

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

Case No.: 2826/2012

In the matter between:

MARIA ELIZABETH HANGER

Plaintiff

And

JOE REGAL

1st Defendant

PETRA REGAL

2nd Defendant

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 27 MARCH 2015

- [1] This is an application by the plaintiff for leave to appeal to the full bench of this division against the judgment of Murray AJ delivered on 11 December 2014 in terms whereof she granted absolution from the instance with costs at the close of plaintiff's case. Insofar as Murray AJ is not presently acting in that capacity, the matter was allocated to me for adjudication of the application in accordance with the provisions of section 17(2) of the Superior Courts Act, 10 of 2013.
- [2] The parties agreed that the application could be decided in chambers in accordance with the provisions of rule 16(5) of this Division. Plaintiff's counsel decided not to file any additional heads of argument. I received heads of argument

from respondents' counsel, supporting the conclusions arrived at by Murray AJ and submitting that the application should be dismissed.

- [3] Plaintiff relies on several grounds of appeal. It is unnecessary to deal with each of these for purposes of the adjudication of this application.
- [4] The test to be applied in applications for leave to appeal is regulated by section 17(1) of the Superior Courts Act. Leave may only be given in certain specified instances, one of which is if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success.

LEGAL PRINCIPLES APPLICABLE TO APPLICATIONS FOR ABSOLUTION FROM THE INSTANCE

- [5] Harms JA dealt with the test for absolution formulated in **Claude Neon Lights (SA) Ltd v Daniel** 1976 (4) SA 403 (AD) at 409 G – H as follows in **Gordon Lloyd Page & Associates V Rivera And Another** [2000] 4 ALL SA 241 (AD) at 243 B:

“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... 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." (emphasis added.)

- [6] For the sake of completeness the well-known test set out in **Claude Neon Lights** *loc cit* is in the following 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 or ought to) find for the plaintiff." (emphasis added.)

- [7] Hattingh J found that the test to be applied in determining the question whether the defendant's application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable Court can find in favour of the plaintiff. Consequently, at the absolution stage the plaintiff's evidence should hold a reasonable possibility of success for him and should the Court be uncertain whether the plaintiff's evidence has satisfied this test, absolution ought to be refused. See: **Build-A-Brick BK en 'n Ander v Eskom** 1996 (1) SA 115 (O) at 123 A – E. See also Schmidt C W H, **Law of Evidence**, loose leave edition, p. 3-16 to 3-18.

[8] I am of the opinion that the appeal would have a reasonable prospect of success and that another court may come to a different conclusion for one or more of the following reasons:

1. Merits and *quantum* were separated by agreement and the only issue to be considered was defendants' alleged liability to compensate plaintiff. Murray AJ was of the view that the matter was argued on behalf of plaintiff on the basis that strict liability should be imposed on defendants and that no reliance was placed on negligence as pleaded. She then found that the case that plaintiff tried to make out was totally different from the case pleaded and that plaintiff was bound by her pleadings. I am of the view that another court may find that plaintiff relied on negligence in her particulars of claim and that the evidence led was sufficient that a court may find in plaintiff's favour on the basis of the *actio legis aquilliae*. In order for a party to succeed in an action based on negligence it is not required that all the grounds of negligence be proven.
2. The particular bear was kept in captivity and plaintiff and her company were allowed to approach it and to be close enough to it for photographs to be taken. In fact it is not disputed that the second defendant even left the plaintiff and her party to fetch a peach which she handed to plaintiff with an invitation to feed the bear.

3. Notwithstanding his concessions in cross-examination, Mr Boing's evidence may be found to be sufficient for plaintiff to ultimately succeed in proving that defendants, and second defendant in particular, was negligent as pleaded and that a case was made out for defendants to respond thereto, failing which plaintiff may succeed in her action based on the *actio legis aquilliae*.
4. It may be found that whether or not the bear could have put his mouth and/or his paws through the openings of the fence in order to hurt a member of the public, and plaintiff in particular, is immaterial based on the invitation to plaintiff to feed the bear.
5. Although Mr Boing's evidence in cross-examination tends to throw a shadow over his evidence in chief, his evidence as an expert in his field demonstrated that the particular fence did not afford adequate protection against the bear and that defendants, and second defendant in particular, was negligent in allowing members of the public, and plaintiff in particular, to be in close proximity of the bear's cage by failing to take adequate, reasonable and necessary steps to protect them/her from danger by erection of a second railing or fence at least 1.5 metres from the bear's cage and/or to expressly warn her from approaching the bear and/or his cage.

[9] Consequently the following orders are made:

1. The application for leave to appeal to the full bench of the Free State High Court is granted.

2. Costs hereof are costs in the appeal.

J. P. DAFFUE, J

On behalf of applicant:

Adv. F.G. Janse van Rensburg
Instructed by:
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On behalf of respondent:

Adv. P.J. Loubser
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