

SOUTH AFRICA / JUDGMENT

Nearhou v Netcare Hospital (Pty) Limited t/a Netcare Milpark Hospital (40774/2013) [2017] ZAGPPHC 556 (16 August 2017) [2017] ZAGPPHC 556

COURT

North Gauteng High Court, Pretoria

BEFORE

Kooverjie

CASE / FILE NUMBER

40774/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 40774/2013

DATE

OF JUDGMENT: 16/08/2017

In

the matter between:

MADELEIN
CHARMAINE NEARHOU
Plaintiff / Appellant
and
NETCARE
HOSPITAL (PTY) LIMITED
t/a Defendant
/ Respondent
NETCARE
MILPARK HOSPITAL

JUDGEMENT

KOOVERJIE AJ:

1. At the hearing of the application for leave to appeal, the Appellant's legal representative requested leave to amend the Plaintiffs pleadings in terms of Section 19 of the Superior Court Act, 109 of 2013. Such notice to amend was filed in March 2017, but had only been brought to my attention at the said hearing.

2. On the 15th of December 2016, I handed a judgment where I granted the Defendant an absolution from the instance and the following order was made:

"

1. The Defendant is granted absolution from the instance; and

2. The Plaintiff is ordered to pay the Defendant's costs of suit arising from this action."

3. On appeal, counsel for the Appellant essentially requested the court to grant the Appellant leave to appeal as there is a possibility that another court may come to a different conclusion particularly in the light of the fact that the evidence regarding the "chain" was not the only issue that had been canvassed at the trial. The issue of "inadequate lighting" where the Plaintiff testified that it was dark in the vicinity where she fell, was canvassed in evidence and this was not challenged

by the Defendant. Consequently, the Appellant is entitled to amend its pleadings by virtue of Section 19 of the Superior Court Practice Act. It follows then that if the court allows the amendment then this matter should be remitted to trial for the relevant evidence pertaining to this aspect be included.

4. At this juncture I must emphasize that the notice of application for leave to appeal bears no substantive grounds. The notice reads:

"Be pleased to take notice that the Applicant/Plaintiff hereby applies to the above Honourable Court for leave to appeal against the whole of the judgment delivered by her Ladyship Madam Justice H Koooverjie (AJ) In the Honourable Court on the 15th of December 2015 and that the Registrar enrol this application accordingly for hearing.

The Applicant/Plaintiff respectfully submits on the facts, another court may find for the Applicant/Plaintiff and would not have granted an order of absolution as done for and reasons advised by the Honourable Court, the presiding judge."

5. On this basis itself, the Appellant's application for leave to appeal remains vague. No substantive grounds of appeal are set out

therein.

6. During argument counsel for the Plaintiff submitted that there are prospects of success on the merits particularly in respect of " inadequate lighting". In considering the proposed amendment it is necessary to refer to my findings thereof:

“

19. In exercising my discretion I must consider whether there is evidence upon which a reasonable court might for the Plaintiff. As alluded to above, the evidence presented on the Plaintiff's part, does not suffice as evidence which I can find in the Plaintiff's favour for inter alia the following reasons:

19.1 The chains are permanently welded and this fact was not denied nor was it successfully challenged by the Plaintiff.

19.2 The chains were always existent between parking bays 1 - 5 according to the Plaintiff's husband's testimony.

19.3 The Plaintiff fell in the vicinity of parking bay 5.

19.4 It could not be that within a period of 5 minutes the chain was drawn across the paths in the Plaintiff's pathway.

19.5 The Plaintiff was not aware of her full surroundings. She noticed the curb, the tree and even the yellow signs hanging from the chains. Having regard to her evidence this could be expected of her as at the time she was concerned and pre-occupied about her husband's condition who was in casualty, the emergency ward at the time.

19.6 The Plaintiff's husband confirmed that the chains were always there and that he found the one in the parking lot where the doctors park.

19.7 He could also not deny that the chains were welded to.”

7. The pleadings before the court during the trial, was essentially (as set out in the Plaintiff's particulars of claim, paragraph 4.2 and 4.3 thereof):

“4.2 she fell over a chain which had become affixed which barred her way and/or access to the area, she wished to proceed from the area she came and In the same direction she had originally taken to the cafeteria.... no chain was affixed to the post when she accessed the said cafeteria in the first instance.

4.3 she fell across the chain which caused her to trip and thereby suffering bodily injuries and more particularly a fracture of her right tibia some 5cm below the knee.”

8. The Defendant denied any liability and in its plea in paragraph 5 thereof responded as follows:

" 5.1 the only chain affixed at all times on the property was a chain affixed around the parking area of the Trauma Doctors' unit between the trauma reception and the cafeteria, which was permanently affixed by welding.

5.2 that the Plaintiff, if she did in fact fall over the chain as is averred (which averment is denied) deviated from the dedicated walkway leading patrons from the trauma ICU to the Netcare Coffee Shop and back.

5.3 that the chain over which the Plaintiff avers to have fallen, was incapable of detachment from the post as a result of the chain being welded to the said post."

9. This court's finding was based on the cause of action set out in the pleadings and the Plaintiff's case during the trial proceedings.

The Plaintiff's case was focussed on her falling over a chain which she claimed was not there minutes before when she proceeded to the coffee shop. By virtue of the notice of amendment the Plaintiff wishes to add further grounds of negligence on the part of the Respondent, more particularly the "inadequate lighting" aspect. It has been argued that although it was not raised in the pleadings, it was raised in evidence and

during cross-examination. Counsel for the Appellant submitted that the issue of the "inadequate lighting" had been canvassed in evidence on the Plaintiff's version. It is upon this basis that this court should grant the amendment as the version that there was inadequate lighting where she actually fell and became injured, has not been denied.

10. Our authorities have duly considered circumstances as to when amendments to pleadings after judgment has been delivered, may be allowed. It has been held that a party whose case had unravelled before a trial court thus cannot stitch together a new one on appeal if it is not properly covered by the pleadings or was not properly covered in evidence.[1] A court of appeal may allow an amendment of pleadings on appeal under certain circumstances. These circumstances are however exceptional and an amendment without remittal will only be granted on appeal if a court is satisfied that the amendment will not occasion prejudice to the other side. Therefore, it follows as a general rule that the amendment on appeal will be allowed only if the issue sought to be introduced by the amendment was in fact, though not pleaded, canvassed at the trial. This will be done especially where the parties had themselves raised the issues without amending the pleadings.
11. The notice of application to amend the Plaintiff's particulars was served on 9 March 2017. The proposed amendments read:
- By having failed to provide and maintain adequate lighting so as to enable pedestrians to see and/or warn pedestrian of the presence/existence of a chain/chains at night, erected or caused to be erected In the parking lot In front of the Defendant's/Respondent's property.
 - By failing to affix reflective material and for warning signs warning pedestrians ambulating across the parking lot of the danger posed by the chains at night.
 - By failing to instruct pedestrians present at the Defendant's/Respondent's premises by way of erected sign boards to remain on allocated pathways only and not to, ambulate across the parking lot.. ”

12. In having considered the evidence in respect of the "inadequate lighting". find that such evidence had not been sufficiently canvassed at the trial and had not been a substantial issue in respect of the Plaintiff's case.

In *British Diesels Ltd v Jeram and Sons* 1958 (3) SA 605 NOP, at 606 Broome JP applied the following principle:

"If it should appear that any substantial issue was duly canvassed in the court below, then in my opinion we ought to regard it as an issue to be decided between the parties whether it has been formally pleaded or not. If on the other hand, the application is to put on the record issues which were not fully canvassed, then no amendment ought to be allowed at this stage."

13. Howard JP in *Desai v NBS Bank Ltd* 1998 (3) SA 245 NPD at 250H (Desai matter) adopted the aforesaid principle (set out in the *British Diesels* matter) and further held:

"I do not consider it as proper to grant an amendment of pleadings on appeal to introduce issues which have not been fully canvassed in the court below. If such Issues have not been fully canvassed in the court below, prejudice to the other party is conclusively presumed."

14. Overall a court in this instance, in exercising its discretion, should inter alia consider the following factors, namely the importance of the case, the ease or difficulty of pleading the proper issues, the prejudice likely to be suffered by the other side and the probability of eventual success by the party seeking the amendment. moreover, courts should not allow an amendment or remit the matter for further evidence on new points where the existing evidence points against the Applicant and where great expense would be involved in the remittal and it would be difficult to compensate the Respondent with the wasted costs.
15. In the *Desai* matter the court further held "In exceptional circumstances an amendment of pleadings may, in the absence of prejudice, be granted on appeal although the points averred by the amendment were not fully dealt with In the court below. In such cases a necessary consequence of the amendment is a remittal of the case for the hearing of further evidence." [2]
16. On the application of the aforesaid test, even if I have to discount the likely prejudice that the Respondent would be subjected to as well as the fact that the issues have not been fully canvassed, I still have to consider whether the facts of this matter warrant circumstances which are exceptional. In these circumstances, I do not find that such exceptional circumstances exist. I am therefore not inclined to grant the amendment.
17. A further amendment proposed concerns the Respondent's failure to affix reflective material and warning signs for pedestrians warning them of the chain which are affixed in the parking lot. Such amendment cannot be allowed as this aspect had not only been raised in the pleadings, but had also been dealt with in evidence. The Plaintiff had, in her evidence, confirmed that a bright yellow notice board was attached to the chain in front of each of the parking bays, but that on that specific night she did not see them. On this aspect, I further refer to paragraph 15 of my judgment:

"

15. Crucial for consideration was that the Plaintiff was unable to deny the existence of the yellow notice board which hung from the chains and the fact that the chains were welded."

Furthermore, the court established that the Plaintiff was not paying attention to her surroundings when she was walking to the cafeteria. Her evidence particularly reflected that her mind and focus was on her husband who at the time, was in the hospital ward.

18. With respect to the application for leave to appeal, I find that such application too must fail. In this regard, I reiterate my findings set out in my judgment. What the Plaintiff is required to at least establish a prima facie case in order to avert a ruling of absolution. At the end of the Plaintiffs case there was insufficient evidence upon which this court could find in her favour. Moreover, the end of the Plaintiff's case was when the Plaintiff's husband, Mr Nearhou, testified that "the chain were always there" and was unable to deny that the chains were welded on to the poles.
19. The test is well grounded in *Claude Neon Lights SA Ltd v Daniel* 1976 (4) SA 403 at 409G where the court of appeal held that the only question is whether, at the close of the Plaintiffs case, there was such evidence before it, assuming it were true upon which a reasonable court might, not should, give judgment against the Defendants.[3]

Even if I were to apply the test set out in *Gordon Lloyd and Associates v Rivera* 2001 (1) SA 88 SCA at 92H-J, where I should be concerned with my own judgment and not that of another reasonable court, I still find that the Plaintiff has failed to establish such prima facie case at the close of its case and that absolution of the matter was justifiably granted. I further maintain that it was in the interest of justice that absolution was the appropriate order. On this point, I refer to *Carmichele v Minister of Safety and Security and another* [2001] ZACC 22; 2001

- (4) SA 938 CC at para 79 where the court held:

"An order for absolution from the Instance Is an appropriate order to make at the end of the Plaintiff's case where a court applying its mind reasonably to evidence could or might find for the Plaintiff. The underlying reason is that It is ordinarily in the interest of justice to bring the litigation to an end in such circumstances."

Consequently, it is on this basis that the application for leave to appeal must fail.

20. In the premises, I make the following order:
- (1) Application for leave to amend the pleadings is refused;
- (2) The appeal is dismissed with costs.

KOOVERJIE A.J.

ACTING JUDGE OF THE GAUTENG HIGH COURT

APPEARANCES:

For Plaintiff:

Mr KM Rontgen

Instructed by:

Rontgen and Rontgen

Pretoria

For the Defendant: Adv W J Bezuidenhout

Instructed by:

Whalley and Van der Lith Incorporated

Johannesburg

[1] Cooper and others NNO v Syfrets Trust Ltd 2001(D} SA 122 SCA at 1338

- D.

[2] Desai v NBS Ban k Ltd 1998 (3) SA 245 at 250G.

[3] See also Gascoyne v Paul and Hunter 1917 TPD 170 at 173.

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