Director-General to

> *"(a) the payment of compensation, the cost of medical aid or other pecuniary benefits to or on behalf of or in respect of employees of this Act where no other person is liable for such payment; ..."*

20. Mr Van der Merwe has submitted that there are not many aspects in dispute, which is clear from the list of common cause issues contained in the list that was attached to the second pre-trial minute and the evidence presented:

20.1. the plaintiff was an employee of the defendant and was authorised to be on Engelbrecht' s premises as she was working there and had been there for approximately four to five weeks at the time of the incident;

20.2. the dogs had been on the premises since the plaintiff had begun her employment;

20.3. the dogs belonged to Mr Engelbrecht;

20.4. the premises was not accessible to the general public and there was only one way to access the premises, which the plaintiff attended for the sole purpose of work;

20.5. the incident took place at around 08h45.

21. Mr Van der Merwe submitted that Mr Engelbrecht was a reliable and credible witness: he answered all questions put to him in a forthright manner and the important aspects of his evidence were not shaken in cross-examination. I agree that none of the important issues covered by Mr Engelbrecht during his testimony

were challeneged either at all or with any success and thus I found his testimony, insofar as the relevant issues are concerned, to be reliable.

22. On the other hand, he argues that the plaintiff was not a credible or reliable witness: the aspects pertaining to her access to the property and the time of her arrival at work are two important aspects which have demonstrated her unreliability:

22.1. as to her access to the property, the plaintiff denies the existence of the keypad (access panel) which is on the gate and into which Engelbrecht stated everyone punched a key-code. That keypad is clearly visible on the photographs at pages 56 and 57 of bundle 3;

22.2. the photos were handed in by agreement between the parties and at no stage was it alleged by plaintiff or put to Mr Engelbrecht that the keypad was a new addition to the gate or did not exist on 7 December 2015;

22.3. the plaintiff also alleged that she gained access to the property *via* a small pedestrian gate, but when given the opportunity to point out its location on the very photos mentioned *supra*, she was unable to do so, as (in her words) it was "*long ago*", she was "*only there for five*

weeks" and she "*could not remember*";

22.4. she also suddenly testified that there were two points of entry to the premises but could not remember where the second point of entry was;

22.5. she could not remember what time she arrived at work on 7 December 2015 as it was "long ago", but she thought it was approximately 07h30 to 08h00. In cross-examination the content of her plea was pointed out, and the time of 08h45, which she conceded could be correct.

Re the witnesses:

23. It must be borne in mind that Mr Engelbrecht was not at the premises on 7 December 2015 and therefore could not and did not present any evidence regarding the incident or how it occurred or the time that the plaintiff arrived at work on that day. His relevant evidence was that the plaintiff's working day commenced at 08h00 and he was never challenged on this. It was also never put to him that sometimes the plaintiff arrived long before 08h00.

24. As to the access control and entry or exit of the property, the photographs bear out the evidence given by Mr Engelbrecht, i.e.

that there is only one point of entry or exit to the property *via* a large grey steel gate with a keypad attached to the right hand pillar. As Mr Van der Merwe put it in cross-examination to the plaintiff, it is clearly meant for a pedestrian to punch in a key-code as the keypad is placed at too high a point for someone sitting in a vehicle to reach.

25. There is no chain and padlock evident around the gate as testified by the plaintiff and it was never put to Mr Engelbrecht that those were either present on the day of the incident or were removed for purposes of the photographs.

26. There is no smaller pedestrian gate evident on any of the photographs and it was never put to Mr Engelbrecht that the premises was accessible *via* a second gate elsewhere – in fact his evidence was that the only way to access the premises was *via* the one gate or over the electric fence and wall that surrounds the remainder of the property and this evidence remained undisputed during his cross-examination.

27. It was never disputed in cross-examination or in the plaintiff's direct evidence that there is a "*Beware of the Dogs*" sign on the gate or that when someone arrived at the front gate, you could hear the dogs barking.

28. At no stage was any evidence led regarding the nature of these dogs or that the attack could not have been anticipated. In fact, during argument, Mr Sehunane emphasised that the company should have known that there was a possibility that these dogs would attack the plaintiff (i.e. the risk factor).

29. Unfortunately, given the plaintiff's evidence in totality, it appeared to me that she was not a credible or reliable witness: she worked at the premises on her own version for approximately five weeks and was "*viciously attacked*"[5] by three of Mr Engelbrecht's dogs. It is inconceivable that she cannot remember what time she arrived at work[6] and how she gained access to the premises,[7] or whether there was one or two access points to the property.

30. Whilst Mr Sehunane has argued that these are all "*irrelevant*" to the issues, I must disagree for the reasons set out below and, in any event, I must say that I take a dim view of the fact that having agreed that the plaintiff arrived at work at around 08h45am on 7 December 2015, the plaintiff now appears to make an attempt to resile from the agreed facts. I can only assume that the attempt to do so is to place her outside of her employment hours at the time.

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5 See particulars of claim, bundle 6, par. 7
6 The attack having taken place near minutes after her arrival
7 The issue of the alleged pedestrian gate and where it was located is relevant here

31. The question of whether section 35(1) can survive a constitutional challenge has already been decided in **Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)**,[8] where Yacoob J stated the following:

> *"Whether an employee ought to have retained the common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the legislature and not a court must make. The contention represents an invitation to this court to make a policy choice under the guise of rationality review; an invitation that is firmly declined. 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 employees' common law right against an employer is excluded."*

32. In **MEC for Health, Free State v DN**,[9] it was said that there was

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8 (CCT15/98) [1998] ZACC 18 at par. 16
9 2015 (1) SA 182 (SCA)

"no bright-line test"[10] *and each case had to be dealt with on its own merits."*

33. The enquiry into whether or not section 35(1) is applicable is twofold: the question is (a) whether the plaintiff is an employee of the defendant; and (b) whether the injuries sustained were as a result of an accident arising out of and in the course of her employment.

34. The first leg of the enquiry is resolved by having regard to the common cause facts, which state that the parties had entered into a written contract of employment. This is also supported by all the evidence and thus the first hurdle has been successfully cleared by the defendant.

35. The second leg of the enquiry is slightly more complicated and requires more analysis.

36. In **De Gee v Transnet SOC Ltd**,[11] Badenhorst AJ set out in detail, and analysed all the relevant case law regarding section 35(1) and from there distilled certain questions to be posed when considering the issue of whether an employee acted within the sphere or area of his employment when an accident occurred:

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10 I.e. to determine whether the employee's claim was excluded under section 35(1).
11 (30085/2015) [2019] ZAGPJHC 2 (29 January 2019)

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

36.2. in travelling the particular route to reach his office, was the plaintiff fulfilling an obligation to his employer posed by the contract of service? In other words, in doing so, was the plaintiff doing something that was part of his service to his employer?

36.3. was the route the "*nearest available route*" to the plaintiff's office?

36.4. was there a duty imposed on the plaintiff to travel *via* this route?

36.5. was the route a private means to access to the plaintiff's office which she was entitled to use by reason only of her status as employee or was it available to the general public?

36.6. in travelling *via* this route, was the plaintiff fulfilling an express or implied term of her contract of service?[12]

37. In analysing the aforementioned questions, the following is relevant in my view:

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12 See *supra* at par.[17]

37.1. In **MEC for Health, Free State v DN** (*supra*), the SCA stated that what must be decided is whether the event is a risk which can be reasonably held to be incidental to the employment, and held[13]

> *"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."*

37.2. In **Ongevallekommissaris v Santam Versekerings-maatskappy Bpk**,[14] Vieryra J cited **Weaver v Tredegar Iron Company**, [15] which stated:

> *"... 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 to 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 him being there, his employment ceases when he reaches a place to*

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13 At p. 348
14 1965 (2) SA 193 (T)
15 [1940] 3 ALL E.R. 157 at 175 C-E

which the public have 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."

37.3. And in **Weaver v Tredegar Iron Company** (*supra*) the court stated

"The question is not whether the man was on the employer's premises. It is rather <u>whether he was within the sphere or area of his employment</u>."[16]

38. In the present matter:

38.1. the common cause facts place the plaintiff at her place of employment and in the premises at around 08h45 on 7 December 2015;

38.2. it was never disputed that she was on her employer's premises at the time of the incident having entered the gate for the sole purpose of commencing her work;

38.3. there was only one route to get to the office from the street. The plaintiff's attempts to suggest that there was a

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16 At 180A

second route was not borne out by any other evidence and is rejected;

38.4. it is common cause and borne out by the evidence that the route followed by the plaintiff to the office, was the only accessible one to her as an employee and was not accessible to the public in general.

39. Furthermore, given the content of paragraph 27 (*supra*) it was never disputed that there was a "*Beware of the Dog*" sign on the gate or that the dogs could be heard barking. The plaintiff herself testified that she sometimes saw the dogs in the yard when she was working and thus she knew that they were a risk –as much was stated by Mr Sehunane in his closing address.

40. This being so, and in line with the authorities, it must be that the plaintiff's injuries flow from that risk and thus it must be held that her injuries arise out of her employment with the defendant as result of which she is precluded from claiming damages from the defendant under section 35(1) of the Act.

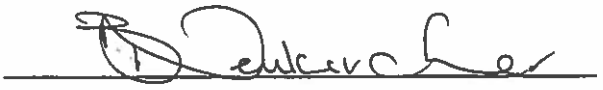
Order:

41. Thus, the order I make is the following:

41.1. The separated question as set out in paragraph 1 of the

order of Rabie J dated 5 March 2019 is upheld and the plaintiff is precluded from claiming damages as against the defendant.

41.2. The plaintiff is ordered to pay the defendant's costs of the action.



NEUKIRCHER J

JUDGE OF THE HIGH COURT

Date of hearing: 7 June 2019

Date of judgment: 10 June 2019

For the plaintiff:

Adv M Sehunane

Instructed by Sehunane Attorneys

For the Defendant:

Adv Van der Merwe

Instructed by: Clyde & Co Inc