In the KwaZulu-Natal High Court, Pietermaritzburg
Republic of South Africa

Case No 14235/08

In the matter between :

Ronald Sydney Hobbs Plaintiff

and

Autumn Star Trading 180 (Pty) Ltd Defendant

Judgment

Lopes J

[1] The plaintiff in this matter claims payment of the sum of R1 335 139,77 from the defendant, being damages allegedly sustained by the plaintiff when he fell down a flight of stairs in the shopping centre known as the Sunningdale Shopping Centre situated in Umhlanga Rocks Drive in Durban and which was owned by, or under the control and administration of, the defendant.

[2] With the consent of the parties I granted an order at the outset of the trial

in terms of Rule 33(4) separating the issues of liability and quantum.

[3] The citation and identity of the plaintiff were admitted by the defendant who also admitted ownership and control of the shopping centre. In argument before me Mr Marais SC who appeared for the defendant also conceded the duty of care owed to the plaintiff to ensure that the stairwell was safe, free of any object or substance that could cause harm, and was adequately illuminated.

[4] The plaintiff's claim is that on the 14th September, 2007 and at approximately 6.45pm (or at any rate, at a time when it had become dark) the plaintiff descended the stairwell and slipped, resulting in his sustaining injuries.

[5] The plaintiff's first witness was Mr Harold Gaze who described himself as an occupational hygiene, safety and environmental consultant. The essence of Mr Gaze's evidence is that he conducted an inspection on the 17th March, 2008 and measured the light levels on the stairwell. The light levels which he found were approximately a fifth of what they should have been as prescribed by the relevant legislation for a working environment.

[6] I regard the evidence of Mr Gaze as being unhelpful because :-

(a) the stairwell is not part of a working environment and he gave no indication that it was governed by the legislation to which he referred; and

(b) the fact that the lighting in the stairwell might have been below the

minimum level required for a work environment does not of itself indicate negligence on the part of the defendant.

[7] Indeed, Mr Topping who appeared for the plaintiff submitted that I should use the evidence of Mr Gaze as an indication or yardstick that the lighting level was clearly below what was required as a minimum standard. Although I accept the accuracy of the readings which were taken by Mr Gaze, he was a most unimpressive witness who sought to exaggerate his technical qualifications, indicating at the outset of his evidence that he had approximately eight or ten degrees and later that he had an Honours degree in the relevant field, none of which appears to be accurate.

[8] The plaintiff's next witness was Anand Pancholy. He testified that he was the proprietor of Indian Summer, a restaurant in the Sunningdale Shopping Centre. It is situated on the left hand side as one enters the stairwell. On the 14th September, 2007 he had been standing alongside the restaurant at the top of the stairs and had been speaking to the plaintiff. The plaintiff had ordered a takeaway and they had spoken for approximately five to ten minutes whilst they waited for the takeaway to be ready. At that stage Mr Pancholy's partner handed over the takeaway and he bid goodbye to the plaintiff. Later he was informed by one of his staff members that the plaintiff had fallen down the stairs. He did not investigate the matter any further because he did not think that any serious injury had been caused.

[9] Mr Pancholy stated that the plaintiff had been on his own when he had been talking to him, but that he had been waiting for his wife. There was nothing in the plaintiff's manner which suggested that his state of sobriety was not normal. In cross-examination by Mr Marais SC he expressed the view that he was able to form an opinion on the plaintiff's state of sobriety. Although he could not recall the weather on the night in question, he stated that wind would blow the water under the roof section at the top of the stairs. It was his habit to caution customers of his establishment that they should be careful going down the stairs. This is because customers regularly did so if they wanted to make use of the toilet facilities in the centre. He also warned them of a red box on the right-hand wall immediately above the middle landing. He did so because he had at some stage banged his own head on the red box.

[10] He also indicated that the two lights on the stairwell were sometimes not working, and would not be fixed for a few days. On the day in question the one light on the wall of the stairwell on the left hand side was not working. With reference to picture four on annexure C10, he indicated the light above the middle landing of the stairwell and the red box. He had remembered that the light was out when his staff told him about the incident because he had considered that to be a possible cause of the plaintiff falling.

[11] The plaintiff then testified that he was a representative for a labour broking

company. On the day in question he had had a busy afternoon visiting various clients, etc culminating in him fetching his wife from her place of work at about 5 or 5.15pm. They drove to Glen Anil to the Spar at the Sunningdale Shopping Centre where his wife went upstairs to purchase a curry takeaway (clearly from Indian Summer). He parked his car downstairs outside the Spar and had gone up to the pub called Someplace Else (using the stairwell) whilst his wife had gone to attend to some shopping. The pub is situated to the right of the stairwell as one enters it from above, and approximately 10 metres from the stairwell. The pub had been very full and he had taken a seat at a table inside the pub door and ordered a beer. He stated that he had met the owner of the pub and his son the week before that he liked the pub and that he had intended to be a regular there. He had continued to watch the rugby until his wife arrived, whereupon he had a second beer and ordered his wife a glass of wine. She had been away for a maximum of approximately ten minutes, and upon her return told him that the curry takeaway order would take approximately 10 to 15 minutes.

[12] When they left the bar they went to Indian Summer to fetch their takeaway. At that stage it was dark and raining. The manager of the Indian Summer indicated that the food would be ready in a minute or two and they stood and chatted to him. As they left with the takeaway, the plaintiff held the groceries his wife had purchased in his right hand, and held her right hand with his left hand. She was carrying the curry takeaway in her left hand. In this manner they proceeded down the stairwell, and approximately on the third or fourth stair from

the middle landing the plaintiff's right foot slipped out from under him and he landed on the middle landing on his right elbow and right hand side. His wife did not fall. He described the lighting in the stairwell as pretty dull and dark, but could give no explanation as to why he had slipped. He was in a lot of pain but nonetheless drove home. At a later stage his daughter took him to hospital where a fracture of the cuff of his shoulder was detected on X-ray. It was pointed out to the plaintiff that in its plea the defendant alleged that he had consumed approximately six beers in a short space of time. He denied this and maintained that he had only had two beers.

[13] In cross-examination by Mr Marais, the plaintiff maintained that he had been in Someplace Else for only approximately 15 to 20 minutes. It was suggested to the plaintiff that he had been able to drive home because he had had so much to drink that he was unaffected by his injury. He denied this and maintained that he had been in pain but had been keen to get home to watch the remainder of the rugby match.

[14] Various recordings of the plaintiff's fall were then put to him. Exhibit A(4) was a handwritten manuscript statement which records that after buying a takeaway from the Indian Summer restaurant the plaintiff was walking down to the lower level where his car was parked, and he slipped on the stairs which were wet. The words "*due to rain*" had originally been part of the manuscript but had been crossed out. The plaintiff's evidence was that his wife had written out

the document that he was unable to recall whether or not he had been present when it was written out. He says that he did not tell her that he slipped because the stairs were wet.

[15] The plaintiff was then referred to the medico-legal report of Mr J R Domingo which records that he slipped on water which was on the stairs. He was carrying a shopping bag in his right hand. The plaintiff conceded that there is a strong possibility that he may have told that to Mr Domingo. He said he may have done so because when they later went to the scene they were told that there was water on the stairs because the fire hydrant on the middle landing had been leaking. He also said that he seemed to remember water on the landing when he fell. He conceded that he had previously said that he could not say whether or not the stairs had been wet. He also said that Dr Domingo had got it wrong in his report where he recorded that the plaintiff's wife had driven him home.

[16] The plaintiff was extensively cross-examined on his drinking habits. It was clear from his evidence that he frequented bars on an almost daily basis. He conceded that he might well consume six beers on any given day. However, he was adamant that on this day he had only had two beers, and that he was able to handle his drink and said that he would be totally stable having consumed between six and eight beers.

[17] With regard to other possible reasons why he fell, he said that he had been looking approximately two to three steps ahead of where he was walking but that if the illumination in the stairwell had been good enough, he would have been able to see anything lying on the step. He maintained that the footing on all the other stairs on which he had trodden on the way down the stairwell was firm.

[18] The plaintiff then closed its case. The defendant called as its first witness Johannes Petrus Mostert van Zyl who was the sole owner and creator of the Someplace Else pub. He had been present in the pub on the evening in question. The bar had been very busy, and he testified that it had rained quite heavily that night from the east when a lot of water would come into the top of the stairwell and down onto the stairs.

[19] Mr van Zyl said that he knew the plaintiff, but only as a customer. He described him as a nice person who was well spoken and who communicated with him. He said that he sometimes came into the bar in the morning at approximately 10am to have a couple of beers. He would usually drink Hansa pints and he would come into the bar approximately three to four times per week.

[20] Mr van Zyl stated that on the day in question there had been a change in the behaviour of the plaintiff who had been somewhat out of the normal. He said that that night the plaintiff was very loud and as a result of that Mr van Zyl had focused on the group of people with whom the plaintiff was sitting. He said that

he would always do that, fearing some kind of trouble in the bar. He had counted that the plaintiff had consumed approximately six beers during the second part of the rugby match. He did not agree that the plaintiff had only been in the bar for 15 minutes. After the plaintiff had left he had been told that someone had fallen on the stairs and he had gone there and seen the plaintiff sitting on the landing bent forward as if in pain, with people attending to him.

[21] Under cross-examination by Mr Topping for the plaintiff, Mr van Zyl conceded that everyone was talking about the wetness on the stairs because it had rained heavily from the east and water had got onto the stairs. He said that when he was standing at the top of the stairs looking down they had been wet. He could not see how far down the stairs the wetness extended.

[22] In response to a suggestion by Mr Topping that the plaintiff had only moved into the area two weeks previously and only met Mr van Zyl on the previous Friday night, Mr van Zyl was of the view that he had definitely met the plaintiff before that time.

[23] Mr Topping put to Mr van Zyl that he was getting his timeframe confused and that the plaintiff had only adopted a routine of drinking approximately six beers per day at the pub after the incident. Mr van Zyl was of the view that the plaintiff's habits had not changed. Mr van Zyl conceded that the plaintiff had not been disturbing other patrons, but maintained that he had been loud, shouting at

the barman. I did not understand Mr van Zyl to mean that the plaintiff did so in an aggressive or unfriendly way.

[24] Mr van Zyl conceded it was possible that when the plaintiff's wife had joined him he had ordered another beer together with a glass of wine for his wife. He conceded that he did not keep track of the plaintiff all of the time that he was there. He could not recall the exact time that the plaintiff left but said that the plaintiff had to pass his table when he emerged from the bar. When he did so he was still talking loudly. As he was leaving he had swung around to wave to his friends, and had seemed unable on his feet at that stage.

[25] John Charles de Beer then gave evidence and testified that he was the owner of S E Services, a security services company which rendered services to the owner of the Sunningdale Shopping Centre, and had been doing so for approximately five years. He had previously assisted with the management of the shopping centre, but not on a full-time basis. He attended to repairs, arranging for defects to be attended to, etc. He was familiar with the staircase and was aware of the incident but was not able to say whether or not the light had been working on the night in question. He said that during 2007 faults would be reported to him and he would pass the message onto JHI who were looking after the centre administratively.

[26] He had never seen rain on the stairs of the stairwell. He was unable to

comment on Mr Topping's suggestion that it had rained heavily that night, and that people had complained of the wet stairs. He conceded that the foot traffic of people using the stairwell would carry water down the stairs.

[27] Mr de Beer acknowledged that he had received complaints about the fire extinguisher hose on the middle landing leaking, although he had not seen it himself. He maintained however, that things had more recently been improved and the stairwell had been better illuminated after the incident. He conceded that at the time of the incident lights could have been off in the stairwell for a couple of days.

[28] The defendant then closed its case.

[29] At the end of the first day of the trial an inspection *in loco* was conducted which was attended by Mr Marais SC, Mr Topping and myself. The record of that inspection *in loco* is contained in annexure F but the most relevant aspects were the following findings :-

a) the stairwell comprising two tiers of stairs is completely covered;

   (i) from the top landing approximately 12 stairs lead to the central or middle landing; and

   (ii) after the middle landing approximately another ten stairs lead to the bottom of the stairwell which leads into a parking area at the bottom end of the shopping centre; and

b) there are two large round lights in the stairwell, one in the vicinity of the top landing approximately a metre below the ceiling line and the second on the left-hand side of the middle landing at approximately the same height below the ceiling;

c) when the inspection *in loco* was conducted the middle landing light was covered so that the only light available was the round light in the vicinity of the top landing; and

d) it was dark, and if one descended the stairwell from the top landing the lighting was such that the tile covering the top of each step was clearly visible, albeit dimly lit. The available lighting was poor;

e) Mr Marais SC placed a R1 coin and a 50 cent coin on each of the bottom two steps of the top half of the stairwell i.e. immediately above the middle landing. As one descended the top half of the stairs those coins were visible, as was amply demonstrated when a passerby, unconnected with the inspection *in loco*, came down the stairwell oblivious to the presence of those attending the inspection *in loco,* and picked up the two coins;

f) The fire hydrant was present on the middle landing as evidenced in the photographic exhibits and the stairwell was covered through its entire length running from a roughly easterly to westerly direction; and

g) When the inspection *in loco* was conducted the light above the middle landing was covered. At the end of the inspection *in loco* the light was

uncovered and the visibility was dramatically improved and one was able to see the steps much more clearly;

h) As one descended the stairs from the top the lighting was initially dim, but at the bottom one emerged into fairly bright lights from a chemist's shop at the bottom of the stairs; and

i) The fire hydrant on the middle landing would not have leaked onto the steps above it, but it was agreed that foot traffic may have carried any water lying on the middle landing onto the few steps above it.

[30] Mr Topping submitted in argument that the most likely reason why the plaintiff fell was a combination of wetness and the fact that the stairs were dimly lit. Confirmation of these facts is to be found in the evidence of Mr van Zyl who testified as to the rain. The poor lighting was common cause. Had all the lights been properly working, the plaintiff would have in all probability detected the wetness and sought to avoid it. Mr Topping referred to various cases involving persons who slipped and fell and the liability attaching to those in charge of such premises.

[31] Mr Marais SC argued that the plaintiff had failed to demonstrate any negligence on the part of the defendant, and even if such negligence was demonstrated, there was no causal link between the negligence and the injuries sustained by the plaintiff. He said that as this stairwell was situated outside, people should expect rain to intrude and for the stairwell to be wet.

[32] Mr Marais SC maintained that as the plaintiff could not explain why he had fallen, he could not succeed. There were a number of possible explanations for his falling such as :-

a) the poor state of the lighting, resulting in the plaintiff being unable to see properly and losing his footing – this was discounted by the inspection *in loco* where it was evidenced that the lighting, albeit poor, was sufficient;

b) that he slipped on wet stairs – this had not been established;

c) that he slipped because he was intoxicated- the plaintiff had conceded his excessive alcohol consumption;

d) that he might just have fallen anyway.

[33] The onus was on the plaintiff to pinpoint the probable cause of his fall, and he could not do so.

[34] Mr Marais maintained that this was not a case where, with the exception of the expert witness Gaze, and the plaintiff's evidence on his consumption of alcohol on the night, the witnesses could be criticized.

[35] Despite what the plaintiff had said in his evidence, Mr Marais SC maintained that it was clear that he believed he had fallen because of water causing the tiles on the steps to become slippery. This was not, however, his

evidence.

[36] In reply, Mr Topping pointed out that the plaintiff had said that he landed in water and not that he had fallen because of it.

[37] What we are concerned with in this case is the duty of care owed by the defendant to ensure that members of the public using the stairwell in the Sunningdale Shopping Centre were not harmed as a result of poor lighting or that the stairwell was not kept free of objects or substances which could cause people to fall and harm themselves. A failure to do so would constitute the necessary element of wrongfulness which, in addition to the requirements of fault, causation and harm, would determine liability for delictual damages caused by an omission.

See : *van Eeden v Minister of Safety and Security* 2003(1) SA 389 (SCA) at 395H-396E

[38] From the evidence referred to above the following emerges :-

a) that the light above the middle landing of the stairwell was not working on the night in question and consequently the lighting conditions on the stairwell were poor. This emerged both from the evidence of Pancholy and the inspection *in loco*. The fact that one could have made out the steps, and even possibly anything lying on them, does not detract from the fact that poor lighting made it more difficult to see anything lying on the steps; and

b) it had rained heavily that night and at least the top of the stairs would have become wet from the rain which would have been driven under the cover at the top of the stairs by the easterly wind. This emerged from the evidence of van Zyl. That the wind would cause the rain to come in under the roof at the top of the stairwell was also confirmed by Pancholy;

c) the fire hydrant was a continual problem in that it leaked. That it was doing so at the time is to be found in the plaintiff's evidence that when he landed on the middle landing, he had got the impression that it was wet. As there was no evidence that he was bleeding from his fall, water is the most likely source of that wetness. It was evident from the inspection *in loco* that water leaking from the fire hydrant would not have leaked onto the steps above the middle landing, but that foot traffic could have carried water onto those steps.

[39] Although the plaintiff in his evidence said he could give no explanation for why he had fallen, it appeared he was being somewhat over-cautious in his evidence. I say this because it is clear from the evidence gathered shortly after the incident that the plaintiff believed he had fallen because of water. In the statement taken down by his wife it was recorded that he had slipped on something wet. The fact that the words "due to rain" had been scratched out appears in hindsight to be attributable to the fact that the plaintiff and his wife were probably unsure whether the water had come from the rain or from the fire hydrant, or indeed from some other cause. In addition, the probabilities favour

the plaintiff having informed Mr Domingo that he had slipped on water which was on the stairs. This version appears likely because Mr Domingo also records that the plaintiff was carrying a shopping bag in his right hand, a factor which he confirmed in evidence.

[40] There is a discrepancy in this evidence insofar as Mr Domingo later records that the plaintiff's wife drove him home. This may have been an assumption on Mr Domingo's part, because the plaintiff denied that he had told her that.

[41] In addition, in the documents provided in respect of Theo Gregersen an occupational health and safety specialist who did not testify at the trial, but whose expert summary was included in Exhibit C, is an interview with the plaintiff where it is recorded that the plaintiff apparently stated that his foot had slipped "on a wet spot".

[42] Viewing the evidence in its totality, it would seem that on a balance of probabilities the cause of the plaintiff's fall was the presence of a wet patch on the stair where his foot slipped. One cannot discount the possibility that he would have been better able to see that wet patch, had the light above the middle landing of the stairwell been working.

[43] The defendant was accordingly at fault in not ensuring that the lighting

was properly maintained and the stairwell kept free from water. Indeed, no evidence was led on the part of the defendant to demonstrate that it had taken steps to maintain or ensure that the stairwell was properly maintained. Indeed, the evidence of Mr de Beer on behalf of the defendant would appear to contradict such a conclusion.

[44] In those circumstances the failure on the part of the defendant as set out above was causally linked to the plaintiff falling on the stairwell. The extent of the harm caused to him is something which is to be determined at the next phase of the trial.

[45] What remains for me to consider is whether the negligence of the plaintiff himself contributed to his falling. Whilst Mr Mara's SC indicated that the plaintiff should not be believed on the question of how much he had to drink on the night in question, I am not persuaded that I should do so. The evidence of the plaintiff was contrasted with the evidence of Mr van Zyl who was of the view that the plaintiff had been somewhat loud on the night in question and had consumed approximately six beers. Even if he had done so, the evidence of the plaintiff was that he could handle his drink and would be completely stable after consuming six to eight beers. Although disputed, no evidence was led by the defendant in that regard. The plaintiff candidly acknowledged that he was accustomed to drinking six beers on any given day, but was adamant that on the day in question he had only consumed two beers. Although he may have

attracted the attention of Mr van Zyl by his behaviour in the bar, it seems unlikely that Mr van Zyl would have consciously counted the number of beers which the plaintiff consumed. The suggestion by Mr van Zyl that the plaintiff had been unstable on his feet at the time he left the bar, is based on his evidence that the plaintiff had turned and was waving to his friends as he left the bar. I am not satisfied that I am able to conclude from this that any instability which may have been evidenced in the plaintiff's gait whilst he was turning was due to his drinking could have contributed to his fall.

[46] There is nothing else in the evidence which would indicate that the plaintiff was at fault in the manner in which he descended the stairwell. Indeed, he seems to have taken the sensible precaution of holding onto his wife's hand while they were descending the stairwell. Whatever his reason for so doing, the fact that he did so would have contributed to his stability in descending the stairwell. To paraphrase Hattingh J in *Kriel v Premier, Vrystaat en Andere* 2003 (5) SA 66, para 12, a person walking down a flight of stairs is not obliged to study each step carefully to ensure that there are no obstacles in his path. In my view he was not contributorily negligent in any way.

[47] I accordingly make the following order :-

(1) the defendant is liable to compensate the plaintiff for any damages which he may prove that he has suffered as a result of the fall which he sustained on the stairwell at the Sunningdale Shopping Centre on the 14th

September, 2007;

(2) the defendant is directed to pay the costs of the action thus far.

Date of hearing : 22nd February 2011

Date of judgment : 4th March 2011

Counsel for the Plaintiff : I Topping (instructed by Friedman & Associates)

Counsel for the Defendant : J Marais SC (instructed by Deneys Reitz Inc)