

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

CASE NO: 5545/2022

In the matter between:

NONDUMISO MYATHAZA

Plaintiff

and

SPORTCENE MTHATHA

Defendant

JUDGMENT

CORAM: PITT AJ

Introduction

[1] The plaintiff, Nondumiso Myathaza (“Ms Myathaza”) instituted a claim against the defendant, Sportscene Mthatha (“Sportscene”) for damages allegedly suffered after she slipped and fell at the entrance of the defendant’s premises on 3 December 2019 at approximately 17h00.

[2] Ms Myathaza alleged that she slipped on a mat at the entrance to the premises of Sportscene, which mat was wet with water from the rain. Ms Myathaza alleged that she injured her left ankle as a result of the fall. Sportscene denied liability and alleged that Ms Myathaza tripped over her own legs outside of the premises of Sportscene and fell into the entrance of Sportscene. These are two mutually destructive versions, and the court must decide which of the two versions to accept, and which one to reject *in hoc casu*.

[3] At the commencement of the trial, both Counsel for the parties requested the court to separate the issues of liability and quantum, and that the matter proceed on liability only. The request for separation was granted in terms of Rule 33(4) of the

Uniform Rules of Court and the issue of quantum was postponed for determination at a later stage.

[4] The main issue to be determined is whether Sportscene is to be held liable for damages allegedly arising from the injury sustained by Ms Myathaza as a result of her slipping and falling at the entrance of the premises of Sportscene. The defendant also contended that if the court finds that the plaintiff fell outside the premises of Sportscene, that the mall should be held liable instead.

The two versions.

[5] The plaintiff's version is that she had gone to Sportscene to purchase some clothing items on 3 December 2019, which was a rainy day. She was a teacher at the time, and she had left school after 16h00 on the day. It had been raining since earlier in the day. When she reached the entrance to Sportscene, she shook the rain off her umbrella outside the premises before she turned to go inside. The entrance to Sportscene was on her left-hand side. She further alleged that she turned to her left-hand side, and she walked into the entrance. After she had taken about three steps, she slipped on the mat at the entrance which was wet and fell after breaking her left ankle. After she had fallen, she rolled around in pain a few times before coming to a halt at the entrance with her legs outside of the entrance. She was not certain whether she had taken three or four steps before she slipped and fell, but she was certain that she slipped on the mat and fell inside the premises of Sportscene. While she was lying on the floor, she felt that her legs were wet from the mat.

[6] The defendant's version of the incident, according to the witness who testified on behalf of Sportscene, Mrs Ronetha Chantell Gonzalves ("Mrs Gonzalves"), is that she was standing near the entrance where Ms Myathaza fell. She saw Ms Myathaza approaching the entrance and subsequently falling. Ms Myathaza did not slip on the mat inside the premises. Ms Myathaza fell outside of the premises when she crossed her right leg over her left leg, thereby tripping and falling down. Ms Myathaza fell into the shop after tripping over her own legs, and that is how she injured herself.

[7] In addition to the plaintiff testifying, another witness, Ms Ntombomzi Lwebuga (“Ms Lwebuga”), was called to give evidence. The defendant did not call any other witnesses to testify.

PLAINTIFF’S WITNESS:

Ntombomzi Lwebuga.

[8] Ms Lwebuga testified that she was a friend of the plaintiff for over ten years. The plaintiff was one of her clients at the business at which Ms Lwebuga worked as a hairdresser. The business was situated a few minutes’ walk from where the incident took place. According to Ms Lwebuga, she received a telephone call from another client of hers that the plaintiff had been injured shortly after the incident took place. Upon hearing the news of the plaintiff’s injury, she hurried to Sportscene to see if she could assist the plaintiff in any way. When she arrived there, the plaintiff was already lying on the floor on the mat to the entrance of Sportscene and crying in pain. She gave evidence that she asked the plaintiff what had happened, and that she told her that she slipped on the mat and fell. She bent down and felt with her hand that the mat was wet. She did not witness the incident.

DEFENDANT’S WITNESS

Ronetha Chantell Gonzalves.

[9] The defendant only called one witness, Gonzalves, as referred to above. The following is her evidence in support of the defendant’s version that the plaintiff fell outside the premises of Sportscene and not inside the premises. Mrs Gonzalves was no longer employed by Sportscene and she had resigned at the end of 2019. She is self-employed and decided to testify out of her own will and at her own expense. She was the only staff member of Sportscene who witnessed Ms Myathaza falling. There were other staff members on duty on the premises, but they were not in the position that she was in to witness the incident. That is why only she testified on behalf of the defendant. The plaintiff landed at the entrance of the Sportscene. On a photograph which was handed in as evidence, Mrs Gonzalves indicated that the plaintiff fell on her left- hand side on the mat, and that she rolled over to her right-hand side. She ran over to the plaintiff when she fell, and tried to assist her as she was trained in

first aid. During this time, she had knelt over the plaintiff, and she did not feel that the mat was wet where she was kneeling at the time. The mat was a non-slip mat embedded into a gap in the floor of the premises. The purpose of the mat was to trap dirt and water. Over the entrance of Sportscene there was a roof which prevented the rain from entering the premises, more especially the entrance. The tiles next the mat before the entrance were wet because persons entering the premises tracked water from the rain onto the tiles. Ms Gonzalves was an assertive witness who gave an account of what she recalled she saw. When asked whether the mat would get wet during the course of such an afternoon as the one on which the incident occurred, she merely stated that the mat was dry where she was. She further insisted that the mat would not get wet after it was put to her that the mat would probably get wet after foot traffic or customers were to traverse the mat with wet feet.

The law.

[10] As mentioned above, the court is faced with two mutually destructive versions of the incident. The question is which one of the versions should be accepted. It is trite that courts, when faced with two mutually destructive versions, resolve factual disputes as was held in ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others***¹ *"To come to a conclusion on the disputed issues a court must make findings on: (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probability or improbability of each party's version on each of the disputed issues. In light of the assessment of (a), (b) & (c) the court will, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its observations and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised probabilities prevail"*.

¹ 2003 (1) SA (SCA) 1 at [5].

[11] In **National Employers' General Insurance Co Ltd v Jager**² a similar approach was echoed "*in that the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. Where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and the other version is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the court will weigh up and test the plaintiff's allegations against the probabilities. When considering the probabilities of both versions and if the balance of probabilities favours the plaintiff the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore that they favour the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied his version is true and that of the defendant is false*".

[12] In **Dreyer v AXZS Industries**³ the court reiterated the approaches in the **Stellenbosch** and **Jagers** cases. The court referred to the probabilities inherent in the respective conflicting versions and that the maxim that the party who bears the onus must satisfy the court on a balance of probabilities that his version, taken into account the probabilities of the two destructive versions, is true and should be accepted.

Evaluation of the evidence.

[13] I am satisfied that the plaintiff's version is the most probable for a number of reasons. I found the plaintiff to be a credible and reliable witness. The plaintiff testified that she did not trip over her own legs before she fell. She also testified that she slipped on the mat which was wet. Further, she gave evidence that she fell on her left-hand side. This was confirmed by Mrs Gonzalves. The plaintiff fractured her left ankle. Although she was not asked how exactly she sustained this injury, I assume that she twisted her foot and ankle when she stepped on it and that is most probably how she injured it. She fell on her left-hand side, and it confirms that the

² 1984 (4) SA 437 (ECD) at 440D-441A.

³ 2006 (5) SA 548 SCA.

plaintiff took a fourth step before falling, which she could not remember. The plaintiff was honest enough to say she could not remember if she took a fourth step before falling. It is most probable that she did take a fourth step before falling. From the photos it is clear that there was water on the tiles or cobble pavers just before the mat. It is most probable that there was water tracked onto the mat at the entrance to Sportscene.

[14] Ms Lwebuga was a reliable and credible witness. She appeared truthful and was not evasive at all when asked questions under cross-examination. She admitted straight away that she did not see the incident happen, and that she does not know where the plaintiff had slipped and fallen. She told the court what the plaintiff had told her about how and where she had slipped and fallen.

[15] Mrs Gonzalves correctly testified that the purpose of the mat was to trap dirt and water. In all probability, the mat did trap the water tracked onto it by the customers who walked into Sportscene on that day. A mat, even a non-slip mat, which was wet from the rainwater tracked onto it by wet shoes will most probably become slippery and its grip function become impeded by the water. Ms Myathaza testified that her legs were wet from the water while she was lying on the mat after she had fallen. Ms Lwebuga also testified that the mat was wet when she felt it. Mrs Gonzalves gave evidence that the mat was wet where she had knelt down when she assisted the plaintiff after she had fallen. She did not testify that the rest of the mat was not wet. It is probable that the mat was wet where the plaintiff alleged that she had stepped on it before she slipped and fell.

[16] The plaintiff testified that after she had fallen, she rolled in pain and that is why she ended up lying with her feet outside the entrance as depicted in one of the photographs referred to at the trial. Mrs Gonzalves also confirmed that the plaintiff rolled to her right-hand side after she had fallen down. It explains why the plaintiff was not lying inside the premises with her whole body at the time when the photograph was taken. The version of the plaintiff is far more probable and ties in with the factual position where the plaintiff was found after the fall.

Costs.

[17] The general rule is that the successful party should be awarded his or her costs, and unless there are exceptional circumstances. I am of the view that there are no exceptional circumstances to deviate from the general rule. The purpose of a cost order is for the successful party to recover from the losing party the expenses incurred as a result of the case.⁴

Order.

Accordingly, the following order shall issue:

1. The defendant is held 100% liable to the plaintiff for damages suffered as a result of injuries sustained by the plaintiff on 3 December 2019.
2. The defendant shall pay the plaintiff's costs on High Court scale A.

DV PITT
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant:	<i>Adv J Hobbs</i>
Instructed by:	JA le Roux Attorneys Mthatha
Counsel for the Respondents:	<i>Adv Westerdale</i>
Instructed by:	Joubert Galpin Searle C/O J Sikungo Attorneys Mthatha
Heard on:	5 and 6 February 2024
Date judgment delivered:	20 June 2024

⁴ See Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa* 4th Ed p 701.