IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

CASENO: 33737/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 2/03/2018

SIGNATURE: .....

2/3/18

In the matter between:

LOUISE KOEN PLAINTIFF

and

PRETORIA CENTRAL INVESTMENTS

(PTY) LTD t/a PRETORIA PARKADE DEFENDANT

JUDGMENT

CHESIWE AJ:

[1] This a personal injury action instituted by the plaintiff against the defendant for an injury she sustained on the 19 June 2012 at the premises of the defendant.

[2] At the request of the parties and in terms of Rule 33(4) of the Uniform Rules of Court, that the issue of liability be determined separately from the quantum of damages, which was postponed *sine die*. Therefore the court is called upon to determine liability.

[3] The parties adduced evidence, the plaintiff testified and Mr Heyman testified on behalf of the plaintiff. The defendant called one witness, Mr De Watt.

[4] The plaintiff said on 19 June 2012 she entered the Pretoria Parkade which is a parking building with some shops and the parking area belongs to the defendant. It was early winter's morning and the parking area was dark because the Sanlam Building did not have electricity for the past two days. Inside the building by the passage that had stairs there was a small light. She could not turn left as the steel roll door was closed. She turned right at the stairs. As she was walking towards the right side of the stairs she fell into a hole with her left foot. She had immediate pain on her left foot.

[5] A Mr Heyman came to her assistance and she immediately took pictures of the hole, as Mr Heyman assisted with his phone to torch the area in order for

her to take a picture of the hole. The pictures of the hole are depicted in photos 8.1 and 8.2 of the trial bundle.

[6] The plaintiff indicated that when she took the photos she saw a cone in the hole and warning tape inside the hole.

[7] After the incident and being discharge from the hospital, the plaintiff took new photos of the hole. This time the hole was covered with a grid. This is depicted in photos 7.1 and 7.2 of the trial bundle.

[8] Under cross-examination by Counsel for defendant, when questioned about the Disclaimer Notice at the entrance of the building she explained that she has been parking in Pretoria Parkade for more than five years and do not recall seeing a Disclaimer Notice at the entrance of the building. The plaintiff mentioned that she did not read the back of the parking ticket nor did she sign any agreement with the defendant.

[9] Mr Luther Heyman testified that on the 19 June 2012, he was at the Bull's Coffee shop, when he heard someone screamed. He went to see what was happening as he has been the Assistant Manager at Pretoria Parkade for 17

years. He saw the plaintiff next to this drainage hole. The plaintiff told him she stepped in the hole. He saw the drainage hole which had a cone inside. The hole was about 30cm X 30cm. There was space around the cone in the hole. However he remembers that there was a cone with a stick coming out of the hole.

[10] Mr Heyman confirmed that not enough was done to cordon off the hole. He said he knew the building very well and was not aware of the open hole. He explained that about 10 minutes before the incident he passed the hole, but did not notice it.

[11] Mr Heyman confirmed that the electricity was off. There was a little bit of natural light as well as some light from the side of Pretoria Parkade. Mr Heyman further indicated that there was a contractor in the building who has been there for quiet sometime putting-in new tiles on the side of the Pretoria Parkade. That was the plaintiff's case.

ABSOLUTION FROM THE INSTANCE

[12] Counsel for the defendant on instructions of his client made an application for absolution from the instance at the close of the plaintiff's case.

[13] Counsel for the defendant submitted that the plaintiff was aware of the risk; plaintiff indemnified the defendant by entering the premises at own risk and that there was no negligence on the part of the defendant. Counsel made reference to the case of Naidoo v Birchwood Hotel 2012(6) SCA at 170 and Deacon v Planet Fitness 2016 SCA 236. Counsel submitted that the Court cannot hold parties to a bargain if there is no gross negligence, and that the evidence of the plaintiff in insufficient for the mere fact that the plaintiff and her witness contradicted each other.

[14] Adv Venter, Counsel for plaintiff opposed the application. He submitted that the defendant has a higher duty that rests upon an owner of a property that must take reasonable precaution to protect or prevent any harm to members of the public entering the building. He submitted that even though the defendant's lights were on, the area where the hazard/harm was, there was no visibility. And that the issue of the sub-contractor was a none-starter. He requested the application be dismissed with costs.

[15] The tests 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 to such reasonable such

evidence. (See Claude Neon Lights (SA) Ltd v Daniel 1976(4) SA 403(A) at 409G-H.

[16] The applicable principle in an absolution from the instance has been enunciated in the matter of Gascoyne v Paul & Hunter 1917 TPD 171 at 173, the Court said:

"At the close of the case of the plaintiff, therefore the question which arises for the consideration of the Court is evidence upon which a reasonable man might find for the plaintiff? The question for the Court would be: 'Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff.'"

[17] The same principle was stated in Oosthyzen v Standard General Versekenringsmaatskappy BPK 1981(A) at 1035H – 36A.

"If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution."

[18] Therefore the plaintiff has to make out a *prima facie* case that there is evidence relating to all the elements of the claim, to survive absolution, because without evidence no court could find in favour of the plaintiff (see

Marine and Trade Insurance Co Ltd v Van der Schyff 1972(1) SA 26 (A) at 37G-38A.)

[19] At this stage I need not concern myself with the credibility or otherwise the evidence of the plaintiff and/or witnesses.

[20] The plaintiff bears the *onus* to prove that she has suffered damages. Once the plaintiff has adduced evidence which constitutes a *prima facie* proof of damages sustained, then the plaintiff succeeds on her evidence.

[21] I am of the view that the plaintiff has proven that there is *prima facie* evidence adduced by the plaintiff.

[22] I therefore dismissed the application for absolution with no order as to costs.

DEFENDANT'S EVIDENCE

[23] The defendant called Mr De Watt to testify. He is the Manager at Pretoria Parkade. He was told by Mr Heyman about the plaintiff's incident. He went to the area where the drain hole was to check if the contractor used the items

that he requested to cordon off the hole. He said the sub-contractor had requested him the day before to buy six cones, broomsticks and chevron tapes, which he bought and gave to the sub-contractor. When he got the area were the hole was he saw in the hole a cone with the broomstick sticking out of the cone. He confirmed that the electricity on the side of Sanlam Building was off but was on at the side of the defendant.

[24] Under-cross examination he mentioned that the subcontractor was working on the site and had to ensure that the area is cordoned off. He did not check the night before whether the subcontractor marked off the area properly, as he had no duty to supervise the sub-contractor.

[25] Mr De Watt stated that he cannot refute the evidence of the plaintiff, as he was not there at the time the incident occurred. Nor can he dispute it if the plaintiff testified that the cone was not clearly visible when she stepped into the hole.

[26] Counsel for the plaintiff in closing argument submitted that the witness for the defendant was not present when the incident occurred. Counsel submitted that the defendant had a legal duty to ensure public safety for the fact that there was tiling by a subcontractor. He said that the defendant on his own

version added to the evidence of the plaintiff that the roll gate was closed; there was no other light except the natural light. Counsel said plaintiff's witness; Mr Heyman was an independent witness and had no reason to be untruthful or dishonest with the court, therefore the Court is to accept the evidence of the plaintiff and reject the evidence of the defendant.

[27] Counsel for defendant argued and submitted that the plaintiff has not proven that the defendant was negligent. The plaintiff did not plead on the issue of the disclaimer notice; Counsel submitted that the issue on disclaimer notices has not yet been settled by the law. He said a person by *quasi-mutual* consent, knowingly sees a notice but do not bother to read it as in this instance the plaintiff failed to read the parking ticket. He submitted that the plaintiff by walking into a dark building also took the risk and failed to take reasonable steps of carefulness. Counsel submitted that the plaintiff also be held to have contributed towards the negligence, that as a police official the plaintiff should have made a plan either by having a torch or turning back to use another entrance to the building. He submitted that Mr Heymans evidence's corroborated the evidence of the defendant that there was sufficient light and thus contradicted the plaintiff's version.

THE SUBCONTRACTOR

[28] The defendant relied on the evidence and presence of subcontractor as a defence. The *onus* is on the defendant to rely on the subcontractor and to prove the existence of a contractual relationship with the contractor.

[29] Generally a principle is not liable for the wrong of an independent contractor or its employees except where there was at fault. (**Charta Props 16 (Pty) and Another v Silberman 2009(1) SA 265 (SCA) para 28).**

[30] However in order to succeed, the defendant has to establish the existence of a valid contract between the defendant and the independent contractor. In this instance the defendant was unable to prove the existence of a contract. Counsel for the plaintiff alleged that contract had expired nor is the contract before Court. Therefore the Court is to disregard the defence of or existence of a contract. Accordingly the Court would therefore disregard the defence of the defendant with regard to the issue of a subcontractor. The defendant therefore remains liable for claims arising out any negligence of the subcontractor.

DELICTUAL LIABILITY

[31] The issue remains whether the defendant was negligent by not taking or placing the necessary precaution to prevent any member of the public from suffering injuries. The first element to be proven in a delictual claim is of course wrongfulness. The requirements being harm sustained by the plaintiff due to the conduct on the part of the defendant which was wrongful; a causal connection between the conduct of the defendant and the plaintiff's harm; fault or blameworthiness on the part of the defendant.

[32] Wrongfulness have to be adjudicated in the light of defendant failed to warn clients that there is an open drain hole in the building and that the electricity was off on the side of Pretoria Parkade where the hole was. The defendant failed to make the hole properly visible by not putting up a mobile light or torch, or a visible notice away from the hole, or a reflecting warning notice.

[33] The Court is conscious of the fact that negligence and wrongfulness are sometimes intertwined, though it can be regarded as two separate claims. Although this is so, it is thus necessary to recognise the conceptual difference between wrongfulness and negligence.

[34] The SCA in a recent decision of Minister of Safety and Security v Van Duiwenbolsen 2002(6) SA 431(SCA) 2002 3 All SA 741; [2002] 2ASCA 79 para 12 it was said:

"Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful, where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but not so in the case of 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."

[35] For purposes of establishing the existence or otherwise of negligence the court in Kruger v Coetzee 1966 (2) SA 428 (A) 430 E-G the following was articulated:

"for purposes of liability culpa arises if:

(a) A diligens paterfamilias in the position of the defendant;

(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;

(ii) Would take reasonable steps to guard against such occurrence;

(b) The defendant failed to take such steps."

[36] If all the three parts of this test receive an affirmative answer, then the defendant has failed to measure up to the standard of a reasonable person and will be judge negligently. It follows that the plaintiff's fall and subsequent injury was caused solely by the negligence of the defendant.

[37] Counsel for the plaintiff submitted, correctly so, that the defendant had a higher legal duty, for the mere fact that there was tiling being done by the subcontractor in the period the incident took place, this truly places a higher responsibility on the defendant. The defendant is fully aware that it is running a parking business and the public will enter and exit the building on daily basis. It is definitely expected that a reasonable business entity would take the necessary and reasonable precautions to ensure safety of the public. Notwithstanding the fact that the specific area were the hole was located was dark due to the absence of electricity in the Sanlam Building. This places even more of a higher duty on the defendant. It is for this reason that the defendant had to take extra precautions to avoid any harm to any person or members of the public. The defendant had a duty to regulate, minimise or eliminate any risks that can cause injury to any person, and not only the plaintiff.

[38] In Ngubane v South African Transport Services 1991 (1) SA 756 at 776 G-I, the court said: "Once it is established that a reasonable man would foresee the possibility of harm the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances."

[39] It would therefore be expected of the defendant to put up proper measures in place on the specific danger or around it. These extra precautions would ensure that any person entering the Parkade would be able to see the immediate danger or risk before him/her. The witness for the plaintiff, Mr Heyman testified that a couple of minutes before the incident, he passed the hole but did not see it or did not notice it. One can therefore conclude that even the employee of the defendant in that darkness was unable to see the immediate danger.

[40] The plaintiff came forth as an honest witness, who is in the employment of the SAPS for 27 years and had no reason to mislead this court. The plaintiff evidence was quite simple that she has been parking there for five years prior to the incident. She was truthful in the sense she did not see the hole. And that the cone inside the hole had space around it as a result it was possible for a person to step in the hole. Therefore the plaintiff has on a balance of

probabilities established and proven that the defendant was solely negligent to the harm caused by the defendant's conduct.

[41] I accordingly in my view the plaintiff has established negligence on the part of the defendant.

DISCLAIMER NOTICE

[42] Counsel for the plaintiff in oral argument and Heads of Argument submitted that disclaimer notices are bad in law as they are contrary to public policy as well as being contrary to the Consumer Protection Act 68 of 2008. He argued that the defendant cannot run a business for gain to invite the public to park but not prepared to accept responsibility. He quoted the matter of **Naidoo v Birchwood Hotel 2012 (6) SA 170 (SGH)**, which confirms the aforesaid principle. He submitted that these notices also offend the Constitution.

[43] The defendant relies on the disclaimer notice, it contends that the notices are displayed at the entrance of the Parkade and that it is a visible big board which 1m x 1m above the entrance and cannot be missed by any person entering the building. Counsel for defendant submitted that the disclaimer

notices are clear and unambiguous, and are binding for both parties. The relevant wording being quoted as follows:

" ..... Pretoria Parkade, Pretoria Central Investments (Pty) Ltd... will accept no liability for loss of or any damage to any vehicle .... Or injury or death caused to any person in the Parkade, howsoever caused and whether or not caused by the negligence of Pretoria Parkade's proprietor or its management or their employees. RIGHT OF ADMISSION RESERVED."

[44] Counsel for the defendant contends further that the parking ticket that is received by all the people parking who enters the building, at the back of that ticket the same wording on the notice board also appears on the parking ticket. He submitted that for the fact that the disclaimer notices are visibly displayed on the entrance of the building became part of the contract between the parties. He therefore concludes that it is clear from the evidence that the plaintiff saw the disclaimer notice on many occasions, but proceeded to accept the risk by using the building.

[45] It is settled law that a party wishing to contract out of liability must do so in clear and unequivocal terms which are clearly visible. In First National Bank of SA Ltd V Roseblum and Another 2001 (4) SA 189 (SCA) [2001] 4 ALL SAA 355 [para 6], Marais JA said: "In matters of contract the parties are taken to have

intended their legal rights and obligations to be governed by the common-law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common-law under a contract of the kind which the parties intended to conclude, it is for that party to ensure that the extent to which he/she or it is to be absolved is plainly spelt."

[46] In Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999 (1) SA 982 (SCA) ([1999] 1 ALL SA 411) it was expressed as follows: "If the language of a disclaimer or exemption clause is such that is exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens.* The courts have interpreted any exemption clause contra *proferens.*"

That is to say if there is ambiguity, the language must be interpreted against *proferens (*see Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 (2) SA 794 9A) *at 804C.* But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible, it must not be "fanciful" or "remote."

[47] The plaintiff in her testimony indicated that she did not read the back of the ticket, nor did the defendant make her aware of the notices around the building or on the ticket itself. She said she has not signed on the parking

ticket nor signed any contract with the defendant, she explained in her testimony that had she signed a contract she would have taken responsibility for her injuries. She denied that by paying for the parking ticket it meant she had a contract with the defendant. She further indicated that she has not seen the disclaimer notices for the period she has used the Pretoria Parkade. She saw the disclaimer notices the first time when she returned from sick leave.

[48] The Legislature has created a statutory framework in adopting the Consumer Protection Act 68 of 2008 (CPA) to deal with the rights and obligation of suppliers and consumers to ensure a speedy, inexpensive and fair procedure. The Constitutional Court has repeatedly held that where legislation has been enacted to give effect to Constitutional Rights, a litigant should rely on that legislation to give effect to the rights or else challenge that legislation as being inconstant with the Constitution. (See **Mazibuko & Others v City of Johannesburg 2010 (4) SA 1 (CC) at [para 73]**

[49] In this instance the plaintiff relied on section 4(4)(a) which gives authority to the *contra proferentem* rule of interpretation that any contract must be interpreted to the benefit of the consumer. And section 44(3)(a) which deals with clauses excluding liability of bodily injury or death caused negligently, and provides that a term of a consumer agreement is presumed to be unfair if

it has the purpose or effect of excluding or limiting liability of the supplier for death or injury caused to the consumer through the act of omission of that supplier.

[50] The Preamble of CPA confirms the recognition of the fact that it is desirable to promote an economic environment that supports and strengthen a culture of consumer rights and responsibility and therefore is it necessary to develop and employ innovative means to: Protect the interest of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; To give effect to internationally recognised customer rights; Promote and protect the economic interest of consumers; Protect consumers from hazards to their well-being and safety (my emphasis).

[51] I agree with the viewpoint expressed by Victor J in **Afriforum v Minister of Trade and Industry 2013 (4) SA 63 GNP [para 11 – 17]**: "that an extensive reach of consumer protection is embedded in the CPA itself for purpose of protection of consumers, the marketplace should be fair, accessible, efficient, sustainable and responsive for the benefit of the consumer."

[52] Section 61 (1) of CPA provides for strict liability as a consequence of inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailers, in this instance the negligence of the defendant as a service provider for parking, according to the plaintiff the warning instructions were inadequate.

[53] Thus aligning myself with the provisions of the CPA and the matter of **Bafana Finance Mabopane v Makwakwa and Another 2006 (4) SA 581 (SCA)** ([2006] 4 ALL SA 1), that a clause which has the tendency too or resulting in depriving a party of the right to approach the courts for redress was inimical to public policy. The same sentiment was expressed by the Constitutional Court that public policy imports the notion of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust and unfair. (see **Barkhuizen v Napier 2007 (5) SA 323 (CC) (2007 (&) BCLR 691; [2007] ZACC 5)** .

[54] Accordingly disclaimer notices that a bad in law and not being able to be enforce or allow an injured person to approach the courts for redress are bad in law and can therefore not pass the constitutional muster.

[55] In my view and under these circumstances to enforce any exemption clause as it appears on the disclaimer notice would be unfair and unjust.

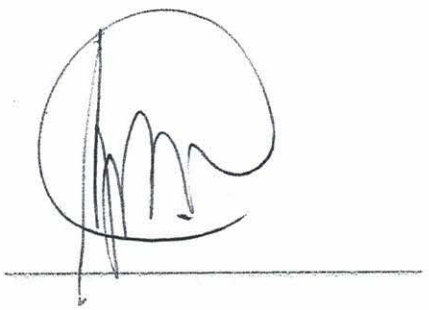
[56] I therefore conclude that the defendant as the owner of the premises, owed a larger duty to the plaintiff and is solely negligent for the harm suffered by the plaintiff. Further that the plaintiff has discharged her onus of proving her claim against the defendant and that neither the disclaimer notices, nor the exemption clauses are good defences to the defendant's claim.

[57] In the result I make the following order.

1. The plaintiff succeeds with its action against the defendant and is entitled to 100% of its proven and/or agreed damages.

2. That quantum is separated in terms of Rule 33(4) and postponed *sine die*

3. The defendant is to pay the cost of the action, which cost includes the cost of 5 and 6 February 2018.



S. CHESIWE JA

Appearances:

For Plaintiff:	Adv. PA Venter
Instructed by:	Van ZYL LE Roux INC.
	Pretoria
For Defendant:	Adv. SD Maritz
Instructed by:	AM Ellis Attorneys