

/EVDM

15/3/2010

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case Number: 32819/2008

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

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

(3) REVISED.

DATE 15/3/2010

SIGNATURE

2010 -03- 15

GRIFFIER VAN DIE NOORD GAUTENG
HOE HOF, PRETORIA

In the matter between:

M. F. KLESH

PLAINTIFF

vs

MONATENG SAFARI LODGE SHAREBLOCK LTD

DEFENDANT

JUDGMENT

Delivered on: 15 March 2010

POTTERILL J,

- § 1. The plaintiff is claiming damages from the defendant after slipping while walking across the patio of Unit RB05. The plaintiff occupied this unit in terms of an oral agreement between the parties that the plaintiff could take up occupation of this unit at the defendant's Safari Lodge for the period 14 January 2008 to 21 January 2008.

§ 2.

The plaintiff is averring that the slipping of the plaintiff was caused solely as a result of the negligence on the part of the defendant and or its employees. The grounds of negligence are set out as follows:

"7.1 there was insufficient protection against water and/or rainwater collecting and/or falling onto the tiles at the said patio;

7.2 there was no warning to members of the public including the Plaintiff who occupied the said unit that the said tiles when wet were dangerous and slippery;

7.3 no precautions were taken in order to ensure that if the said tiles became damp and/or wet, same would not be slippery and would be safe for members of the public including the plaintiff to walk across;

7.4 in allowing the tiles to on the patio to become wet and in not taking any or any sufficient steps to ensure that same did not occur in failing to avoid the aforementioned when, by exercise of reasonable care, same could and should have been avoided.

7.5 in failing to avoid the aforementioned when, by the exercise of reasonable care, same could and should have been avoided."

It is also averred that the defendant owed a duty of care to the members of the public who took up accommodation to have foreseen:

"8.1 ...that the tiles on the patio aforementioned would become dangerously slippery and a danger to such person or persons, including the plaintiff when wet;

8.2 *the defendant should have taken reasonable steps to guard against such occurrence which the Defendant failed to take.*

9 *The Defendant breached its duty of care aforementioned in that it failed to take any reasonable steps to guard against an incident as referred to hereinabove occurring when, by the exercise of reasonable care, it could and should have done so."*

§ 3. The defendant denied that it or its employees were negligent. It pleaded that if the court should find that there was negligence on the part of the defendant or its employees then by accepting Annexure A, an indemnity form and search warrant, the defendant was absolved from liability. On a proper construction of Annexure A the defendant is absolved from potential liability for any incidents however such incidents might be caused. Cumulatively or in the alternative the notice that was prominently displayed at the entrance to the lodge and assented to by the plaintiff on a proper construction served to excuse the defendant from potential liability. Furthermore Annexure A and the board excluded the plaintiff from a duty of care. It was also pleaded that should the court find that there was negligence on the part of the plaintiff and its liability was not excused by Annexure A and/or the board at the entrance then the plaintiff negligently contributed to the incident. He did so by failing to keep a proper lookout. He also failed to take account of the fact that it was raining and that the surface was consequently wet and did not take due care.

§ 4

The plaintiff is a native from the United States of America who at the time of the incident was stationed in Addis Ababa for three years. He is well-read with an MBA-degree and a seasoned traveller. He in January 2008 exchanged his RCI points trading the resort Sun City for the resort Monateng Safari Lodge. He would take up accommodation from 14 to 21 January 2008. Two years previously he had also stayed at the Monateng Safari Lodge. He passed the green board on his arrival but did not notice it at all. He stopped under the thatch at the entrance to the resort. When standing there the board is behind one and he did not see it. The security rushed him on because of a vehicle behind him and he parked at the parking bays. In cross-examination he admitted that on his visits to the dentist he had passed the board 4 times and did then notice it, it but he did not read it. The board at the top and bottom has very bold letters drawing attention to the fact no fire-arms are allowed and the right of admission is reserved. He did not read the remainder of the writing on the board. At reception he handed over his credit-card, his UN diplomatic passport and divulged his vehicle's registration number. He also signed and dated annexure A with the heading "INDEMNITY FORM AND SEARCH WARRANT." He however did not read the first three-quarters of the document. He only read the question whether he had a fire-arm or not and that his vehicle could be searched. He was told that the document related to fire-arms and pets. He was rushed at reception and he knew he had to sign to get his key. He wanted it to be speedy because he was in pain due to his visit to the dentist. The receptionist told him the document was a mere formality. At

Sun City he saw the big board at the entrance to the resort. At all resorts he would sign a document before receiving his keys.

Prior to the incident he did not use any of the other resort facilities except the restaurant and its amenities. He saw a board at the restaurant, but he also did not read it. In between the teeth appointments he also worked on his personnel's performance assessment reports. Over the four days prior to the incident it rained in the night, he did not find the patio to be wet, he knew this from the wet surroundings.

On

On the 19th of January 2008 he was at the resort. He was working on the patio. He had moved the table and chairs to the east so that he could have some African sun and have a view on all sides. He had taken a nap earlier in the day. He was wearing shoes, topsiders, with very good traction, made for use on boats. While taking a comfort break he heard that it had started to rain heavily and he also heard the wind. He feared that his important governmental documents on the patio were being blown away and would get wet. He was also not sure if he closed the windows of his vehicle. He finished up, washed his hands and went to the patio door to see that his worst nightmare had come true. From finishing up to getting on to the patio took him no more than 4 seconds. He described the storm as a tempest; an exceptional storm. The wind was whirling and he saw tornado manifestation of the strong wind. He took 2-3 steps on the patio when he slipped. He did not see water on the patio but conceded there must have been rainwater there,

because that is why he avers he slipped. He hydroplaned at a 45 degree angle and fell with his back on the corner of steps 2 or 3 which caused his back to break. He landed another 2-3 metres further on the concrete breaking his wrist in trying to break his fall. In this state he lay in the rain until he managed to painfully and slowly drag himself up the steps. He managed to get to his cell-phone and called for help. Jacques and a lady with first-aid knowledge arrived within 6 minutes. When crawling he was amazed at the amount of water that had collected on the patio. He testified that he could do nothing to avoid the incident. He was not running but walking briskly.

§ 5. The question that must be answered is whether the defendant was negligent. To answer in the affirmative I must find that a reasonable person in the defendant's position would have foreseen the reasonable possibility that the defendant's conduct caused the plaintiff's damage. The reasonable person would also have taken reasonable steps to guard against such occurrence and the defendant should have.

§ 7. Part of unit RB5 consists of a large covered patio. The patio accommodates a built in braai and a large table with 6 chairs. The patio has a roof, ceiling and a tiled floor. The patio is formed with two walls of the unit itself, thus two sides of the unit are walled in and two sides are open. With the patio being roofed rain from above is not reasonably foreseen. Normal rainfall would also not render the patio wet, but by its very nature it is an open patio to see and experience the elements. The

plaintiff himself pushed the table to the eastside to experience the African Sun, thus although the patio is covered sun will shine on the patio. The moment the plaintiff heard the rain and wind he hurried to save his documents because he knew the wind would blow on the patio. Although the patio is covered sideways rain may fall onto the tiles. The plaintiff put no evidence before the court that the tiles were not fit for outdoor use. There is no evidence to suggest that the tiles on the patio are as a general rule slippery when wet. The defendant can foresee that a two sided open patio is partially open to the elements, sun, wind, rain and hail as a few examples. The reasonable person would also foresee that most surfaces, including tiles, are slippery when wet.

§ 2. The degree of the probability of the harm occurring raises the question whether the defendant had to take reasonable steps to guard against it. The evidence is that on the plaintiff's previous visit and the four days prior to the incident the rain on the patio did not cause him any harm. The incident occurred 2-3 steps from exiting the patio sliding door, even before reaching the table as set out in the photographs. The plaintiff could not explain how the rainwater had got up so far onto the patio. He ventured that he had seen a leak from the roof, but nothing was made of that and it was in anyhow not in the vicinity of where he slipped. It is probable that the tempest with swirling winds had blown the water on to the tiles. Should the defendant have foreseen that an exceptional storm would blow the water in under the roof, more than 4 metres up to 2-3

steps from the patio sliding door in 4 seconds? Should they also have foreseen that a person with knowledge that the patio is open to the elements, which while this tempest, is playing itself out would rush to save possessions on the patio from these very elements and then slip. The slip resulted in the plaintiff sliding 4 metres, down steps and landed 2-3 metres further. Under these circumstances it would to my mind be expecting too much of a reasonable person to hold that the defendant should have guarded against injury to another in these circumstances. The open-sided patio allows for tiles to get wet when rain is accompanied by side winds; the defendant did not have to guard against this. There is simply no evidence to suggest that the tiles are more slippery than to be expected when wet; i.e. dangerously slippery. I accordingly find that the defendant was on a preponderance of probabilities not negligent.

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The argument that the defendant owed the plaintiff a duty of care and breached it is similarly not proven. In as far as the duty of care arises when a reasonable man in the position of the defendant would have foreseen harm and taken steps to guard against it there is no difference from the test for negligence. Lord Goddard, C.J. said in **Gillmore v London County Council** [1938] 4 ALL E.R. 333(C.A.) at 639;

"The mere fact that the plaintiff slipped on some stones which had become polished owing to ordinary wear in this drive is no justification for holding that this was a dangerous place, or that reasonable care had not been used to see that the premises were reasonably safe."

In this matter the plaintiff had in the night slipped on shiny and polished stones with which the drive was made up. As set out above the plaintiff has not on a preponderance of probabilities proven that the defendant should have foreseen that the tiles when wet would be so dangerously slippery that they should have taken reasonable steps to guard against it. They had no duty to prevent rain on an open-sided patio.

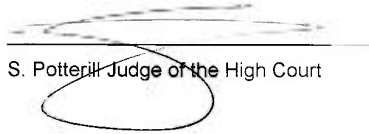
§ 10. It was also argued that the plaintiff proved he slipped, the defendant did not lead evidence to the contrary and accordingly *res ipsa loquitur* applies. This maxim is applicable where the facts of the matter are such to give rise to an inference of negligent conduct. A court is however not compelled to draw an inference of negligence and on these facts I am not applying the maxim. The plaintiff slipped on wet tiles after hurrying to save important papers and perhaps the interior of his vehicle. There was no evidence that the tiles were dangerous when wet and not suitable on a patio. In fact the evidence is that the plaintiff was really worried about his papers on the patio. He heard the tempest and knew the wind and rain of the tempest would affect his papers on the patio. He had moved the table with the papers to the more unprotected side of the patio. Within 4 seconds he reached the patio, crossed the patio walking "briskly" with 2-3 steps and then he hydroplaned. He did not look at his feet, or the patio floor, he never saw water on the tiles. He was hurried and worried. The incident was not due to a thing or means within the exclusive control of the defendant or where the only known facts relating to negligence consist of the occurrence itself. These facts

do not warrant the application of the maxim or for the defendant to adduce evidence to the contrary.

§ 11. It follows that it is not necessary to address whether Annexure A, the averred indemnity and /or the board at the entrance absolved the defendant from liability.

§ 12. I accordingly make the following order:

§ 12.1 The plaintiff's claim is dismissed with costs.



S. Potterill Judge of the High Court

Matter heard on: 08 & 09 March 2010

Delivered on: 15 March 2010

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