IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO: 1372/2016

Date Heard: 17 – 19 September 2024

Date Delivered: 29 October 2024

In the matter between:

TJELKE TOKAT ANGELBAUER KLATTE **PLAINTIFF**

and

DRS VISSER, ERASMUS, VAWDA & PARTNERS **FIRST DEFENDANT**

JUDGMENT

MULLINS AJ

[1] This matter came before me in respect of the merits only and at the commencement of the trial I made the following order by agreement:

> "The parties agree that the Honourable Court will be requested to Order that the following issues should be separated from the remaining disputes on the Pleadings (being issues of

causation and quantum), and should be argued first and that the remaining issues should stand over for later determination:

1. Whether the Plaintiff's fall was caused by the First Defendant's negligence which, *inter alia*, requires a determination as to:

   (a) Whether the fall was reasonably foreseeable, and;

   (b) Whether the fall was reasonably preventable.

2. Whether the First Defendant's conduct was wrongful."

[2] Although the matter commenced as what is known as a medico-legal dispute, by the time it came before me it had become a straightforward delictual action, the medical negligence aspect having been abandoned by the Plaintiff. As a result thereof the Second Defendant, the hospital where the incident occurred, had also fallen out of the picture.

[3] At the conclusion of the Plaintiff's case the Defendant[1] applied for absolution from the instance, which application was opposed by the Plaintiff.

[4] It is the Plaintiff's case that as a result of an incident, which is briefly described hereunder, the Plaintiff suffered a brachial plexus injury of the right arm which ultimately led to the amputation thereof.

[5] What I am called upon to decide is whether the Defendant is in law responsible for the Plaintiff's loss of her right arm. Essentially this boils down to whether, on the Plaintiff's evidence, the incident giving rise to the injury was reasonably foreseeable.

[6] The Defendant, which is a partnership trading as Bayradiology, carries on business as radiologists, whose rooms are situated at Netcare Greenacres Hospital in Gqeberha, but is completely independent of the hospital, (which is the erstwhile Second Defendant).

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1 As there is only one defendant before court the First Defendant will be referred to as the Defendant.

[7] Prior to the commencement of the evidence, and by agreement between the parties, in order for all concerned to be familiar therewith and so as to have a visual picture of the layout of the premises in question, an inspection-in-loco was held at the Defendant's rooms. Nothing contentious arose from the inspection-in-loco, which served its purpose.

[8] The Plaintiff's case consisted of her evidence, an expert witness, one Grant Swartz, who is a qualified radiographer, and that of her husband, whose evidence was relevant in respect of one narrow, but important aspect.

[9] The incident giving rise to this litigation occurred in the Defendant's x-ray room, which consists of a number of different apparatuses, a roof mounted x-ray camera, which can be moved in various directions and adjusted as the need arises, and a semi-partitioned area behind which the radiologist stands when the x-rays are taken.

[10] At the time of the incident the Plaintiff was 34 years old and, according to her, in good health. Her evidence in chief may be summarized as follows:

(a) Due to a painful right knee she had been referred to the Defendant for what is described as a leg length x-ray;

(b) She reported at reception and shortly thereafter was taken through to the changeroom area by a lady (who was identified by the Defendant as a radiographer) and asked to wait. The lady went into a room (the x-ray room) and emerged a short while later to invite the Plaintiff in;

(c) On entering the x-ray room the lady told her to stand against an apparatus, which had a raised platform, and the camera was positioned. Initially she was on an additional step, but this was subsequently removed;

(d) Despite numerous attempts, and the assistance of two other persons who were called in to help, for some reason the x-ray machine wouldn't work;

(e) The Plaintiff estimates that this took about 20 minutes, during which time she remained standing on the apparatus;

(f) While still standing on the apparatus she blacked out and fell. When she came to she was on the ground and there was, in her words, a lot of blood. A Dr Wickens was called from emergency who treated her and, *inter alia*, required a head and neck x-ray, which was duly performed;[2]

(g) She was admitted to casualty where she received 55 stitches for a cut on her forehead and 3 stitches for a cut lip. She spent the night in the hospital and was discharged the next day.

[11] Although no evidence was led in regard thereto, as stated above, it is not in dispute that as a result of this fall that the Plaintiff suffered a brachial plexus injury, which in due course resulted in the amputation of her right arm becoming necessary.

[12] The Plaintiff was subjected to a lengthy cross-examination, which boiled down to this:

(a) The entire episode did not take anything like 20 minutes and in support thereof reliance was placed on the Defendant's computer generated records which indicate that from the time the Plaintiff registered at reception to the time Dr Wickens was called was nowhere near 20 minutes;

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2 Ironically, the machine appears to have had no problems at this stage.

(b) According to the medical records the Plaintiff suffered a syncopal episode, which is a sudden, unexpected loss of blood pressure. Her blood pressure, albeit after the blackout, was 74/49, which is extremely low;

(c) There was no indication, no warning, that the Plaintiff was about to faint;

(d) Even if the Plaintiff had been left standing for twenty minutes there was no indication that there was anything amiss. There were no warning signs;

(e) In any event, the Plaintiff could have sat down if she felt she was being left standing for too long.

[13] In response the Plaintiff was adamant that she had been left standing for about 20 minutes and that, given that she had an injured knee, it was too long to be left standing in one position. She should have been offered a chair, but she wasn't, nor was there one available.[3]

[14] The Plaintiff could not dispute that her blackout was as sudden event.

[15] The Plaintiff's expert, Mr Swartz, opined that the Plaintiff had been left standing for too long and that given that the Plaintiff had suffered a tear of the meniscus[4] the knee was unstable and could give way at any time. Once the problems with the x-ray machine manifested the Plaintiff should have been offered a chair because of the possibility that she could fall.

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[3] During the inspection-in-loco there was a stool alongside the apparatus, but that is not proof that there was one on the day.

[4] Which is in fact not what was the problem.

[16] In cross-examination the expert's expertise was placed in issue and, in addition, the very basis upon which he had prepared his opinion was questioned, legitimately so. For present purposes it is not necessary to deal with his evidence and its shortcomings.

[17] The Plaintiff's husband, Karl Udo Klatte, testified that he was on his way to an appointment when he received a call to the effect that his wife had had a fall. He immediately proceeded to the hospital and on arrival at the Defendant's rooms the Plaintiff was still on the floor and was being treated by Dr Wickens.

[18] It had been put in cross-examination of the Plaintiff that when her husband arrived at the scene he said to one of the Defendant's employees that "*she often faints*". The Plaintiff denied that this was the case. In his evidence the Plaintiff's husband denied that she often faints and also that he had said this to one of the Defendant's employees. As Mr Klatte was not cross-examined, I must accept the Plaintiff's evidence in this regard.

[19] So where to from here? It would be apposite to start with the allegations on the pleadings. The following is alleged:[5]

> "16.1. the first defendant's employees failed to attend to the plaintiff with due and proper care and skill, causing her to fall during the taking of the initial x-ray images;
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> 16.2. the first defendant's employees placed the plaintiff in a comprising position for an extended period of time during the taking of the initial x-ray images, causing her to fall;
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> 16.3. the first defendant's employees failed to provide sufficient assistance to the plaintiff during the taking of the initial x-ray images;"

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[5] There are numerous other allegations which are either no longer relevant, or relate to the erstwhile second defendant (Netcare Greenacres Hospital)

[20] These very generalized allegations were fleshed out in the Plaintiff's evidence, to which the Defendant did not object.

[21] The requirements for delictual liability, which is routinely applied, was formulated by Holmes JA in **Kruger v Coetzee:**[6]

> "For the purposes of liability *culpa* arises if:
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> (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."

[22] These requirements were refined by Olivier JA in **Mukheiber v Raath and Another**[7] as follows:

> "The test for *culpa* can, in the light of the development of our law since Kruger v Coetzee 1966 (2) SA 428 (A), be stated as follows (see Boberg The Law of Delict at 390):
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> For the purposes of liability *culpa* arises if:
>
> (a) a reasonable person in the position of the defendant:
>
> (i) would have foreseen harm of the general kind that actually occurred;
>
> (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
>
> (iii) would have taken steps to guard against it, and
>
> (b) the defendant failed to take those steps."

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6 1966 (2) SA 428 (A) at 430 E – F.
7 1999 (3) SA 1065 (SCA) at 1077 E – F.

[23] The two formulae are referred to respectively as the abstract theory and the relative theory. This somewhat academic approach should not obscure the fact that at the end of the day the test in any particular set of circumstances is whether the conduct complained of falls short of the standard of the reasonable person.

[24] With regard to reasonable foreseeability there is seldom what has been referred to as a "*bright line*".

[25] Foreseeability is an objective test. It is also fact specific, with no two cases being the same. It is the Defendant's argument that if the Plaintiff having a fainting spell / blackout was not objectively foreseeable, then one of the elements of delictual liability is missing and absolution from the instance must inevitably follow.

[26] The test for absolution from the instance was formulated in **Gascoyne v Paul and Hunter**[8] as follows:

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff."

[27] It is axiomatic that the granting of absolution from the instance at the close of a plaintiff's case should only be resorted to in the clearest of cases in that it relieves a defendant of having its defence tested. Thus, in **Myburgh v Kelly**[9] the following was stated:

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[8] 1917 TPD 170 an 173, which has been followed in scores of judgment: see Erasmus: Superior Court Practice; Vol. II; D1, p. 39 – 15.

[9] 1942 EDL 202 at 206

"When absolution is asked for, as here, at the close of plaintiff's case, the magistrate must bring to bear upon the evidence not his own but the judgment of the reasonable man. Renouncing for the time being any tendency to exercise a judgment of his own, he is bound to speculate on the conclusion at which the reasonable man of his conception not should but might, or could, arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer."

[28] The court must also assume that the Plaintiff's evidence is true, unless it is palpably not so, and credibility should not normally play a role at this stage. There need not be a preponderance of probability in favour of a plaintiff, and it is sufficient if one of the reasonable inferences which the court may come to in due course is in the plaintiff's favour.

[29] The reference to the reasonable person should, more correctly, be a reference to the court hearing the matter. Thus, the test referred to in **Carmichele v Minister of Safety and Security**[10] is formulated thus:

"[26] Both the trial Judge and SCA applied the appropriate test for the grant of absolution from the instance at the close of the plaintiff's case, viz whether a court, applying its mind reasonably to the evidence, could or might (not should or ought to) find that the police or prosecutors at Knysna owed a legal duty to the applicant to protect her."

And in **South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd:**[11]

"[15] I conceive that the test to be applied as to whether a genuine factual dispute has been raised on the papers is similar in nature to that in a trial at the point where the plaintiff's case

[10] 2001 (4) SA 938 (CC) at 951; para [26].
[11] 2012 (3) SA 431 (KZP) at 439D – E; para [15].

has been closed and absolution is sought before the defence is embarked upon. Here, the test is whether there is evidence upon which a reasonable presiding officer might or could find for the plaintiff. If there is, absolution should be refused. The court does not enter into an evaluation of the credibility of witnesses unless they have "palpably broken down, and where it is clear that they have stated what is not true."

[30] Having canvassed the principles relevant to the granting of absolution from the instance, or not, as the case may be, I return to the issue which is at the forefront of the matter: the reasonable foreseeability that the Plaintiff could faint and fall off the x-ray apparatus on which she was standing.

[31] Not surprisingly the Defendant referred me to **Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another.**[12] The facts were as follows:

(a) A cold storage warehouse in the Cape Town harbour was set alight by a flare fired to celebrate New Year, which flare lodged in one of the warehouse's gutters. The warehouse and its contents were destroyed by the ensuing fire;

(b) The warehouse did not have a sprinkler system and the owners of goods which had been stored in the warehouse sued for damages;

(c) As the building was regarded as "low risk" a sprinkler system was not a requirement. There were, however, fire extinguishers and hoses installed at various places in the building;

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[12] 2000 (1) SA 827 SCA,

(d) Significantly, it was common cause that had there been a sprinkler system it would have either extinguished the fire, or limited the damage.

[32] In applying the reasonable person test the court held (and I paraphrase) that it was not merely whether or not a fire was foreseeable, which it was, but whether a fire would be caused by a flare lodging in a gutter and the building catching alight as a result. Given these peculiar facts the court held that the chance of a fire starting in this manner was so remote that it was not reasonably foreseeable. Put another way: a fire was always reasonably foreseeable, but a fire in those specific circumstances was not. The court dismissed the plaintiffs' claims.

[33] Relying on **Sea Harvest** Mr *Brown*, for the Defendant, argued that there had to be evidence that it was reasonably foreseeable that a healthy 34 year old woman would suffer a syncopal episode in the circumstances. There was no evidence of a medical nature to support this conclusion, which was a "*gap*" in the Plaintiff's case. He submitted that there had to be evidence to establish how the alleged negligent event occurred and why it was objectively foreseeable. In this regard he quoted from **Kruger v Carlton Paper of South Africa (Pty) Ltd:**[13]

> "When confronted with a case where there is absolutely no explanation of how a plaintiff came into contact with the terminal, and his right to relief depends upon proof of whether the risk of his doing so was reasonably foreseeable, there can be no justification for assuming that it was foreseeable simply because the event occurred. The temptation to do so should be resisted. '(I)t is easy to be wise after the event, and nothing is so perfect that it cannot be improved' (Heuston and Buckley Salmond and Heuston on the Law of Torts (1987) 9th ed at

[13] 2002 (2) SA 335 (SCA) at para

264). That is the situation in casu. It would be easy to say, because the terminal was exposed and the defendant could have covered it, therefore liability should follow."

[34] Mr *Brown* also submitted that there were no facts in the possession of the Defendant which would disturb the balance and which would incline me to refuse absolution from the instance.

[35] Mr *Schoeman*, who appeared with Ms *Ayerst,* for the Plaintiff argued that the test is "*might"*, not "*should"* or "*could"* and that the Plaintiff's evidence had met this threshold. He also argued that there was information and knowledge in the Defendant's possession which would add "*flesh"* to the Plaintiff's case. In this regard he made reference to the fact that there had originally been two defendants before court and evidence in the possession of the erstwhile Second Defendant[14] would in due course become relevant. Mr *Schoeman* was at pains to point out that only the Plaintiff's evidence was before me and that the time line put to the Plaintiff in cross-examination was not evidence. It still had to be tested.

[36] Mr *Schoeman* argued that the repeated failure of the x-ray machine was a relevant factor, which only the Defendant could deal with, as was the fact that, despite the delay occasioned thereby, whatever the duration, the Plaintiff was not invited to sit down.

[37] Finally, Mr *Schoeman* argued that the issue was not whether a syncopal episode was reasonably foreseeable, but whether, in the circumstances a fall was reasonably foreseeable. If I find that it might have been, absolution from the instance had to be refused.

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[14] Netcare Greenacres Hospital.

[38] In **Ordecor (Pty) Ltd v Quality Caterers (Pty) Ltd and Others**[15] it was held that the power which a court has to grant absolution at the end of a plaintiff's case is a discretionary power. Conversely, the power to refuse to grant absolution from the instance must also be a discretionary one, such discretion to be judicially exercised.

[39] Ultimately, my decision is guided by the following quote from **Carmichele:**[16]

> "There may be cases where there is clearly no merit in the submission that the common law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial Judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors. This has the merit of avoiding the determination of issues on the basis of what might prove to be hypothetical facts. It also ensures that there is a full and complete record on which the dispute can be determined with finality not only by the trial Court, but by an appeal Court required to deal with the matter. This may curtail rather than prolong litigation."

[40] As stated above, when it comes to absolution from the instance there is no "*bright line*". Although some cases may be clear-cut, in my view this is not such a case. In the circumstances, and guided by the above-quoted passage in **Carmichele**, I intend to refuse the application.

[41] In the circumstances I make the following order:

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[15] 1978 (3) SA 1073 (N) at 1076G – 1077F.
[16] At para [80].

1. Absolution from the instance is refused.

2. The costs of the trial to date, including the application for absolution from the instance, are reserved.

3. The parties are to approach me in order to arrange a date for the resumption of the trial.

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NJ MULLINS

ACTING JUDGE IN THE HIGH COURT

DATE:

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