



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

CASE NO: 8986/2011

In the matter between:

GERALD ADRIAN CLARKE

PLAINTIFF

And

MERVELEE INVESTMENTS (PTY) LTD

DEFENDANT

ORDER

- (1) The injuries sustained by the plaintiff were caused by the negligent conduct of both the defendant and the plaintiff.
- (2) The negligence of the parties is assessed at 60% - 40% in favour of the plaintiff.
- (3) Defendant is ordered to pay the costs of the action.

JUDGMENT

SISHI J

[1] The plaintiff, a 60 year old retired male, allegedly fell through a gap in the boundary wall at the north-western corner of the second floor parking area of the Glenwood Village shopping centre and fell approximately ten meters to the ground below, sustaining injuries as a result of the fall.

[2] The defendant Mervelee Investments (Pty) Ltd, a property owning company, owns and runs the shopping centre and parking area known as Glenwood Village in Moore Road, Durban, KwaZulu-Natal where the incident occurred.

[3] This action arises because on 13 March 2010, at approximately 12 noon, Mr Clarke fell and injured himself as aforesaid. He attributes his fall to the negligence on the part of the defendant, Marvelle Investments (Pty) Ltd, the owner of the building, principally in failing to ensure that the boundary wall situate at its premises was in such a condition that no person could fall through the gap.

[4] Mervelee Investments denies negligence and in the alternative pleads contributory negligence on the part of the plaintiff.

[5] At the commencement of the trial, the Court granted an application for the separation of the issues of liability and quantum. The matter proceeded on the issue of liability, with the issue of quantum to stand over for later determination.

[6] On behalf of the plaintiff, the court heard the evidence of Mr Clarke and his wife Mrs Marlien Clarke, Kervin Robert Lewis, the Managing Director of the Security company which guarded the building at the time; Christopher Mxolisi Mbombo, a handy man employed at the centre residing in the building. On behalf of the defendant, Charlien Dukes-Heads who was the centre manager at the relevant time; Nichol Strydom, a hair dresser, working at the Saloon at the same centre; Joseph Ziko Rukangika, a Congolee citizen who was a car guard at the center at the time.

[7] The Court was furnished with two sets of photographs, depicting various relevant areas of the complex.

[8] The ground floor of the building mainly consists of the shops and the first floor of the building also consists of a few shops plus a parking area. The second floor of the building consists of a parking area only.

[9] The gap where Mr Clarke is alleged to have fallen from is on the north-westerly direction of the second floor of the building, near the exit ramp. The building itself is situated at the corner of Moore Road and Hunt Road in Durban.

[10] Access to the second floor of the parking area is gained through a Moore Road entrance, and the exit ramp from the second floor is on Hunt Road.

[11] The difficulty with this case is that the Court has been asked to draw inferences on whether the plaintiff fell from the upper level of the exit ramp at the upper western level floor and landed on the ground floor of the enclosed area.

[12] The plaintiff himself does not remember how he fell and landed on the ground floor of that section of the building. There were no eye witnesses to the incident. All that the plaintiff remembers was when he left his home together with his wife and a pet, driving to the shopping centre. His wife was driving the car.

[13] The following facts are either common cause or not disputed by the parties.

[13.1] That Mr Clarke was admitted to hospital after the incident;

[13.2] That Mr Clarke had no recollection of the events immediately leading up to the incident, which have given rise to the claim.

[13.3] That as at the date of the incident (13 March 2010) a gap existed in the north-western corner of the fencing/boarding at or about the edge/corner concerned of the upper level parking exit (to and in order to proceed down the ramp towards Hunt road) above the height of approximately 500 to 600 mm from standing level (as is more readily apparent in photograph No.1 of the plaintiff's photographs made available to the defendant and taken on or about 19 March 2010).

[13.4] That the aforesaid gap was approximately 450mm wide, i.e. between boarding placed above metal rail fencing.

[13.5] That at the later stage the said gap was filled by new railing placed above the existing (bottom railing) so as to close the gap.

[13.6] The roofing above the upper level parking was asbestos based at the time.

[13.7] Evidence has established that it was very hot at the upper parking level during the time of the incidence.

[13.8] The plaintiff was discovered at the ground level in an enclosed service area immediately adjacent and below the aforesaid gap in the fencing concerned.

[13.9] Access to the said service area in the normal course of events at the time would be by way of a locked gate thereto.

[13.10] The said service area was enclosed and the public did not have accessed thereto.

[13.11] Total height from the floor/standing level of and at the ramp concerned near the gap mentioned (immediately after the gap) i.e. to the top of the boarding above railing was a total of 1.2 metres high.

[13.12] The drop from the standing level of the north-western corner of the ramp leading down from the upper level parking at the centre concerned to the ground level of the service area mentioned above is approximately 7 to 8 metres.

[13.13] That the plaintiff had reduced visual ability as a result of pre-existing glaucoma.

[13.14] That at the relevant time no CCTV footage of the relevant areas concerning the incident was available to the defendant.

[13.15] That there was no history whatsoever of the plaintiff having suffered epileptic fits or blackouts prior to the incident giving rise to the claim.

[13.16] Persons including staff tenants and members of the public utilise the area in the vicinity of the aforesaid gap.

[13.17] That there was no restriction of movement of pedestrians to this area.

[13.18] That the aforesaid gap was only closed after the incident giving rise to this claim.

[13.19] That as a result of the incident, the plaintiff suffered the following bodily injuries:

- (a) a head injury including a laceration into the back of the head;
- (b) a fracture of the right Tibia fabula
- (c) a fracture of his right heel;
- (d) a fracture of his ring figure;
- (e) lacerations to his back.

The Issues

[14] The following issues remain to be determined by this Court:

- (a) The circumstances under which the plaintiff sustained his injuries;

- (b) Whether there was any negligence on the part of the defendant;
- (c) Contributory negligence.

Plaintiff's cause of action

[15] The plaintiff's cause of action is set out as follows in the particulars of claim¹:

"The sole cause of the fall was the negligence of the defendant, who was negligent in one or more of the following respect: -

- (a) It omitted to ensure that the boundary wall situate at its premises was in such a condition that no person could fall through the gap.
- (b) It ought to have realised that the gap in the said boundary wall was a hazard of such a nature that it exposed persons using the parking area at the shopping centre to potential danger.
- (c) It omitted to ensure, as a reasonable prudent property-owner would have done, that no person could fall through the said gap in the wall and fall to the ground, as a result of which they could injure themselves.
- (d) It failed to warn, adequately or at all, or ensure that the public at the shopping centre concerned were aware of the existence of a gap

¹ Paragraph 5(a) – (e) on page 5 of indexed papers.

from approximately knee height in the perimeter fencing of the upper level parking of the centre concerned.

(e) It failed to inspect, timeously, adequately or at all, the premises concerned to identify potential sources of danger so as to eliminate such from, in particular, areas to which the public would normally have access.

(f) It failed to avoid the incident when by the exercise of reasonable care and skill it could and should have done so.”

[16] As indicated above, the defendant has denied any negligence on its part.

Circumstances under which the plaintiff sustained his injuries

[17] As indicated above, the plaintiff himself has no recollection as to how he fell and sustained the injuries in question. Furthermore, there is no direct evidence of witnesses who witnessed how the plaintiff landed up on the ground floor of the secured area. The Court therefore has to rely on circumstantial evidence as to how the plaintiff fell and sustained the injuries.

[18] In the absence of direct evidence to prove factual issues, courts are entitled to use inferential reasoning normally referred to as circumstantial evidence.

[19] Although all evidence requires the trier of fact to engage in inferential reasoning², all circumstantial evidence ultimately depends upon the facts which are proved by direct evidence.

[20] Direct evidence generally concerns the assertion of a fact by a person who claims to have perceived it with his or her own senses.³

[21] In P J Schwikkard and SC Van der Merwe; *Principles of Evidence*, 3^{ed}⁴ the following appears on circumstantial evidence:

“Circumstantial evidence often forms an important component of the information furnished to the court. In these circumstances, the court is required to draw inferences, because the witnesses have made no direct assertions with regard to the facts in issue. These inferences must comply with certain rules of logic.”

[22] Circumstantial evidence is described as follows in CWH Schmidt:

Bewysreg 4^{ed}⁵:

“Omstandigheidsgetuigenis is getuigenis van ‘n feit of feite waaruit ‘n afleiding ontrent die primere feite in geskil gemaak kan word.”

The passages above were cited with approval in *Burger v S*⁶.

² *S v Zuma* 2006 (3) All SA 8 (W) at 71.

³ D T Zeffert and AP Paizes, *The South African Law of Evidence* 2 Ed, 99.

⁴ (2009) at 21 paragraph 29.

⁵ (2000) at 101.

⁶ [2010] 3 All SA 394 (SCA) paras 26 and 27.

[23] In *Goliath v MEC for Health, Eastern Cape*⁷, a surgical swab was left in Ms Goliath's abdomen during a hysterectomy performed at a provincial hospital falling under the MEC. It resulted in infection and further surgery was required to remove the swap. Ms Goliath sued the MEC in delict, alleging negligence on the part of the doctors and nursing staff that performed the hysterectomy. The High Court dismissed the claim despite the fact that the MEC did not adduce any evidence.

[24] In holding that Ms Goliath failed to discharge the onus of establishing negligence, the High Court pointed out that it was precluded by precedent from applying the *res ipsa loquitur* doctrine in the medical/negligence field. The decision of the High Court was reversed on appeal, the SCA holding as follows:

"Thus at the close of Ms Goliath's case, after both she and Dr Muller had testified, there was sufficient evidence which gave rise to an inference of negligence on the part of one or more of the medical staff in the employ of the MEC who attended to her. In that regard it is important to bear in mind that in a civil case it is not necessary for a plaintiff to prove that the inference that she asks the court to draw is the only reasonable inference; it suffices for her to convince the court that the inference that she advocates is the most readily apparent and acceptable inference from a number of possible inferences (*AA Onderlinge Assuransie Assosiasie Bpk v De Beer*⁸; see also *Cooper and Another NNO v Merchant Trade Finance Ltd*⁹). That being so, the MEC, in

⁷ 2015 (2) SA 97 (SCA).

⁸ 1982 (2) SA 603 (A)

⁹ 2000 (3) SA 1009 (SCA)

failing to adduce any evidence whatsoever, accordingly took the risk of a judgment being given against him. ..." (at para 19).

[25] Counsel for the plaintiff, Mr *Frost* submitted that the Court should infer from the following circumstances that the plaintiff fell from the gap on the upper level of the parking area to the ground floor.

[26] The plaintiff was found on the ground floor and immediately below the gap referred to in the perimeter fencing.

[27] Evidence established that access to the service area was only by way of a locked gate and that members of the public had no access thereto.

[28] Evidence led established that, a key was used to unlock the gate to access the service area.

[29] The plaintiff's injuries from his oral testimony and exhibit "D1" the Entabeni Hospital casualty document, are consistent with a fall from the upper level of the parking area to the ground floor of the service area.

[30] Blood was found in the service area immediately below the gap of the perimeter fencing.

[31] It was common cause that the plaintiff was seen going to the north westerly corner of the upper level of the parking close to the gap.

[32] It is evident from the evidence of both the plaintiff's wife and Mr Mbombo that not much time elapsed between the plaintiff's wife going to the area and the discovery of the plaintiff by Mr Mbombo.

[33] Mr Mbombo testified that the plaintiff's dog was seen going down the exit ramp and turning to the left towards the service area as Mr Mbombo said "to find the owner".

[34] Counsel for the plaintiff submitted that this indicated that the separation between the dog and its owner occurred not long ago since the dog was seen going down the exit ramp.

[35] No one saw the plaintiff going down the exit ramp.

[36] The evidence of Kevin Robert Brewis who was at the time Managing Director for the security company guarding the building and Charlene Dukes-Heads who was the Manageress at the relevant time in the Glenwood Shopping Centre, established that the centre was quiet on the commission of crimes during the day. Furthermore, there were security guards guarding the area during the day.

[37] Counsel for the plaintiff submitted that robbery as a possible cause for the plaintiff to have gone down should be excluded, because no possessions were taken from the plaintiff, no blood or blood trails was seen at the corner of

the upper level, no person was seen leaving the area. He then submitted that from the nature of the injuries sustained, as set out above, it is clear that he fell on the back of his head and assault could be totally excluded. The absence of blood trails in the area of the upper level of the parking as opposed to the blood found on the ground floor tells a story.

[38] Evidence established that no report was made to the security controller on the day of the incident. The possibility of blood being cleaned up on the upper level of the parking was not likely.

[39] Furthermore, there was no indication that the plaintiff was somebody prone to committing suicide.

[40] Counsel for the plaintiff submitted, correctly in my view, that the evidence of Mr Strydom, the hair dresser should be rejected. His evidence was that the plaintiff Mr Clarke, was sitting on top of the board of the perimeter fence, holding his dog with two hands, most probably his feet were hanging because of the length of the wall, which is highly improbable. Mr Strydom also contradicted himself as he showed two different positions wherein the plaintiff, Mr Clarke was seated on top of the perimeter fencing in photographs "C1" and "C2". In photograph "C1", he pointed at the position on the extreme right of the photograph. In photograph "C2", he pointed at the position on the extreme left of the photograph. Furthermore, Mr Strydom conceded that his opportunity for observation was limited as he had gone to

the upper floor only to fetch the towels to be used in the salon where he works, on the first floor.

[41] If Mr Strydom's evidence that the plaintiff was seated on top of the perimeter fence is correct, that would have been pleaded by the defendant.

[42] In paragraph 5.1 of the defendant's plea, it is pleaded that the sole cause of the fall, was due to the plaintiff's own negligence in that he, *inter alia*, failed to keep a proper look out for the alleged gap in the boundary wall when by exercise of reasonable care he could and should have done so.

[43] There is no positive allegation in the defendant's plea that the plaintiff was seated on top of the boundary wall immediately before he fell down.

[44] What can further be elicited from this plea, from the phrase 'the sole cause of the fall was due to ...' is that the defendant seems to have accepted that the plaintiff fell from the boundary wall.

[45] In any event, Mr Strydom was not a credible witness in that besides these contradictions, it was inherently improbable that the plaintiff would have been seating in the position referred to above on the evidence of Mr Strydom. Furthermore, he was hesitant in answering questions and questions had to be repeated before he answered.

[46] Counsel for the defendant, Mr Bedderson on the other hand, submitted that it is not known how the accident occurred, the plaintiff is merely speculating. He advanced a number of possibilities, namely, that the plaintiff might have tripped on an uneven surface, the possibility that he might have tripped and fell whilst he was chasing his dog. All these possibilities do not make the defendant liable.

[47] He submitted that the evidence of Mr Strydom should be accepted, although he was not a model of clarity. I have no hesitation in rejecting Mr Strydom's evidence as unreliable.

[48] In applying the legal principles enunciated in the cases referred to above to the facts of this case, and possibilities referred to above, there is no need for the mind and conscience of an ordinary man¹⁰ to resort to conjecture or guessing as to the probable causes of the plaintiff's injuries¹¹. On the contrary, the plaintiff's injuries at the back of his head are consistent with the fall on his back from the upper level of the parking area. See *Motor Vehicle Assurance Fund v Dubuzane*¹², it surdices for the plaintiff to convince the court that the inference that he advocates is the most readily apparent and acceptable inference from a number of possible inferences.

[49] I am satisfied that the inference that plaintiff fell from the gap on the perimeter fence of the upper level of the parking area in the said shopping

¹⁰ *Cf Wildebeest v Geldenhuis* 1911 TPD 1050

¹¹ *Motor Vehicle Assurance v Duduzane* 1984 (1) SA 700(A) at 705 A

¹² *Ibid* at 705 A

mall, to the ground surface is the most plausible inference which can be drawn from the facts of this particular case.

Negligence

[50] The classic test for negligence was articulated by Holmes JA in *Kruger v Coetzee* as follows:

“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.

...

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 the other cases.”¹³

[51] This test has been applied in a number of subsequent cases by our courts including the Supreme Court of Appeal.¹⁴

¹³ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-G.

¹⁴ *Imvula Quality Protection (Pty) Ltd v Loureiro and Others* 2013 (3) SA 407 SCA para 24; *Transet Ltd and another v Witter* [2009] 1 All SA 164 (SCA) paras 4 and 6.

[52] The next issue is whether Mr Clarke's fall was due to the negligence on the part of Mervelee Investments (Pty) Ltd, the defendant.

[53] In *Herschel v Mrupe*¹⁵, the Court elaborated on the test for negligence and Van Den Heever JA had the following to say:

"The concept of the *bonus paterfamilias* is not of a timorous, faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise."

[54] On the element of foreseeability, Scott JA expressed himself as follows in *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another*:¹⁶

"It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case... Notwithstanding the wide nature of the inquiry postulated in paragraph (a)(i) of Holmes JA formula – and which has earned the tag of the absolute or abstract theory of negligence – this Court has both prior and subsequent to the decision in *Kruger v Coetzee* acknowledged the need for various limitations to the broadness of the enquiry where the circumstances have demanded. For example, it has been recognised that, where the precise and exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable"

¹⁵ 1954 (3) SA 464 (A) at 490 E-F.

¹⁶ 2000 (1) SA 827 (SCA) para 22 .

[55] This passage was cited with approval in *Imvula Quality Protection (Pty) Ltd v Loureiro and Others*¹⁷.

[56] In *Kruger v Coetzee, supra*, the Court held that the standard of care that is required of the defendant will be determined by the circumstances of each particular case.

[57] It is trite law that negligence alone is not sufficient to give rise to liability for an omission: The omission must be wrongful as well. In *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*¹⁸ Brand JA stated:

“When we say that a particular omission or conduct causing pure economic loss is “wrongful”, we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages; his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether the negligent or not.”

This passage was cited with approval in *Chartaprops 16 (Pty) Ltd and Another v Silberman*¹⁹.

¹⁷ 2013 (3) SA 407 SCA para 26.

¹⁸ 2006 (3) SA 138 SCA at para 12.

¹⁹ 2009 (1) SA 265 SCA para 15.

[58] Turning to the facts of the instant case, this Court is required to determine whether a reasonable person in the defendant's position would have foreseen the reasonable possibility that the gap at the north western part of the defendant's parking area presented a danger to such person or persons using the area next to the gap such that a person could pass through the gap and drop to the ground on the concrete floor and, having so realised, failed to close the gap.

[59] Counsel for the plaintiff submitted that the defendant failed the test of negligence as set out in *Kruger v Coetzee and Herschel v Mrupe, supra*, in that, it failed to close the gap in the North Western part of the shopping centre on the upper floor, which presented a danger to the users of the area and more in particular the plaintiff.

[60] Mr Frost for the plaintiff also referred to *Swinburne v Newbee Investments (Pty) Ltd*²⁰ where Wallis J held that the owner of the property is ordinarily liable to ensure that the property does not present undue hazards to persons who may enter upon and use the property. In other words, it is the owner's legal duty to ensure that the premises are safe for those who use them. That is so whether one is dealing with trespassers, invitees or others who may have a right to enter upon the property such as tenants²¹.

[61] Ordinary members of the public and also staff members utilise the area in the vicinity of this gap. There is no restriction of movement of pedestrians

²⁰ 2010 (5) SA 296 (KZD) para 13.

²¹ *Spencer v Barclays Bank* 1947 (3) SA 230 T at 241-243.

around this area. There is no notification to pedestrians of the existing danger.

[62] It is common cause that this gap was only closed after the incident. That moved the defendant to ensure that there was no particular danger presented.

[63] Counsel for the plaintiff submitted that the gap was the cause of the plaintiff's fall and that the defendant had a legal duty to close that gap so as to protect all the users of the area.

[64] Mr *Bedderson* for the defendant also referred to the test for negligence enunciated in both *Kruger v Coetzee and Herschel v Mrupe, supra*, and submitted that it was incumbent upon the plaintiff to prove the requirements as set out in these cases. He also submitted that the onus of proof never shifts.

[65] Counsel for the defendant also referred to *Broom and Another v The Administrator, Natal*²², wherein the test for negligence as set out in *Herschel v Mrupe, supra*, was cited with approval at 515 H - 516 A.

[66] Counsel for the defendant submitted that the gap referred to by Counsel for the plaintiff was never the cause of the accident as suggested by the plaintiff. He referred to the evidence of Charlene Dukes-Heads and Mr

²² 1966 (3) SA 505 (D).

Mbambo who both testified that during tenure of office, an incident of this nature never occurred in the centre.

[67] Counsel for the defendant submitted that the plaintiff should have foreseen that that gap may cause him harm. He further submitted that although Mr Strydom was not a model of clarity in his evidence, he testified that he saw plaintiff seated on the rail, holding his dog like a baby and that the Court cannot find that he was lying.

[68] I have already referred to the evidence of Mr Strydom earlier on in this judgment. He, however, submitted that if the plaintiff was sitting on the edge of the fence, he was completely negligent and contributed towards his injuries.

[69] The defendant was aware that the area next to the gap was used by staff, pedestrians and ordinary members of the public. Evidence also established that pedestrians also used the area of the exit ramp.

[70] The proximate cause of the injuries is that the plaintiff fell because the perimeter fencing was inadequate as a result of the gap.

[71] As indicated above, it is highly unlikely that he was sitting on top of the fence and fell through. He must have fallen through the gap. There was therefore causal negligence present in this case.

[72] In my view, there was a negligent failure on the part of the defendant, to ensure that the gap on the perimeter fencing referred to above was closed and was reasonably safe for users of the area. In this instance, the test is that of a *diligens paterfamilias* who would foresee the possibility of his conduct leading to the injury to others, and would take reasonable steps to guard against such injury.

[73] In the instant case, there can be little doubt that the reasonable person in the position of the defendant would have foreseen the possibility of someone falling through the gap down to the ground floor and injuring himself or herself.

[74] I, accordingly, find that the accident involving the plaintiff was occasioned by the negligence on the part of the defendant.

[75] The defendant's negligence lay in failing to close the gap in the perimeter fencing of the upper floor of the parking area in the north-westerly section of the parking area in the building.

[76] I am satisfied that causative negligence has been established in this matter.

Contributory Negligence

[77] I now tend to consider the question of contributory negligence.

[78] Section 1(1)(a) of the Apportionment of Damages Act²³ enjoined the Court to reduce damages suffered by a claimant “to such an extent as the Court may deem just and equitable”, having regard to the degree to which the claimant was also at fault.

[79] In *South British Insurance Company Ltd v Smit*²⁴, Ogilvie Thompson JA said:

“From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of “the degree in which the claimant was at fault in relation to the damage” is necessary a matter upon which opinions may vary. In the words of *Lord Wright in British Fame (Owners) v McGregor (Owners)* - 1943 (1) AER 33 at p35 (a maritime case; but the principle appears to be equally followed in England in relation to the Contributory Negligent Act).

“It is the question of degree of fault, depending on a trained, an expert judgment considering all the circumstances, and it is different to assess from a mere finding of fact in the ordinary sense. It is a question, not of principle, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion as to which there will be difference of opinions by different minds”

See also: *Transnet Ltd v Witter*²⁵

²³ Act 34 of 1956

²⁴ 1962 (3) SA 826 (A)

²⁵ 2009 (1) All SA 164 SCA at 169 A-D.

[80] The onus is on the defendant to prove that the plaintiff was negligent and that this negligence was causally connected to the damages suffered by the plaintiff²⁶.

[81] Mr *Frost* for the plaintiff submitted that the Court has to consider whether the defendant had done enough to prove contributory negligence. He submitted that the defendant has not done enough to prove contributory negligence in this case.

[82] He submitted that it was unlikely that Mr Clarke would do something stupid like seating on a thin rail of fence next to the gap as testified by Mr Strydom, he then submitted that the defendant has not placed sufficient evidence to enable the Court to conclude that the plaintiff was at fault.

[83] He then submitted that if the Court was not with him, obviously the degrees of fault are not equal. The defendant was more at fault, it was required to repair the perimeter fencing to prevent anyone from falling but did not do so, causal negligence has therefore been established, he then submitted that the degree of negligence which could attributed to the plaintiff could be in the region of between 20 and 30 percent.

[84] Mr *Bedderson* submitted that on the evidence of Mr Strydom, he saw the plaintiff sitting on top of the railing, holding a dog like a baby, there was no evidence that the dog was restricted by a leash, this Court cannot find that he

²⁶ *South British Insurance Company Ltd v Smit* 1962 (3) SA 826 (A); *Union National South British Insurance Company Ltd v Victoria* 1982 (1) SA 444 (A).

was lying. He conceded, however, that Mr Clarke had to jump to be able to sit on the edge of the fencing. He then submitted that if he was indeed seated there, he was completely negligent.

[85] He then submitted that the plaintiff placed himself in danger, he took the risk and he must live with it.

[86] He submitted that if the Court finds reason for apportionment, the plaintiff's blame worth should be placed at 75 per cent and 25 per cent be attributed to the defendant.

[87] He further submitted that the worse scenario could be 50 per cent – 50 per cent basis.

[88] There is no doubt as the Court has found that the plaintiff fell from the gap on the upper level of the parking. Whether he was seated or standing whilst he fell, it is not clear. Plaintiff himself should have noticed that the area wherein there was a gap, was dangerous and ought to have avoided it. In failing to guard against the danger of falling from the gap, he was partly negligent. He therefore also contributed towards his fall.

[89] In the light of the evidence tendered, the conduct of the plaintiff deviated from the norm, being that of a reasonable man, to a lesser degree than that of the defendant.

[90] I am satisfied on the evidence that both parties were negligent in this matter, but their degrees of negligence vary.

[91] The damages sustained by the plaintiff have to be apportioned in terms of section 1(1)(a) of Act 34 of 1956.

[92] Considering all the above, I am of the view that the degree in which the plaintiff was at fault in relation to the damage sustained by him, should be assessed at 40 per cent and the defendant's negligence at 60 per cent.

[93] The plaintiff's proven damages should be reduced by 40 per cent.

[94] In the circumstances, the negligence of the parties in this matter should be assessed at 60 per cent – 40 per cent in favour of the plaintiff.

Costs

[95] On the issue of costs there is no reason why costs should not follow the result in this matter. The defendant should be ordered to pay the costs of the action.

[96] In the result, I make the following order:

- (1) The injuries sustained by the plaintiff were caused by the negligent conduct of both the defendant and the plaintiff.
- (2) The negligence of the parties is assessed at 60% - 40% in favour of the plaintiff.
- (3) Defendant is ordered to pay the costs of the action.

SISHI J

APPEARANCES

Date of Hearing : 17 April 2015

Date of Judgment : 31 July 2015

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