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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 2021/28721

DATE: 18 DECEMBER 2024

**(1)REPORTABLE: YES/NO**

**(2)OF INTEREST TO OTHER JUDGES: YES/NO**

**(3)REVISED**

**DATE: 18/12/2024**

**SIGNATURE**

In the matter between

**LEPHOTO PAULINA MALINDI**

**PLAINTIFF**

And

**GOLD VALLY LOUNGE**

**DEFENDANT**

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**JUDGMENT**

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**MATSEMELA AJ**

[1] This action by the plaintiff for damages against the defendant arising from an incident which occurred at a shopping complex, 1[...] B[...] Street Pretoria.

**COMMON CAUSE**

[2] It is common cause that on 30 January 2021 the plaintiff slipped and fell and got injured at the entrance of the toilet at the above shopping complex (the scene).

[3] A number of people including the plaintiff walked over the area where she slipped prior to her fall and many more walked over the same area after her fall and none of them slipped or stumbled and fell.

[4] There were no signs or warnings placed on the scene to warn of a dangerous/slippery floor.

[5] By agreement between the parties, the issues of quantum and liability were separated, and the trial proceeded on liability.

[6] By agreement the following pictures were handed in as exhibits

(a) Picture 1 depicted the door that leads to down the stairs and to the toilets;

(b) Picture 2 depicted the entrance to the toilets, with the step, the cardboard box and the tiled step to the toilets;

(c) Picture 3 depicted the toilet the plaintiff used;

(d) Picture 4 depicted the exit from the toilets;

(e) Picture 5 depicted where the Plaintiff fell on the cardboard box; and

(f) Picture 6 depicted where the gate is and the other toilets are located down the corridor.

## **EVIDENCE**

### **LEPHOTO PAULINA MALINDI**

[7] The plaintiff was the first person to testify about her version of events and testified that on 30 January 2021, she attended Gold Valley Lounge the defendant's premises as a patron. Gold Valley Lounge is a gambling place. She was and still a regular customer of the defendant. She has been their bona fide patron for over 5 years and she can utilize the common shop area and the toilet.

[8] She went to the toilet. The two buildings of Gold Valley Lounge and the toilet are separated by a corridor. If you wish to go the toilet you leave Gold Valley Lounge through the back door into the corridor. Then you have to climb the stairs which take you the door of the toilet. Each day that she spent in the Lounge she go about 4 or 5 times to the toilet.

[9] She was leaving the bathroom when she stepped on a cardboard box which caused her to fall. The cardboard box was located at the bottom of the stairs meant for patrons exiting and entering the toilets.

[10] She attempted to catch onto something during the fall motion however was unable to prevent her fall. Due to the incident, she suffered a fracture, to her right ankle.

[11] While she was laying on the floor, she observed that the cardboard box, that she stepped on, was wet and torn. The cardboard box was placed in front of the stairs that lead to the toilet used by the employees of the defendant. She stepped on it the when she was leaving entering the toilet.

[12] The Defendant's cleaner, a certain Delight, saw her sitting at the step and came to her aid. Delight indicated that the Defendant does not have first aid box, but provided a piece of cloth and ice to place on the injured ankle.

[13] She, with Delight's assistance, limped up the stairs, to the front of the Store and waited for her husband.

[14] She was not allowed to utilize the toilets referred to as the Nandos and Salon toilets (Nandos Toilets). That the defendant 's customers were previously permitted to utilize these toilets. However, a gate was installed and was locked. This gate prevented anyone from entering from the defendant's direction. This in a way, also prevented the defendant's customers from utilizing those Nandos toilets in the commercial complex. The manager of the defendant made an announcement, stating that their customers must not utilize the Nandos toilets.

[15] The toilet that she utilized, is that of the defendant and that the defendant 's employees were responsible for cleaning the relevant toilets. She usually reported any issues of the relevant toilet to the employees of the defendant, such as the shortage of toilet paper or if anything is broken.

[16] The improvements have been made, since, the incident took place. Things such as hand railings at the stairs, reflectors installed on the steps and a rubber mat has been bolted.

[17] She suffered the following injuries:

- (a) fractured right tibia;
- (b) injuries to her right ankle;
- (c) injuries to her left ankle.

[18] She had worn sandals with rubber soles on the day of the incident.

[19] She informed the defendant's representative, a certain Harry, of the incident and they have never given any indication that they were not responsible for the injuries due to the area where the incident took place.

[20] That the toilets were previously locked and customers of the Defendant had to collect the key from the cashiers when they when they wanted to use the toilets. The toilets are no longer locked and she does not know what the reason is.

## **JOHN MSIZA**

[21] John Msiza testified that he is a major male and regular customer of the defendant. He attended the defendants' address on the date of the incident.

[22] He observed the Plaintiff heading to the toilets and also observed when she returned. He noticed that the Plaintiff returned with the cleaner of the defendant. The Plaintiff was leaning on the cleaner, limping through the store and the Plaintiff's foot was dressed in a cloth.

[23] He said the customers of the Defendant were only allowed to utilize the relevant toilet and that the gate to the Nandos toilet was also always locked.

[24] There would be a cardboard box always placed in front of the stairs to the toilets, to prevent any footprints from being made in to the toilets when it rained.

[25] He noticed that changes had taken place at the area where the incident took place, such as steel railings that were installed at the stairs. The reflectors on the steps and a rubber mat have also been installed where the cardboard box usually was. These changes were brought about end of 2021 or beginning of 2022, after Plaintiff got injured.

### **VUSI NDLOVU**

[26] Vusi Ndlovu (Vusi) was the third witness to testify for the Plaintiff. He testified that he is an ex-employee of the defendant, working from 2014 until 2023. He started as security, was promoted to cashier and later promoted to manager.

[27] The relevant toilets, where the incident occurred, was initially not utilized by the Defendant's customers. This area, was previously utilized as a storeroom by the defendant. The customers had to use the Nandos toilets at that time.

[28] In 2016, the members from the other shops complained about the defendant's customers utilizing the Nandos toilets during the time that their shops were closed, seeing that the Defendant operated 24 hours. The storeroom was then converted to a toilet and the gate was installed to prevent the defendant's customers from utilizing the Nandos toilets.

[29] Only the Defendant's employees were responsible for cleaning of the relevant toilets. There were three cleaners at the time, namely Gladys, Delight and Nelly. There were no other people who cleaned the relevant toilets, other than the Defendant's employees.

[30] There was a card board box always placed in front of the steps at the toilet because of a leak coming from the roof. The cleaners placed the card box there to prevent customers from entering the toilet with dirty wet shoes and causing the toilet's floor to get dirty.

[31] The Defendant's employees were not only obliged to clean the toilet but also, to clean the concrete located in front of the step of the toilet.

[32] If there was any issue relating to the maintenance of the toilets had to take place, Mr Ndlovu corresponded that to the Defendant via email reporting those issues.

[33] Initially, after the new toilets were installed, the toilets were locked and the customers had to obtain the key from the cashiers when they wanted to utilize the toilets. The key, however, got lost after a few months since the new toilets were installed and thereafter it stayed opened.

[34] A printed notice was placed at the toilets, stating that the toilets are to be utilized by the defendant's staff and customers only. This notice was placed at the toilets for a period of 3 years, the notice, which was an A4 paper, later fell off. Even though the notice was not replaced, the fact that the toilets were only to be utilized by the Defendant's personnel and/or customers, was a general understanding.

[35] The contractor's work of installing the new toilets, was only done for the defendant and that there was no other work done for any of the other shops.

### **GLADYS MNCUBE**

[36] Gladys Mncube was the fourth and final witness for the Plaintiff. She testified that she was employed as a cleaner and server at the defendant from 2015 until 2023 until she found a better job opportunity. She normally cleaned the Lounge, the area surrounding the toilets and the toilets and that no other person than the defendants' employees cleaned these areas.

[37] Initially the staff members and customers of the Defendant had to utilize the Nandos toilets that were at the other side of the complex, until the new toilet was built for the Defendant's personnel and customers.

[38] There was a cardboard box that was always placed in front of the step, as there was water leaking from the roof, box absorbed the water and prevented customers from falling when stepping from the wet concrete to the inside of the tiled floor in the toilet.

[39] The arrangement to put the cardboard box there was made by the cleaners, as the leak was reported to the management, but the leak was not attended to for a long time. The cleaner on duty would sometimes change the box at least 4 to 5 times a day, depending on the wet conditions.

[40] Even after the management attended to the leak problem, it would later on start to leak again. She informed boet Ben, a supervisor of the site and employed by City Properties, owners of the complex, of the leak, who then indicated to her that the leak issue is not their problem.

[41] There was a notice at the toilets indicating that the relevant toilet was only to be utilized by the Defendant's staff and customers, which notice later on fell off and was never replaced.

[42] That it was common knowledge that the relevant toilet was only to be utilized by the Defendant's employees and customers.

### **TSHIAMO TLOMETSANA**

[43] Tshiamo Tlometsana was the only witness to be called by the Defendant to come and testify. He told the Court that he is a major male, manager working at the defendant since June 2023.

[44] The relevant toilet is outside the Defendant's shop and/or business premises. There is no key for the relevant toilets.

[45] The employees of the Defendant clean the toilet and that the complex cleaner have never cleaned the relevant toilet. The complex cleaner cleans the

pavement in the corridor.

[46] There is no cardboard box in front of the toilet, just a rubber mat.

[47] The gate in the corridor is locked at night and the Defendant's customers cannot enter from the Defendant's side.

[48] The area where the incident took place had undergone some changes, such as a steel railing at the steps, rubber mat outside the toilet and reflector tape on the steps. That he himself placed the reflector tape on the steps for a cautionary measure.

[49] He cannot confirm any arrangements and/or circumstances of the premises before his employment in 2023.

[50] He has received instructions on attending to health and safety protocols, such as stairs notices, fire extinguishers and signs indicating a wet floor.

## **RAISED LEGAL ISSUES**

[51] The first legal question raised is whether the defendant has, or had at the time exclusive control over, and responsibility for that part of the entrance of the toilet where the plaintiff slipped and fell.

[52] The second legal question is whether on the evidence, both real and circumstantial that it was proven that the defendant could foresee the risk and was negligent by not taken the necessary steps to address the risk as what could be reasonably expected from a person faced with such a position of similar facts. The Defendant on the other hand denies that any breach of duty of care took place.

## **NON JOINDER**

[53] The test for non-joinder was set out in ***ABSA Bank Ltd v Naude No and Others 2016 (6) SA 540 (SCA)*** para[10] which held that the test whether there



has been non - joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.

[54] In ***Gordon v Department of Health, KwaZulu –Natal*** it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined'. It is now settled law that the joinder of a party is only required as a matter of necessity as opposed to a matter of convenience. A person has a direct and substantial interest in an order that is sought in the proceedings if the order would directly affect such a person's rights or interests, such a person should be joined.

[55] The defendant pleaded that the area where the incident took place, was a general walkway. In other words, it is a common area. They were not responsible for the area where the incident took place. Counsel for the defendant further argued that to impose a legal duty of care on the defendant under these circumstances will extend liability too far and will be unjust.

[56] The question, is whether the toilet in question, forms part of the defendant's premises, or is intended for its exclusive use and enjoyment. I hold the view that the building of the toilet does not form part of Gold Valley Lounge as the two buildings are separated by a corridor.

[57] The Plaintiff's witnesses testified that the toilets were converted from a storeroom in approximately 2016. The main reason was that the defendant customers used the other bathrooms on the premises and especially at night, when the complex's cleaners were not, there, left the bathrooms untidy.

[58] None of the plaintiff's witnesses were able to say with certainty who had paid for the conversion. It would in any event be improbable for a landlord to demand from a tenant to build its own bathroom, at its own costs, because the landlord had a problem with the tenant's customers using bathrooms that were initially

available to all tenants and their customers.

[59] If it was in fact the defendant who had converted the bathroom at its own cost and for the exclusive use of its staff and customers, one would have expected direct access through the kitchen without an outside door.

[60] If an outside door was the only option, to control access the toilets would be locked (like Nandos did) and to give customers a key to open the bathroom when needed.

[61] The erstwhile manager, Vusi, testified that the bathroom was initially locked when it was converted in 2016, but after about 5 months the key got lost and the bathroom was never locked after that.

[62] For the past 8 years, none of the managers attempted to simply have the lock replaced, which is simple, quick and inexpensive exercise that could have been performed by the maintenance people who apparently were often called in to perform maintenance at the bathroom.

[63] This simply does not accord with the actions (or intentions) of a business that converted its own bathroom for the exclusive use of its staff and customers.

[64] Vusi also testified that a laminated printed piece of paper was put on the door of the bathroom to indicate that the bathroom was for the exclusive use of the Defendant. When the notice fell off, nobody bothered to put it back or simply put up a new notice without much effort and cost.

[65] Vusi's explanation was, that by the time that the notice was no longer on the door everybody in the complex knew that they were not allowed to use that toilet, if they were not staff or customers of the defendant.

[66] He however, had to concede that other people could still make use of the bathroom. When he was asked whether it was possible for people doing

deliveries to use the bathroom, he said that whenever there was a delivery, a cleaner would be posted at the bathroom's door to make sure the bathroom was not being used. Gladys, who was a cleaner there for 8 years, however, testified that she had never been asked to guard the entrance to the bathroom.

[67] The Defendant's witness, the current manager, gave a simple explanation as to why the bathroom is cleaned and maintained by the Defendant. He testified that the defendant is operating 24/7 and it is important for the defendant to ensure that the bathroom is clean and in a working condition for their customers at all times. It is clear from the evidence that the complex cleaners and their supervisor, boet Ben, mostly neglected their duty to maintain the building. Therefore, taking responsibility for the maintenance and cleaning of the bathroom was a pure business decision.

[68] The plaintiff testified that she spent a lot of time at the premises and would often use the bathroom 3 to 4 times during each of her visits. It is generally known that if customers did not have a working (and clean) toilet, they would leave and go home instead of spending more time and money at the defendant's business.

[69] The plaintiff testified that the bathroom was often in a state because both males and females use the same toilet, it would be dirty, or there would be no toilet paper, she would then take a photograph and send it to the manager to complain. Obviously, no business would like to chase away a loyal and frequent customer, as the plaintiff was and still is.

[70] The fact that the defendant was cleaning and maintaining the toilet does not necessarily mean that it should be an indication and proof that it had exclusive control over the scene and the toilet. The plaintiff should have joined representatives of owners of the complex and /or City property as joint wrong doers. They would have to come and testify as to whether the defendant had exclusive use of and responsibility for the scene.

[71] I hold the view that the defendant has, or had, no control over who has

access to the scene at any specific time, including people delivering goods to the other businesses, tenants throwing their refuse out, security personnel, as well as employees from Nandos, who frequented the defendant's lounge. It also did not have control over the complex cleaners cleaning the scene area with hose pipes either.

[72] There was a water leak emanating from the roof. The plaintiff was aware of the water being present. A cardboard box would be placed at the bottom of the stairs at the scene. This cardboard box would be changed every 4 to 5 hours because of the leak coming from somewhere on the roof of the complex. The defendant had no control of the leak coming from the roof.

[73] It will be not in interest of justice if I would grant judgement on merits therefore I will not deal with the second legal question. I hold the view that the owners of the complex and/or City Property must be joined as joined wrong doers.

### **COSTS**

[74] The defendant was supposed to raise the issue of non-joinder as *a point in limine* and has failed to do that. This has resulted in trial that was unnecessarily prolonged.

[74] Thus the following order is made:

**THE PAINTIFF'S CLAIM IS DISMISSED.**

**EACH PARTY TO PAY ITS COSTS.**

**MOLEFE MATSEMELA  
ACTING JUDGE OF THE GAUTENG HIGH COURT**

This judgement was prepared and authored by the Judge whose name is

reflected and is handed down electronically by circulation to the parties' legal representative via email and by uploading it to the electronic file of this matter on Case Lines. The date of this judgement is deemed to the 18 December 2024.

Heard on 18 September 2024

FOR THE PLAINTIFF

INSTRUCTED BY

FOR THE DEFENDANT

INSTRUCTED BY

Adv SJJ VENTER

BURNETT ATTORNEYS

Mr AJ du PLOOY

A KYPRIANOU ATTORNEYS