

SOUTH AFRICA / JUDGMENT

Anwarey v Loch Logan Waterfront (Pty) Ltd (A78/2022; 2096/2018) [2023] ZAFSHC 113 (20 April 2023) [2023] ZAFSHC 113

COURT

Free State High Court, Bloemfontein

BEFORE

JP Daffue, S Boonzaaier, NG Gussha

CASE / FILE NUMBER

A78/2022; 2096/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

No: A78/2022

Case

No: 2096/2018

Reportable:

NO

Of

Interest to other Judges: NO

Circulate

to Magistrates: NO

In

the matter between:

KATIJA

BEBE ANWAREY Appellant

and

LOCH

LOGAN WATERFRONT (PTY) LTD Respondent

JUDGMENT

BY: JP DAFFUE J

HEARD ON: 24 March 2023

DELIVERED ON: 20 April 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 20 April 2023.

ORDER

On appeal from: Free State Division of the High Court (Mbhele AJP, sitting as a court of first instance):

1. The appeal is dismissed with costs.

JUDGMENT

[1] This appeal to the full bench is against the judgment and order of a single judge of this division, Mbhele AJP, sitting as a court of first instance.[1] On 17 February 2022 the court a quo granted absolution from the instance in favour of the respondent, each party to pay its own costs. On 10 June 2022 the court a quo granted leave to appeal to the full bench.

[2] We had to consider two applications before we entertained submissions on the merits of the appeal. Both applications were brought by the appellant and both were unopposed. Consequently, and having applied

our minds to the relief sought, we granted appropriated orders. For the record, the following orders were granted:

a. The application filed on 10 October 2022:

1. The applicant's non-compliance with the provisions of rule 49(6)(a) and rule 49(7) of the Uniform Rules of Court is condoned.
2. The applicant's appeal is reinstated.
3. The applicant shall bear the costs of the application on an unopposed

basis.

b. The application filed on 17 March 2023:

1. The time period set out in the rules in respect of this application is abridged.

2. The application shall be heard simultaneously with the appeal.

3. Condonation is granted for the applicant's non-compliance with

the rules of court pertaining to the filing of the heads of argument in the appeal under case no A78/2022.

4. The applicant is permitted to proceed with the appeal.

5. There shall be no order as to costs.

[3] On 21 August 2016 Ms KB Anwarey, the appellant before us and the unsuccessful plaintiff in the court a quo, fell in the Loch Logan

Waterfront shopping mall in Bloemfontein and sustained certain injuries. She instituted action under case no 2096/2018 against the respondent, the Loch Logan Waterfront (Pty) Ltd, claiming damages in the amount of R2 700 000.00. The claim is based on delict. The incident, causing her to sustain injuries, is pleaded as follows in the appellant's particulars of claim:[2]

'On 21 August 2016, and whilst walking through the Loch Logan Waterfront shopping centre ("the premises") in the vicinity of the Foschini store, Plaintiff fell as a result of floor tiles which had been removed during refurbishment of the premises ("the incident").' (Emphasis added)

[4] The respondent's duty of care is not in dispute. It is alleged that the appellant's injuries were caused by the unlawful and negligent conduct of the respondent, acting through its employees, who at all material times acted within the course and conduct of their employment with the respondent. It is the appellant's case that the respondent acted negligently by removing floor tiles from the walkway in its shopping mall, or permitting the removal of the floor tiles, in each instance thereby rendering the floor dangerous, and failing to take any or adequate steps to prevent the appellant and other persons from falling as a result of the condition of the floor.[3] The respondent denied negligence.

[5] It is apposite to indicate that the appellant confirmed her stance in her further particulars for purposes of trial, stating that 'the removal of the floor tiles rendered the floor uneven and unstable and reduced the walking area available in the busy mall'; also that the respondent 'failed to ensure that all the tiles on the floor of the premises were properly in place and even and that the floor was safe and free of obstructions.'[4]

[6] Although I could not find an order separating issues in terms of rule 33(4) in the record, there can be no doubt that merits and quantum have been separated on the basis that the disputed allegations in paragraphs 3, 6 and 7 of the particulars of claim, read with the corresponding paragraphs in the plea were to be adjudicated at the hearing. Particularly relevant for purposes of the appeal is the appellant's allegation that she 'fell as a result of floor tiles which had been removed during refurbishment of the premises.'

[7] The appellant and her husband testified about the incident. In the process video footage obtained from two CCTV cameras were shown. Also, various photographs taken of the scene after the incident were addressed in their evidence. The evidence will be considered in some detail hereunder. An inspection in loco was also undertaken. Nothing

turns on the minutes of the inspection for purposes of this appeal. After the closure of the appellant's case, the respondent

successfully applied for absolution from the instance.

[8] The court a quo held that there was insufficient evidence to enable it to conclude that the appellant 'fell because of the removal of tiles on the walkway' insofar as she was adamant in her testimony that she was walking at all times on the tiled area and never steered away from the tiled area.[5] It concluded that the evidence was insufficient to infer negligence on the part of the respondent.[6]

[9] In order to adjudicate the appeal it is apposite to consider the test to be applied at the stage when absolution from the instance is sought as reconfirmed by Harms JA in *Gordon Lloyd Page and Associates v Rivera and another*: [7]

'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976

(4) SA 403 (A) at 409G - H in these terms:

'... (W)hen 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 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958

(4) SA 307 (T).)

This implies that a plaintiff has to make out a *prima facie* case

- in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972

(1) SA 26 (A) at 37G - 38A; *Schmidt Bewysreg* 4th ed at 91

- 2).' (Emphasis added)

[10] A bundle of photographs was placed before the court a quo. The evidence of the witnesses was led whilst viewing video footage of the incident (the appellant's fall) and the period immediately preceding the incident. It is common cause that two rows of floor tiles, parallel to each other, had been removed in the area where the incident occurred, leaving the cement coverage. The appellant fell in the vicinity of the Foschini store. These rows of tiles

were removed over the length of the particular passage leading to the Woolworths store; therefore, splitting the passage in three separate tiled walkways. The appellant and her family were on their way to Woolworths. Yellow plastic warning signs, (the usual type warning customers against wet sand slippery floors during cleaning operations), were placed at regular intervals on the cement strips where tiles had been removed. It is also evident from the photographs, the video footage captured and the evidence that most of the customers walked on the tiled walkways on each side of the cement strips, although in a few instances there is evidence of people crossing the cement strips.

- [11] Adv HJ Cilliers acted for the respondent in the court a quo and also appeared for it before us. He submitted, whilst relying on damning evidence that had been repeated several times, that there is no doubt that the appellant did not fall ‘as a result of floor tiles which had been removed during refurbishment of the premises’ as pleaded by her in paragraph 3 of the particulars of claim quoted in full above. He was at pains in extracting evidence from the record to show that the appellant never walked on the cement strips where tiles had been removed, but had always been walking on the tiled area. I do not intend to cite all the passages relied upon, but merely refer to the relevant portions of the appellant’s evidence contained in annexure A to Mr Cilliers’ heads of argument. In her evidence in chief she explained that she walked on the tiled passage between the cement strip and the stores immediately before her fall, explaining that Woolworths was on her right-hand side and the ‘cemented area’ was on her left-hand side.[8] Also, that she did not recall stepping onto the cement strip at any time.[9] Although she never saw the yellow warning signs, she was aware of the cement strip and testified during cross-examination *inter alia*:

‘I knew I had to walk on the tiled area so that is where I falled (sic).[10]

Immediately after this testimony she confirmed having seen the ‘cement area, stating that as she was walking, I saw it (the cement area) so I carried on that row (referring to the row of tiles) and I looked ahead’.[11]

She ‘continued walking on the tiled area’ and ‘remained on the tiled area.’[12]

Even the appellant’s husband, who was pushing a trolley whilst walking just in front of her and to her right-hand side, confirmed

that they walked on the tiled area. His evidence is also summarised by Mr Cilliers as is apparent from annexure B to the heads of argument.

- [12] A major issue was made by the appellant of cement found on the outside of her right boot and the right leg of her trousers. This does not take the matter any further, bearing in mind that on her version the cement strip was on her left-hand side, she tried to grab hold of her daughter who was walking to her left, but notwithstanding this she fell and came down on her right hand and arm. It is apparent from the photographs that she was examined by emergency personal whilst lying partially on the cement strip.

[13] Adv P Uys who appeared before us on behalf of the appellant conceded from the onset in his oral argument that he had to rely, like the members of the bench on appeal, on the record and the documentary evidence as he was not involved in the trial. He submitted that the appeal should succeed insofar as the court a quo incorrectly applied the test applicable to adjudication of applications for absolution from the instance. He conceded that if the appeal was to succeed and the matter referred back to the court a quo and on the assumption that the respondent might close its case without calling any evidence, a different test would be applicable. At such stage, he submitted, he may have a problem to convince the court that the appellant should be successful. His submission is correct, bearing in mind the different tests applicable, but it is not necessary to deal with this any further.

[14] Mr Uys also referred us to the test to be applied in the case of inferential reasoning. He elected to refer to a criminal case, *R v Badenhorst*, [13] where the court accepted with approval the following dictum from an English judgment, to wit *Jones v Great Western Railway Co*:

'The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved.' (Emphasis added)

[15] In civil matters a court is entitled to consider severable reasonable or plausible inferences and then to find which of those inferences is the most plausible or likely one in the circumstances. At the stage when absolution from the instance is sought, the inference the plaintiff seeks to be drawn from the proven facts does not need to be the most likely one, but it does have to be a reasonable one. As mentioned in *Schmidt and Rademeyer*, [14] at such stage the plaintiff's evidence must be such that there is a reasonable chance of success. However, I repeat as stated in the above quotation, that inference must be carefully distinguished from conjecture or speculation. There can be no inference in the legal sense, unless there are objective facts from which to infer the other fact or facts sought to be established.

[16] In order to arrive at the reasonable inference that the respondent was negligent, there must be a finding of facts from which such inference can be drawn. This court, as was the case in the court a quo, cannot rely on speculation or conjecture. Mr Uys submitted that a reasonable inference to be drawn from the totality of the appellant's accepted evidence is that she fell because of the unevenness of the floor, ie that she stepped onto the cemented area, bearing in mind the evidence of cement on her right boot. The same submissions were made on behalf of the appellant in the court a quo. I am not prepared to accept this

submission. It is based on speculation. Several reasons may be advanced in order to try and explain the appellant's fall. A court cannot be called upon to come to a finding based on speculation. In casu, the evidence is clear: the appellant was concentrating at all relevant times whilst walking, she was aware of the cement strip, she never left the tiled area, or steered away from that area and she fell while on the tiled area. I agree with Mr Cilliers that no evidence was presented to remotely suggest that the cement strip, ie the cement area where tiles had been removed, played any role in the appellant's fall. It is repeated that the appellant's case as pleaded is that she had fallen as a result of the removal of floor tiles. The evidence and the objective facts do not allow a reasonable inference in the legal sense to be drawn in support of her case.

- [17] The following paragraph in the judgment of the court a quo should be accepted as a correct summary of the appellant's version, which paragraph is directly in contrast with the case pleaded as mentioned:[15]

'The evidence before me is not sufficient to enable me to come to the conclusion that the plaintiff fell because of the removal of tiles on the walkway. The plaintiff was adamant that at all times she was walking on the tiled area of the walkway. She reiterated that she never steered away from the tiled area.'

- [18] It is emphasised, *ex abundanti cautela*, that the appellant did not rely on any other evidence to show what might have contributed to her fall. At the hearing her counsel tried to put words in her mouth in this regard, but she was prevented from dealing with that topic. Speculation and conjecture may not be resorted to for as stated in the dictum of the English judgment referred to above, 'its essence is that it is a mere guess'.

- [19] It is quite amazing that the appellant testified that she did not see the numerous yellow warning signs placed on regular intervals on the longitudinal cement strips where tiles had been removed. It was always common cause during the trial that these warning signs were in place on the day of the incident as is also evident from the photographs and video footage. The court a quo correctly held that the *res ipsa loquitur* principle could not be relied upon on the basis that the incident would ordinarily not have occurred without negligence on the part of the respondent.

- [20] The appellant was also confronted with an affidavit deposed to by her in support of an application to obtain the video footage. Therein she stated that she suddenly lost her footing as a result of the tiles which were removed and fell.[16] This version is in total contrast with her pleaded case and *viva voce* evidence. In a last-ditched attempt to exonerate her from any fault, the appellant testified as follows:

'It is not my fault because it (the cement strip) should have been cordoned off for us not to be there. We should not be there.'[17]

Having considered the totality of the evidence, particularly the appellant's awareness of the cement strips and her steadfast approach that she did not leave the tiled area, her attempt to blame the respondent and exonerate herself in the process was a futile exercise.

[21] The appellant failed to present prima facie evidence to which the respondent had to answer. The order, granting absolution from the instance, cannot be faulted.

[22] Consequently, the following order is made:

1. The appeal is dismissed with costs.

J.P. DAFFUE J

I concur

S. BOONZAAIER AJ

N.G. GUSHA AJ

On behalf of the appellant: Adv P Uys

Malcolm Lyons and Brivik Inc

c/o Mayet & Associates Inc

BLOEMFONTEIN

On behalf of the respondent: Adv HJ Cilliers

Phatshoane Henney Inc

Bloemfontein

[1] Record, vol 3 p 557.

[2] Par 3 of the particulars of claim, record p 8.

[3] Par 6 of the particulars of claim, record p 10.

[4] Paras 4 & 5 of the further particulars, record p 48.

[5] Judgment, par 17, vol 3 p 584.

[6] Ibid, par 18 p 584.

[7] 2001

(1) SA 88 (SCA) at 92 F – H.

[8] Record, vol 2 p 307 / 20 – p 308 / 5.

[9] Ibid, p 322 / 6-8

[10] Ibid, p 351 / 10-12.

[11] Ibid, p 352 / 1-13.

[12] Ibid, p 353 / 17-23.

[13] 1951 (4) SA 532 (N) 535.

[14] Law of Evidence, issue 17 p 3-18.

[15] Volume 3 p 584 par 17.

[16] Record, vol 2 p 388 / 10-15.

[17] Record, vol 2 p 390 / 10-14.

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