



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES /NO
Of Interest to other Judges:	YES /NO
Circulate to Magistrates:	YES /NO

Case No.: 2096/2018

In the matter between: -

KATIJA BEBE ANWAREY

Plaintiff/Respondent

and

LOCH LOGAN WATERFRONT (PTY) LTD

Defendant/Applicant

CORAM: N. M. MBHELE, AJP

HEARD ON: 16, 17, & 19 NOVEMEBR 2021 and 28 JANUARY 2022

DELIVERED ON: 17 FEBRUARY 2022

- [1] The issue presently due for determination is whether the application for absolution from the instance moved on behalf of the defendant herein should be granted.
- [2] It is necessary to chronicle a brief history of the facts giving rise to the issue for determination. On 21 August 2016 the plaintiff whilst walking through the corridor of the Loch Logan Mall fell onto the floor on her right arm resulting in her suffering a fracture and dislocation. The plaintiff claims damages against the defendant for the injuries sustained. Before me is the merits of the dispute.

[3] During the trial the plaintiff testified and further called her husband as a witness. The parties handed in a video footage depicting activities on the corridor where the plaintiff was walking just before she fell. There was an inspection *in loco* conducted just before the plaintiff was subjected to cross-examination. At the close of the plaintiff's case an application for absolution from the instance was moved on behalf of the defendant. The plaintiff did not concede her claim.

[4] It is apposite at this juncture to set out the relevant law applicable in applications of this nature. The test for absolution from the instance is well formulated in **Claude Neon Lights (SA) Ltd v Daniel**¹ quoted with authority by Harms JA in **Gordon Lloyd Page & Associates v Rivera and Another**² where the following was said:

"[2] 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 Danie** 1976 (4) SA 403 (A) at 409G - H in these terms:

' . . . (When 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 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. (**Gascoyne v Paul and Hunter** 1917 TPD 170 at 173; **Ruto Flour Mills (Pty) Ltd v Adelson** (2) 1958 (4) SA 307 (T).)'

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 (**Marine & Trade Insurance Co Ltd v Van der Schyff** 1972 (1) SA 26 (A) at 37G - 38A; **Schmidt Bewysreg** 4th ed at 91 - 2)."

[5] At this stage of the proceedings it is not required of me to critically look at all the evidence as it would be required at the end of the trial as the onus is less stringent. In applying the test stated above the plaintiff must have delivered

¹ **Claude Neon Lights (SA) Ltd v Daniel** 1976 (4) SA 403 (A) at 409 G-H

² **Gordon Lloyd Page & Associates v Rivera and Another** 2001 (1) SA 88 (SCA) at 92 F-H:

evidence relating to all the elements of the claim. For example, the plaintiff must show that there was a duty of care that was breached by the defendant and that that breach resulted in the injuries she sustained.

[6] In her particulars of claim the plaintiff alleged the following:

- "4. At all material times Defendant:
 - 4.1 exercised control over the said premises,
 - 4.2 was responsible for the maintenance and safety of the said premises;
 - 4.3 was aware that members of the general public, such as Plaintiff, visited the premises; and
 - 4.4 was obliged to take reasonable steps to protect the safety of members of the public, such as Plaintiff by, *inter alia*, ensuring that the floor of the said premises was safe and free of obstructions.
5. In the premises, Defendant owed a duty to Plaintiff that, when present upon the said premises, she was not exposed to the risk of injury.
6. The incident referred to in paragraph 3 above was caused by the negligence of Defendant and/or breach of its aforesaid duty of care, in that its employee(s), acting at all material times within the course and scope of their employment with Defendant:
 - 6.1 removed floor tiles on the walkway of the premises, thereby rendering the floor dangerous to Plaintiff and other persons present upon the premises;
 - 6.2 permitted the removal of floor tiles on the walkway of the premises, thereby rendering the floor dangerous to Plaintiff and other persons present upon the premises;
 - 6.3 failed to maintain the floor of the premises in a reasonable state of repair;
 - 6.4 failed to take any and/or adequate steps to prevent Plaintiff and other persons from falling as a result of the state of the floor of the premises;

6.5 failed to take adequate steps to warn Plaintiff and other persons of the state of the floor of the walkway;

6.6 failed to take any and/or adequate measures to ensure the safety of Plaintiff and other members of the public present on the premises;

6.7 failed to prevent the Plaintiff's fall when by the exercise of reasonable skill and care Defendant could and should have done so; and

6.8 failed to act with due care.

7. In and as a result of the incident referred to in paragraph 4 above Plaintiff sustained a fracture dislocation of her right elbow."

[7] The defendant in its plea admitted that an incident occurred on 21 August 2016 at Loch Logan Waterfront in the vicinity of the Foschini store, during which the plaintiff fell. The defendant admits that tiles were removed on the certain portion of the walkway but denies that the removal of the tiles led to the fall of the plaintiff. The defendant pleaded that at all material times there were disclaimer boards visibly displayed at the entrance of the building exempting the plaintiff from any damages, loss or injury to the plaintiff. It, further, pleaded that there were warning notices/ signs displayed in the premises and in the vicinity of the Foschini store warning visitors at the mall that tiles have been removed and to be cautious.

[8] The plaintiff who was 58 years of age at the time of the incident testified that she was walking towards Woolworths at the Loch Logan mall to have something to eat. She was accompanied by her husband, daughter and grandson. There were two strips on the walkway where tiles had been removed. The area where the tiles were removed was layered with cement and grey in colour. She walked on the tiled area which parties measured and agreed that it was 178 cm wide. She was walking next to her husband who was closer to the cemented area while she walked closer to the shops. According to the plaintiff, the mall was busy with people going back and forth in the same space just before she fell. She was in the vicinity of Foschini and Sterns when she fell. At the time of her fall she turned around grabbed her daughter and held on to her grandson before

she fell on her right elbow. She does not know what caused her fall. She said that she did not see the yellow caution signboards spread all over the cemented area. She admitted that the yellow signboards that could be seen spread on the cemented area throughout the corridor on the video footage are used to warn people of the potential danger in the specific area.

[9] She was wearing a pair of black Green Cross boots. The boot on her right foot had some cement on it when the plaintiff was placed on a stretcher at the scene before she was carried away by the paramedics. She simply could not tell how she fell.

[10] The next witness was Moushini Mayet, the plaintiff's husband. He testified to the effect that he was slightly in front of the plaintiff and he did not see how she fell. He testified that there were many people walking in the mall at the time the plaintiff fell. He was confronted with the video footage which showed a different picture from the one he described.

[11] Is the evidence before me sufficient to enable me to find in favour of the plaintiff? In **Gascoyne v Paul and Hunter**³ the court said the following:

“At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the Court would then be, “Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?”

[12] Liability hinges on the notion that we have a certain set of responsibilities in any given situation. For the plaintiff to succeed in her claim she must prove that there was a duty of care that was breached and that the breach resulted in an injury which caused monetary loss. Once it has been established that the defendant owed a duty to the plaintiff and that the defendant breached that duty, the plaintiff must show that the breach is the proximate cause of the accident which caused her harm.

³ Gascoyne v Paul and Hunter 1917 TPD 170 at 173.

- [13] Ms. Becker, on behalf of the Plaintiff, submitted that there is sufficient evidence from which I can draw an inference that the Plaintiff fell because of the unevenness of the floor at the mall, caused by the removal of the tiles. She contends that the fact that there was cement on her shoes after falling, it means that she might have stepped on the cemented area.
- [14] The above contention ignores the evidence that the cement was on the right foot shoe of the plaintiff and that her right part of the body was away from the cemented area as she was walking towards Woolworths. Her right part of the body was closer to the shops while the left part was the one on the side of the cemented area. If the cement on the shoe is indicative of the fact that she stepped on the cemented area while walking, logic dictates that it is the left foot that should have stepped on the cemented area. It is improbable that the plaintiff's right foot could have stepped onto the cemented area while walking towards Woolworths in the manner that she described.
- [15] Inference is a conclusion arrived at based on evidence, it must be logical and reasonable. **Blacks Law Dictionary** defines inference as a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.⁴ This indicates that the conclusion drawn must not be based on speculation, it must be supported by evidence.
- [16] In **S v Essack & another**⁵ the following passage by Lord Wright in **Caswell v Powell Duffryn Associated Collieries Ltd**⁶ was quoted:

"There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved

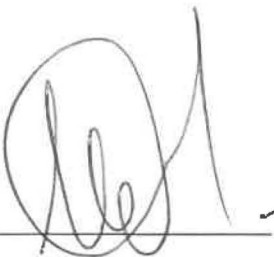
⁴ Blacks Law Dictionary on the definition of inference.

⁵ S v Essack & Another 1974 (1) SA 1 (A) at 16C-E.

⁶ Caswell v Powell Duffryn Associates Collieries Ltd [1939] 3 All ER 722 at 733.

facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

- [17] The evidence before me is not sufficient to enable me to come to the conclusion that the plaintiff fell because of the removal of tiles on the walkway. The plaintiff was adamant that at all times she was walking on the tiled area of the walkway. She reiterated that she never steered away from the tiled area.
- [18] Ms. Becker, further, submitted that in the absence of an explanation of how the accident happened, I must apply *res ipsa loquitur* and find that the accident would ordinarily not have occurred without the negligence on the part of the defendant. The defendant, however, placed yellow caution boards throughout the corridor which were clearly visible. It is inconceivable how the plaintiff who was walking adjacent these boards did not notice them. The evidence is insufficient for me to infer negligence on the part of the defendant.
- [19] The plaintiff failed to bring a *prima facie* case to which the defendant has to answer. The application for absolution from the instance must succeed. Costs are in the discretion of the court. I am of the view that the circumstances surrounding this case call for each party to pay its own costs.
- [20] I make the following order:
1. Absolution from the instance is granted
 2. Each party to pay its own costs.


N.M. MBHELE, AJP

Appearances:

For the Plaintiff/Respondent:

Adv. C. Bekker

Instructed by Matsepes Inc.

Bloemfontein

For the Defendant/Applicant:

Adv. H. J. Cilliers

Instructed by Phatshoane Henney

Bloemfontein