



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

Case No: 8144/2019P

In the matter between:

IRENE ELFRIEDE BLAND

PLAINTIFF

And

ABAQULUSI MUNICIPALITY

DEFENDANT

ORDER

1. The application for absolution from the instance is dismissed.
2. The defendant is ordered to pay costs.

JUDGMENT Delivered:

Mngadi J

[1] The Plaintiff claims damages from the Defendant for injuries she sustained when she fell whilst walking on a sidewalk along the street.

[2] The plaintiff is Irene Elfriede Bland an adult female pensioner. The defendant is Abaqulusi Municipality a Local Authority constituted in terms of the Local Government Municipality Systems Act 32 of 2000 and the Local Government Municipal Structures Act 117 of 1998.

[3] The plaintiff sued the defendant in that the sidewalk was not well maintained which caused her to fall and it was the defendant's duty to have the sidewalk and pavements within its area of jurisdiction properly maintained ensuring the safety of users, and if there was a danger, to warn users of such danger.

[4] The defendant in the plea pleaded no knowledge of the incident and put to the plaintiff to the proof of her claim including proof of the defendant's liability.

[5] By consent at the commencement of the trial in terms of Uniform Rules 33 (4) the issue of liability was separated from the issue of quantum. The trial proceeded on the issue of liability.

[6] The plaintiff lead evidence of two witnesses and closed her case. The defendant applied for absolution from the instance.

[7] Irene Bland testified as follows. She was the plaintiff. She was 75 years old. She stayed in South Street in Vryheid Town. She has lived in Vryheid for all her of her life.

[8] On 26 April 2008 she was walking down the street in town. She was shopping. At about 9h45 she was walking down High Street. She fell into a hole. The hole was on the pavement. She fell hard and she broke her left hip. Mubarak with a shop nearby came and assisted her to stand up. She could not walk. Mubarak assisted her to sit in a chair Infront of his shop. She than called her husband. He arrived and she was assisted to get into a car, and she was taken to the doctor. The doctor examined her in his surgery. The doctor called an ambulance, which came and took her to Newcastle Private Hospital. She was admitted for about five (5) days in Hospital and received medical treatment.

[9] The plaintiff testified that when she fell, she was walking normally. She had not fallen anywhere on that day. She did not see the hole before she fell into it. There was a shadow of a building covering where the hole was which caused her not to see the hole. Plaintiff, when shown a bunch of photos, testified that she was present when the photos were taken. She did not remember the date the photos were taken. She testified that there the pavement as it depicted in the photos was like that on the date she fell.

[10] The set of photos consists of sixteen (16) photos. They depict a chair next to a shop entrance, the pavement on part of it has smooth concrete slabs. Where there is a missing smooth slab there is a concrete mix slab covering the area. The concrete mix slab in some areas is cracked and chipped creating unevenness with the smooth concrete slabs. The plaintiff testified that she was unable on the photos to point out the hole into which she fell. The photos depicting the section Infront of the shop with the chair in the entrance it is not known what they depict because the plaintiff fell about five (5) metres to the right of a person sitting on a chair facing the pavement. She had walked past that spot. The nature of the pavement on that spot depicts the kind of the pavement around that area. There is a photo depicting plaintiff and next to her left leg there is some unevenness on the pavement. There are also photos depicting holes on the pavement when a slab meets with the smooth concrete slabs and other holes

in the pavement, but again there is no evidence connecting those uneven depicted area with the spot-on which plaintiff fell.

[11] The plaintiff testified that she tripped and fell. The hole caused her to trip and fell. Her shoes or anything she was wearing did not cause her to trip and fall. The weather was clear. The pavement was not wet.

[12] In the pre-trial conference the parties that document filed are what they purport to be and they including copies are admissible without the necessity of proof, save that there is no admission as to the truth of the contents.

[13] The plaintiff was referred to pathology reports of April 2018 showing that she had a blood haemoglobin of 9.0, a red cell counts of 2.84 and haematocrit of 27.7 under comment it is stated 'Anaemia with some microcytic cells and rouleaux formation Retrophilia with toxic granulation and mild left shift noted, lymphopenia noted. Occasional small platelet clumps noted on slide-the platelet count may be higher than reported and should be confirmed in fresh specimen.' The defendant's counsel argued that the pathology report shows the plaintiff as someone prone to falling which the plaintiff denied.

[14] The plaintiff was referred to a report by Dr Johan H. Ehlers dated 30 April 2018 addressed to Dr M Pieters stating: 'Baie dankie vir die verwysing van bg. soos telefonies besprek. Mev. Bland het in the dorp rondgeloop en volgens haar het die linker been net onder haar padgee en het sy toe geval'. The plaintiff said she did not remember telling that to the doctor. She however, confirmed that Dr Ehlers treated her and they communicated in Afrikaans.

[15] The Mediclinic records shows the following: '26 April 2018 at 15h50 admissions- female came from Dr Pieterse's rooms in an ambulance, history of fell in the street-- injury her hip left leg'. Dr Ehlers in the above – mentioned report stated: 'By ondersoek: Klinies by ondersoek in die hospitaal kon 'n mens duidelik die verkoting van die linker been sien met die been wat in eksterne rotasie le,' Erge pyn is teenwoordig rondom die linker heup. X-strale toon soos genome n fermur nek fraktuur'. A report dated 27 April 2018 by a Nickey Haupt Fleisch a physiotherapist shows that on diagnosis the plaintiff had a left femur neck fracture treated by being mobilised.

[16] The plaintiff was referred to a medico report by Dr Vic Oelofse which on page 3 recorded under a heading "Full Description of incident (In Clients own words): 'She was walking south on the right-hand pavement between Utrecht and Church Street in Vryheid (a few meters away from the traffic light). Due to the shade provided by buildings she did not see the broken pavement and stepped into the hole and fell'.

[17] Lastly, the plaintiff was referred to a Fall Risk Assessment examination conducted on her on admission at Mediclinic on 26 April 2018 which found her to be of a high risk of falling, and it recorder under 'Prior History of falls with last 3 months' a Yes. The plaintiff denied that she was prone to falling. She stated that fell in her home in 2019.

[18] The plaintiff as a second witness called Mr Mubarak Bachcha. (Bachcha). He testified that on 26 April 2018 he was sitting on a chair Infront of his store. He observed about 5 meters away from him a lady falling. She fell on a pavement into a hole. He proceeded to her, and he assisted her to stand and to go and sit in a chair. She was Mrs Bland. Before that date he did not know her. She then phoned her husband. The husband came with a vehicle, and he took her to hospital. The lady when he approached her, she did not report anything to him. He also did not say anything to her. The husband took a photo of where the lady had fallen in the pavement. He did not know who took and on what date the rest of the photographs. Bachcha testified that the photo on page 10 showed the hole to which the plaintiff fell. The whole was about 5 cm deep. He also put an X mark on a photo depicting plaintiff walking towards the traffic lights. The mark is on the right-hand side of the plaintiff in the middle of the pavement. He stated that the hole can't been seen on the photo because it is blocked by the plaintiff in the photo Bachcha confirmed that the other photos show the pavement in front of his shop.

[19] Bachcha admitted that he had not paid any attention to the plaintiff before she fell when she walked past him to his right. What drew his attention was the plaintiff falling. He then saw the hole in the pavement that the plaintiff fell into. He immediately went to her to help her. Except the hole in the pavement nothing caused or could cause the plaintiff to fall. The pavement as depicted in the photos is still like that. On

the day of the incident the pavement was in the same condition as depicted in the photos.

[20] The defendant in the application for absolution from the instance contends that the plaintiff was the owner of her misfortune. She had anaemia caused by low haemoglobin which made her to be high risk of falling. There is no delict, contended the defendant's counsel, that has been proved against the defendant.

[21] Uniform Rule 39 provides that at the close of the case for the plaintiff the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The test is whether the evidence presented by the plaintiff establish on the preponderance of probabilities a *prima facie* case. Whether there is evidence upon which the court could or might find for the plaintiff. See *Mazibuko v Santam Insurance Co Ltd and Another* 1982 (3) SA 125 (A) at 133.

[22] The burden of proof is on the plaintiff to establish the factual basis for a claim. The factual basis must be established as a matter of probability on a balance of probabilities. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particulars state of affairs existed. See Schwikkard and Van De Merwe *Principles of Evidence* 3rd ed at 580.

[23] There is no doubt that as claimed in the particulars of claim the defendant has a legal duty to keep the pavements in its area of jurisdiction in such a condition that they don't pose a danger to the persons using the pavements. The photos show that the area in question had holes and uneven areas which posed a danger to the users, in particular, to the weak and the elderly.

[24] The defendant has not led any evidence that the plaintiff fell because of her compromised physical condition. There was no evidence that a person with haemoglobin level that the plaintiff had would be physically weak and be unable to walk on the pavement without falling. A person prone to falls might also fall where the nature of what caused her to fall could have caused a person not prone to fall to fall. Defendant's counsel argued that the low level of haemoglobin in plaintiff's blood

together with other deformities caused the plaintiff to fall. Counsel, in my view, cannot rely on his knowledge or refer to articles on the subject, without expert evidence there are no evidential basis for such a contention.

[25] The photographs shows that the pavement in the area where the plaintiff fell is in a poor condition with cracks, uneven surfaces and portholes. It is true that on the photographs the porthole which the plaintiff claims caused her to fall is not clearly identified. However, the evidence of Bachcha who is familiar with the area and who is an independent witness shows that where the plaintiff had fallen there was a porthole. Bachcha who was physically there at the time in question and immediately attended to the plaintiff saw that what caused the plaintiff to fall was the hole in the pavement. This makes it probable that the plaintiff tripped on the pothole and fell. The defendant has not pleaded that it had no legal duty to repair the pavement, if unrepaired and constituting a danger, to warn members of the public of the danger. Pavements in town are for use by pedestrians. They must be suitable for such use and not be in a state of disrepair constituting a danger to the users. The users are not expected to carry out repairs to the pavements. A municipality of a medium sized town must be in a financial position to carry out repairs on the pavements in CBD in its town. See *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at para [28].

[26] The plaintiff immediately after falling was taken to the doctor and medically examined. She was found to have on the left femur neck fracture. She received extensive medical examination. There was nothing found to be medically wrong with her physical condition except the injury on her left leg sustained when she fell. The examination including laboratory results would have revealed if something caused her leg to collapse. A leg cannot just collapse and on examination it be found to be physically intact. The defendant presented no expert evidence that the laboratory results show that the plaintiff's leg could just collapse. The report by Dr Ehlers that the left leg suddenly gave way is, in the context of the totality of the evidence, not correct, it must have been as a result of miscommunication. In any case, Dr Ehlers himself find nothing medically that could have caused the plaintiff's leg to suddenly collapse.

[27] The application for absolution from the instance falls to be dismissed.

[28] It is ordered as follows:

3. The application for absolution from the instance is dismissed.
4. The defendant is ordered to pay costs.




Mngadi J



APPEARANCES

Case Number : 8144/19P

For the Plaintiff : Adv. Matlamela

Instructed by : G Grobbelaar Incorporated
c/o Austen Samith Attorneys
PIETERMARITZBURG

For the Defendant : Adv RM Mahlatsi

Instructed by : Mathopo Attorneys
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PIETERMARITZBURG

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Heard on : 5 August 2024

Judgment delivered on : 23 August 2024