

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO. 3873/2015

In the matter between:

SICELO AUBREY MAHLASELA

Plaintiff

and

**NELSON MANDELA METROPOLITAN
MUNICIPALITY**

Defendant

JUDGMENT

MBENENGE JP:

[1] The plaintiff seeks to recover damages allegedly suffered as a result of an injury he sustained when, on or about 05 September 2014, *“he slipped in a pool of water caused by a leaking pipe”* while *“attempting to gain access to his residence at 42 Pepetha Street, Kwa-Nobuhle, Uitenhage.”*

[2] Negligent conduct is attributed to the defendant's employees. It is alleged that the employees failed to, *inter alia*, attend to the water leak in order to prevent harm to the general public, including the plaintiff.

[3] The defendant has denied having been negligent towards the plaintiff, either as alleged or at all and pleaded, in amplification of such denial, that the injury was occasioned by the sole negligence of the plaintiff in, *inter alia*, failing to keep a proper look-out or exercising the requisite care and diligence in the circumstances.

[4] According to the parties' pre-trial conference minutes, it is common cause that on the date in question the plaintiff sustained a bimalleolar fracture of the left ankle, leaving the issues for determination being-

- (a) the plaintiff's *locus standi*;
- (b) whether -
 - (i) there was a leak in the water reticulation system for the area where the plaintiff's house is situated;
 - (ii) the plaintiff was injured in the manner alleged in the particulars of claim or at all; and
 - (iii) the defendant was in breach of the duty of care to maintain and repair the water reticulation system under its control as admitted by the defendant in its plea; and

- (c) negligence on the part of the plaintiff and/or the defendant and/or the combined negligence of both parties and, in such latter event, the degrees of negligence to be attributed to each party.

[5] Mr Loyiso Stemela who was, at the relevant time, a councillor for ward 47, Uitenhage, where the plaintiff resides, testified that the plaintiff had, once upon a time, lodged with him a complaint of a water leak due to a burst pipe. He said the plaintiff had reported that whilst alighting from a vehicle he stepped over water from a burst pipe, slipped and broke his ankle. Residents of the area in question had also made reports of the leak. He took the matter up with the relevant officials in the Water and Sanitation Section of the defendant Municipality. Nothing immediately eventuated from that. The pipe was ultimately fixed by municipal officials after the incident that resulted in the plaintiff's injury.

[6] Under cross-examination Mr Stemela was taken to task for not having reported the burst pipe by utilising the toll-free/call-centre system. He explained that the complaints made to the call-centre had not yielded any concrete results. When called upon to mention the names of the Municipal officials to whom he had referred the complaint, he said due to the passage of time, the only person he could still recall was Mr Koekemoer. On the occasions he had made endeavours to contact the call-centre, receipt of the complaint had

been acknowledged and a reference number issued, but nothing beyond that eventuated.

[7] Mr Loyiso Mkhombisa, the plaintiff's neighbour residing at 45 Pepetha Street, also testified. For some time, Pepetha Street residents were beset by water flowing down the street from a burst pipe. He called the relevant toll-free number and approached the municipality. When the desired results did not ensue, he referred the matter to Mr Stemela. The burst pipe was eventually attended to by municipal officials after the occurrence of the incident involving the plaintiff. He was summoned by the plaintiff's son to the scene where the incident had occurred. He drove the plaintiff to hospital. The plaintiff reported to him that he slipped on the pavement as he was about to enter his yard, fell and broke his ankle. He said he had to jump over some water in order to get into the yard. He observed for himself that the plaintiff had been injured.

[8] The plaintiff also testified. On the night in question, he had just been dropped off by a vehicle at his place, and when jumping over running down the street in front of his yard, he slipped on the pavement, fell and broke his ankle. He said there was no way he could have accessed his yard without jumping over the water. He was hospitalised and received treatment for his injury. Upon his discharge from the hospital, he reported the incident to Mr Stemela, the ward counsellor.

[9] The plaintiff pointed out, under cross-examination, that he fell on the edge of the road where there is paving. The vehicle that dropped him off had already left when he fell. He said the vehicle had nothing to do with his fall. The plaintiff's attention was drawn to entries made in hospital records and other documents embodying a different account of how the plaintiff got to sustain his injury. It was further suggested that, because the plaintiff had always known about the wetness of the surface of the ground in front of his house, he could and should have treaded more carefully. His response was that most of the time he drove, and did not walk, into his yard.

[10] The following excerpt from the transcript also sheds some light in relation to how the cross-examination of the plaintiff unfolded:

“MS NTSEPE:	So it would be incorrect then to say while you were jumping to avoid this water, you slipped and fell?
MR MAHLASELA:	I jumped over the water and stepped on the pavement and slipped and fell back on the water.
MS NTSEPE:	Sir I think I was missing you. So your intention was to jump onto the grass area?
MR MAHLASELA:	No, on the grass there is a spot there on the pavement where I would step on so that I could walk on the grass.
MS NTSEPE:	So there was a specific point that you were aiming for to put your foot on?
MR MAHLASELA:	Yes.
MS NTSEPE:	And you missed that point and slipped on the pavement?
MR MAHLASELA:	I did not make it there because of lots of water.
MS NTSEPE:	You would agree with me if you had not jumped and walked where the water was, the worst that would happen is your shoes would get dirty?
MR MAHLASELA:	I understand that and that was the reason why I stretched over there.”

[11] The contents of a letter written by his attorney of record to Dr Aslam wherein it is stated that the plaintiff “*sustained injuries while trying to cross over holes in the road when he slipped*”¹ were brought to his attention. He distanced himself from this assertion as being incorrect. He also dissociated himself from the case pleaded in the particulars of claim that he slipped in a “*pool of water*”. According to him, there were neither holes nor a pool of water where he fell.

[12] It was further put to the plaintiff that the entry made by Dr Biermann who treated him that “[the plaintiff] *fell when stepping out of a friend’s car*” negated his version. His response was “*maybe the doctor misunderstood me. I would not know.*” His attention was also drawn to another entry made by a nurse who received him in the ward on the night in question that “[the plaintiff] *fell in/out of a friend’s car and dislocated . . . ankle.*” He denied this, too, stating that he never told the medical and nursing staff that he “*wrongly stepped out of the car,*” adding that he had told them that he “*alighted from the vehicle and the vehicle left, [he] then faced this problem that [he] had now.*”

[13] At closure of the plaintiff’s case, Ms Ntsepe, counsel for the defendant, applied for absolution from the instance. The application was refused, with reasons to follow.

¹ In this letter Dr Aslam was being asked to advise on the cost involved in completing a medical report.

[14] I was of the view that there was evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.²

[15] Much was made of the contradictions between the plaintiff's pleaded case, his testimony before court and what the plaintiff was alleged to have informed the medical and nursing staff. In my view, those are questions of credibility which should not normally be investigated at that stage of the proceedings.

[16] The only witness called to testify on the defendant's behalf was Ms Casandra Haselou. She was the nurse on duty at Cuyler Hospital on the night in question. She received the plaintiff in the ward where he slept on that night and completed the relevant admission report. She sought information relative to the plaintiff's personal history, medical history and illnesses, and recorded the answers given by the plaintiff on the relevant form. The plaintiff informed her that "*he had fallen in or out of a car and hurt his ankle...*" She made the same entry on the patient progress report. She said she understood the plaintiff as having broken his ankle whilst getting out of a car or in a car. She identified the note made that "*patient fell while stepping out of a car and fractured ankle*" as having been made by Dr Biermann who attended to the plaintiff whilst at the casualty ward. She was emphatic that there was no way she could have just

² Which is the test for absolution from the instance [see *Swanee's Boerdery (Edms) Bpk (in liq) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A) 862 F-G; *McCarthy Ltd v Absa Bank Ltd* 2010 (2) SA 321 (SCA) at 328 H].

copied Dr Biermann's notes because her section received notes recorded at the casualty section later after she had compiled her notes.

[17] Under cross-examination, Ms Haselou conceded that, but for the notes she compiled, she had no independent recollection of the interaction with the plaintiff on the night in question. She stated that she communicated with the plaintiff in English, without the aid of an interpreter. Had she gleaned the information she recorded from somebody else, she would have indicated that the informant had been somebody other than the plaintiff. Even though the plaintiff had initially been sedated, at the time she interacted with him, the sedation had waned; he was stable at the time of being received in the ward.

[18] As the trial unfolded, the issue for determination had crystalized into whether the plaintiff had injured himself in the manner alleged by him and, if so, whether the injuries he sustained were caused wholly or partly by the negligence of the defendant.

[19] The plaintiff, being the party who asserts, bears the duty to prove that the injury he sustained was attributable to the negligence of the defendant.

[20] The probabilities, credibility of witnesses and documents relevant in determining the outcome of the case must be considered.³ At a subsidiary level, it also becomes important for the court to consider, among other factors, internal

³ *National Employers' General Insurance v Jagars* 1984 (4) SA 437 (E) 440 D-G

contradictions in a witness's evidence and external contradictions with what was pleaded or put on the witness's behalf.⁴

[21] Also, regard being had to the fact that the plaintiff was a single witness in relation to how he slipped and fell, his evidence, as one of the parties to the proceedings, must be credible to the extent that his uncorroborated evidence must satisfy the court that on the probabilities it is truth.⁵ The paramount question is whether I should accept the plaintiff's version as to how he slipped and fell or reject it as being a fabrication.⁶

[22] The defendant, on the other hand, bears no onus, but an evidentially burden which may be discharged by the defendant pointing to inherent contradictions in the plaintiff's testimony *viz-a-viz*, in this instance, statements made to hospital staff as also against other objective factors that belie the plaintiff's version. That of course depends on the cogency of those factors. Questions of admissibility also come to the fore.

[23] The plaintiff's pleaded case which the defendant was called upon to meet in answer was that the plaintiff "*slipped in a pool of water ... seriously injuring himself.*" The plaintiff denied that there had been a pool of water where he fell stating that that was not what he had said. Ms Ayerst, who signed the particulars of claim and appeared at the hearing of this matter, explained that

⁴ *Stellenbosch Farmers' Winery Group Ltd & Another v Martell & Cie SA & Others* [2002] ZASCA 98; 2003(1) SA 11 (SCA) at para 5

⁵ *Botha v Kirk Attorneys* (EL 257/2016, ECD 757/2016) [2019] ZAECELLC 1 (22 January 2019) at para 32.

⁶ *Daniels v General Accident Insurance Co. Ltd* 1992 (1) SA 757 (C); also see *Botha, op cit.*

she had settled the particulars without having “*consulted with the plaintiff as yet.*”

[24] Quite apart from the reference to “*pool*”, what remains unexplained and rearing its ugly head towards the plaintiff’s case, however, is the content of the letter wherein the plaintiff is said to have “*sustained injuries while trying to cross over holes in the road.*”

[25] I was urged to treat Ms Haselou’s testimony as translating to no version at all because she had no independent recollection of the relevant events, leaving the testimony of the plaintiff uncontroverted. To begin with, the evidence of the plaintiff, a single witness, does not translate to the truth merely because it is not contradicted.⁷ Much as the plaintiff speaks isiXhosa and Ms Haselou is English speaking, I am not persuaded that there was a language barrier when the two interacted. Indeed no entry on the hospital records was, for example pointed to as having been incorrect or inaccurate due to a language barrier or some other factor.⁸ According to Ms Haselou in instances where there is a language barrier an interpreter is organised. Nor was any suggestion

⁷ *Siffman vs Kriel* 1909 TS 1 538 at 543; also see *Botha (supra)*, where in relation to a plaintiff’s version not controverted by that of the defendant, it was held:

“[36] What if the version of the plaintiff even before any testimony on behalf of the defendant is given is, under cross-examination, shown to bear inherent contradictions? Can it be said that in such an instance the defendant bears a duty of “*proving*”, as contended, by putting up a valid alternative version? I think not. That is not my understanding of the legal position. As pointed out above, to come to conclusion on the disputed issues a court must make findings on the credibility of the witness’s. Those findings in turn depend on subsidiary factors such as, *inter alia*, internal contradictions in a witness’s evidence and external contradictions with what has been pleaded. To contend otherwise would be to suggest that in all instances, such as the present one, where there is only one version of the events which gave rise to the accident with no other eye witness testifying as to the collision and putting up the opposite version, the plaintiff’s mere say-so should be accepted without further ado.”

⁸ *Cf Jo-Anne Melony Grootboom v Road Accident Fund* (unreported decision by Schoeman J under Port Elizabeth Case Number 3998/2016), where no weight was given to information on hospital records because the relevant notes had been inaccurate and there was paucity of evidence as to who supplied the recorded information.

made that the recording Ms Haselou made as to the plaintiff's injury and the cause thereof were a fiction of her own imagination. In my view, the testimony tendered by Ms Haselou in relation to the plaintiff's history namely, that the plaintiff informed her that he fell whilst alighting from or in a vehicle does translate into a credible version. Ms Haselou impressed me as an honest witness. She was not taken under cross-examination. She made concessions when such were due. For instance, even though she had recorded that "*the plaintiff appears to have had a few alcoholic drinks and appears to be intoxicated and smelt thereof*", she conceded that her conclusion in that regard was merely deduced from her observation that the plaintiff smelt of liquor. She could not dispute the plaintiff's version that he was not intoxicated.

[26] The plaintiff, on the other hand, vacillated when confronted with the entries made by the medical and nursing staff in relation to what caused his injury. He initially rationalised by saying Dr Biermann had "*taken [the notes he made] from the other one that also made a statement in this document*", suggesting that the doctor had merely copied what Ms Haselou had written. Initially, he had sought to attribute the alleged incorrect recording to language barrier and said "*it could be that there was a miss between the English or the Afrikaans that we spoke that day*"- a fact which flew in the face of the testimony by Ms Haselou that a language barrier is resolved by simply soliciting the services of an interpreter. This and the cumulative effect of the discrepancies

and incongruities already pointed to above render the plaintiff's version incredible with the result that his version is rejected.

[27] I am of the view that the plaintiff has not proven on balance of probability that his version is the truth and that the injury he sustained resulted from negligent conduct on the part of the defendant.

Order

[28] The plaintiff's claim is accordingly dismissed with costs.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Counsel for the plaintiff : *H B Ayerst*

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Port Elizabeth

Date heard : 07- 08 August 2019; 25 September 2019

Date delivered : 15 October 2019