IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 40774/2013

DATE OF JUDGMENT:

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
15/12/16

In the matter between:-

MADELEIN CHARMAINE NEARHOU **Plaintiff**

and

NETCARE HOSPITAL (PTY) LTD
t/a NETCARE MILLPARK HOSPITAL **Defendant**

JUDGEMENT

KOOVERJIE AJ:

[1] The Plaintiff instituted an action against the Defendant for the recovery of

damages for injuries sustained by her which was caused by her falling over a chain on the Defendant's premises.

[2] The pleadings reflect the following dispute:

2.1 On the 12th September 2011 in the parking lot of the Defendant's premises, the Plaintiff in her particulars of claim, paragraphs 4.2 and 4.3 thereof alleged that:

> ***"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 5 cm below the knee."***

2.2 The Defendant denied any liability on its part and in its plea, particularly pleaded in paragraph 5 thereof that:

> ***"5.2 the only chain affixed at all times on the property was the chain affixed around the parking area of the Trauma Doctors' unit between the trauma reception and the cafeteria, which was permanently affixed by welding.***
>
> ***5.3 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.***
>
> ***5.4 that the chain over which the Plaintiff avers to have fallen was incapable of detachment from the posts as a result of the chain being welded to the said posts."***

2.3 In the Defendant's request for admissions from the Plaintiff, at pre-trial stage, the Plaintiff was requested to admit that there was a dedicated walkway towards the cafeteria and that she did not utilise such pathway. The Plaintiff's response thereto was that she was unable to admit or deny these facts and moreover she could not recall as to whether there were other dedicated pathways.

2.4 When requested to admit that the chain was permanently fixed by having being welded in place, she also denied this fact.

[3] It remains common cause that she fell over the chain. The particular facts which remain in dispute are, where she fell, were the chains welded to the posts and whether she followed the same path when she proceeded to and when she came from the cafeteria?

[4] The witnesses who testified on the Plaintiff's behalf were the Plaintiff and her husband. After the Plaintiff closed her case, the defence informed this Court of its intention to lodge an application for absolution from the instance. This Court then directed time periods within which such application be brought and requested that both parties file heads of arguments in this regard.

[5] By virtue of Rule 39(6) of the Rules of Court, it is settled law that when absolution from the instance is sought, the test to be applied is whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might find for the Plaintiff. Counsel for the Plaintiff also referred the Court thereto. Such test was formulated in **Gascoyne v Paul & Hunter 1917 TPD 170 at p 173** (**Gascoyne** matter) and has been approved by the SCA in various decisions thereafter.

[6] It is further trite that the power which a Court has to grant absolution at the close of the Plaintiff's case is a discretionary one. In this instance, I refer to

Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd 1978 (3) SA 1073 N at 1076 G.

[7] What the Plaintiff has to establish in order to avert a ruling of absolution is at least to establish a *prima facie* case. It was common cause in this matter that the Plaintiff bears the burden of proof and has to discharge same.

[8] The test as set out in the **Gascoyne** matter is that this Court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff?

[9] With measured caution, our authorities have also ruled that a Plaintiff should not be lightly deprived of his remedy without the evidence of the Defendant being heard. Hoexter J in **Gandy v Makhanya 1974 (4) SA 853 N at 855** held that when there is doubt the Court should lean on the side of caution and allow the case to proceed. Counsel for the Plaintiff also referred this Court to a further matter where the aforesaid test was not adopted. In **Gordon Lloyd and Associates v Rivera 2001 (1) SA 88 SCA at 92 H** – J, Harms J stated that:

"The Court should rather be concerned with its own judgment and not that of another "reasonable" person or court."

I am however swayed by the test formulated in the **Gascoyne** matter, and which test has been adopted by the SCA and the Constitutional Court.

[10] The test at this stage is to satisfy itself that no reasonable Court could draw the inference for which the Plaintiff contends. In other words, it does not have to weigh up different possible inferences but merely determine if one of the reasonable inferences is in favour of the Plaintiff. In the aforesaid **Gordon Lloyd** matter the Court stated:

> ***"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: ... The inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one ....."***

[11] In circumstances such as this matter, a possibility exists where there is only one Defendant, the Plaintiff has closed her case, and the Court has heard all the evidence against the Defendant, any further evidence that would be forthcoming if the case continues, would likely be to the detriment of the Plaintiff. In such an instance it is not in the interest of justice to allow the case to continue if there is no *prima facie* evidence against the Defendant.

[12] I have considered both the Plaintiff's as well as her husband's evidence and I note the relevant portions which have a bearing on this matter and which *inter alia* were the following:

12.1 She followed the same path to and from the cafeteria;

12.2 There was no designated pathway to the cafeteria and furthermore she was not aware of such designated path;

12.3 Her visit to the cafeteria was for approximately 5 minutes. She had only purchased two cups of coffee.

12.4 When she walked to the cafeteria she did not see any chains in the path. However, upon her return on the same path she fell over a chain. She only noticed after she fell that it was caused by the chain;

12.5 It was dark at the time and there was insufficient lighting in the vicinity;

12.6 She could however not deny that the chains were welded to the posts. At this juncture it must be mentioned that this is in contradiction to what she had stated in her pleadings. In her pleadings she denied that the chains were welded to the posts.

[13] When this Court requested the Plaintiff to demonstrate on the exhibit (a diagram handed by the Plaintiff's counsel just before the trial commenced) to illustrate the path she used and where she fell, she had done so and the Court took cognisance of the point marked "X".

[14] The Plaintiff was also referred to a further diagram appearing in the discovered bundles, bundle 1 at page 45, where the Plaintiff confirmed *inter alia* the following that:

- There were parking bays 1 to 5 just outside the cafeteria;

- There were chains on posts from parking bay 1 to 5;

- From a further exhibit shown to her, which was a picture depicting the deck of the cafeteria, she confirmed that parking bay 1 and a half of parking 2 were adjacent to the cafeteria deck and more importantly, the incident took place in the vicinity of parking bay 5.

- In her explanation as to the path she followed, she testified that she passed between the tree on the curb and parking bay 5.

[15] Crucial for consideration was that the Plaintiff was unable to deny the existence of the yellow notice boards which hung from the chains and the fact that the chains were welded. This was the primary defence of the Defendant as reflected from the pleadings.

[16] In respect of where she actually had fallen, she conceded "in the parking lot". The location identified by her was next to the chains on parking bay no. 5.

[17] This Court also took cognisance of Dr Carides' report where he set out the background related to him by the Plaintiff in respect of her fall. He records in his report:

"She described the chain as a permanent fixture which separates the doctors' parking area from the public parking area."

[18] When her husband, Mr Nearhou testified, the following was noted by this Court, namely:

18.1 He did not witness the path his wife walked to the cafeteria;

18.2 He also did not witness how she fell;

18.3 However, when he was alerted of her fall, he found her in excruciating pain on the ground in the parking lot;

18.4 Moreover, he was aware that the chains were always in front of trauma doctors' parking bay. He could do so since he was a paramedic in his professional capacity and he often frequented the said hospital.

18.5 He further did not deny that the chains were welded to the posts;

18.6 In respect of the lighting he testified that there had been a flood light erected in the area but it had not been in working order for a while.

[19] In exercising my discretion I must consider whether there is evidence upon which a reasonable Court might find 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 were 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 to 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 posts 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 his wife lying in the parking lot where the doctors park.

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

[20] In order to determine whether an inference of negligence can be drawn from the evidence, the Court has to draw such an inference from the objective facts or proven facts before it.

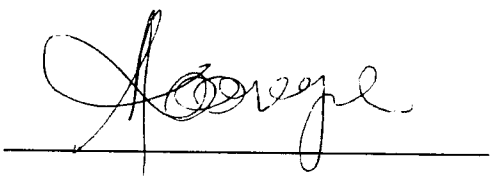
[21] In **Carmichele v Minister of Safety and Security & Another 2001 (4) SA 938 CC** at para 79 the Court held:

> ***"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 the evidence could not or might not 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."***

[22] In this instance I find that the Plaintiff has failed to establish a *prima facie* case against the Defendant. All the Plaintiff was required to do was to draw one reasonable inference of negligence. I have difficulty in finding for the Plaintiff when applying my mind reasonably to the evidence before me. Therefore, I consider that it is not in the interest of justice to allow the matter to continue before this Court.

[23] In the premises, I make the following order:

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.



H KOOVERJIE AJ
ACTING JUDGE OF THE
GAUTENG DIVISION

APPEARANCES:

For Plaintiff:	Mr K M Röntgen
Instructed by:	Röntgen & Röntgen
For Defendant:	Adv W J Bezuidenhout
Instructed by:	Van Stade van Ende