



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

CASE NO: 2021/39063

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

27/02/25

Date



ML TWALA

SULTAN ZEBERGA SHIRBEZA

APPELLANT

And

TOBITRIX (PTY) LTD

DEFENDANT

JUDGMENT

TWALA J

Introduction

- [1] The plaintiff, Mr Sultan Zeberga Shirbeza, sued the defendant, Tobitrix Pty Ltd, out of this Court for damages arising out of an incident that is alleged to have occurred in front of the building owned by the defendant on the 10 February 2021 in Johannesburg. The defendant is defending the claim of the plaintiff. The plaintiff called two witnesses to testify on its behalf and the defendant called two of its employees to testify.
- [2] At the commencement of the trial, the parties informed the court that they have agreed to have the issue of the merits to be determined first and that the issue of quantum be postponed *sine die* in terms of Rule 33(4) of the Uniform Rules of Court. Therefore, the matter proceeded only on the merits of the case.

Plaintiff's case

- [3] The plaintiff testified that on the 10 February 2021 while he was walking on the pavement in front of the building known as Medical One Shopping Centre at 209 Rahima Moosa Street, Johannesburg, he was struck by a glass window on his left forearm that fell from the defendant's building. As a result of the glass window falling on him, he sustained a huge cut wound on his left forearm which necessitated that he immediately be taken to hospital for medical treatment. His fellow Ethiopian countrymen assisted him and took him to the Lister Medical Centre where he received medical attention on his injury and or wound.

- [4] At the time of the incident, he was a shopkeeper and was on his way to his shop when it occurred. After he was injured and received treatment at the Lister Medical Centre, he stayed at home for over a month whilst having further follow up consultations with the doctor. He did not report the matter to the owners of the building at that time but only approached them later and spoke to the manager of the building who advised him to write a letter and state everything that happened and the damages he has suffered so that he, the manager, can present to his bosses.
- [5] On 30 April 2021 he prepared the letter in Amharic language and handed it to the building manager. When he did not receive a response to his letter, on the 18 May 2021 he wrote another letter to the defendant pleading for assistance. He discussed the matter with the manager of the building on four occasions. Then the defendant offered to compensate him with a total sum of R50 000 which he refused as it was insufficient to meet and compensate for his damages – hence he instituted this action.
- [6] Under cross examination, he stated that his shop was at the other side of Medical One Centre, but he did not recall the name of the street. He had been trading there for about two years. He went to hospital the same day at around 16H00. It was his first time to attend the hospital, and he did not remember the name of the doctor who treated him though he consulted him more than once. When shown the medical report from Lister Medical Centre dated 10 March 2021, he agreed that it bears his name though it was spelt incorrectly. He stated that he went to Lister Medical Centre on three occasions to consult the doctor.
- [7] He has been operating in the area where the incident occurred for a period of six years but only operated his own shop for two years. He was familiar with the area and the building from which the window glass fell has a balcony above the pedestrian pathway.

- [8] In a nutshell, Mr Shamsu Shafi Ahmed's evidence was that he did not witness the incident but attended the scene later and took the plaintiff to the hospital where he also took the photographs on the injuries of the plaintiff. This occurred on 10 February 2021, at approximately 17H00. He knew the plaintiff who is his countryman for over ten years, and they were living together at 26 – 7th Avenue Mayfair, Johannesburg. Plaintiff was running his own clothing shop at the time of the incident.
- [9] Mr Ahmed Dalil testified that he is a street vendor in front of the Medical One Shopping Centre building and was at his stand on 10 February 2021. He saw the plaintiff, who is his countryman, walking along the pathway in front of the Medical One Shopping Centre building and he saw a window glass fall on his left forearm and a second one fell but did not hit the plaintiff. As the plaintiff was injured, he assisted him to his feet and the people around took him to the Lister Medical Centre. He did not accompany him because he is working alone and had nobody to leave at his shop.
- [10] Under cross examination he stated that he did not see the window glass fall but he saw it when it struck the plaintiff on his left forearm. He knows the plaintiff, but he is not related to him. He has been running his business in front of this building for about twelve years. He testified that the building has a balcony and that there are security personnel that guard the building.

Defendant's case

- [11] Mr Amanuel Hailu was employed as the manager of the Medical One Shopping Centre building for nine years before he resigned in November 2024. His duties included, amongst others, managing, administration and maintenance of the building. His office was on the twelfth Floor, and no incident was reported to him on 10 February 2021; it was business as usual. The procedure is that, when an incident occurs, it is reported to security and security would report it to him. There

is security inside the building, at the entrance and outside in front of the building. There are thirty-two cameras monitoring the movement in and around the building.

[12] He testified that there were screens in his office where he watched what was going on in front of and inside the building. On the 10 February 2021 he did not notice anything unusual, and nothing was reported to him. The building has a balcony and a window glass breaking from the building would fall onto the balcony. However, he conceded under cross examination that the window glass may be carried by the wind to fall beyond the balcony. He denied that the plaintiff was injured at the building and stated that there is no evidence to that effect. He also testified that he has never worked with window glasses, and the recording of the monitoring system of the cameras is deleted every thirty days.

[13] Ms Ngobile Ndlovu, the supervisor of security in the Medical One Shopping Centre building, testified that she has been working as such at the building for sixteen years to date and her office is on the twelfth floor. She keeps an occurrence book for recording all incidents that may occur inside and around the building. The security officers on the ground report all incidents directly to her and she proceed and report such incidences to the manager of the building.

[14] There are eight security officers posted at the building at any given time, two outside the entrance on the pavement; two at the entrance; three inside and one at the basement gate to the building. The security officers are equipped with two-way radios, and she routinely checks them twice a day. No incident was reported to her on 10 February 2021, and there is no such incident noted on the occurrence book. The building has shops from the ground floor up to the eighth floor, the ninth to eleventh floors being used as storage and the twelfth floor being the offices and security.

[15] She conceded under cross examination that she is not an expert on glass windows but stated that it is impossible for a window glass to fall from the upper floors of the

building and land beyond the balcony of the building. She stated that if the incident occurred as described, the security officers patrolling at the ground level would have known about it and reported it for they patrol the whole area to protect customers of the shops on the ground floor. She has never seen a broken glass in the area of the building in her sixteen years as a security supervisor of the building.

Legal Framework

- [16] It is trite that for the plaintiff to succeed with its claim against the defendant in a case where it is alleged that the defendant was negligent in doing something or failed to do something, it must prove that there was a duty of care owed to it by the defendant which the defendant has breached and that the breach has caused harm to occur which resulted in damages. Thus- the onus rest on the plaintiff to prove all the elements of the delict in order for its claim to prevail.
- [17] Put differently, the elements a plaintiff must establish, on a balance of probabilities, to hold a defendant liable for delictual damages are trite. Our law recognises five elements and if a plaintiff fails to establish one of these the claim cannot succeed. The five elements a plaintiff, seeking to succeed with a claim in delict must establish are: (1) the conduct (either act or *omission*); (2) wrongfulness; (3) fault (negligence); (4) causation; and (5) that harm was suffered. Without the convergence of all these elements delictual liability will not ensue.
- [18] In *Kruger v Coetzee*¹ the Supreme Court of Appeal stated the following:
- 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.

¹ 1966 (2) SA (A) 430

[19] In *Le Roux and Others v Dey*² the Constitutional Court stated the following:

“In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant’s conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.”

[20] In *Country Cloud Trading cc v MEC Department of Infrastructure Development*³ the Constitutional Court sated the following:

“Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether ‘the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue’. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability.”

Discussion

[21] As indicated above, the onus is on the plaintiff to prove all the elements of the delict complained of. Further, in determining whether the plaintiff has discharged the onus placed upon it, the court must consider all the facts and the circumstances of this case since the plaintiff must prove its case on a balance of probabilities.

²[2011] (3) ZACC SA 274 (CC) at para 122.

³ [2014] ZACC 28; 2015 (1) SA 1 (CC) at para 20.

[22] In *GC v JC and Others*⁴ the Supreme Court of Appeal stated the following:

“The onus to prove these requirements rests on the plaintiff. Where a defendant is proved to have initiated a prosecution without reasonable grounds, it does not follow that he acted dishonestly, nor does it necessarily imply that she did so *animo iniuriandi*. However, in the absence of any other evidence the natural inference is that the plaintiff has established both. The defendant thus bears an evidential burden to rebut this inference regarding her state of mind, including any mistake that would exclude her liability.”

[23] Although the defendant does not have a version as to how the events unfolded on the day in question to countervail the evidence of the plaintiff and its witnesses, the defendant denies that the incident ever occurred and if it occurred, it did not occur on the 10 February 2021. That leaves the evidence of the plaintiff unchallenged. However, the onus still rests on the plaintiff to tender credible evidence to convince the court that the incident occurred and, in the manner, as described by the plaintiff.

[24] Recently, in *Schaefer v City of Cape Town*⁵ the Western Cape High Court stated the following:

“Having regard to the law the plaintiff must prove on a balance of probabilities that there was a defect in the sidewalk of Victoria Street and that it was the specific nature of the defect caused her fall and injury. The plaintiff must also prove that the City was responsible for that stretch of sidewalk and either knew or should reasonably have known of the hazard. In respect of wrongfulness and negligence and applying *Kruger v Coetzee* the plaintiff must establish the answer to the question: Would a reasonable municipality, like the City, have foreseen the risk of harm and taken steps to avert it? Lastly, since I’m not concerned with the damages inquiry, the plaintiff must establish factual causation by providing evidence that *but for* the municipality’s failure to fix or warn of the defect, she would not have been injured and that in respect of legal causation that the type of harm must be within the realm of what is reasonably foreseeable or differently stated that the *omission* was closely linked to the injury.

⁴ (Case No 205/2019) [2021] ZSCA 012 (3 February 2021) para 40

⁵ (4202/2019) [2025] ZAWCHC 46 (17 February 2025) para 29

- [25] It is undisputed that the defendant is the owner of the building known as Medical One Shopping Centre and that there are hawkers trading in front of the building. It is further not in dispute that there is a pathway between the front of the building and the tree which is depicted on the photograph admitted in evidence as 'exhibit D1'. It is further not in dispute that the building has a balcony over and which covers the pathway that runs in front of the building. The plaintiff alleges that he was walking on the pathway and was about to pass through between the entrance of the building and a tree which is depicted on exhibit D1.
- [26] It was debated between the defendant's witnesses and counsel for the plaintiff whether it was possible for the window glass to fall from the upper floors and land beyond the balcony of the building and onto the parking area or onto the road in front of the building. The witnesses disputed that the window glass could fall and land beyond the balcony of the building and onto the street. However, the witnesses accepted that they have no experience or expertise of working with window glasses and cannot testify with certainty that the window glass can or cannot fall beyond the balcony.
- [27] The question that arises is whether the defendant has acted or omitted to act in a particular manner in this case and whether such conduct was wrongful and whether it caused the plaintiff to suffer damages. The test to be applied in this case is what a reasonable owner of the building of the same kind would have done in the circumstances to prevent an injury of this kind to the plaintiff. Furthermore, would a reasonable owner of the building of this nature have foreseen a window glass falling from the upper floors and landing beyond the balcony of the building and causing injury to people and in particular the plaintiff.
- [28] The defendant owns the building which has a balcony over the pathway of pedestrians who walk in front of the building. The purpose of the balcony is to protect the people on the ground from being exposed to injury from any objects that may fall or be thrown out of the windows from the upper floors of the building.

[29] In *The Memorable Order of Tin Hats v Kenneth Paul Els*⁶ the Supreme Court of Appeal, upsetting the judgment of this Court and the Full Court of this division stated the following:

“It is well established that negligence arises from positive conduct which causes physical harm which raises a presumption of wrongfulness. However, with an omission as opposed to positive conduct, wrongfulness is not presumed, and for wrongfulness to be established reliance falls upon a legal duty. This duty arises from public and legal policy considerations. This case rests on the liability attracted for an omission on the part of the M.O.T.H. In these circumstances, a different approach than that of positive conduct is applicable, in addressing wrongfulness for the omission or failure to do something.

An omission per se is not wrongful unless it is considered to go against legal policy or public considerations, which dictate that a plaintiff be compensated for the loss suffered as a result of such omission. Thus, the approach alluded to above, involves a further enquiry, that being whether there was a legal duty that gave rise to delictual liability. Put differently an omission does not necessarily attract liability, only if it was culpable would it do so.”

[30] It would be far-fetched to suggest that the defendant should have foreseen that a window glass would fall from the upper floors of the building and cause injury to people on the ground and in particular, the plaintiff, who was walking on the pathway in front of the building and under the balcony. The balcony is there to protect the people from objects that may fall from the upper floors of the building and the defendant has erected same for that purpose. There is nothing that suggests nor did the plaintiff demonstrate that a reasonable owner of a building of the same kind would have done more than what the defendant did to protect people on the ground from being injured by objects falling from the building including window glasses.

⁶ (488/2021) [2022] ZASCA 99 (22 June 2022) para 17 and 18

[31] Even if it is suggested that the plaintiff was not walking on the pathway which is under the balcony of the defendant's building, it cannot be said that the defendant, as expected of a reasonable owner of the building of the same kind, should have foreseen that a window glass would fall from his building and cause injury to someone walking a distance from the building or walking on the street that passes in front of the building. The plaintiff has failed to demonstrate, nor did it tender any expert evidence that when falling from the upper floors of the building, a window glass would fall past the balcony and injure someone and the plaintiff in particular whilst walking on the road. Additionally, the plaintiff has not shown that the defendant should have foreseen that occurring.

[32] The ineluctable conclusion therefore is that the plaintiff has failed to prove all the elements of the delict and in particular that the act or omission by the defendant was wrongful to the extent that it caused injury to the plaintiff and has attracted liability on the part of the defendant. In the circumstances the case of the plaintiff falls to be dismissed.

[33] In the premises, the following order is made:

The plaintiff's claim is dismissed with costs on scale B.

A handwritten signature in black ink, consisting of a stylized 'T' and 'M' followed by a flourish, is written over a black rectangular redaction box.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

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Date of Hearing: 10 – 12 February 2025

Date of Judgment: 27 February 2025

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 27 February 2025.