



**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 12544/2010

BASMATHY NAIDOO

PLAINTIFF

and

**THE TRUSTEES FOR THE TIME BEING OF THE
HABIB ARBEE FAMILY TRUST**

DEFENDANT

JUDGEMENT

Delivered: 12 May 2015

MBATHA J

[1] The Plaintiff is Basmathy Naidoo, an adult female of Flat 2 Alpine Road, Durban. The Defendant is Habib Arbree Family Trust of 183 Alpine Road, Springfield, Durban. The names of the trustees have been amended and they appear in exhibit "A".

[2] At the commencement of the trial and by consent between the parties, the Court split the issues and ordered that the merits of the liability be determined first. In regard to the merits the Court had to determine the question of wrongfulness and if established, the issue of fault (*culpa*). In respect

of *culpa*, the Court had to determine if there was any contributory negligence on the part of the Plaintiff.

[3] Exhibits “B” and “C” being various photos of the rooftop of the building where the accident happened were handed in as well as exhibit “D” being a letter of demand forwarded by the Plaintiff’s erstwhile attorneys to the Defendant.

[4] It is common cause in this action that on the 10th of November 2008, on the rooftop of the premises at 183 Alpine Road, Durban, the Plaintiff fell into the bathroom from the skylight and sustained severe injuries. It is also common cause that at the time when this happened the Plaintiff was a tenant in flat number 2 in the building owned by the Defendant.

[5] The Plaintiff avers that she sustained injuries as a result of the negligence on the part of the Defendant, in that the Defendant failed to cover the glass/skylight with a metal grill, that the Defendant failed to place any warning signs at all indicating that the skylight was covered with glass, failed to take into account that there was a risk of the glass breaking if one stepped on the cover thereof and that this resulted in the Plaintiff sustaining injuries and suffering damages to a tune of R429 000,00.

Accordingly, the Defendant denies that they were negligent at all. It avers that the danger was within the knowledge of the Plaintiff and she was the author of her misfortunes.

[6] In summary, the Plaintiff's evidence is that on the rooftop there are living quarters for the employees of the Defendant. The roof which has washing troughs and washing lines is accessed through the stairs leading to it. The washing lines are within the vicinity of skylights, in fact, some of the lines run over the skylights. On this day in question, she had moved from the troughs with her washing, which was in a bucket and moved to the washing lines to hang it. The washing had been drip dried and ready for hanging. She had a top on her hand that was ready to be hanged. What caused her to fall is that she stepped on the block surrounding the skylight and put her other foot on the same structure, ready to hang the top on her hands, but suddenly fell down through the skylight and landed inside the neighbour's bathroom. She denied tripping on anything nor falling onto anything that was on the rooftop, though there are various loose objects on the floor of the rooftop, including plastic buckets and crates.

[7] The Plaintiff called only one witness in support of her case, her daughter, Samantha Naidoo, who corroborated her evidence in that they had never been prevented from going to the rooftop, that they had no knowledge that the top of the skylight was made of glass nor that it was a skylight. The skylight in their unit sounds like wood, whenever she cleaned it with a mop and supported the

Plaintiff's version that the skylight is not visible inside their unit to show that it is made of glass.

[8] The Defendant called various witnesses in support of its case including Mrs Mohamed, the Plaintiff's neighbour, whose evidence was that the Plaintiff knew that the skylights were made of glass therefore dangerous. Her evidence was further that Mrs Naidoo had informed her that she had slipped and fell on the skylight.

8.1 The son of Mrs Mohamed, Mr Uweiss, was also called as a witness. His evidence was that he had repaired the very same skylight when it had a crack, painted it in a red oxide colour and used a white colour on top to write a warning for people not to step on it.

8.2 Mr Arbee, a trustee of the Defendant, was also called as a witness. His evidence was that the Naidoo's unit also had a glass skylight but when they moved in, it was painted to give them privacy. He informed the Court that tenants were not allowed on the rooftop save for his employees who lived there. They were also not permitted to use the washing lines on the rooftop. He did not erect the steel poles which held in place the washing lines. There were gates leading to the rooftop and the tenants' gate was supposed to be locked to prevent them from accessing the rooftop. He also had been upset prior to the incident about the Plaintiff's washing that had been hung on the compressors, which affected the air-conditioning system in the supermarket below and he had made her aware of his disgust about her conduct.

8.3 The last witness called by the Defendant was Mr Mabhika, an employee of the Defendant, who lives at the quarters on the rooftop. He says that the washing lines were put up by the employees but not the steel poles. The steel poles have always been there and Arbee knew about them. His version is that on the day in question he saw the Plaintiff put her foot on the skylight, warned her and moved into his room, and then he left for work as she was rinsing a mop on the troughs.

[9] In the evaluation of the evidence presented before me, I have to consider if the Defendant allowed a dangerous situation to persist and ought to have taken steps to safeguard against it.

[10] This is a *delictual* claim, whereby it is trite that certain requirements need to be proved:-

- (a) the commission or omission of an act (the *actus reus*),
- (b) which is unlawful or wrongful,
- (c) committed negligently or with a particular intent (*culpa*);
- (d) which resulted in or causes harm (*causation*); and
- (e) the suffering of injury, loss or damage.

On *delictual* cases, the test is objective.

[11] The Defendant allowed people to live on the rooftop with the full knowledge of the existence of glass skylights. It was not disputed that there are living quarters for his employees on the rooftop. Arbee's evidence is that

tenants are not allowed access to the rooftops, irrespective that there were two (2) sets of steps leading to the rooftop, which were not fully secured. However, Mrs Mohamed stated that children had access to the rooftop and that they used the rooftop to wash and hang their laundry. Mrs Mohamed's son, Mr Uweiss's evidence was also that he also goes to the rooftop to hang his washing about three (3) times a week.

[12] This rooftop was not a forgotten place. Mr Arbee received complaints about concerns of the tenants that there were people peeping through the skylights and that there were fears of housebreakings through the skylights. This was a clear indication that there was a frequent presence of people on the rooftop. Mr Arbee had a problem about Mrs Naidoo hanging her washing over the air conditioners' compressors. These were all the signs that should have made him aware of the ticking time bomb. Irrespective of these signs, he still did not put any warning signs either at the entrance, the floor, walls or any other place on the rooftop warning people of a potential danger of walking on the glass skylights. The danger was not only to the tenants but on anyone who had access to the rooftop.

[13] Mr Arbee denied having put the steel poles that secured the washing lines. Mr Mabhika's evidence was that they were there when they put on the washing lines. These steel poles that stand at the exit points are next to the skylights and the washing lines run over them. It cannot be conceived that the employees had brought such expensive poles, secured them in concrete without the knowledge and approval of the Defendant. My view is that the

person who could put a permanent structure on the premises was only the Defendant. The way that the steel poles were installed indicates a degree of recklessness on the part of the Defendant, who ought to have foreseen that there was a danger that someone may step on the glass and get seriously injured. It is my view that the landlord was always aware of the existence of these steel poles, the washing lines running over them and the danger imposed by that. Mr Arbee had been up there when there was a problem with the compressors, if he had not installed them, he would have ordered that they be removed with immediate effect.

[14] The presence of plastic buckets, crates and other objects on the floor as they appear in exhibits “B” and “C” indicate that there is a presence of human traffic in the rooftop. It was suggested to Mrs Naidoo that she could have tripped from those objects, slipped and fell down. I do not agree as these are colourful objects, which are visible to any person walking on the rooftop. The floor is made of dry concrete. It does not appear to hold puddles of water as it is exposed to the natural elements. I accept Mrs Naidoo’s evidence that her washing was not dripping of water as it was in a bucket, which is not disputed, and that she had wrung it before placing it on the bucket.

[15] Mr Uweiss’s evidence is that the skylight was painted over and he had put a warning sign on it. He conceded that it was a long time ago and that the sign had faded. This is confirmed by the debris on exhibit “C3”, which appears to be faded. Furthermore, no attempt has been made by the Defendant to show that on the broken slabs of glass there are any visible letters of the warning sign on

it. I accept that there was no way that the Plaintiff had knowledge that there was glass under the faded paint. It was never suggested to Samantha that she was told that there was glass underneath when she testified before this Court. Mr Arbee also stated that a discussion took place between him and Samantha when she came to the shop; this was also never put to Samantha. There is no evidence indicating that the Plaintiff had knowledge of the existence of glass on that skylight.

[16] Mr Arbee's evidence had versions which were not put to the witnesses, which in my view is an indication that he was tailoring his evidence to the questions put to him. I gained the impression that he was grabbling at straws. His evidence was that the washing was not to be put on the compressors by Mrs Naidoo, it does not say that there must be no washing done on the rooftop because of the existing danger. I accept that the tenants were only told after this incident that they should not access the rooftop. On exhibit "B1" one of the steel poles lie down in a very dangerous and awkward position, has never been fixed, thus creating another potential danger to the people who have access to the rooftop.

Uweiss's evidence was clear in that the rooftop was used for laundry purposes and for hanging the washing, everyone was allowed access thereto, the landlord was made aware of the cracked glass, the steel poles holding the washing lines were always there and that he had seen Arbee and his brother on the rooftop.

[17] Mrs Mohamed also stated that the rooftop was used for hanging the washing. Furthermore, that the paint had peeled off, light filtered in at the time when Mrs Naidoo fell through. The evidence of Uweiss and Mrs Mohamed confirms the evidence of the Plaintiff in a material respect, in that as tenants they were allowed to use the rooftop.

[18] Arbee introduced a lot of new facts in his evidence which were not put to the Plaintiff and her witness in trying to shift the blame to the Plaintiff. He was also aware that the gate was never locked at all times, and this gave easy access to the rooftop.

[19] Mabhika's evidence cannot be correct when he said he saw her put her foot on the skylight, warned her, left for his quarters and when he emerged again she was rinsing the mop on the troughs as by then she had already fallen through the skylight. He lives up there permanently, but he did not take notice of the paint on the skylight. This confirms that this warning was not visible to the naked eye. The danger posed by the skylights was not only a threat to the tenants but to all that had access to the rooftop, including Mabhika.

[20] Mr Frost on behalf of the Defendant submitted that in her letter of demand, exhibit "D", the word "slipped" had been used. There is no evidence before this Court suggesting that she slipped. The same applies to the reference to the skylight as an air vent. Mrs Naidoo is a lay person and the misuse of a word by her ex-attorneys should not be attributed to her.

[21] The Defendant's argument is that she failed to take the necessary precautions and ought to have exercised some degree of care as she had ignored a warning by Mabhika and others. It was also submitted that she had prior knowledge of the danger, disregarded warnings and was imprudent. In short, she was not supposed to be there and there was contributory negligence on her part.

[22] I was referred to various authorities by both parties, which I have all considered. I am relying on **Kruger v Coetzee**¹ to establish if the Plaintiff has established the element of fault where Holmes JA at page 430E-G held that:-

"For purpose 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 occurrences; and*

(b) The Defendant failed to take such steps. This had 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."

¹ [1966] 2 All SA 428 (A).

[23] I will apply these principles to the relevant facts of this case. In applying the test for negligence as stated in abovementioned **Kruger v Coetzee** judgment, it is my view that the incident was reasonably foreseeable, that reasonable steps could have been taken to prevent the occurrence of the incident and that the Defendant failed to take steps to prevent the occurrences of the incident. On the facts of the case, the Plaintiff has proved the requirements of *cupla*.

[24] The Defendant referred the Court to **Ablort-Morgan v White Bank Farms (PTY) LTD²**, a full bench decision by the Eastern Cape High Court, where the Court on page 536 (D-E) stated as follows:-

“He was thus a normal adult with no idiosyncrasies likely to make him more accident-prone than the ordinary run of people. Ablort-Morgan knew this. He was, accordingly, entitled to expect the plaintiff to make ‘a given degree of care of himself’, per De Villiers JP in Cecil v Champion Ltd 1933 OPD 27 at 31. Ablort-Morgan had no reason to think that the pit would not be observed by a normal person entering the workshop. Sun was shining into the room through the two windows on the eastern wall and the door was partly ajar. It was light enough for him and the plaintiff to look for the L-end key, which is about four inches long, without requiring any artificial light. He had no reason, so he says, to think that the plaintiff had not seen the inspection pit on entering the workshop.”

² 1988 () SA 531 at page 536.

The Plaintiff's case is not an open pit case like in the Ablort-Morgan case. Had the Plaintiff tripped on any visible object and fell in an open pit in broad daylight, the position taken by this Court would have been different.

[25] In the matter of ***Cape Town Municipality v Bakkerud***³, besides considering the issue of the liability of the Municipality, it also considered whether the Appellants' failure to repair the holes constitutes an unlawful act or omission and whether the Appellant was negligent. In the Bokkerud case, the Appellant conceded that she was aware of the holes in question and that she stepped into the hole because she must have been thinking about other things. This is completely different from the facts of this case. The situation here was, I would say, more volatile as it was not obvious to the naked eye and there were no warning signs. I cannot find that Mrs Naidoo was to any degree to blame for the damages she suffered, in the light thereof.

[26] The criticism meted to Mrs Naidoo as not being a good witness cannot be accepted. The Defendants' witnesses were the ones who were unsatisfactory witnesses, in particular Mr Arbee, as they contradicted each other materially and tailored the evidence to suit their defence.

[27] In ***Swinburne v Newbee Investment (PTY) LTD***⁴, the Court dealt with a similar scenario to the one before me. A tenant in the Defendants' building sustained injuries when he slipped and fell some distance off a flight of stairs leading to his flat. The Court held that there were a number of instances where

³ 1997 (4) SA 356.

⁴ 2010 (5) SA 296 (KZD), 2010 (5) DS 295 KZD.

our Courts have imposed a legal duty upon the owner of property in relation to the condition and use of staircases, such a ***Spencer v Barclays Bank***⁵, which confirmed that, where the landlord provided a staircase to occupiers of flats as a means of entry into and exit out of their flats, he was under a legal duty to see that the staircase was not dangerous. The stairs in the present case were the obvious and natural route for tenants, and others visiting the premises, to use in order to gain access to and exit the flats, and accordingly the Defendant owed Plaintiff a legal duty to ensure that the stairs were safe to be used. (Paragraphs 13 and 14 at 303F – 204G.)

[28] The Court further held that the Defendant's legal duty having been established, the next question which arose was whether a reasonable person, in the position of Defendant, would have:-

- (i) foreseen the possibility of his conduct leading to injury to others; and
- (ii) would have taken reasonable steps in guarding against such injury.

The nature of the surface of the staircase suggested that the material such as sand and water could render it slippery. A reasonable person in the position of the defendant would therefore have foreseen the possibility of someone slipping on the staircase, losing their balance and falling. The provision of a handrail was the obvious step in guarding against such injury, and failing to do so was negligent on the part of the Defendant. (Paragraphs 15 and 19 at 204G-H and 306C-E.)

⁵ 1947 (3) SA 230 (T).

[29] Consequently, it is my view that the Defendant acted negligently as a result that the Plaintiff suffered damages. It should not have happened if the Plaintiff had taken reasonable and necessary precautions. I also find that there was no contributory negligence on the part of the Plaintiff.

[30] In the result the order that I make is as follows:-

- (a) The Defendant is ordered to pay the Plaintiff such damages as either agreed or as the Plaintiff may establish at trial.
- (b) The Defendant is ordered to pay the Plaintiff's costs of hearing to date.

MBATHA J

Date of hearing : 10 December 2014

Date delivered : 12 May 2015

Appearances:

For the Applicant : Adv. Harrison

Instructed by : Mooney Ford Attorneys, Durban

For the Respondents : Adv. Frost

Instructed by : Audie, Botha Attorneys, Durban