REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 2009/4633

DATE:09/09/2011

In the matter between:

HANSON, PENELOP ANNE HOPE	**Plaintiff**
and	
LIBERTY GROUP LIMITED	**First Defendant**
PARETO LIMITED	**Second Defendant**
LIBERTY GROUP PROPERTIES (PTY) LTD	**Third Defendant**

JUDGMENT

NOTSHE AJ:

[1] On 10 March 2006 the Plaintiff was a passenger in a motor vehicle that entered the Sandton City shopping complex parking area. She fell in the parking area of the mall by tripping over an elevated expansion joined cover. As a result thereof she sustained some injuries.

[2] She instituted action proceedings for damages she sustained as a result of the injuries she suffered.

[3] The Defendants are the owners and operators of the Sandton City shopping complex. They duly defended the action instituted by the Plaintiff.

[4] The parties agreed that I should only determine the issue of whether the disclaimer notice that had been displayed by the Defendants at the entrances to the mall is enforceable to exempt the Defendants from liability for the injuries sustained by the Plaintiff.

[5] I made an order directing that the aforesaid issue be separated for determination from the other issues.

[6] The Plaintiff's claim is founded in delict. The Defendants rely on a contract in terms of which liability for negligence which was allegedly excluded. They accordingly bear the onus of establishing the existence of the contract and the terms thereof. [1]

[7] This case is one similar to the so called "Ticket Cases". In simple terms the Defendants aver that they are not liable for damages suffered by Plaintiff because they had concluded an agreement with her to the effect that they would not be so liable. As a result thereof they bear the onus of proving the contract and the terms thereof.

[1] See: Durban's Water Land (Pty) Ltd v Botha and Another, 1999(1) SA 982(SCA) at 991 B-C

[8] In this regard they rely on the notice notices that are placed at the entrances to the parking area.

[9] A contract they rely on is not an expressed contract. They do not aver that the Plaintiff read and accepted the disclaimer notices . neither do they aver that she saw the notices, realized that they contained conditions relating to entry to the parking area but did not bother to read them. They rely on what is commonly known as a quazi- mutual accent. A quazi-accent arises where a party relying on a disclaimer is reasonably entitled to assume from the other parties conduct in entering the premises that she ascended to the terms of the disclaimer or was prepared to be bound by them without reading them. The parties relying on a disclaimer will, under those circumstances, have to prove that it did what was reasonably sufficient to give the person entering the premises notice of the terms of the disclaimer. In the circumstances the nature of the notice, where it was placed and the context thereof are important to the enquiry.

[10] The test is on an objective one based on the reasonableness of the steps taken by the proferens to bring the terms in question to the attention of the customer or patron. If the answer is positive the next question would be whether the terms of the disclaimer exclude the parties liability.

[11] At the beginning of the trial the parties handed up an index of Bundle C I was informed that the documents in pages 1,2,3,4 and 5 were admitted.

They depict the wording of the notices as they stood at the entrances to the mall.

[12] On page 2 thereof shown that the notices were placed on a concrete island like slab on the entrances. They were on the driver's side of the entrances near the machine where the driver collects the entry ticket. The notice itself is on the white background and its written in red letters. The first three sentences are in bold letters and read "**CONDITIONS OF PARKING AND PARKERS/ OWNER'S RISK**". The remainder of the notice is in small letters and it reads as follows "*The owner or its officers or its servants or its agents or the independent contractors of any of them or the employees of any of them (hereinafter collectively referred to as "The Employer") do not accept or take any responsibility or liability for the safe custody of any vehicles or articles therein nor for any damage to vehicles or articles therein nor for any injuries or loss to any persons whether as a result of the negligence of the employer or any cause whatsoever including but without limiting the generality, collision, fires, theft, rain or hail. All vehicles are parked or driven in all respects at the risk of the parker, driver, owner thereof and all persons entering the car park do so at their own risk. The employer has the right to move or drive any vehicle left for parking*." Then below that notice there is a separate notice with the heading "covered parking" and what follows thereafter are the deterios for parking.

[13] The Defendant rely on the wording which says that “the employer is not liable for any injuries or loss to any persons whether as a result of negligence of the employer …” and also “all persons entering the car park do so at their own risk.”

[14] As stated the test is objective and is whether the Defendant took reasonable steps to bring the terms in question to the attention of customer or patron.

[15] In this case the notice is placed prominently on the driver’s side of the entrance. The heading of the notice is “**CONDITIONS OF PARKING AND PARKER/ OWNERS RISK**”. In my view such a notice is directed at the parkers or the owners of vehicles who intend to park therein. On reading of the entire notice I am satisfied that it refers to the parkers and no one else. It refers to the safe custody of vehicles, articles in the vehicles or damage to them. Any person either than the parker or owner of a motor vehicle would not have realized that the notice refers to him/her; he/she would have been entitled to ignore it.

[16] The words relied on by the Defendant are in a sentence which deals with vehicles and articles in the vehicles. It is clear in my view that such is directed at the persons parking vehicles and the owners of the vehicles.

[17] I am of the view that the Defendants did not do what was reasonable sufficient to give Plaintiff notice of the terms of the disclaimer. As stated

the notice was not directed at Plaintiff as a passenger. Plaintiff was entitled to ignore it even if it had come to a notice.

[18] In the circumstances the disclaimer raised by the Defendants is invalid. I find accordingly.

V.S NOTSHE

Acting Judge High Court

Date of hearing:

Date of Judgment: 9 September 2011

For Plaintiff:

For Defendant: