IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

UNREPORTABLE

DATE: 20/11/2009

CASE NO: 23698/2002

In the matter between:

GERT HENDRIK JOHANNES ETSEBETH Plaintiff

And

MINISTER OF DEFENCE First Defendant

CHIEF OF THE SOUTH AFRICAN DEFENCE FORCE Second Respondent

JUDGMENT

LEDWABA, J

[1] The plaintiff is claiming a substantial amount of money as damages from the defendants as a result of the negligent conduct of the personnel of the second defendant.

[2] Defendants' filed a special plea to the plaintiff's claim stating the following:

"…, the plaintiff was a permanent member of the South African National Defence Force and was aboard the Alouette III 616 helicopter ("helicopter") in the course of his employment with the South African National Defence Force. In the premises, and in terms of Section 35(1) of the Compensation for Occupational Injuries and Diseases Act No 130 of 1993, the Plaintiff is barred from recovering any damages from the Defendants in respect of any occupational injury resulting in the Plaintiff's disablement."

[3] As per the agreement of the parties, the court ruled that the special plea would be dealt with and the other remaining issues be stayed. More particularly, the parties wanted the court to adjudicate on the following issues:

3.1 Did the accident on which the plaintiff's claim is based, arise out of and in the course and scope of his employment with the SANDF?

3.2 Is the plaintiff's claim accordingly affected by the provisions of **section 35 of the Compensation for Occupational Injuries Disease Act No 130 of 1993 (COIDA)** as alleged in the defendant's special plea?

[4] The defendants' accepted that they bore the onus of proof and the duty to begin on the aforesaid issues. The defendant called one witness warrant officer Michael Bottom (Mr. Bottom), to testify and they closed their case. The plaintiff testified and closed his case.

[5] The evidence of Mr. Bottom relevant to the special plea can be summarised as follows:

5.1 On 2 September 1999 he was a passenger in the helicopter mentioned in the defendant's plea, as flight engineer together with the plaintiff. Plaintiff was an apprentice aircraft mechanic. The trip was discussed with warrant officer Badenhorst, one of the plaintiff's seniors, a day before it was undertaken. The plaintiff was also a co-observer for poachers in the flight.

5.2 He said by further exposing the plaintiff to a flying helicopter, the plaintiff would gain the experience which could assist him to determine if he wished to pursue being an aircraft engineer as a career.

5.3 Mr. Bottom testified that, according to him the plaintiff's presence in the flight was part of his duties. He denied that the plaintiff was on a jolly ride. He also mentioned that when civilians participated in casual flights, they normally filled in indemnity forms. However, in this instance the plaintiff did not complete same. He further said that whilst the plaintiff was in the helicopter he could operate the microphone.

5.4 He also stated that if the plaintiff did not want to take the flight he could stay behind and continue with his normal duties.

[6] The plaintiff's evidence can be summarised as follows:

6.1 He said his duties involved cleaning, refilling, greasing, oiling aeroplanes and helicopters on the ground.

6.2 On 2nd September 1999 he was in the helicopter as a 'flip' mechanic, that is, he was just on a jolly ride and was not on duty. He stated that he was informed that they would also observe the poachers and safety briefing were made before the helicopter took off, however, he cannot remember if he was shown technical operations. He further said had a headset which was switched off.

6.3 Regarding a claim to the Commissioner in terms of **COIDA**, he said he knew nothing about it.

6.4 Under cross-examination he conceded that if he was not an employee of the SANDF he would not have the privilege to be in the helicopter.

[7] It is common cause that the plaintiff was employed as an apprentice mechanic by the second defendant at the time when the helicopter was involved in the accident. However, the plaintiff contends that he was on a jolly ride when the accident occurred.

[8] Mr. Bottom explained that in involving the plaintiff in the trip, he wanted to give him exposure to a helicopter maybe he would develop an interest in becoming a flight engineer. The

plaintiff said he was given a safety briefing by Mr. Bottom and he cannot remember if technical operations were shown to him.

[9] The plaintiff further said he knew that he was going to assist as a spotter for poachers.

[10] The trip was taken during working hours and the trip was also arranged or organised by the plaintiff's seniors for work related matters. The crew in the flight was not on a frolic and I do not think that they would just allow the plaintiff to have a jolly ride during working hours whilst they had to perform some duties.

[11] The issue herein is not to determine if the accident occurred when the plaintiff was strictly performing his duties or not. The word accident in the **Act** is defined as follows:

*"**'accident'** means an accident arising out of and in the course an employee's employment and resulting in personal injury, illness or the death of the employee."*

[12] **Section 35(1) of COIDA** reads as follows:

"*35. Substitution of compensation for other legal remedies*

1) No action shall lie by an employee or any dependant of an employee for 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."

[13] **COIDA** does not state that it should be in the course of employees 'duties' but employment. The word employment has, in my view, broader meaning than the word duties.

[14] The plaintiff's presence in the flight was, in my view, connected with his employment. The fact that he did not have a note book or binoculars is in my view, material.

[15] Even though the plaintiff testified that he knew that he did not know if a claim was submitted to the Compensation Commission, on the documents referred to in court, I am satisfied that such a claim was submitted.

[16] On the evidence and information available the accident on which the plaintiff's claim is based arose out of and in the course and scope of his employment with the SANDF.

[17] **I therefore, make the following order:**

(i) The defendant's special plea is upheld.

(ii) The plaintiff is liable for the costs.

A. P. LEDWABA

JUDGE OF THE HIGH COURT