

4 SEPTEMBER 2009
NOT REPORTABLE
IN THE NORTH GAUTENG HIGH COURT
(PRETORIA)

CASE No.: 27705/06

In the matter between:

PRINSLOO R.

and

BARNYARD THEATRE

OLD MUTUAL LIFE INSURANCE CO (SA) LTD

HANDEUR WAT NIE VAN TOEPASSING IS NIE

(1) RAPPORTEERBAAR: JA/NEE. NEE

(2) VAN BELANG VIR ANDER REGTERS: JA/NEE. NEE

(3) HERSIEN.

2009-09-02

DATUM

HANDTEKENING

PLAINTIFF

FIRST DEFENDANT

SECOND DEFENDANT

JUDGMENT

Hiemstra AJ

[1] On the evening of 2 November 2004, the plaintiff, Mrs Ronel Prinsloo, together with her daughter and two nieces, attended a show at the Barnyard Theatre in the Menlyn Shopping Centre in Pretoria. They were seated on the upper level of the theatre. After the show they proceeded downstairs using the staircase. The plaintiff walked ahead of her group while holding on to the wooden handrail on her right. She reached a landing at the bottom of the first flight of stairs. The next flight of stairs is to the right of a person descending and consists of five steps. From the third step down from the landing the stairs widen. There are two concrete pillars at the entrance to these last five steps which form a kind of portal. The guardrails end at the bottom of the first flight of stairs. There are no guard rails along the last five steps. The plaintiff testified that when she started down the first of the last five steps she expected the handrails to continue and reached for a handrail with her right hand. When there was no rail, she lost her balance and fell down the stairs. She crushed her left elbow in the fall and suffered bruises and chafe wounds. She also suffered psychological trauma.

[2] She instituted action against the first and second defendants for payment of the sum of R580 977,53, which is made up of hospital and medical expenses incurred; future hospital and medical expenses; loss of income and loss of earning potential.

[3] The parties agreed that the merits of the claim and the quantum of damages should be separated. I accordingly made an order in terms of Rule 33(4) to that effect and the trial proceeded on the merits only.

[4] "The Barnyard Theatre" is the trading name of On Cue Investments Kilo CC, which conducts the business of a theatre. The second defendant is the landlord of the premises. The plaintiff withdrew her claim against the second defendant at the outset of the trial. The parties agreed that should this court find that the plaintiff's injuries had been caused by a wrongful and negligent act or omission on the part of either the first or second defendant, the first defendant would be liable for the plaintiff's damages. The parties further agreed that I should decide which of the plaintiff or the first defendant is responsible for the second defendant's costs.

[5] The plaintiff testified that the staircase had been poorly lit. She further testified that she went to inspect the staircase some time later after she had been discharged from hospital. On that occasion she found that the stairs were not of equal height. She vacillated under cross-examination as to the cause of her fall. It was not clear whether it was the absence of a handrail, the poor lighting or the uneven steps or all of them.

[6] The plaintiff's daughter, Mrs E. Campher, who had walked down the stairs right behind the plaintiff, testified that her mother had fallen because she had reached for the non-existent handrail and lost her balance.

[7] The night manager, Mr Bjorn Schlickemeier, testified that he was looking down the stairs from the upper level when the accident happened. He did not actually see her fall, but saw the plaintiff lying at the foot of the stairs. He was adamant that the lighting

had been quite adequate. He said that there was no dimmer switch that could be turned down.

[8] Mr Tom Muller, one of the members of the first defendant close corporation and the manager of the theatre, was not present at the night of the fall. Mr Schlickemeier reported the incident to him. Mr Muller confirmed that there was adequate lighting. He said that the lights are always on and are only switched off when the theatre is locked up at night. The theatre is in a shopping centre and there is no natural light at any time. He said that the staircase had been designed by an architect according to prescribed specifications. He saw no need for a handrail along the bottom steps. He further testified that according to bookings, approximately 130 000 people attend shows at the theatre per year. Since the opening of the theatre in November 2002 there had been about three incidents where patrons had fallen. However, all the other incidents happened in other areas of the theatre and none at the stairs.

[9] Several photographs were presented of the staircase. There is nothing out of the ordinary about the staircase. The last five steps are wide with a gentle slope. It is difficult to determine the state of lighting from photographs, but it does not appear to be particularly dark. Several lights are visible above the staircase.

[10] Despite the plaintiff's confusion as to the cause of her fall, I am satisfied on a conspectus of her evidence and that of Mrs Campher that she fell because she lost her balance when she expected a handrail when there was none. The alleged poor lighting and uneven steps had nothing to do with her fall.

[11] The plaintiff's claim is that she was injured because of the defendants' failure to install a handrail along the bottom steps. The law regarding an omission as a wrongful act that can give rise to a duty of care and delictual liability is trite. A useful summary of the law is found in the judgment of A.P. Joubert AJ in *Faiga v Body Corporate of Dumbarton Oaks and another* 1997 (2) SA 651 (W) in which several guiding dicta are quoted, e.g.:

Administrateur, Transvaal v Van der Merwe 1994 (4) SA 347 (A) at 358D-F where the following was said:

“'n blote late [kan] ook onregmatig [wees] indien dit, volgens die gemeenskapsoortuiging, onredelik oftewel sosiaal-inadekwaat is. Indien daardie late ook spreek van nalatigheid, is daar deliktuele aanspreeklikheid.”

And at 360E—G:

“Natuurlik is dit so dat beheer oor eiendom aanspreeklikheid kan meebring omdat juis daardie beheer sosiale verantwoordelikheid en gevolglik 'n regsplig kan skep om die beheer doeltreffend uit te oefen sodat andere nie benadeel word nie.”

[12] It was held in *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) as follows at 373E--H:

“In general, the law allows me to mind my own business. Thus if I happen to see someone else's child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try to save it. But sometimes the law requires me to be my brother's keeper. This happens, for example, when the circumstances are such that I owe him a duty of care; and I am negligent if I breach it. I owe him such a duty if a diligens paterfamilias, that notional epitome of reasonable prudence, in the position in which I am in, would –

(a) foresee the possibility of harm occurring to him; and

(b) take steps to guard against its occurrence.

Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case, and it is neither necessary nor desirable to attempt a formulation which would cover all cases. For the purposes of the present case it is sufficient to say, by way of general approach, that if I launch a potentially dangerous undertaking involving the foreseeable possibility of harm to another, the circumstances may be such that I cannot reasonably shrug my shoulders in unconcern but have certain responsibilities in the matter - the duty of care.”

[13] I shall consider this matter in view of the above principles. The first question is whether the first defendant was in control of a potentially dangerous object, namely a dark staircase without a handrail. I am satisfied that it was never so dark that one could not see the stairs, and whether or not there had been a handrail. Therefore, if the plaintiff had looked for a handrail, she would have seen that there was none.

[14] The next question is whether it was foreseeable that a normally prudent and careful person would assume that there was a handrail and reach for it without looking. I believe not. When the plaintiff reached the landing, she found herself in a new environment. The steps took a new direction and there were concrete pillars on each side

that formed a portal to the last five steps, the last three of which are noticeably wider. There was nothing from which she could assume that there would be a handrail identical to the one on the stairs that she came from. The staircase, in particular the last five steps, can be negotiated by any healthy able-bodied person. The plaintiff agreed that she was a healthy woman who had no difficulty negotiating stairs.

[15] I therefore find that no special duty of care rested on the first or second defendant. One could not foresee the likelihood of a person assuming that there was a handrail and reach for it only to grab fresh air.

[16] People negotiate all kinds of stairs and obstacles in everyday life without falling. Sometimes they stumble and fall where there are no obstacles, even in their own homes. It cannot be expected of owners of property to protect the public against their own inattentiveness or possible clumsiness.

[17] I therefore find that the defendant has not caused the fall of the plaintiff.

[18] That brings me to the question of whether the plaintiff or the first defendant should pay the costs of the second defendant.

[19] On 8 November 2006 the first defendant's attorney wrote to the plaintiff's attorney as follows:

"Ons bevestig dat die eerste verweerder, namens wie ons hierin optree, op risiko was ten tye van die beweerde voorval op 2 November 2004.

Sou u kliënt kan bewys dat ons kliënt nalatig was, soos beweer (wat ontken word), sal u kliënt van ons kliënt kan verhaal die skade, indien enige, wat sy kan bewys.

In die omstandighede sal u kliënt dan 'n besluit moet neem of sy nog steeds met 'n aksie teen die tweede verweerder wil voortgaan."

[20] In a letter marked "URGENT", dated 17 August 2007, the second defendant's attorney referred the plaintiff's attorney to the first defendant's letter of 8 November 2006, referred to above, and explained that the first defendant's risk arose from a contractual provision between the first and second defendants. The plaintiff's attorney is urged to

consider whether the plaintiff wants to proceed against the second defendant in the circumstances. On 7 October 2008 the second defendant's attorney again requested the plaintiff's attorney urgently to respond to the matter. The plaintiff's attorney did not respond to any of the letters.

[21] On strength of the above correspondence Adv Pieterse, who appeared on behalf of the first defendant, argued that the plaintiff, or her attorneys, knew at all times that the first respondent had accepted the risk.

[22] Adv Geach SC argued on behalf of the plaintiff that despite the correspondence, the first defendant never admitted in its plea, which was filed on 23 April 2007, that it alone was at risk. He argued that the plaintiff could therefore not assume that the first defendant had accepted the risk. This argument is spurious. The second defendant explicitly denied in its plea that it had control over the premises. Furthermore, its attorney explained in a letter to the plaintiff's attorney the basis of the first defendant's sole potential liability, namely a contractual provision between the first and second defendants. This should have made it clear to the plaintiff that only the first defendant was potentially liable. It was therefore unreasonable to have proceeded against the second defendant.

The plaintiff's claim is dismissed with costs, including the costs of the second defendant.



J. Hiemstra AJ

2009-09-02