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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No.: 2021/45446

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- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED

02 August 2024

DATE

SIGNATURE

In the matter between:

ELFREDA ALBERTS

Plaintiff

And

LOUIS ANDRE MULLER

Defendant

Date Heard: 28 and 30 May 2024

This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to Caselines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 02 August 2024.

JUDGMENT

[1] The plaintiff instituted a delictual claim for damages against the defendant in respect of injuries she sustained on 04 August 2020 when a metal sliding gate at her rented premises fell on her, ("the incident"). By agreement between the parties, the issue of merits and quantum was separated, with quantum to be determined at a later stage. At the close of the plaintiff's case, the defendant applied for absolution from the instance. The application is opposed by the plaintiff.

Background facts

[2] The plaintiff, Ms Alberts is a 69-year-old veterinarian. The defendant, Mr Muller is a dentist practising as such at number 1[...] V[...] G[...] Street, H[...], Gauteng, ("the premises"). It is common cause that at the time of the incident, the defendant rented out part of the premises to the plaintiff for purposes of running her veterinary clinic in terms of a written lease agreement.

[3] In her particulars of claim, the plaintiff alleged that on 04 August 2020 and at the premises, she was injured when a metal sliding gate fell on her causing injuries to her neck, back, left shoulder and left hip. The plaintiff alleged that the incident resulted from the defendant's negligence and or breach of his duty of care by failing, amongst other duties, to take steps to protect the safety of persons entering the premises, such as the plaintiff, by ensuring, *inter alia* that the premises including the gate, were properly maintained and repaired.

[4] The defendant, in his plea admitted that he rented out part of the premises to the plaintiff and that he owed a duty of care towards the plaintiff arising from the lease agreement. The following issues were put in dispute by the defendant without putting up any version of his defence: -

- 4.1 that the incident occurred
- 4.2 that he was negligent and or in breach of his duty of care in all the respects as alleged in the particulars of claim
- 4.3 the plaintiff's alleged injuries and sequelae, and

4.4 the relief sought by the plaintiff.

The Legal Framework

[5] Rule 39(6) of the Uniform Rules provides that:

"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which case the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate."

[6] The test whether to grant absolution from the instance at the close of the plaintiff's case is an objective question whether the plaintiff has made out a prima facie case against the defendant. In *Gordon Lloyd Page & Associates v Rivera*¹ Harms JA restated the following test for absolution that was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H:

" . . . 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, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307 (T))."

[7] Harms JA further cautioned that absolution at the end of the plaintiff's case, should be granted sparingly and in circumstances where granting the order of absolution from the instance is in the interests of justice.

Application for absolution

¹ *Gordon Lloyd Page & Associates v Rivera and Another* (384/98) [2000] ZASCA 33; 2001 (1) SA 88 (SCA); [2000] 4 All SA 241 (A) (31 August 2000) para 2

[8] The defendant in his application for absolution contended that the plaintiff failed to prove the actual cause of the gate falling. According to the defendant, proof of the cause of the gate falling, “*would have enabled the Court to possibly make a factual finding regarding the alleged failure by the defendant to take reasonable steps to protect the safety of persons entering the premises*”. The defendant contended that the plaintiff failed to lead evidence that there were any defects on the gate and or gate motor that needed maintenance and or repairs.

[9] The defendant submitted that the plaintiff failed to prove that her actions didn’t amount to a *novus actus interveniens* which resulted in the falling of the gate. According to the defendant, the plaintiff failed to prove any wrongful conduct by the defendant and that in the absence of proof of wrongful conduct, there is no reasonable possibility of success for the plaintiff and therefore sought an order for absolution from the instance with costs on scale C.

Analysis

[10] Both counsels in their heads of argument referred to numerous authorities on the subject of absolution from the instance and elements of delict which I have noted. In order for the plaintiff to succeed with her claim found in delict, she must allege and prove wrongful conduct on the part of the defendant and that the wrongful conduct caused her to suffer harm and or damages. In a decision of Molahlehi J in *G E P obo M M L vs MEC for The Department of Health Gauteng Provincial Government*² which was referred to by both parties in their heads of argument, the court dismissed the application for absolution with costs. The court stated the following regarding a test for absolution:-

[11] “17. *The test to apply in considering an application for absolution is not that the evidence led by the plaintiff established a case that would be sustained if the case was to proceed to its final conclusion. The essential inquiry in determining whether to grant absolution from the instance is whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff.*

² *G E P obo M M L vs MEC for The Department of Health Gauteng Provincial Government* [2023] ZAGJHC 535 para 17.

In other words, a court would not grant absolution from the instance in a case where the plaintiff has, at the end of his or her case, presented an answerable case or prima facie case. The test, as stated in Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd, is not “what ought a reasonable court to do” at the close of the defendant’s case. Thus the threshold required by the law, which the plaintiff has to satisfy in opposing an application for absolution from the instance at the close of his or her case, is very low.”

[12] It is common cause between the parties that the defendant was the owner of the leased property. In terms of the lease agreement, the defendant was responsible for the repair and maintenance of the leased property, including the gate. The defendant in his plea admitted that he owed a legal duty of care to the plaintiff and persons entering the premises through the gate. It was his duty to ensure that they were not exposed to the risk of injury.

[13] The uncontested evidence of the plaintiff is that the gate started to malfunction as early as 2015. The defendant had failed to maintain the gate and instead, he used the services of his brother-in-law, Mr Seronio who is a handyman. The plaintiff testified that she was instructed by the defendant to lift the flap on the motor to change the gate from automatic to manual whenever the remote control was not working. She would then push the gate manually to open for her clients. This evidence was corroborated by Mrs Smuts who had been an administrator at the plaintiff’s clinic since 2015. Mrs Smuts confirmed that that on the days when the gate was not opening, the plaintiff would manually open the gate with a handle.

[14] Regarding the incident, the plaintiff testified that in the afternoon of 4 August 2020 at 13h45 she went to open the gate in preparation for her afternoon session. When she pressed the remote control, the gate only opened a little gap. She then went to the gate motor and switched the mode from automatic to manual and then pushed the gate open to allow a person with a dog on a leash to enter. She started to walk back to the motor to switch it back to automatic. When she was at a distance of a third to half towards the motor, the gate dislodged from its rails. It started pivoting and the left side of the gate fell on her at an angle. The gate struck her left shoulder, and left hip causing her to fall. Her foot got stuck under the gate and she

had to crawl on her hands and knees from underneath the gate. The gate motor prevented the gate from falling flat, in which instance, it would have crushed her.

[15] She used her cellphone to call the defendant's office to report the incident and she was told by the receptionist that the defendant was busy. When she received no response from the defendant, she went to a mechanic business next door to ask Mr Jacques Bauer for help. Mr Bauer and his staff attempted to get the gate upright, however the gate fell down a second time. They then put some nuts and the gate was eventually able to stand upright. Plaintiff testified that she consulted with her doctor telephonically as physical consultations were not allowed due to covid restrictions. She described herself as stoic by nature. She self-medicated and was in constant contact with her doctor.

[16] Mr Bauer testified on behalf of the plaintiff. He confirmed that he assisted the plaintiff with picking up the gate. He stated that the plaintiff was distraught when she came to ask for his assistance. When he came to the premises, him and his assistant tried to put the gate up, but it fell flat on the floor almost on top of his assistant. He noticed that there was a problem on the left hand side of the gate where the gate connects with the wall. He observed that the main locking screw or bolt (not sure) attaching the actual beam to the concrete on the left-hand side was broken. He instructed his assistant to secure that bolt and he left.

[17] The defendant asked the court to grant absolution on the grounds that the plaintiff failed to adduce evidence or to call an expert witness to testify on what actually caused the gate to fall. I'm in agreement with the plaintiff's counsel's argument that the cause for the gate falling is evident from the facts as alleged by the plaintiff. The plaintiff's evidence was corroborated by Mrs Smuts that the gate was malfunctioning for 5 years prior to the alleged incident. This evidence has not been challenged by the defendant. In the absence of a contrary version from the defendant that the gate was well maintained, I am of the view that a reasonable inference can be drawn that the defendants wrongful and negligent conduct in failing to maintain the gate resulted in the gate falling down and thereby injuring the plaintiff.

[18] It is also noted that the defendant's case as pleaded is a denial of the incident that gave rise to the plaintiffs claim. The defendant's counsel was pressed to admit that the gate fell but sought to introduce new defences that the plaintiff's conduct amounted to a *Novus actus interveniens* which resulted in the falling of the gate; that the plaintiff did not suffer any injury, that she failed to seek medical treatment immediately after the incident and that the plaintiff allegedly had pre-existing medical conditions.

[19] With the defendant having pleaded a bare denial, it does not avail him of the defenses that were put to the plaintiff during cross examination. I am therefore of the view that the defenses advanced in support of his application for absolution from the instance were not pleaded. The defendant's plea was served in November 2021 and the parties have met on 4 occasions at a pre-trial meeting. On all these occasions the defendant has maintained his denial that the incident took place and has never sought to amend his plea to introduce these defenses. It is trite that a party is bound by his or her pleadings and ordinarily, he or she will not be allowed to raise a different case without a due amendment. A court is equally bound by those pleadings and should not pronounce upon any claim or defense not made in the pleadings by the parties.³

Evidence of damage or harm

[20] In *Jowell v Bramwell-Jones and Others*⁴ the court stated as follows regarding damage: -

"22. The element of damage or loss is fundamental to the Aquilian action and the right of action is incomplete until damage is caused to the plaintiff by reason of the defendant's wrongful conduct (see Oslo Land Co Ltd v The Union Government 1938 AD 584 at 590; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 SA (A) at 838 H - 839 C). ...Whether a plaintiff has suffered damage or not is a fact which, like any other element of his cause of action

³ Minister of Police v Gqamane (226/2022) [2023] ZASCA 61; 2023 (2) SACR 427 (SCA) para 13.

⁴ *Jowell v Bramwell-Jones and Others* (543/97) [2000] ZASCA 16; 2000 (3) SA 274 (SCA) para 22.

and subject to what is said below, must be established on a balance of probabilities”.

[21] Regarding damage, the defendant contented that the plaintiff's credibility with respect to her injuries is questionable in that there were contradictions as to the nature of the injuries sustained, the fact that she did not inform Mr Bauer and Mrs Smuts at the scene that she was injured and the fact that she only consulted with her doctor a year later. The defendant argued that the plaintiff has failed to prove her case on a balance of probabilities and that it is impossible for the court to make a finding in her favour.

[22] I take note that the parties agreed to postpone the issue of quantum. It is therefore not for this court to determine the extent of the plaintiff's injuries or damages. The evidence presented by the plaintiff to this court was that that she sustained injuries to her left shoulder, left hip and left lumbar region. That her foot was stuck under the gate, and she had to crawl on her hands and knees from underneath the gate. Her evidence was that her shirt was torn at the back. Mr Jacques Bauer confirmed that the plaintiff was distraught when she came to ask for help and Mrs Smuts testified that the plaintiff told her that she was hurt and that she was distraught. It appears from the WhatsApp messages exchanged between the plaintiff and the defendant that the plaintiff also informed the defendant that she was hurt.

[23] I do not agree with the defendant that the plaintiff had to prove her case on a balance of probabilities as the standard on proof is lower in an application for absolution from the instance. The plaintiff need only establish a prima facie case against the defendant. I am satisfied that the evidence adduced by the plaintiff on the issue of damage is enough to constitute a prima facie case against the defendant.

Conclusion

[24] The plaintiff's counsel submitted that the plaintiff presented an answerable case and that to grant the defendant's application for absolution would be tantamount to denying the plaintiff access to Justice, a right which is guaranteed by

the Constitution. She asked that the defendant's application be dismissed with costs on scale C. The defendant on the other hand contended that there is no reasonable possibility that the court may find in the plaintiff's favour and requested the court to grant its application for absolution from the instance with costs on scale C. I am of the view that the issues raised in the matter are not complex to justify an order of costs on scale C for either party. I'm of the view that costs should be awarded on scale B.

[25] Having considered the evidence adduced by the plaintiff and her two witnesses, I am satisfied that the plaintiff succeeded in putting a prima facie case answerable by the defendant.

Order

[26] In the result I make the following order: -

1. The defendant's application for absolution from the instance is dismissed.
2. The defendant is ordered to pay the costs of this application on scale B.

JL BHENGU
ACTING JUDGE OF HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

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