



IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION,
KIMBERLEY.

Not Reportable

Case no: 655/2016

In the matter between:

MARTHA JACOBA VAN ZYL

PLAINTIFF

and

SIYANCUMA MUNICIPALITY

RESPONDENT

Heard: 13 February 2019

Delivered: 29 March 2019

JUDGMENT

PHATSHOANE ADJP

[1] This is a delictual claim for damages by Ms Martha Jacoba Van Zyl, the plaintiff, presently 87 years old, against Siyancuma Municipality, Griekwastad, Northern Cape. The claim arises from the injuries she sustained when she stumbled and fell off the municipality's stairs.

[2] The parties agreed to separate the issues of the merits from the quantum. Having granted the application in terms of Rule 33(4) of the Uniform Rules the matter proceeded on the question of liability only.

- [3] There are three set of stairs, without hand rails, leading into the main entrance of the municipal building. Access into the municipal offices, by members of the public, can also be gained by means of a ramp, situated approximately five meters from the three stairs. The door leading into the offices at the end of the ramp was locked following public protest action which took place around October 2013. Its burglar bars were sealed off using cement/mortar or the like substance by the protestors during the unrest. Since then the entrance in question has not been in use. Members of the public can only gain access into the municipal offices using the three stairs.
- [4] A week prior to 27 February 2015 the plaintiff, then 83 years old, visited the municipality to purchase electricity but returned without buying it because the door at the end of the ramp was locked. Due to her advanced age and frailty she walked slowly; was cautious; and had difficulty climbing the stairs. On 27 February 2015, when her electricity was about to run out completely, she visited the municipality once more. Due to the closure of the door at the end of the ramp she attempted accessing the municipal building using the three stairs. As she stepped on the second stair she slipped and fell backwards on her left arm and elbow thereby sustaining injuries.
- [5] She conceded that on the unmeasured far right of the stairs there is a wall that she could have leaned on to support her in ascending the stairs. However, she had been using the ramp to access the building and never used the stairs. She also did not think of asking someone to assist her to climb the stairs. Following the incident, prior to her relocation to Pretoria in March 2017, she started to lean against the wall to support her to gain entry into the municipal offices.
- [6] The defendant called two witnesses. Mr Nicolaas Witbooi, a member of the public, and Ms Anna Sesenyamotse, one of its employees. Mr Witbooi was two steps behind the plaintiff when she fell. He helped her to her feet and noticed that her elbow was bleeding. He walked her inside the municipal offices where she was attended to by municipal officials. Ms Sesenyamotse was inside the municipal offices and did not witness the fall. She knows that the plaintiff, like most of the elderly and people with disabilities, used the ramp to access the

building. She drove the plaintiff to a local clinic to receive medical attention. As at January 2019 the door at the end of the ramp was still not in use because the municipality took no steps to repair it.

- [7] What arises for consideration is whether there was any negligence on the part of the municipality and/or its employees which resulted in the plaintiff falling and sustaining injuries. In the event it is found that the municipality was negligent it should be established whether the plaintiff contributed causally to the negligence and if so the degree of her contributory negligence must be determined.
- [8] In *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd*¹ the Court restated the essential elements of delict as follows:

'[13]...As with delictual claims in general the essential elements are (a) conduct, initiating wrongfulness, by the defendant; (b) fault, in this instance negligence, by the defendant; (c) harm suffered by the plaintiff; and (d) a causal connection between (a) and (c). The section is concerned only with element (b), where negligence is the fault complained of. While the onus remains on the plaintiff to establish elements (a), (c) and (d), the section relieves him of, and instead encumbers the defendant with, the burden of proving or disproving element (b).

[14] Conduct (element (a) above) can take the form of a *commissio*, for example where the fire causing the loss was started by the defendant (cf *Steenberg v De Kaap Timber (Pty) Ltd* 1992 (2) SA 169 (A)), or an *omissio*, for example the failure to exercise proper control over a fire of which he was legally in charge (cf *Simon's Town Municipality v Dews and Another* 1993 (1) SA 191 (A) at 194C - E), or the failure to contain a fire when, in the absence of countervailing considerations adduced by him, he was under the legal duty, by virtue of his ownership or control of the property, to prevent it from escaping onto a neighbouring property thereby causing loss to others (*Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A); and compare *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A)).'

¹ 2001 (4) SA 814 (SCA) 820 para 13

[9] In *Kruger v Coetzee*² the Court held:

'For the purposes of liability culpa arises if —

- (a) a *diligens paterfamilias* in the position of the defendant —
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.'

[10] The municipality's conduct in this case took the form of an *omissio*. An omission is not considered wrongful unless there was a duty to act positively to prevent harm to the plaintiff and it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.³ At para 10 of its plea the municipality admitted owing to the plaintiff and other members of the public a legal duty to prevent injury by providing safe access to its premises.

[11] The foreseeability of harm depends on the degree of probability of the manifestation of the harm (or how great the chance or possibility is that it will occur). Therefore, the greater the possibility that damage will occur, the easier it will be to establish that such damage was reasonably foreseeable, the contrary is also true. See **Law of Delict** forth edition, Neethling *et al* at 141-142.

² 1966 (2) SA 428 (A) at 430 E

³ See the unreported judgment of this Court in *Ratebelelo Samuel Motlhaleemang v Transnet Limited* Case No 1744/2008 at 9 para 26 (handed down on 05 December 2012) and authorities cited therein.

[12] Absent any access into the premises by means of the ramp, or the provision of hand rails to the three stairs, the risk of harm occurring was forever present. It was reasonably foreseeable that an elderly person, who finds it difficult to climb the stairs, would stumble and fall. This is so because the ramp was constructed mainly to cater for those members of the public who are not able to use the stairs.

[13] To argue that in a period of 15 years, that Ms Sesenyamotse had been in the employ of the municipality, no member of the public fell from the three stairs cannot avail the municipality. On the evidence, the municipality failed to take reasonable steps to ensure safe access to its building by the plaintiff. It is disquieting that since the unrest, which is said to have taken place almost 6 years ago, nothing was done to repair the burglar bars to the door leading into its offices through the ramp. Neither did the institution of this action prompt the municipality to effect repairs to the burglar bars and to unlock the door. There was no shred of evidence suggesting that there had been, in this case, anything inhibiting the municipality from taking such steps to ensure safe access to its building by its customers. The costs could not have been prohibitive.

[14] In my view, regard being had to the circumstances of this case, it will be illogical to attribute any form of negligence to the plaintiff. I am satisfied that the plaintiff proved on a balance of probabilities that the exclusive causal negligence of the municipality caused her injuries. She therefore should succeed on the merits. The costs will follow the result.

Order

1. Judgment is granted in favour of Ms Martha Jacoba Van Zyl, the plaintiff, against Siyancuma Municipality, the defendant, on the merits;
2. The defendant is ordered to pay all such damages of the plaintiff flowing from the incident of 27 February 2015, when the plaintiff fell off the stairs of the defendant's premises, as the plaintiff will be able to prove;

3. The defendant is ordered to pay the plaintiff's costs of the trial on the merits;
4. The hearing on the question of quantum is postponed *sine die*;

MV Phatshoane
Acting Deputy Judge President

APPEARANCES:

FOR THE PLAINTIFF:

Adv J.M Rust
Instructed Venters Incorporated

FOR THE DEFENDANT:

Adv AG Van Tonder
Instructed by Engelsman Magabane Inc