IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019-21688

(1 REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

26/05/2025

In the matter between:-

A[…] B[...] Plaintiff

and

EMERALD SAFARI RESORT (PTY) LTD Defendant

JUDGMENT

Mfenyana J

[1] The plaintiff instituted proceedings against the defendant, (the Resort) for damages arising from injuries she sustained at the defendant's premises on 26 December 2018. The plaintiff alleges that she tripped over an uneven wooden beam, causing injuries to her right foot. The plaintiff thus contends that the defendant was negligent in that it did not ensure that the premises were safe for its patrons.

[2] The parties agreed that the issue of liability be determined separately from quantum, with the issue of quantum postponed *sine die*.

[3] The defendant has defended the action and denies that it was negligent in any way, claiming that the plaintiff's own negligence is the sole cause of the incident, and the injuries she sustained.

[4] In her particulars of claim, the plaintiff alleges that on 26 December 2018, she tripped over an uneven wooden beam at the resort, resulting in severe injuries to her left foot and a broken right ankle. It is common cause that the plaintiff was admitted to hospital and underwent surgery on 27 December 2018. She was discharged from hospital on 28 December 2018 but required a plaster of Paris (cast) for a period of 6 weeks, and physiotherapy. The plaintiff claims an amount of R378 902.77, made up as follows:

4.1. Past hospital medical expenses: R40,859.34
4.2. Future hospital medical expenses: R50,000.00
4.3. Past and future loss of earnings: R73,043.43
4.4. Domestic assistance costs: R15,000.00
4.5. General damages for pain and suffering: R200,000.00

Plaintiff's case

[5] Two witnesses testified for the plaintiff; the plaintiff herself and her husband, V[…] R[…] B[...] (Mr B[...]).

[6] In essence, the evidence is that on 26 December 2018 at approximately 11h00, the plaintiff, her husband and their 7 year old son were on a family outing at the Resort, generally known as Aqua Dome. The main purpose of the outing was to take their son there, as the Resort has various activities for children. Further evidence reveals that on the day in question, a lot of people attended the resort for entertainment.

[7] Having paid the required entrance fee the B[...]s entered the Aqua Dome and found a spot to settle in, whereafter they placed their valuables in a locker. They thereafter got into the pool and swam for a short while. They allowed their son to

swim in the lazy pool as they could see him from where they were seated. They then moved to sit at a bench that had become available.

[8] Both Mr. and Mrs. Ms B[...] testified that they did not notice any warning signs when they entered. Mr. B[...], however, further testified that he saw the warning signs when he returned to the resort about a week later and has no doubt that the warning signs were always there.

[9] When lunchtime was approaching, Mrs. B[...] left to buy lunch from the food stalls. She had to go around the bend, down three long stairs. She testified that it was so congested that she had to ask, “excuse me, excuse me”, all the way to get through the people who were standing there. She tripped on ‘something’ on the second step and staggered ahead trying to cling to the rails. She broke her right ankle when she fell on the third step. She tumbled forward, landing on the patch of grass by the GUN barrel. She used her arm to support her leg so it wouldn’t break entirely. When her son showed up, she requested him to go and call his father, which he did.

[10] Mr. B[...] arrived shortly thereafter, whereafter a lifeguard arrived. Thereafter, a paramedic from the Aqua Dome emergency services arrived. Mr. B[...] was asked to write a report. He testified that he wrote the report even though his wife did not tell him what happened as she was in pain, and being attended to.

[11] The plaintiff was thereafter taken to hospital where she received medical attention, including an operation. The plaintiff’s testified that on her arrival at Emfuleni hospital, before being transferred to Sunward Park hospital, she was seen by an orthopaedic surgeon who pushed her ankle into position. She further testified that she was under a lot of pain. The doctors fitted her with a plaster of Paris (cast) in her right foot. She remained in hospital until 28 December 2018, whereafter she went for follow up visits at which the doctor put in a plate and six screws. She had the cast until March 2019.

[12] During cross examination, the plaintiff conceded that she does not know what caused her to stumble and fall.

[13] With regard to the incident, Mr B[...] testified that he found the plaintiff lying in an awkward position on the grass between the barrel and the bench and table. She was holding her own head and leg up and was in shock and in a lot of pain. Her feet were close to the wooden beam. He does not know what happened to her or what caused her to fall.

[14] He testified that the plaintiff's ankle was completely dislocated. Notably, Mr B[...] testified that he did not see the plaintiff fall, but figured out what could have happened. He assessed the situation and realised that there were a lot of people around him. He also noticed that there was a lot of items lying around on the grass and next to the tables all around him, including shoes, handbags and other items. He stated that he explained that the plaintiff stumbled over clothing / towel when she was approaching the stairs. It is on this basis that he concluded that his wife stumbled over clothing / towels when she was approaching the stairs. On the same assumption, he completed the incident questionnaire and recorded his assumptions, He conceded under cross examination that his conclusion was based on speculation.

[15] It is common cause that Mr B[...] returned to the resort after the incident and took photographs of specific areas. He testified that this was with a view of showing what he saw as an unsafe environment and an unsafe walkway at the resort.

Absolution

[16] At the close of the plaintiff's case, the defendant applied for absolution. The defendant contends that the essence of the difficulty facing the plaintiff is that she does not know what caused her fall. The defendant relied on the decision of the erstwhile Appellate Division in *Claude Neon Lights*[1] for the proposition that what the court is required to establish at this stage of the proceedings is not whether the evidence establishes what would finally be established, but whether there is evidence upon which a court, applying its mind reasonably could or might (not

[1] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

should nor ought to) find for the plaintiff.

[17] Mr De Beer argued on behalf of the defendant that there is no evidence for this court to apply its mind to, on the basis that the plaintiff has failed to discharge the onus which rests on her, to prove all the elements of a delictual claim, being (i) an act/ omission, (ii) which is wrongful, (iii) negligence (iv) causation and (v) damages. In other words there must be a wrongful and negligent act or omission which caused the plaintiff to fall and suffered damages.

[18] He further submitted that for purposes of liability, *culpa* would only arise if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property, and causing him patrimonial loss, and would take such steps to guard against such occurrence, but fails to take such steps.[2] Mr De Beer further submitted that in the present case the evidence is simply that 'the plaintiff was walking, there were a lot of people, she tripped and she fell.' Even though one might argue that the minimum evidence of the plaintiff is required, in this case the plaintiff does not know what caused her to fall and conceded as much, including that that she might have tripped over someone else's foot, counsel further submitted.

[19] He argued that the plaintiff wants this court to draw an inference that she fell over something that was left on the ground when she has not provided any evidence to that effect, and thus requires the court to speculate. Counsel cited *S v Cooper*[3] where the court held that inferential reasoning requires facts and cannot amount to speculation. He pointed out that in the present case there are no facts, and that the case is exacerbated by the fact that the plaintiff's letter of demand and her particulars of claim do not speak to each other.

[20] With reference to evidence of something on the floor, counsel referred to the decision in *Monteoli v Woolworths (Pty) Ltd* [4] where the court noted that:

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[2] *Kruger v Coetzee* 1966 (2) All SA 490 (A).
[3] *S v Cooper and Others* [1976] 3 All SA 253 (T).
[4] (A5042/99) [2000] ZAGPHC 4 (21 August 2000).

"[37] It seems to me that in the context of a supermarket or something similar, before the presence of produce such as green beans on the floor can give rise to an inference of negligence, there must be some evidence of either a direct or circumstantial nature that the defendant at the time of the accident:

(i) ought to have taken steps to prevent the presence of beans on the floor from occurring; alternatively,
(ii) knew; or
(iii) ought to have been aware of their presence; and
(iv) failed to take reasonable steps to remove the offending items forthwith.

[21] Mr. De Beer stated, correctly in my view that there is no evidence of something that was on the floor, causing the plaintiff to trip, and consequently, there is no *prima facie* case to shift the evidentiary burden to the defendant.

[22] As stated in *Prinsloo v Barnyard* [5],

"People negotiate all kinds of stairs and obstacles in everyday life without falling. Sometimes they stumble and fall where there are no obstacles, even in their own homes. It cannot be expected of owners of property to protect the public against their own inattentiveness or possible clumsiness.[6]

[23] Counsel further relied on the above extract, stating that while Mr. B[...] navigated through the same path in a hurry, he did not suffer the same fate as his wife, and that Mrs. B[...] cannot explain what caused her injury or what she tripped or slipped on.

[24] Lastly, counsel submitted that "where a plaintiff does not prove the cause of her injury she cannot succeed in an action against the defendants for negligently causing her loss."[7] He drew similarities between *Ramafamba* and the present case that the plaintiff did not discharge the onus of proving that the defendants had

[5] (27705/06) [2009] ZAGPPHC 105 (4 September 2009).
[6] Para 16.
[7] (517/2012) [2012] ZASCA 162 (19 November 2012).

caused her injury.

[25] In the absence of any evidence as to what the plaintiff fell over, the defendant submitted that there can be no basis for alleging that the defendant ought to have guarded against it, he added. There is no inference to draw as Ms B[...] might have fallen over a towel, a rucksack, someone else's feet, a bench or a block, because it could have been anything.

[26] On these grounds, he submitted that absolution should be granted with costs on Scale B.

[27] Mr Motala agreed on the test to be applied in considering whether or not the court should grant absolution. He however argued that it is not correct to suggest that there is no evidence on which this court could or might find for the plaintiff. He conceded that the particulars of claim as they stand do not tie in with the evidence of the plaintiff as to what caused her to fall. He submitted that the plaintiff was candid that she does not know what caused her to fall but was adamant that she fell over an item on the floor.

[28] He challenged the fact that nobody else fell there, the question is whether there ought to have been items on the floor in the first place. That the defendant should provide evidence as to what steps it took to avoid harm. I do not agree with this proposition. What the plaintiff suggests is that the defendant should have foreseen the possibility of someone leaving an item on the ground that would cause another to trip and fall. Moreover, the plaintiff's own evidence is that she did not see what caused her to fall.

[29] Mr Motala argued that it could not be expected of the plaintiff having stated that there were various items on the ground to specify what specific item she tripped over. It would be sufficient for to state that there were items left there which should not have been there in the first place. The difficulty with this contention is what case should the defendant prepare for?

[30] In this regard, it was submitted on behalf of the plaintiff that the defendant

pleaded specifically in amplification of its denial and cannot aver that they have no case to answer to, or do not know what to plead to. They have pleaded specifically as to what caused the plaintiff to fall. The plaintiff has identified an obligation for the defendant to ensure that the area was kept in a safe condition, and that the defendant failed to do so. Her case is that she tripped and fell over an item she did not see. With regard to the walkways, the answer is that the benches were protruding onto the walkway causing it to narrow down. Although the particulars of claim state that the plaintiff fell over a wooden beam this should be considered holistically, counsel further submitted.

[31] There is no dispute that the plaintiff tendered two contradictory versions, first in the particulars of claim, and secondly in her evidence before this Court. The two versions are irreconcilable, for the plaintiff could have either tripped and fallen over an item that was on the floor, or a wooden beam that was protruding. Having pleaded to the particulars of claim, the defendant was faced with a different version at the trial. That the defendant had pleaded to the particulars of claim, in my view, does not assist the plaintiff.

[32] Relying on the judgment of the Appellate Division in *Regal v Superslate*[8], Mr Motala submitted that control over the maintenance of a building is an important consideration in establishing whether the defendant's omission amounts to unlawful conduct.

[33] The real question is whether in these circumstances, it could be said that the defendant is the cause of the plaintiff's injuries. What did the defendant leave or allow to be left on the floor which caused the plaintiff to fall? This is the question to be answered by the plaintiff. She did not. To the contrary, Mr B[...] testified that to this day, there is still confusion as to what caused the plaintiff to fall.

[34] As Mr De Beer argued, correctly in my view, the plaintiff could have tripped over her own foot, someone else's foot, and perhaps due to her own inattentiveness, did not notice it. The danger with this kind of approach is that it leaves the court to

[8] 1962 (3) SA 18 (A).

speculate as to what caused the plaintiff's fall. If it was someone else's foot, was the defendant required to guard against that occurrence? If it was a bag, a towel or any other item, was the defendant expect to prevent such occurrence? It appears to me that the observation by Mr B[...] of various items lying on the ground was in any event, after the fact, while trying to piece together the events which might have led to his wife's fall. The truth of the matter is that no one knows what caused the plaintiff's fall. Not even the plaintiff herself. This is not sufficient to discharge the onus which rests on the plaintiff. Consequently, the report provided by Mr. B[...] is without basis and by his own admission, mere speculation.

[35] Was there evidence led on behalf of the plaintiff, assuming it were true, upon which a court acting reasonably, might give judgment against the defendant. In other words, "whether a court, if no further evidence was led, after reasonable application of its mind, might find in favour of the plaintiff"[9]. I think not.

[36] It follows therefore that the application should succeed, and absolution granted. I am not oblivious to the fact that absolution is a stringent remedy and should be granted sparingly, as it goes against the principle of *audi alteram partem*. I do not make light of this. However, in the facts of this case and the evidence adduced by the plaintiff's witnesses, there is no evidence upon which this Court could or might find for the plaintiff.

[37] In the result, I make the following order:

a. Merits and quantum are separated, and the issue of quantum is postponed *sine die*.
b. Absolution from the instance is granted with costs on scale B.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

[9] *De Klerk v ABSA Ltd and Others* 2003 (4) SA 315 (SCA)

APPEARANCES

For the plaintiff:	N Motala instructed by Clark Attorneys paula@clarkattorneys.co.za
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Date of hearing.:	17 - 20 February 2025
Date of judgment:	26 May 2025