

SOUTH AFRICA / JUDGMENT

Matalen v Ikamva Signs CC and Another (22343/2010) [2020]

ZAWCHC 165 (20 November 2020)

[2020] ZAWCHC 165

COURT

Western Cape High Court, Cape Town

BEFORE

E D Wille

CASE / FILE NUMBER

22343/2010

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)

Case

Number: 22343 / 2010

In

the matter between:

DOROTHY
MATALEN
Plaintiff
and
IKAMVA
SIGNS
CC
First
Defendant
S
& G SIGNS (PTY)
LTD
Second
Defendant

Coram:

Wille, J

Heard:

5th of November 2020

Delivered:

20th of November 2020

JUDGMENT

WILLE, J:

[1] This is a trial action in delict for damages. The plaintiff is Mrs Matalen. The first defendant was a close corporation that previously traded under the name and style of Ikamva Signs CC. The second defendant is a private company with limited liability, trading under the name and style of S & G Signs (Pty) Ltd. The first defendant is not before court as the first defendant was deregistered on 15th July 2011.[1]

[2]

Issues

relating to the merits and the quantum have been separated out by agreement and, this judgment deals solely with the merits of the plaintiff's claim. The plaintiff's case is that while she was working at a branch of Nedbank Limited[2] in Parow, an advertising sign[3], became detached from its secured position and fell onto her, causing her injuries and damages.

[3] The plaintiff testified that the incident took place on the 11th of October 2017. At that stage she had been in the employ of Nedbank for approximately (26) years, albeit not at the branch where the incident occurred. She was at work at the time of the incident, when she was called to the desk of a fellow employee in the same branch who was employed as a Sales Consultant. Whilst she was standing in front of the said fellow employee's desk, the signage[4], fell down on to her and she sustained injuries.

[4] The signage initially became only partially detached from its position, when it fell and struck her on her right shoulder. Thereafter,

she fell to the ground and then the entire signage fell on to her, causing her, not insubstantial injuries.

[5] She did not pursue any claim as against her former employer as she was advised to sue the entity who had installed the signage. Initially, during cross examination, she opined that the first defendant installed the signage, but thereafter, she conceded that she had no knowledge of who actually installed the signage. She conceded that certain of the first defendant's employees were 'onsite' during the renovation process to their offices.[5]

[6] The plaintiff handed in a bundle of documents consisting of some (11) pages in support of her claim. The agreed status of these documents was to the effect that the said documents were entered into evidence on the basis of what they purported to be, but not as 'real documents' as to the proof of the actual content thereof. In my view, nothing turns on this, as these documents are of no real assistance to the plaintiff as they exhibit, inter alia; that the second defendant manufactured the sign; that the first defendant was the second defendant's client; that Nedbank was the first defendant's client and that the first defendant

and the second defendant had concluded a 'sub-contractors' agreement.[6]

- [7] The plaintiff tendered no further evidence and closed her case. The second defendant applied for absolution from the instance.

Absolution from the instance may be granted at the close of a plaintiff's case, if, at that stage, there is no evidence to support the plaintiff's claim, or insufficient evidence upon which a court - acting reasonably

- might find for the plaintiff.

- [8] In connection with the appropriate test to be applied when evaluating and assessing an application for absolution from the instance, I take the following from Claude Neon Lights[7], in which it was held, *inter alia*, as follows;

'When absolution from the instance is sought at the close of the 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'

- [9] It is trite that the onus rests upon a plaintiff to prove all the elements of a delict in order to prevail in its claim against the second defendant. The plaintiff seeks to hold the second defendant liable in delict in this matter, not for a positive act, but for one or more omissions, which allegedly were the cause of the plaintiff's injuries.

- [10] At first blush, I cannot imagine that there existed any legal obligation on the second defendant, as the manufacturer of the

signage[8], to foresee the reasonable possibility of harm[9], in these particular circumstances. The pleadings by the plaintiff are to the effect that the said signage was installed by the first defendant, alternatively, the second defendant, alternatively, by both the first defendant and the second defendant.

- [11] There is not an iota of evidence in support of the averment that the signage was installed by the second defendant. In my view, one of the issues to be considered, is whether the second defendant's employees, in these circumstances, were in some manner possessed of the - foresight of the reasonable possibility of harm - that the signage would be insufficiently installed by the first defendant's employees.

- [12] I think not, as I cannot think of any obligation on the second defendant's employees in the circumstances of this particular

case. Some of the findings in Duivenboden[10], are instructive on the appropriate test for negligence to be applied in instances such as these, but at the same time, one must remain alive to the issue of wrongfulness, which in itself, is a totally discrete enquiry. I take the following from Duivenboden, in this connection;

‘Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely, whether a reasonable person in the position of the defendant would not only have foreseen the harm, but would also have acted to avert it’

[13] The question that remains, in these circumstances, is whether the second defendant in some manner, ought reasonably and practically to have prevented harm to the plaintiff. If so, the failure to do so, constitutes - wrongful

- conduct on the part of the second defendant.

[14] In *Telematrix* [11], it was pointed out that a first principle of our law of delict is that everyone has to bear the loss that she or he suffers. The act or omission complained of must not only be negligent and have caused the harm, but it must also be wrongful. Traditionally, a legal duty to act may arise, *inter alia*, where some prior conduct on the part of the person has created a potentially dangerous situation[12]. Strictly speaking, this situation is in a sense a case of a mixed commission and omission. The so-called - omission per commissionem - situation[13]. It is unclear what the actual legal omission is on the facts of this case, as contended for by the plaintiff.

[15] Brand JA, in *Smith*[14], warned of the potential confusion between wrongfulness and negligence which could lead to instances of defendants being held liable because negligence has been established, without the requirement of wrongfulness having been considered and he explained wrongfulness,

inter alia, in the following terms:

‘Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirably and overly burdensome to impose liability’

[16] Further, in *Loureiro*[15], it was held that the wrongfulness enquiry focuses on the harm-causing conduct and goes to whether the policy and the legal convictions of the community - constitutionally understood

- regard it as acceptable.

[17] Even if some element of fault was established on the part of the second defendant, it would not be the end of the enquiry, as the plaintiff, in addition, bears the onus to prove (albeit only prima facie), that any omission on the part of the second defendant was the cause of the plaintiff's

injuries. As indicated previously, this is not supported by the evidence as the plaintiff testified that an advertising board fell from the roof, to which it was attached, with chains. The plaintiff did not adduce any evidence as to the possible reasons or causes for the signage falling down onto her, which involved any act or omission, on the part of the second defendant or its employees.

[18] The test for factual causation, was expressed as follows in *International Shipping Co (Ltd) v Bentley* 1990(1) SA 680 (AD) at 700 F;

'The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non, of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not'

[19] Finally, the plaintiff pins her hopes on the maxim that the 'facts speak for themselves'. There is not a shift in the - onus of proof

- in such cases. On the facts of this case, in so far as they relate to the second defendant, there is no prima facie case in favour of the plaintiff. Further, before one can seek to rely on - res ipsa loquitur
- the occurrence must create a high probability of negligence on the part of the second defendant. This, leads me to the next enquiry.

[20] The application of the principle of - res ipser loquitur – in so far as same may be applicable in cases where there are - co-defendants or multiple defendants - was neither raised by counsel for the plaintiff, and more surprisingly, nor by counsel for the second defendant. It seems to me, that the problem of the applicability of the doctrine in cases of potential joint liability may be somewhat more problematic. This is so, particularly because this doctrine evolved in circumstances where the courts were confronted with cases involving only, one plaintiff and one defendant. That having been said, the doctrine does not stand to be totally defeated when two or more defendants have been cited as wrongdoers jointly and severally, or in the alternative.

[21] The enquiry, in my view, should remain directed on the aspect of the probability of negligence in some cases and on the element of control, in others. Further, I am of the view that it may not be legally sound to allow the doctrine to be applied against

co-defendants, irrespective of the defendants' legal relationship with one another. I say this because the application of the doctrine remains case specific and particularly in a case where the specific alleged wrongdoer (amongst others), was not identified on the facts or documents that were adduced into evidence. The plaintiff must at least be able to substantially identify the probable wrongdoer in a given situation for the doctrine to find any application.

[22] Further, as a matter of logic, it also falls to be somewhat dependent on the procedural effect of the doctrine, the legal

weight given to the doctrine and the problems of proof in any specific case. In this case, no explanation was offered up by the plaintiff as to why any employee of the contracting party for the signage[16], was not subpoenaed to testify. Alternatively, at the very least, a subpoena to produce their documents in connection with the contract for the signage could have been issued out. The plaintiff could also have asked for better and more comprehensive

discovery from the second defendant.

[23] In any event, in my view, even if I were to accept the plaintiff's arguments in connection with the maxim - *res ipsa loquitur*- and find that the plaintiff did lead sufficient evidence to infer negligence on the part of the second defendant (which I do not find), the plaintiff's case is absent, *prima facie*, the elements of wrongfulness and causation.

[24] In support of her case on this score, the plaintiff relies on what was recorded in a delivery note[17], in which it was recorded as follows;

'The supplied signage is in good order, has been manufactured and installed according to the approved specifications and/or official

order received'

[25] This delivery note was entered into the record by consent, absent any evidence led in connection therewith. The plaintiff argues that this delivery note constitutes - evidence

- that the second defendant installed the signage. I disagree. This is so, for two reasons. Firstly, because

no evidence was led as to how this delivery note came into existence. Secondly, the delivery note is on a plain reading thereof, open to different interpretations. The 'description' on the delivery note itself, refers only to the manufacture of the signage. Further, the actual wording on the delivery note, upon which the plaintiff seemingly relies, contemplates an alternative interpretation, namely;

'...has been manufactured and installed according to the approved specifications and/or official order received'

[26] In my view, in so far as the plaintiff relied on a legal duty that fell to be imposed on the second defendant, she has not discharged - *prima facie*

- the onus of establishing that the second defendant was guilty of any wrongful omission. In addition, there was no evidence to establish or even suggest that the employees of the second defendant were in any manner involved in the installation of the signage.

[27] Further, I find that the plaintiff has not provided sufficient evidence upon which a court, applying its mind reasonably, could find for the plaintiff against the second defendant. Put in another way, in my view, there is no evidence warranting an inference that the second defendant was in any manner negligent or was the cause of the plaintiff's injuries. The principle of

- *res ipsa loquitur*
- is not a rule of law, but rather a type of circumstantial evidence, which may or may not, permit an inference of negligence to be drawn adverse to a defendant.

[28] In all the circumstances of the matter, the following order is granted;

1. That the application for - absolution from the instance - by the second defendant is granted.
2. That the plaintiff is ordered to pay the costs of and incidental to this action, on the scale as between party and party, as taxed or agreed.

E D WILLE

Judge of the High Court

- [1] The former members were not sought to be held personally liable for the debts of the first defendant
- [2] Nedbank
- [3] The signage was about (1) meter in length and was made of thick material.
- [4] Bearing the words 'Sales Consultant'
- [5] Some of the first defendant's employees were wearing 'T-Shirts' bearing the first defendant's logo thereon
- [6] The 'agreement'
- [7] *Claude Neon Lights SA Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H
- [8] Absent any evidence of a defect in the manufacture of the sign
- [9] *Mkhatswa v Minister of Defence* 2000
- (1) SA 1104 (SCA) at 1112H
- [10] *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) at [12]

[11] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority 2006

(1) SA 461 (SCA)

[12] Minister van Polisie v Ewels 1975

(3) SA 590 (A)

[13] Principles of Delict – Jonathan Burchell - First Published in 1993 - page 40

[14] Za v Smith 2015

(4) SA 574 (SCA) at 583 B-C

[15] Loureiro v Imvula Quality Protection (Pty) Ltd 2014 SA 398 CC at para 53.

[16] Nedbank Ltd

[17] This note was sent by the second defendant to the first defendant

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