

/SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 31/03/2006

CASE NO: 7907/2005

UNREPORTABLE

In the matter between:

CHARLOTTE VERMOOTEN

PLAINTIFF

And

SOUTH AFRICAN STATE THEATRE

DEFENDANT

JUDGMENT

SERITI, J

In this matter, plaintiff instituted action against the defendant claiming certain amount of money as damages she allegedly sustained.

In her particulars of claim, the plaintiff alleges that the defendant is “The State Theatre”, a corporate body in terms of section 4(1) of Act 119 of 1998, which took over all assets and liabilities of “The Renaissance Theatre”, (alternatively the board or legal entity controlling it prior to 1 April 2005) in terms of section 4(8) of the aforesaid Act, alternatively, defendant is the Renaissance Theatre, a section 21 company duly

incorporated in terms of the company laws of the Republic of South Africa, trading as such at 320 Pretorius Street, Pretoria.

In the said particulars of claim the plaintiff further alleges that on or about 21 September 2004 whilst she was attending a performance called “The Phantom of the Opera” she fell in a passage when she attempted to exit from the theatre to the foyer area.

Defendant was at all relevant times under a legal duty of care to ensure the safety of its patrons during and after performances, which legal duty defendant wrongfully, unlawfully and negligently breached as set out hereunder.

The sole cause of the accident was defendant’s sole negligence, through its employees acting in the course and scope of their employment in that:

1. The passage ending at the foyer was not lit, alternatively not adequately lit for patrons to traverse it safely;
2. The curtain between the passage and the foyer was closed which contributed to the lack of lightning;

3. The steps leading to the foyer had no lights or reflective strips and no rubber strips on the edges and no handrails were fitted, alternatively the passage leading from the theatre to the foyer had inadequate lighting and inadequate handrails.
4. Defendant failed to instruct its employees to assist patrons leaving the theatre whilst the performance was in progress.
5. By placing carpeted steps at a slight angle and carpeted walls leading to the foyer in a dark passage, defendant created a potential risk for patrons falling and injuring themselves and failed to take reasonable steps to avoid such occurrence, which occurrence they could and ought to have foreseen.
6. Defendant failed to warn patrons of the presence of steps that were not adequately lit.

As a result of her fall she sustained bodily injuries in that her left humerus was broken in two places.

In its plea, the defendant denied the description of the defendant as contained in the particulars of claim.

Defendant admitted that on or about 21 September 2004 and at a performance of “The Phantom of the Opera” the plaintiff fell, but denied that the fall of the plaintiff was due to the negligence of the defendant and/or its employees. In the alternative, defendant pleaded that plaintiff fell due to her own negligence in that, *inter alia*:

1. She made a conscious decision not to leave and go to the toilet when the house lighting was at full strength, but rather during the course of the performance, alternatively after the house lights had come down and while they remained down knowing that the lighting for the theatre was not at its full strength.
2. She failed to watch where she was walking, alternatively failed to properly watch where she was walking;
3. She failed to ensure that while venturing into the dark she was properly supported by either holding on to a wall or

hand-railing or any other support, alternatively, not finding such support still ventured forth.

4. She failed to ascertain the lay of and positioning of the steps prior to her journey while the house lights were down.
5. She failed to exercise the necessary caution under the circumstances, alternatively the caution and circumspection which could be expected from a reasonable theatregoer under the circumstances.

At a pre-trial conference held prior to the hearing of the matter, the parties agreed that the court will be requested in terms of rule 33(4) of the Uniform Rules of Court to separate question of liability from the question of quantum.

During the said pre-trial conference, plaintiff enquired whether defendant keeps an occurrence book in which incidents such as patrons injuring themselves are recorded, and the defendant answered in the negative.

Plaintiff further enquired whether defendant possesses a health and safety plan and the defendant said no.

At the beginning of the trial, court ruled that merits and quantum be separated and the court will deal only with merits of the case.

The first witness to testify is the plaintiff herself.

She testified that she is a pensioner and currently 75 years old. On 21 September 2004 she, together with her husband and other people attended a show in the evening at State Theatre, Pretoria.

She does not visit the State Theatre regularly.

In the theatre, she was seated at a seat which is not far from the exit.

Towards the end of the show she wanted to go out and go to the toilet. She stood up and went towards a step which is inside the theatre but leading to the door where an "Exit" sign was displaced. From her seat, she went down two stairs which had rubber edges and came to a door which was closed. She opened the door and found about three

carpeted stairs between the door and the foyer. The door opened towards outside, she went out and came to the carpeted stairs, she closed the door behind her and in doing so, she had to move forward in order to allow the door to close, and in the process she fell and injured herself.

In the passage where she fell, the light on top was not on and the said passage was dark. When she went out, inside the theatre there were dim lights. Curtain which is between the door in question and the foyer where she had to go was closed. The said curtain is between the door and the foyer. To reach the foyer she had to walk on the three carpeted stairs which were between the door and the said curtain. The said area was dark.

Where she fell, there was a carpet with dark grey colour. She fell whilst on the first step as she wanted to close the door behind her, and at that time, she did not realise that there were stairs in front of her.

On the stairs where she fell, there is a small light at the bottom, and the said light could not have enabled her to see the said stairs. There are no reflectors on the stairs where she fell nor any warning of the presence of the said stairs. Unlike the stairs inside the theatre, where she fell the stairs are not fitted with rubber edges.

When she fell, she sustained a fractured left humerus and nobody came to her assistance. She woke up and went to the toilet. After relieving herself, she went to the bath and put her injured arm in the water. At that stage other theatregoers came and assisted her. At that stage she did not see any of the defendant's employees.

Under cross-examination she said that when she first went into the theatre, came out at interval and went back into the theatre, they were walking in a group and she did not notice the said stairs.

She fell from the top step and at that stage she did not see the last step where there is a small light. When she opened the door, it was dark and she did not see any hand-rail.

She cannot remember whether she managed to close the door behind her or not, but she assumes that she managed to close the said door.

She opened the door, moved forward and she fell.

When it was pointed out to her that the door is level with the first step, she said that she fell whilst on the first step and she cannot remember whether she managed to close the door behind her or not. She was definitely not on the last step when she fell.

Prior to her falling, she did not see the stairs nor any sign warning people about the presence of the said stairs.

She was asked why she did not use the handrail which is on the passage where she fell, she said that she did not see the said handrail as it was dark. She further said that the said handrail does not indicate that there are stairs.

She further said that it is possible that she fell when door went forward. She fell from the first step, and then she should say she did not close the door. She definitely did not fall from the last step.

Stairs in the theatre had lights which she saw.

She knows theatre etiquette and because of her upbringing, she will usually close the door behind her. She further said that in her evidence in

chief she spoke about closing the door behind her but on second thought, she did not close the said door before she fell.

She further testified that she left her seat at the end of the show but before the theatre lights were put on. It was put to her that there was a light on the last step in the said passage and a handrail, and she said that she did not see them.

It was put to her that when she fell, she should have been aware of the stairs because she walked on the said stairs three times before she fell, and she said that she did not noticed them because on all the three occasions referred to, they were walking in a group. She further said that if there were lights or other warning signs, she could have noticed or seen the stairs prior to her falling.

She did not realise that after opening the door, one would be already on the stairs.

She did not go down any stairs before she fell.

Under re-examination she said when she fell, she was walking normally.

When they went into the theatre, lights were on and curtains at the beginning of the passage were opened.

The next witness to testify is Mr Conrad Bosch.

He testified that he is an expert and he works in the field or area of Occupational Hygienist. He is a registered Occupational Hygienist, registered Occupational Safety Coordinator and registered Ergonomics Facilitator.

He referred to section 47 of The Occupational Health and Safety Act 85 of 1993 (the Act) which states that the said act binds the state. In his view, the defendant is bound by the provisions of the said act and the regulations promulgated thereunder. He further referred to section 24 of the act whilst provides *inter alia*, that an incident in which a person is injured which at the premises where activities of the undertaking take place, shall be reported to the relevant inspector. He also referred to Regulation 8(1)(3) which provides, *inter alia*, that:

“Wherever an incident arising out of or in connection with the activities of persons at work occur to persons other than

employees the user, the employee or self employed person as the case may be, shall forthwith notify the provincial director by facsimile or similar means of communication as to the ...”

Regulation 9 provides for the keeping of records of incidents reportable in terms of section 24 of the act for a period of at least three years.

He further testified that on 15 February 2006 he attended the scene where plaintiff was injured and carried out certain investigations. He attended the said scene prior to preparing his report, which report formed part of the bundle of documents. During his inspection, he asked for copy of report that should have been send to the relevant inspector as provided for in section 24 of the act and he was told that the act is not applicable to the State Theatre. He also made enquiries about safety plan and committees as provided for by the act and regulations promulgated thereunder, and he was again informed that the act is not applicable to the State Theatre.

During the inspection he found that when the door leading into the theatre and the curtain at the end of the passage where plaintiff fell are

closed, the illumination level at the said passage is 0.0, when the house lights are switched off.

In his report, he states, *inter alia* that:

“As a result of the variance in persons other than just employees who may visit the theatre, as well as the natural human requirement of having to visit ablution facilities at any given time (during a play), it is the duty of the South African State Theatre to have identified potentially dangerous or under illuminated and suitable means of illumination to such areas habitually used, occupied or travelled. Such area typically includes the passage and steps in between the door and curtains opening into the foyer area.

Steps at the upper level of the staircase as well as the passage in its vicinity were not illuminated. Persons entering or leaving the seating areas therefore had to walk over steps not illuminated by any means before reaching the bottom step which had some means of illumination. This was also the case at the steps in between the door and the curtain opening into the foyer area.

Steps as well as rails or similar structures were also not fitted with reflective strips or an equivalent”

He further testified that the State Theatre has failed to comply with the act and regulations promulgated thereunder in several respects.

Soft and smooth carpeting on floors and specially steps are known to reduce safe footing. The same applies to lack of non-slip rubber or similar strips on the edges of steps (such as those in between the curtain and door area of the Opera House Theatre, and that is likely to result in a person falling.

He then made certain recommendations which he said if implemented, will reduce the possibility of person falling and injuring himself or herself.

The steps he suggested are reasonable steps which can be implemented and reduce possibilities of people falling and injuring themselves.

Under cross-examination, he said that even when lights were on in the theatre, the illumination level was still low.

It was put to him that the State Theatre was build long before the act came into being, and his response was that there are other reasonable alternative methods that can be put in place to ensure safety of the patrons.

Illuminating the said stairs where the plaintiff fell can be done without disturbing people who will be watching the show inside the theatre.

Under re-examination he said that he fell at the said scene whilst conducting an inspection.

The State Theatre did not take enough precautions to make the stairs safer. They could have taken the said steps without affecting the functionality of the light traps.

The defendant's counsel was given an opportunity to cross-examine the expert witness about his alleged fall.

He said he fell as he left the first step, between door and curtains.
He did not see the said step.

He further testified that in fact he stumbled and not fell.

Plaintiff closed her case.

A witness who testified on behalf of the defendant is Mr Jacobus Lodwyckx. He testified that he is the front house manager, employed by the State Theatre. He has been working for the State Theatre for the past twenty-five years.

If somebody is injured at the premises he will know about it. In the past twenty-five years, only one person fell and injured himself, and he was taken to hospital by an ambulance.

One lady fell when running and she said she does not know how it happened.

When plaintiff's expert witness came to the premises for an inspection, he was present. He did not see him falling.

Under cross-examination, he said that the said expert was on the premises for a long time. He did not watch him at all times. It is possible that he could have fallen without him seeing the said expert witness falling.

He further testified that they do have an “Incident Book” which is kept by the security officers.

He was not present when plaintiff fell, but he was later informed about the said incident, but same was not recorded in their “Incident Book”.

He further testified that the stairs where plaintiff fell did not have reflective strips. It is difficult to make structural changes to the entrance.

The theatre is generally not financially viable. Budget constrains have a negative impact on the number of people they can employ.

He is not at all times in the theatre. Not all incidents of people falling are reported in their “Incident Book”.

They are aware of the fact that people go out of the theatre during a play for a variety of reasons.

Health and safety plan does not exist at the State Theatre.

Under re-examination he said that people do go out during a play because of emergencies or if they do not like what they are seeing.

After the evidence of the above witness, the defendant closed its case.

During argument, the defendant's counsel was asked if the defendant still persists in its argument that *locus standi* of the defendant is in dispute, he said that defendant no longer disputes its *locus standi*.

It is common cause between the parties that on 21 September 2004 whilst attending a certain performance at the premises of the plaintiff fell in a passage whilst attempting to exit from the theatre to the foyer.

It is not in dispute that when she fell, plaintiff was on her way to the bathroom, and after falling, she proceeded to the bathroom.

It is also not in dispute, that the plaintiff, during the fall mentioned above sustained severe physical injuries mentioned earlier.

According to the plaintiff, the passage where she fell has about three stairs and a door situated between the theatre and the passage, and a curtain at the end of the said staircase just before the foyer area.

She further testified that when she reached the said staircase she opened the door, and at that stage, it was dark in the said passage.

She testified, in her evidence in chief, that after opening the door, she moved forward, entered the passage and thereafter moved backwards in order to close the door behind her.

As mentioned earlier, during cross-examination she said she is no longer certain whether she actually closed the door behind her or she intended doing so, but fell before she could do so.

I think I should mention at this stage that I carefully observed her during her evidence in chief and cross-examination and she came across as a reliable witness.

The fact that during cross-examination she said that she can no longer remember whether she actually closed the door or not, does not negatively impact on the impression that she created on the court.

She mentioned on more than one occasion that she did not see the small light which was on the third and last step.

In my view, the probabilities are that she did not close the door behind her when she fell and she fell from the first step. This explains why she sustained serious injuries in her fall.

She further testified that from the theatre, the stairs on the passage in question are not visible, despite the fact that the last step has a small light.

On this point, her evidence was corroborated by the evidence of her expert witness Mr Conrad Bosch, who I also find to be reliable witness. He gave his evidence in a clear and satisfactory manner despite the fact that he mentioned that he fell on the said stairs and under cross-examination he said that actually he stumbled.

I find that the passage where she fell was dark at the relevant time. The light which was in the said passage was not bright enough to enable her to see the stairs where she fell.

The handrail which is next to the stairs in question does not suggest that there are stairs in that vicinity.

In *Kruger v Coetzee* 1966 2 SA 428 (AD) 430E-G, the learned judge, HOLMES JA said the following:

“For purposes of liability culpa arises if –

- (a) a diligence paterfamilias in the position of the defendant
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps ...

Whether a diligence paterfamilias in the position of the person concerned would take any guarding steps at all, and if so what steps would be reasonable, must always depend upon the particular circumstances of each case.” –

See also *Sea Harvest Corporation v Duncan Dock Cold Storage* 2000 1 SA 827 (SCA) 845F; *Groenewald v Groenewald* 1998 2 SA 1106 (SCA) 1112H-I.

My view is that in this particular case, the facilities of the defendant are utilised, not only by its employees, but also by members of the public of all ages.

A reasonable person in the position of the defendant would have foreseen that the possibility exists that during the show a person who ventures into the passage in question might not see the stairs and as a result might fall and injure himself or her. This is so because Mr Lodewyckx, when he testified, mentioned that they are aware that people at times go out during the show for a variety of reasons.

In *Herschell v Mrupe* 1954 3 SA 464 (AD) 477A-B, SCHREINER JA said the following:

“But the circumstances may be such that a reasonable man would foresee the possibility of harm, but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of it happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of it happening were fair or substantial.”

The passage where the plaintiff fell has three steps. The defendant should have foreseen that if a person falls from the said stairs, there are possibilities that the said person might sustain serious injuries.

In his report and during his evidence, Mr Conrad Bosch, mentioned several factors which contribute to making the stairs in question unsafe, eg soft and smooth carpeting on floors especially on the steps, poor illumination levels at the passages, lack of non-slip rubber or similar strips on the edges of steps, etcetera.

Measures to address the above concerns, will contributed towards making the said stairs in question more safer to traverse and would not necessitate great expenditure when one takes into account the possible injuries to patrons as it happened in this case.

My view is that the defendant has failed to take the necessary reasonable steps to guard against the possibility of people falling on the stairs in question.

The next question which requires attention is whether there is any negligence which can be attributed to the plaintiff.

At the time of this incident, the plaintiff was about 73 years old. On the day in question she passed through the passage in question at least

three times before she fell whilst attempting to go through the same passage.

Defendant's counsel argued that the plaintiff choose to leave the theatre when the house lighting was at its lowest and therefore she was negligent.

Plaintiff testified that when she left the theatre, she wanted to go to the bathroom. She chose to go out at the time she did, because she wanted to go to the bathroom before it gets full at the bathroom.

I do not think that the plaintiff can be criticised for opting to go to the bathroom at the time she did.

If the passage in question was dark, I do not think that the submission that she did not look where she was walking can be sustained. If visibility was poor in the said passage as it was, the possibilities of her seeing the said stairs are minimal if any.

When she first went into the theatre, went out during interval and going back into the theatre, they were walking in a group and there was some lighting. The possibility of seeing exactly where the said stairs

starts and ends are remote because of the fact that they were moving in and out in a group. She cannot be faulted for not remembering in the dark exactly where the said stairs start and end.

I do not think that she was in any way negligent.

There was argument advanced by the plaintiff's counsel that the defendant has failed to comply with the provisions of the Occupational Health and Safety Act 85 of 1983.

I will not deal with the said submission because of the above decision that I arrived at.

The court therefore makes the following order:

1. The defendant is ordered to pay the plaintiff whatever damages that the plaintiff can prove.
2. Defendant is ordered to pay the plaintiff's costs.

W L SERITI
JUDGE OF THE HIGH COURT

7907/2005

<u>HEARD ON:</u>	02/09/2005
<u>FOR THE APPLICANT:</u>	ADV F J ERASMUS
<u>INSTRUCTED BY:</u>	MESSRS VAN DER MERWE DU TOIT INC, PRETORIA
<u>FOR THE DEFENDANT:</u>	ADV D M LEATHERN
<u>INSTRUCTED BY:</u>	MESSRS SOLOMON NICOLSON REIN & VERSTER INC, PRETORIA
<u>DATE OF JUDGMENT:</u>	31/03/2006