IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 16484/2007

CHRISTINE CAMILLERI Plaintiff

v

OLD MUTUAL INVESTMENT GROUP INVESTMENTS PTY LTD Defendant

JUDGMENT DELIVERED ON THURSDAY, 15 SEPTEMBER 2011

CLOETE AJ:

[1] This is an application by the defendant for absolution from the instance at the close of the plaintiff's case.

[2] The test for absolution from the instance at the end of a plaintiff's case is well established. It is set out in the following passage from *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-93A:

'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

"....(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required or to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff..."

.....

This implies that a plaintiff has to make out a prima facie *case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff... As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one... The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff'...Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'*

[3] This is the approach to be applied in determining whether or not the plaintiff has crossed what has been referred to as the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not: see *De Klerk v Absa Bank Ltd and Others* 2003 (4) SA 315 (SCA) at paragraph 1. It is necessary to have regard to and assess the evidence for that purpose. However, it should be borne in mind that as a general rule where absolution at the close of the plaintiff's case is refused, a court should avoid unnecessary discussion of the evidence, lest it seem to take a view of its quality and effect that should only be reached at the end of the whole case: see *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D-G.

[4] The defendant in its argument in support of the application for absolution essentially relies on four grounds based in turn on four propositions. These are the following:

4.1 Firstly it is contended that the evidence suggesting that the plaintiff slipped on anything is so speculative and vague that she has failed to establish a *prima facie* case;

4.2 Secondly it is contended that there is no evidence that the plaintiff's feet were obstructed by a hindrance which caused her to trip and fall down the steps in question;

4.3 Thirdly it is contended that the alleged non-existence of the railing (which is not conceded by the defendant, but which is assumed for purposes of the defendant's application for absolution to be the case) in any way contributed to the plaintiff's injuries;

4.4 Lastly it is contended that there is no evidence to suggest that the defendant did not have an adequate system in place to prevent hazards to members of the public passing through the Link Shopping Mall in Claremont (*'the Link'*).

[5] The defendant accordingly submits that the evidence adduced during the course of the plaintiff's case both in chief and in cross-examination should lead me to conclude that the plaintiff has failed to make out a *prima facie* case in the sense that there is evidence relating to all of the elements of her claim. Simply put, so the argument goes, an analysis of the testimony of the three witnesses has as its high water mark that the plaintiff slipped and fell at the Link on the afternoon of 21 July 2006, and that she sustained a serious injury or injuries. The argument is thus that no evidence has been placed before me which points to any causal link between the

plaintiff's fall and subsequent injury and any act or omission on the part of the defendant. And at best for the plaintiff, the inferences sought to be drawn by her and her witnesses are highly speculative.

[6] In resisting the application for absolution the plaintiff argues that the defendant's first and second contentions misconstrue the evidence, the third contention misunderstands simple common sense and the last contention misunderstands the law.

The evidence to suggest that the plaintiff slipped on anything is highly speculative and vague

[7] The plaintiff argues that there are only two possible explanations for what caused her to slip. The first is that, as the plaintiff testified, she slipped on a substance present on the floor at the time. The second is that she slipped for no reason at all. The evidence of the plaintiff was that her feet slipped on a substance which was slippery and either wet or oily. She does not know what the substance was, but assumes that it was liquid since when she stepped onto it, it did not feel like something solid. Against this evidence must be measured the unsupported proposition put to the plaintiff in cross-examination that she could have simply slipped on nothing since that is sometimes what happens. That suggestion was denied by the plaintiff. There exists no other possible reason for the unexplained slipping. The plaintiff testified that at the time she was wearing shoes which were sensible if not fashionable, and that these shoes were worn and had been worn by her regularly. She also testified that she had never slipped whilst wearing these shoes previously. She confirmed that she did not

suffer from any medical condition at the time which might have caused her to slip or to lose her balance. The plaintiff submits that in the face of this evidence and at this stage of the proceedings her version must prevail.

No evidence to suggest that the plaintiff's feet were obstructed by a hindrance which caused her to trip and fall down the steps in question

[8] The plaintiff argues that once again the court at this stage is faced with an explanation supported by evidence and an explanation which is unsupported and inconsistent with the evidence. The plaintiff's feet were stopped and caught on the top of the steps in question. This was her evidence and cannot be contested at this stage. She testified that she felt them being stopped by a protrusion at the top of the stairs. The evidence and photographs indicate that there is indeed a metal strip on the surface of each stair and that each strip is not integrated into the stair structure. The plaintiff testified that she believed that it was the metal strip which was protruding from the top of the stairs. No other explanation has been tendered which could properly explain why the plaintiff's feet were caught. However, the defendant has indicated that it will call a witness to testify that he had inspected the edging comprised of the metal strip and could find no fault with it. The plaintiff submits that in the face of her evidence and the absence of any evidence to the contrary at this stage of the proceedings, her version must again prevail.

[9] The defendant's first and second contentions must be considered in light of the case of *Brauns v Shoprite Checkers (Pty) Ltd* 2004 (6) SA 211 (ECD). In that case the court found at 217E-G that: '*The* diligens paterfamilias *in the position of the defendant would have foreseen and guarded against the reasonable possibility of the plaintiff*

slipping and falling on the quantity of water which had found its way onto the floor of its supermarket and injuring herself in the process. This is also something which our Courts have constantly stated in analogous situations over the past 50 years or more. Like anybody else who walks in a walkway where the general public not only has access but indeed is invited to enter and walk on it, the plaintiff was entitled to expect that she could walk on it with safety.'

No evidence to suggest that the alleged non-existence of the railing in any way contributed to the plaintiff's injuries

[10] The plaintiff argues that the defendant's submissions that the absence of a railing would have no bearing at all on the plaintiff's fall, and that in any event that there was no legal duty on the defendant to install such a railing, defy common sense. It is common knowledge that when someone suddenly loses his or her footing and starts to fall, it is a natural reaction to reach out for someone or something to break that fall.

[11] In *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD) at 303E-304A Wallis J (as he then was) dealt with the duty placed upon a person in control of premises. Although in that case he was dealing with the owner of property, the principles considered by him would apply equally to a person or entity in control of property. He found that it is the legal duty of such a person or entity to ensure that the premises are safe for those who use them, and that such a person or entity must ensure that the property does not present undue hazards to persons who may enter upon and use it.

[12] And in *King v Arlington Court (Muizenberg) (Pty) Ltd* 1952 (2) SA 23 (CPD) at 30B-D, the court found that as the defendant in that case was in control of the common stairway, a duty rested upon it in law to see to it that the stairway was not dangerous. A failure to observe that duty would constitute *culpa* on the defendant's part.

No evidence to suggest that the defendant did not have an adequate system in place to prevent hazards to members of the public

[13] Whether it is incumbent on the plaintiff to have adduced this evidence to avoid absolution from the instance is a matter of law. In *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W) at 197 – 198 the court held that in situations such as the present matter it is justifiable to invoke the method of reasoning known as *res ipsa loquitur* and in the absence of an explanation from the defendant, to infer *prima facie* that a negligent failure on the part of the defendant to perform its duty must have been the cause of the fall. This does not involve a shifting of the burden of proof onto the defendant. However, it does involve identifying the stage of the trial at which the plaintiff has done enough to establish, with the assistance of reasoning along the lines of *res ipsa loquitur*, a *prima facie* case of negligence on the part of the defendant, so that unless the defendant meets the plaintiff's case with evidence which can serve, at least, to invalidate the *prima facie* inference of negligence on the defendant's part, and so to neutralise the plaintiff's case, judgment must be entered for the plaintiff against the defendant.

[14] In *Monteoli v Woolworths (Pty) Ltd* 2000 (4) SA 735 (WLD) the majority of the full bench disagreed with the finding of the court in the *Probst* case in instances where

both parties had already presented their cases. Willis J in delivering the majority judgment stated however at 741 that *'The application thereof may be apposite when considering absolution from the instance at the close of the plaintiff's case.'* And in *Chartaprops (Pty) Ltd and Another v Silberman* 2009 (1) SA 265 (SCA) at 274H-275A, Nugent JA cited the *Probst* case with approval in describing the duty of a person in control of premises to ensure that reasonable precautions are taken to keep the floor safe. It should be mentioned that although this was a dissenting judgment, the majority judgment did not disagree with Nugent JA on this point.

[15] The defendant referred me to the unreported judgments of *Prinsloo v Barnyard Theatre and Another* (North Gauteng High Court) case no 27705/06 and *Hartley v Mariner's Wharf (Pty) Ltd* (Western Cape High Court) case no 12365/07.

[16] The *Prinsloo* case is distinguishable from the present matter since the court was not dealing with the test for absolution at the close of the plaintiff's case. Further, the remarks made by Hiemstra AJ at paragraph 16 thereof that sometimes people stumble and fall even where there are no obstacles must be qualified by his comment that *'It cannot be expected of owners of property to protect the public against their own inattentiveness or possible clumsiness'.* At this stage there is no evidence before me to suggest that the plaintiff's fall was due to any culpable inattentiveness on her part.

[17] It is not clear from the *Hartley* case whether the court was dealing with an application for absolution at the close of the plaintiff's case or at the close of the defendant's case. It is trite that the test for absolution at the close of the defendant's case is different from that at the close of the plaintiff's case. As stated by the authors in

Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa 5th Edition Volume 1 at 921: *'The enquiry* (at the close of the defendant's case) *then is: "Is there evidence upon which the court ought to give judgment in favour of the plaintiff? It is quite possible, therefore, for a court that has refused an application by a defendant for absolution at the conclusion of the plaintiff's case to give a judgment of absolution after the defendant has closed even though no evidence has been tendered by the defendant."'* Accordingly it would be inappropriate for reliance to be placed on the judgment in the *Hartley* case at this stage of the proceedings.

[18] To return to the test for absolution from the instance at this stage of the case. The enquiry is whether there is evidence upon which I could or might find (not should or ought to find) for the plaintiff. To the extent that an inference is relied upon it must be a reasonable one and need not (at this stage) be the only reasonable one. Having considered the evidence before me and the submissions made I am of the view that the plaintiff has met the threshold required in order to avoid absolution from the instance at the close of her case.

[19] In dealing with this application for absolution I have referred to some of the evidence and arguments advanced in relation thereto. I have deliberately avoided any unnecessary evaluation of the evidence and the making of any findings in relation thereto in light of the *Gafoor* case.

[20] Absolution from the instance at the close of the plaintiff's case is therefore refused. Costs shall stand over for later determination.

J I CLOETE