



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 28390/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 11 FEBRUARY 2022
SIGNATURE [REDACTED]

In the matter between:

SANDRA ILOMA KLEINHANS

Plaintiff

and

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Defendant

J U D G M E N T

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

On 29 May 2015 the plaintiff slipped on a smooth concrete surface, fell and fractured her right upper arm in two places. She alleges that the incident had happened on premises within the Kgosi Mampuru Correctional Services precinct in circumstances which render the Minister of Justice and Correctional Services vicariously liable. The Minister denies that the incident had happened at all.

[2] Separation

By agreement between the parties, the issues of merits were separated from those relating to quantum.

[3] The pleadings and relevant pre-trial proceedings

3.1 The plaintiff's version was pleaded as set out in the above introduction.

3.2 The alleged locality of the incident was pinpointed by way of pre-trial procedures as being on the veranda (referred to by all the witnesses as a "stoep") outside the entrance to the supply chain department's offices in the Kgosi Mampuru prison precinct in Pretoria. These premises were at the time accessed by driving through the actual prison area from the main entrance gate in Potgieter Street and exiting the prison on the opposite side via another gate before entering the supply chain area, last mentioned which is now only entered via a separate entrance gate from Dequar road. The access via the prison yard has been closed in recent years "due to security reasons", as explained by a Correctional Services officer. The "stoep" and entrance to the supply chain offices had been visited in December 2021 by way of inspections *in loco* by the parties' legal representatives and colour photographs had been produced by them. Although each party had prepared a separate bundle of photographs, the locality is the same in both bundles.

3.3 The defendant, being the relevant Minister as the responsible member of the executive, pleaded a denial of the incident and, should the court find that the incident had taken place in circumstances which rendered the Minister in his official capacity vicariously liable, then the defendant pleaded that an apportionment of the contributory negligence ascribed to the parties to the incident should be ordered. This plea was done by the State Attorney on instruction of the legal section of the Correctional Services department without anyone having been in contact with or having consulted with any of the personnel at the supply chain department in question. In fact, the head of the department only found out about the allegations of the incident and the plaintiff's claim, last year in December at the time of the inspection *in loco*. The supply chain department's asset clerk only found out about the alleged incident and the plaintiff's claim last week (that is more than six and half years after the incident). These two persons were the defendant's only witnesses.

[4] The plaintiff's case

- 4.1 The plaintiff testified herself. On the day in question she had been asked by her then son-in-law to accompany him to Johannesburg as he did not want to travel on his own. They went to a supplier of adult nappies in Johannesburg and, upon their return to Pretoria, the son-in-law said they should stop at the supply chain offices of the Department of Correctional Services as he wanted to make certain business enquiries there. They entered the Kgosi Mampuru prison precinct via the main gate in Potgieter street and were directed a route to follow to the other side of the prison, which they did. They exited the prison perimeter through a second gate and entered the supply chain offices area.
- 4.2 The area relevant to the incident can be described as follows, as is apparent from the numerous photographs taken by the parties during their

inspections *in loco*: as one enters the premises, there is long stretch of road on the left for vehicular traffic and where cars park. The offices are in an equally long block on one's right-hand side. Stretching out ahead, and which separates the vehicle road and the office block itself is a raised "stoep". It is quite wide and, although primarily designed for pedestrian traffic, it can accommodate the width of a single vehicle. It is accessed by a ramp which is the whole width of the stoep and which is slightly rough in surface. The stoep itself has a smooth surface and is kept polished to a high gloss as is apparent from its shiny appearance in the photographs. There was no direct evidence of the length of the stoep, but from the photographs it appears to be the length of several cars. Some distance down this stoep there is a double-door wide entrance into the reception area to one's right. The outside of the offices is face-brick, the entrance has double-door burglar bar gates which open to the outside and can open flat against the wall on each side of the entrance. To the right-hand side of the entrance, there are two large pots with plants in them visible on the photographs, the right-hand plant apparently dead as only the stumps are visible and the left-hand plant with large foliage. On the ground behind the two pots is a large green sign with yellow lettering. At the first pillar on the wall to the right, almost a double-door width from the entrance, is a recently affixed sanitizing unit and directly above it, above head-height, is a triangular yellow sign which depicts a person slipping and, beneath it, a rectangular sign reading "slippery when wet". These two signs are about A4 paper size each and they are at a right angle to the wall. The reception area beyond the entrance is large and square and has a small table to the right-hand side with a sanitizer bottle on it and, also on the right-hand side, beneath a large window with blinds on the inside, a long black leather and wood couch. Opposite the entrance door, at the right hand side of the back wall of the reception area, is an office and a passage going off to the right and deeper into the office block. On the left-hand side of the reception area

is an office with a counter which is also burglar-proofed. Apart from issues regarding the outside flower pots and signs, none of the physical configurations described were in dispute.

- 4.3 On the day in question, after having parked their vehicle, the plaintiff and her then son-in-law proceeded up the ramp and proceeded along the stoep in the direction of the supply chain offices entrance. Directly opposite the entrance, on the left-hand side of the stoep, a person in an orange overall, later identified as an inmate, was busy cleaning the stoep with an upright, hand controlled cleaning machine. Noticing this, the plaintiff alerted her son-in-law about it and moved to pass the inmate on the right-hand side where the floor was dry. When she was approximately a metre or one and half a metre from the inmate, just before she got to the entrance to the supply chain offices, the inmate moved the machine in the plaintiff's direction, causing soapy liquid to squirt from under the machine and towards where the plaintiff was walking, causing her to slip and fall. She bumped her head against the wall and badly fractured her right humerus. When she found she could not use her right arm to get up, she called to her son-in-law who had walked slightly ahead of her to help her up, which he did. He then assisted her into the reception area of the supply chain offices where she sat down on a couch. Two unknown ladies came across to the plaintiff and she requested one to bring her a glass of water. Someone also bought a "medikit" but her son-in-law found the contents depleted and too inadequate to assist the plaintiff. They then decided to leave and go to the plaintiff's daughter who was working in the reception at a doctor's rooms.
- 4.4 After having gone to the plaintiff's daughter, they then proceeded to Eugene Marais hospital. There the plaintiff's daughter completed the treatment form required by the plaintiff's medical aid. The description of the cause of the injury was noted as "*slipped and fell*" and indicated the

place of the occurrence at “*Tshwane Correctional Services, Potgieter Street, Pretoria*” and the hospital staff noted the diagnosis obtained from the treating doctor as “*humerus fracture in displacement*”. The form was signed by the plaintiff. The injury resulted in internal fixation of the humerus and had certain sequelae more relevant to the issue of quantum.

- 4.5 The plaintiff’s then son-in-law also testified. His evidence of the day’s trips with his then mother-in-law, corresponded with the plaintiff’s evidence as did his description of the location of the incident. He also described in very much the same terms as the plaintiff, although he was a bit more taciturn than she was, what had happened after she had slipped and fallen down. As to the description of the incident itself, the son-in-law testified that, as the plaintiff came close to the inmate operating the machine, it “shot out” a jet of soapy liquid from under it, causing her to slip and fall. With the aid of a blue pen and a copy of one of the photographs taken during the parties’ inspection *in loco*, he indicated that the wet portion of the floor was much closer to the entrance and the plaintiff’s intended route than in her description. In fact, on his description, there appears to have been a portion of the floor that she had to cross which may have been wet.

[5] The defendant’s case

- 5.1 The defendant’s first witness was Ms Mangena. She had been the assistant-director in the Department of Correctional Services responsible for the supply chain department at Kgosi Mampuru prison since 2010. Her office was the one immediately to the right of the supply chain reception area described above, with a window with blinds facing the reception area. The door to her office is in a passage going to the right from the back of the reception area. Outside her door, mounted on the wall, is a large white cupboard, containing the section’s official “medikit”. The key to this

cupboard is retained by her in her office. She is responsible for some six sections in her department, such as the procurement office, the asset section and the accounting section . She visits these sections every day to oversee them and to sign the necessary supply chain documents in each section. Incidents such as the one described by the plaintiff would come to her notice and would also be formally reported to the Occupational Health Safety (OHS) officer who is at a warehouse portion of the supply chain offices in an adjoining part of the building. She denies that the incident, about which she heard for the first time in December last year, had occurred at all. She confirmed having been on duty on the day in question, as confirmed by her signature in the Z8-register, being a register kept in a book form where staff note their daily arrival and departure from work. She also oversees this and deals with absenteeism as reflected by entries in the book.

- 5.2 Correctional Officer Mokgethi also testified. He is an asset clerk employed in the supply chain offices with his office in the back right-hand corner of the reception area described above. His office door faces the entrance. He also denies that the incident had occurred. He testified that, even if he had not been present or not having seen the incident, he and the other staff would have been briefed about such an incident, if it had indeed occurred, at the next morning's roll call briefing. Such an incident should also have been reported to the OHS officer as "claims may be instituted against the department". He recognized the sign which had fallen down behind the two flower pots outside the supply chain office entrance. According to him (although the wording was largely obscured on the photographs) the sign read "Administrasie" and "Administration". He could not say how long ago the sign had fallen down. He confirmed the location and visibility to passers-by of the danger warning sign mounted at a right angle to the wall and the fact that the pot plants had been located

next to the entrance since before 2015. Mr Mokgethi also identified his signature in the Z8 register and that it reflected that he had been on duty on the day in question. He has no independent recollection of the day but confirmed that inmates clean the floor on a daily basis. Currently, as also confirmed by Ms Mangena, this is done by way of buckets mounted on wheels and mops (which could be seen on the photographs being in attendance on the day of the inspection *in loco*). He was not asked whether machines had been used to wash the stoep in 2015.

[6] Mutually destructive versions

- 6.1 The principal dispute is whether the incident had happened at all, or rather, whether the injury sustained by the plaintiff due to a fall, had occurred at the supply chain offices or not.
- 6.2 There was no evidence led by any inmate or by the inmate who had washed the floor on 29 May 2015 and there was no evidence by the OHS officer or presented by way of any occurrence book. There was also no evidence of how oversight or control was exercised over inmates when washing floors or what the standard procedures were. This is despite the defendant's plea, in the alternative to its denial of the existence of a duty to members of the public, asserting that the Minister's "*officials complied with the necessary standard of care*".
- 6.3 The technique generally employed by courts in resolving two irreconcilable versions was described in *SFW Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) at paragraph [5] as follows: "*To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses (b) their reliability and (c) the probabilities. As to (a), the court's findings on the credibility of a particular witness will depend on its impression of the veracity of the*

witness As to (b) a witness' reliability will depend, apart from the factors mentioned under (a), on (i) the opportunity he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it".

- 6.4 As to (a), the plaintiff and her then son-in-law appeared to be credible witnesses. They answered questions in a forthright manner, even questions put in cross-examination and made concessions when reasonably expected. For instance, rather than deny the existence of any warning sign, the plaintiff conceded this and the only dispute was as to its position in 2015. In similar fashion, rather than delineating a wide dry intended path, the son-in-law drew the extent of the wetness of the floor into virtually the width of the supply chain office entrance. Mr Mokgethi also testified in a similar forthright manner and also conceded that he could not comment on nor deny things which he had not seen. Ms Mangena appeared to be a little less forthright and refused to make any concessions, even of matters about which she could not testify.
- 6.5 As to (b), a person who has experienced an injury would, as a result of the intimate knowledge of the incident, generally have a sharper recollection thereof as opposed to an office worker who is questioned almost six years after the event about something in which he had no direct participation. At best, the latter could resort to generalisations. Ms Mangena's evidence and the reliability thereof however, suffer from certain deficiencies. She was adamant about not only her own attendance on the day in question, but also that of Mr Mokgethi. Although the factual case was that Mr Mokgethi had

indeed been of duty that day, the method on which Ms Mangena sought to prove her point, could not be maintained by her. She relied on the Z8 register but could not explain discrepancies between the number of names typewritten therein and the rows of particulars to be completed. In the end, she identified the wrong signature as that of the Mr Mokgethi, which led her to conclude that he may have been absent, which was not the case. In similar fashion, where she and the plaintiff differed on whether the pot plants had been present on 2015 or not, she was adamant that they were and that the photographs taken last year reflected the scene as in 2015. Whilst she relied on these photographs to corroborate her evidence, she should not identify the sign lying on the floor against the wall behind the pot plants. It is a large sign and is next to the main entrance which she passes daily, on her version, since November 2010. She could not explain why the sign was on the floor, as opposed to Mr Mokgethi who conceded that it had fallen down but, as he readily conceded, he could not independently remember when this happened or whether it had been affixed to the left or right hand side of the entrance. All in all, I got the firm impression that Ms Mangena wanted to defend the defendant's case at all costs, rather than testify truthfully in respect of her recollection (or absence thereof). Her loyalty raised concerns of bias and the reliability and integrity of her evidence is the least of all four witnesses. I need not make a finding on the presence of the pot-plants in 2015 or not as it does not impact otherwise on the circumstances of the incident.

- 6.6 As to (c), if the defendant's version is to be accepted, that would imply that the injury (because from the doctors' and hospital records the existence thereof cannot be denied), must have occurred somewhere else. This would further imply, not only that the plaintiff and her then son-in-law had fabricated their version, but it would further imply that this fabrication was arrived at or contrived within the hour after the incident had occurred and

was perpetuated by the plaintiff's daughter and reported to the medical aid, the hospital and the treating doctors. It would also imply that all these people, even though the son-in-law has no longer any connectivity with the plaintiff, were prepared to perpetuate this scam for many years of litigation, including oral evidence in court. Although this may notionally be possible, I find, in the context of all the evidence, such a scheme to be improbable. On the other hand, there is nothing inherently improbable in the fact that Ms Mangena might have been on her rounds or performing her duties in other parts of the building when the incident happened. The incident was also not of a long duration and the plaintiff left very shortly after the incident to be taken to her daughter and from there to the hospital. There is, in these circumstances, every possibility that the matter was and remained unreported. The same considerations also apply to Mr Mokgethi's evidence. The cursory investigation, if any, by the department after having received the summons, confirm that shortcomings in properly dealing with matters, occur in the department.

- 6.7 In the circumstances of this case, I need not find that the defendant's witnesses had lied, in order to find for the plaintiff. It is sufficient to find that the plaintiff's evidence appear to be truthful and more reliable and that the incident had simply happened in the absence of the defendant's witnesses and, accordingly without their knowledge.
- 6.8 In conclusion, I find that, on a preponderance of probabilities, that the plaintiff has slipped on a wet and soapy surface, as a result of the washing of the stoep at the entrance of the supply chain department's entrance at Kgosi Mampuru prison.
- 6.9 Clearly, the defendant exercises control over inmates which it uses to clean and wash departmental facilities, including facilities to which members of

the public who has business to do at or with the supply chain department has access. Once an inmate, in the exercise of his assigned duties under the control of staff in the employ of Correctional Services creates a dangerous or potentially dangerous situation to exist or develop and clearly does so negligently, the defendant is vicariously liable for damages occasioned thereby.

[7] Apportionment

- 7.1 In the event that this court finds, as I have done, that the defendant is vicariously liable in the circumstances as set out above, the defendant has pleaded that the plaintiff has been contributory negligent to the occurrence of the incident and that an apportionment of the parties' respective negligence should be made as envisaged in the Apportionment of Damages Act 34 of 1956.
- 7.2 The plaintiff and her ex son-in-law said that the "shooting" or "squirting" of the soapy water happened unexpectedly and in the wink of an eye and that there was nothing that she could do. Her ex son-in-law, however, successfully negotiated the same path, even when wet when he picked the plaintiff up. The plaintiff is not a petite woman and she had alerted herself and her ex son-in-law of the potential danger when approaching the scene. Apart from walking on the drier or unwashed portion of the stoep, it appears from the evidence of the ex son-in-law, that this was a rather narrow portion or of a narrower width than estimated by the plaintiff. She gave no evidence that she warned the cleaner of her presence or intentions, or that she held onto the burglar bars to her immediate right or even that she had asked her ex son-in-law for the assistance or to lend a steadying hand. Perhaps she thought it was not necessary but, in my view, to only veer to the right-hand side without breaking stride after having identified a potential danger, carries with it a measure of negligence, albeit not much.

- 7.3 Deciding on percentages of apportionment or determining the extent of deviation from what one would have expected a person in the situation of the plaintiff to have done, is never an easy task. See for example *South British Insurance Company Ltd v Smit* 1962 (3) SA 826 (A) and *Thoroughbred Breeders' Association of SA v Price Waterhouse* 2001 (4) SA 551 (SCA).
- 7.4 In my view, I find the plaintiff to have been 20% contributory negligent, which means that the defendant is liable for 80% of whatever damages the plaintiff may prove.

[8] Costs

The issues of merits have not only procedurally been separated from the issue of quantum, but are also factually separate. I therefore find it appropriate in the circumstances of this case, where there is a clear case of damages having been suffered which needs to be determined separately, that a costs order should be made in respect of this portion of the trial. I also find, in the exercise of my discretion, that costs should follow the event.

[9] Order

1. It is declared that the defendant is liable for 80% of whatever damages the plaintiff may prove in respect of the incident reflected in the particulars of claim which occurred on 29 May 2015 at the supply chain department at the Kgosi Mampuru Correctional Services facility in Pretoria.
2. The defendant is ordered to pay the plaintiff's costs in respect of the merits portion of the trial, including the costs of 9 November 2021


N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 3 and 7 February 2022

Judgment delivered: 11 February 2022

APPEARANCES:

For the Plaintiff:

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