IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No.: 2021/45446

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED: NO	
29 November 2024	[redacted]
DATE	SIGNATURE

In the matter between:

ELFREDA ALBERTS Plaintiff

and

LOUIS ANDRE MULLER Defendant

Date Heard: 19 - 20 September 2024 and 09 October 2024

This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to Caselines. The date and time for hand-down is deemed to be 10:00 on 29 November 2024

JUDGMENT

Bhengu AJ

Introduction

[1] The plaintiff instituted a delictual claim for damages against the defendant in respect of injuries she sustained on 04 August 2020 when a metal sliding gate allegedly fell on her at her rented premises. The parties agreed that the matter will proceed on merits only in terms of Uniform Rule 33(4) with quantum to stand over. The question before this court is whether the defendant is in breach of his duty of care for failure to maintain the gate of the leased property causing the alleged injury to the plaintiff.

Background

[2] The Plaintiff is a 70-year-old female, Veterinarian. She leased business premises from the defendant, an adult male, Dentist for purposes of conducting a veterinary clinic. In terms of the written lease agreement, the defendant as the owner of the leased property was responsible for the repair and maintenance of the leased property, including the gate.

[3] The plaintiff alleges that on 04 August 2020, the metal sliding gate in the leased property fell on her causing her bodily injuries. She is claiming damages in the amount of R1,182 500.00 in respect of past medical expenses, general damages, loss of earnings and future medical expenses.

[4] The matter proceeded before this Court on 28 and 30 May 2024. Three witnesses testified on behalf of the plaintiff. At the close of the plaintiff's case, the defendant applied for absolution from the instance which was unsuccessful. After several failed attempts by the parties to agree on a suitable date for continuing with the hearing, this Court issued a directive setting the matter down for hearing on 19 and 20 September 2024.

Application for postponement

[5] On the morning of trial, the defendant applied for postponement of trial pursuant to its Notice of Intention to Amend his particulars that was served on the eve of trial. I directed the defendant to file a substantive application for postponement in order to be able to deal with the application.

[6] In his founding affidavit the defendant cited his intention to amend his plea as reason for seeking postponement. He contended that the trial should be postponed in order to allow the process prescribed by Uniform Rule 28 to follow. He contended that any possible prejudice to the plaintiff will be cured by a tender for costs on a party and party scale. He also undertook not to oppose any application by the plaintiff to re-open her case to counter the defendants case pleaded in the proposed amendment.

[7] The application for postponement was opposed by the plaintiff. The plaintiff contended that the defendant's intention was to gain advantage by first waiting to hear all the evidence led by the plaintiff and thereafter file the amendment to align the pleadings to the evidence already on record.

[8] On the question of prejudice, the plaintiff submitted that she is presently unemployed and that her resources have been depleted. She further submitted that if the postponement and subsequent amendment were to be allowed, the plaintiff would incur further costs in pleading to the amendment. If she has to re-open her case as suggested by the defendant, that will result in duplication of her evidence in chief and cross examination.

The Law on Postponements

[9] The Constitutional Court in *Lekolwane and Another v Minister* of Justice held[1] that:-

[1] Lekolwane and Another v Minister of Justice [2006] ZACC 19; 2007(3) BCLR 280 (CC) para 17

"The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court.

In exercising that discretion, this Court takes into account a number of factors, including whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application."

[10] The only reason advanced by the defendant for requesting postponement of the matter was that he had served a Notice of Intention to Amend his plea on the eve of trial. The defendant averred that his legal team consulted with the defendant's witnesses; Mr Seronio, his expert witness and Mr Mcira on 14 September 2024 and that this consultation reaffirmed the need to amend the plea in order to place defendant's case correctly before the court.

[11] No explanation was provided by the defendant why his legal team did not consult these witnesses in preparation for trial before the date of hearing in May and after judgment on absolution was granted. The only inference that can be drawn from this fact is that the defendant failed to prepare timeously for this trial and that the attempt at postponement is purely for purposes of delay.

[12] In order for the defendant to succeed with this application, he has to satisfy the court that there is good cause for postponement. While I'm mindful of the parties right to amend their pleadings anytime before judgment, however, I have looked at the effect of the proposed postponement if granted.

[13] This matter has already proceeded for two days in May 2024. The plaintiff already closed her case after testimony of three witnesses. The defence that the defendant seeks to introduce through an amended plea was never put to the plaintiff and the two witnesses. The defendant indicated his wish to appoint an expert witness, which if allowed will necessitate re-opening of the plaintiff's case in order for the plaintiff to also call her own expert witnesses. Reopening the plaintiff's case will have an effect of this trial starting *de novo* with no end in sight. The Constitutional Court *in Kirkland v Kirkland*[2] stated the following regarding finality of litigation: -

"… the need for finality in litigation must also be taken into account. The parties are not young anymore…The litigation between them has been extensive and expensive. In these circumstances it appears to me to be in everyone's interest that there be finality in the litigation."

[14] I accept the argument by the plaintiff's counsel that the plaintiff is at an advanced age, and that such prolonged process is prejudicial to her. I am of the considered view that such prejudice cannot be cured with a cost award. If allowed, it will further have an effect of wasting the court's time and limited resources. The defendant's application for postponement for these reasons falls to be dismissed as it is not in the interest of justice.

Breach of the duty of care

[15] The plaintiff's claim is found in delict. It is trite that for a claim found in delict to succeed, the plaintiff must prove the following elements of delict on a balance of probabilities: - wrongful conduct, fault, causation, and harm.[3]

[16] The defendant in his plea admitted that he owed a legal duty of care to the plaintiff and persons entering the premises through the gate. It was his duty to ensure that they were not exposed to the risk of injury. The duty of care

[2] Kirkland v Kirkland [2005] 3 All SA 353 (C) at para 65
[3] Oppelt v Department of Health, Western Cape 2016(1) SA 325 (CC) at para 34

is therefore not in dispute. The next consideration is whether the defendant breached this duty.

[17] Although defendant had initially denied the gate incident, after the testimony of the plaintiff, on 03 October 2024 he subsequently filed his amended plea and formally admitted that the gate fell. He however denied that the incident occurred as a result of his failure to maintain the gate. He stated as follows in paragraph 9 of the plea:

> *"Maintenance was done on the gate motor but as far as its computer receiver needed recalibration and synchronisation with the remotes which opens and closes the gate.*
>
> *The gate itself was not in need of repairs as the gate was fully functional.*
>
> *The gate didn't pose any danger to either the plaintiff and/or members of the public…he could not have done anything to prevent the alleged incident.*
>
> *The actions of the plaintiff on the date of the incident amounted to a novus actus interveniens which resulted in the falling of the gate."*

[18] The defendant's admission of the duty of care and the gate falling incident leaves the plaintiff with the onus to prove on a balance of probabilities that the incident occurred as a result of the defendant's breach of his duty of care and that she suffered some harm.

[19] The plaintiff in her particulars of claim alleged the following: -

> "That the incident referred to in paragraph 3 above was caused by the negligence and/or breach of the aforesaid duty of care of the defendant, in that the defendant:
>
> Failed to ensure that the gate was maintained in a reasonable state of repair.
> Failed to ensure that the electric motor of the gate was operational.
> Failed to ensure that the gate could be opened and closed in a safe manner.
> Failed to act with due care.
>
> As a result of the said incident, the Plaintiff sustained injuries to her neck, back, left shoulder and left hip…"

Evidence

[20] The Plaintiff testified that in the afternoon of 4 August 2020 at approximately 13h45 she went to open the gate in preparation for her afternoon session. When she pressed the remote control, the gate only opened a little gap enough for her to stand sideways. She then went to the gate motor and switched the mode from automatic to manual as instructed by the defendant and then pushed the gate open to allow a person with a dog on a leash to enter. She started to walk back to the motor to switch it back to automatic. When she was at a distance of a third to half towards the motor, the gate dislodged from its rails. It started pivoting and the left side of the gate fell at an angle, stricking her left shoulder, and left hip causing her to fall. Her foot got stuck under the gate and she had to crawl on her hands and knees from underneath the gate. The gate motor prevented the gate from falling flat, in which instance, it would have crushed her.

[21] She called the defendant's office to report the incident, and she was told by the receptionist that the defendant was busy. She went to a nearby mechanic business to ask Mr Jacques Bauer for help. According to the plaintiff the gate started to malfunction since 2015. The defendant failed to properly maintain the gate and only used the services of his brother-in-law, Mr Seronio, Mr Pretorius and Crime Stop to assist when the gate was not working. She stated that the defendant instructed her how to open the gate manually whenever the remote was not working.

[22] Mr Bauer testified on behalf of the plaintiff. He stated that when he arrived at the premises, he found the gate lying flat on the ground. He and his assistants tried to put the gate up, but it fell flat on the floor almost on top of his assistant. He observed that the main locking screw or bolt (not sure) attaching the actual beam to the concrete on the left-hand side was broken. He instructed his assistant to secure that bolt, and he left. He also noted

that one of the guides of the gate were loose or broken on the left-hand side.

[23] Mrs Berker-Smit also testified on behalf of the plaintiff. She confirmed that when she arrived, the gate was lying flat on the floor. She also confirmed that the gate had been malfunctioning since 2015 and that when the gate was not working, the plaintiff would open for her manually.

[24] The defendant testified that he bought the property in 2014. The gate and the motor in question is still the same as when he purchased the property and was never replaced. He only changed the battery of the motor once. He confirmed that he showed the plaintiff how to disengage the gate motor from automatic to manual when the remote was not working. He stated that that was necessary for safety in the event that there was load shedding or emergency. He confirmed that no maintenance was done on the gate or motor except for the reprograming of the remote and the computer PC board and when the battery had to be replaced. He stated that technicians were not always available when the remote was not working. He had to use different people to work on the gate motor to synchronize it including his brother-in-law, Mr Seronio, Mr Pretorius and the employees from Crime Stop Security Company.

[25] The defendant stated that he does not know why the gate fell. He acknowledged that the remote was at times not functional but denied that the motor or the gate was faulty. He denied that there was ever any maintenance required for the gate or remote as they were in good working order.

[26] He is of the view that the allegation that the gate fell on the plaintiff was made up. He also denied that the plaintiff sustained any injuries from the incident. He stated that he recently tried to take down the gate in order to ascertain how the incident occurred. He stated that he needed help of 3 other men and his son to succeed in taking down the gate by removing its

guiding rollers. He gave evidence on the dimensions of the gate from the ground to the rollers, the size of the motor and the weight of the gate. He stated that the gap from underneath the gate was too small making it impossible for a person the size of the plaintiff to crawl underneath as alleged by the plaintiff.

[27] The defendant also called Mr Mcira who was employed as a technician by Crime Stop Security company. Mr Mcira's evidence only went as far as proving that he attended the leased premises at least three times to reset the perimeters whenever the remote was not working.

[28] Mr Johan Seronio, the defendant's brother-in-law also testified on behalf of the defendant. He was a handyman responsible for all the repair work on the premises. He denied doing any repair work on the gate motor as *"there was no need for it"*. In the evening on the date of the incident, at approximately 18h00, he attended the leased property to assist the plaintiff with the gate. He stated that the plaintiff did not tell him that she was injured, and she also did not see any visible injuries on the plaintiff.

Evaluation

[29] On the proven facts elicited from the evidence of the plaintiff, her former employee Mrs Berker-Smit and the defendant himself, it has become clear that the remote had not been working properly from 2015. That the defendant is the one who instructed the plaintiff to lift the flap on the motor to change the gate from automatic to manual whenever the remote control was not working. She would then push the gate manually to open for her clients. The motor was never changed nor was there any repair work done on the gate and motor.

[30] The defendant tried to attribute the malfunctioning of the gate to the manner in which the plaintiff opened the gate, by overriding the gate motor and then closing with a remote. He also mentioned that when the plaintiff

left the gate partially closed to allow entry to the clinic, it caused the gate motor not to function properly.

[31] The defendant already testified that he is a dentist and is not a gate or motor technician, therefore his opinion on what may have caused the remote not to work is rejected by this court. The defendant admitted that he was aware that the PC Board was not communicating with the remote, which caused him to seek the services of Mr Seronio, Mr Pretorius and Crime Stop on several occasions to resynchronise the remote. It is clear from the evidence of the defendant that despite all these interventions, the problem still persisted until the date of the incident in 2020. The plaintiff's counsel contended that the defendant knew that the gate was the only entrance to the plaintiff's clinic and yet he failed to find a permanent solution. His evidence, therefore, that there was no maintenance required on the motor and the gate cannot stand as it is contrary to facts placed before the court.

[32] The defendant acknowledged that the act of overriding the motor put the plaintiff at risk of injury as confirmed by his statement under cross examination that "*anything can happen if you do not open or close the gate fully as this would confuse the PC Board"*. Defendant should have reasonably foreseen the possibility that his failure to maintain the gate and the opening of the gate manually, could result in the injury to the plaintiff and should have taken reasonable steps to guard against such occurrence. I further take into account the uncontested evidence of Mr Bauer, that the main bolt holding the locking screw was broken or loose on the right side of the gate. Once this was fixed by Mr Bauer's assistant they managed to put the gate up. I am therefore of the view that a reasonable inference can be drawn that the reason for the gate to fall was because it was in a state of disrepair as pointed out by Mr Bouwer and the malfunctioning gate motor.

Novus actus interveniens defence

[33] The defendant alleged that the plaintiff did not follow instructions on how to push the gate after changing it to manual. In this regard I take note of the evidence of the defendant and Mr Seronio that the gate was made of heavy metal weighing over 250kg. The defendant required assistance of 3 more men to take it down. It is therefore improbable that the plaintiff would have been able to dislodge the gate off its rails by merely pushing the gate if it was functional, regardless of how she pushed it. Therefore, the defence of a *novus actus interveniens* is rejected as it is farfetched.

Evidence of harm or injury

[34] The Constitutional Court in *H v Fetal Assessment Centre*[4] held as follows regarding the element of harm in a delictual action: -

> 'Harm-causing conduct' is a prerequisite for the further enquiry into the other elements of delict, namely wrongfulness and fault. Without harm-causing conduct there is no conduct which can be found to be wrongful or committed with the requisite degree of fault."

[35] Having found that the defendant's failure to maintain the gate caused the gate to fall, the plaintiff, in order to succeed with her claim for damages against the defendant must still prove on a balance of probabilities that she suffered injuries as a result of the gate falling. It is trite that the element of damage or loss is fundamental to the Aquilian action, and the right of action is incomplete until damage is caused to the plaintiff by reason of the defendant's wrongful conduct[5].

[36] The plaintiff alleged the following in her particulars of claim: -

> "Plaintiff was injured when a metal sliding gate fell on plaintiff when she was opening the gate… As a result of the said incident, the plaintiff sustained injuries to her neck, back, left shoulder and left hip."

[4] H v Fetal Assessment Centre 2015 2 BCLR 127 (CC); 2015 2 SA 193 (CC) pars 54 60)
[5] Jowell v Bramwell-Jones and Others (543/97) [2000] ZASCA 16; 2000 (3) SA 274 (SCA) para 22

[37] The element of harm is disputed by the defendant. The defendant denied that the plaintiff suffered any injures from the incident. Counsel for the defendant highlighted the contradictions between the evidence of the plaintiff and the allegations in her particulars where she alleged that the gate fell on her and her testimony that the gate struck her. The contradictions in her evidence that the gate dislodged at an angle and the testimony of her witnesses that the gate was lying flat on the floor. He also pointed out contradictions as to the nature of the injuries sustained. He contended that it was unlikely that the plaintiff had no physical signs of injury when a metal gate weighing over 250 kg fell on her. She would have suffered severe injuries. She also failed to seek medical attention for 1 year. According to the defendant's counsel, these contradictions and identified issues affects the credibility of the plaintiff. He submitted that the evidence of the plaintiff should be rejected as she was an unreliable witness.

[38] The evidence of the plaintiff was that that she sustained injuries to her left shoulder, left hip and left lumbar region. That her foot was stuck under the gate, and she had to crawl on her hands and knees from underneath the gate. She however during cross examination stated that she was injured on the right shoulder. This was however corrected during re-examination. She testified that her shirt was torn at the back. Mr Bauer who saw the plaintiff after the incident confirmed that the plaintiff was distraught. He could not confirm any physical injuries. Mrs Berker-Smit testified that the plaintiff told her that she was hurt, and she looked distraught.

[39] It is common cause that the plaintiff did not attend a medical facility for treatment until July 2021 when she physically consulted with her doctor. Her evidence was that she self-medicated and was in constant contact with her doctor over the phone. In trying to explain the delay in seeking medical attention, the plaintiff described herself as stoic by nature. She stated that

she knows her body and that "she knows when to see a doctor and when to self-medicate".

[40] Plaintiff's counsel contended that the parties agreed to a separation of merits and quantum, thus no evidence was to be led by the plaintiff as to the injuries she sustained and the sequelae thereto. I disagree with this argument. Separation of liability from quantum in my view does not absolve a plaintiff whose claim is found in delict to prove all the elements of delict on a balance of probabilities. My view is that a quantum trial concerns itself with evidence relating to the sequelae of the plaintiff's injuries and quantification of the plaintiff's claim after having successfully established liability against the defendant. In this matter it is common cause that the plaintiff only sought medical treatment 11 months after the accident. There are no clinical notes from her treating doctor to show that she consulted with her, even if it was telephonically as alleged.

[41] Even though the defendant did not bring proof of the weight of the gate, but it is accepted that it was a heavy metal gate. The plaintiff also testified that if the gate had fallen on top of her, she would have been crushed. Although I cannot make a finding that the plaintiff was not injured as proposed by the defendant, however, my finding is that the plaintiff failed to prove the prerequisite element of harm required for a delictual claim and as such her claim falls to be dismissed.

[42] In the result I make the following order: -

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the defendant's costs on a party and party scale.

[redacted]

JL BHENGU
ACTING JUDGE OF HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Plaintiff:	Adv J.L. Khan
Instructed by:	Malcom Lyons & Brivik Inc
For the Defendant:	Adv L.S. Froneman
Instructed by:	Viljoen & Meek Attorneys
	c/o Swanepoel Attorneys

Date: 29 November 2024