IN THE HIGH COURT SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 1901/2011

In the matter between:

ROSEMARY MATILDA ZULU Plaintiff

And

THE MEC FOR THE DEPARTMENT

OF TRANSPORT, KWAZULU-NATAL Defendant

JUDGMENT

OLSEN J

[1] The plaintiff in this matter, Ms Rosemary Zulu, has sued the MEC for the Department of Transport, KwaZulu-Natal, for compensation arising from severe injuries she sustained in a motor vehicle accident. No other vehicle was involved. According to the particulars of claim the accident occurred by reason of the poor condition of a road for the maintenance of which the defendant's department was responsible. It is alleged that the defendant's employees wrongfully and negligently failed to discharge that responsibility, and that those negligent and wrongful omissions were the sole cause of the accident.

[2] The unfortunate accident occurred on 3 August 2009. At that time the plaintiff was employed by the provincial Department of Health, KwaZulu-Natal as a nurse and she was driving her car in the course and scope of her employment. Against that background the defendant raised a special plea to the effect that the Department of Transport, Kwazulu-Natal is an organ of the Government of the Republic of South Africa, which was the employer of the plaintiff at the time, and that the plaintiff's claim against the defendant was therefore barred by the provisions of s 35(1) of the Compensation for

Occupational Injuries and Diseases Act, 130 of 1993 ("COIDA"). In argument counsel for the defendant clarified the position by contending, without objection from plaintiff's counsel, that the same bar would be found to be in place if one were to regard the plaintiff as having been employed by the Province of KwaZulu-Natal. For the plaintiff it was argued that she was employed by the provincial Department of Health - an employer in its own right. Her employer was not the Government of the Republic of South Africa or the Province of KwaZulu-Natal. Section 35(1) of COIDA is to the following effect.

> "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."

[3] The parties agreed that, the relevant facts being common cause, the special plea should be disposed of first upon the basis that if it were to be upheld, the action should be dismissed; and if not upheld, the special plea should be dismissed and the defendant ordered to pay the plaintiff's costs incurred in connection therewith.

[4] This matter was argued before me on the 28 August 2014. Judgment was reserved. On the 11 September 2014 the Supreme Court of Appeal handed down its judgment in the matter of *Thomas v The Minister of Defence* (506/2013) [2014] ZASCA 109 (11 September 2014). In that case the court held that an employee of the Western Cape Provincial Department of Health was not precluded by reason of the provisions of s 35(1) of COIDA from claiming damages sustained by her as a result of slipping and falling on stairs under the control of the Minister of Defence. The judgment in *Thomas* came to my attention almost as soon as it was handed down, and an invitation was extended to counsel to make further submissions which they might consider necessary in

the light of the decision in *Thomas*. I have not received any further submissions. Thus this judgment.

[5] In my view, the judgment in *Thomas* is dispositive of this case, and it is clearly binding on this court. *Thomas* might be considered distinguishable because this case involves two departments in the same (provincial) sphere of government, whereas in *Thomas* the court was concerned with a provincial department and a national department. However a proper reading of the judgment illustrates that there is no such distinction. Paragraph [22] of the judgment reads as follows.

> '[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.'

[6] I do not propose to furnish an account of the reasoning adopted *Thomas*. I record simply that I experience no discomfort in following it and applying it to this case; which dictates that the special plea must be dismissed.

[7] I intend no disrespect to counsel in this case by doing so. The case before this court was fully and properly argued. Indeed, the difficulties encountered in arguing the case for the defendant in this case, once the municipal level of government is brought into account, were debated before me. The inconsistency in the argument for the defendant which emerges if one attempts to exclude local government from the concept of the "State" was considered and addressed. (See, against that, paragraph [18] of the judgment in *Thomas*, and the preceding

discussion on the local sphere of government.) Counsel for the defendant was unable to overcome this obstacle to acceptance of the reasoning behind his argument. In my view there is no way around that obstacle.

[8] There are two aspects of the argument advanced on behalf of the defendant in this case which ought to be mentioned.

[9] Counsel for the defendant very properly drew my attention to *Yellow Star Properties 1020 v MEC, Gauteng* 2009 (3) SA 577 (SCA), and specifically to paragraphs [27] and [28] of that judgment at page 588. In *Yellow Star* it was necessary to consider the relative positions of ministers of different departments in the same sphere of government. The conclusion was that "the affairs and functions of different departments of State and their ministers are to be regarded as separate and distinct." Counsel referred me to these paragraphs and attempted to distinguish them from the current situation. The context there was different, but it would have been surprising to find that COIDA is not consistent with the findings of the Supreme Court of Appeal in *Yellow Star*. The judgment in *Thomas* illustrates that the proper interpretation of COIDA is indeed consistent with the judgment in *Yellow Star*.

[10] Secondly, counsel for the defendant referred me to a judgment of the Labour Appeal Court in *Member of the Executive Counsel for Transport; KwaZulu-Natal and others v Jele* [2004] 12 BLLR 1238 (LAC), saying that the essence of the argument for the defendant before me is encapsulated in that judgment. The Labour Appeal Court had to decide whether, in the context of the Labour Relations Act, 1995, and specifically item 2(1)(b) of Schedule 7 to that Act, different departments in the same provincial government were simply different arms of the same employer; as a result of which an application for a higher level post in one department made by someone occupying a lower level post in another department should be regarded as an application for promotion.

The court decided that there was indeed a single employer, as a result of which a claim that there was unfair conduct in filling the post was, in relation to the employee in the other department, a claim as to unfair conduct relating to the promotion of that employee.

[11] I do not propose to conduct an analysis of the reasoning followed by the Labour Appeal Court in *Jele*. It suffices to point out that certain provisions of the Public Service Act, 1994 were cornerstones of the reasoning in *Jele*, and that some of those provisions were subsequently amended by Act 30 of 2007. Amongst these were ss 7(2), 8(1), 9, and 30 of the Public Service Act. The amendment to s 30 serves as a good example of the impact of the amendments to the Public Service Act. Section 30(a) was formerly to the effect that every employee should "place the whole of his or her time at the disposal of the State". This provision was regarded by the court as a strong indicator, if not a decisive factor determining, that absent any other provision specifically identifying another entity as an employer, the State was the singular employer of all public servants (see paragraph [26]). The particular provision which replaces what was s 30(a) is now s 30(1) of the Public Service Act, which is to the effect that no employee should perform or engage himself or herself to perform remunerative work "outside his or her employment in the relevant department". The section accordingly no longer implies that the State is the sole employer of public servants; and if anything goes the other way.

[12] If, despite the fact that it had nothing to do with a proper construction of COIDA, the judgment in *Jele* might have been regarded as in conflict with the judgment in *Thomas*, that is no longer the case.

I accordingly make the following order.

The defendant's special plea is dismissed with costs.

DATE OF HEARING:	28 August 2014
DATE OF JUDGMENT:	06 November 2014
FOR THE APPLICANT:	J F Nicholson, instructed by CARLOS MIRANDA ATTORNEY
FOR THE RESPONDENT:	Y N Moodley SC and M Chetty, instructed by THE STATE ATTORNEY (KWAZULU-NATAL) locally represented by CAJEE SETSUBI CHETTY INC.