REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **15279/2015**

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

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In the matter between:

CHARMAINE VERONICA MULLER **PLAINTIFF**

and

JERMAINE LAWRENCE **DEFENDANT**

J U D G M E N T

MALI J

[1] The plaintiff is 56 years old and described herself as an adult female former machine operator residing at No 11 Nahoon Road Brackendowns, Gauteng. She sues the defendant for damages for the amount of R750 000.00. The claim for damages arises out of the injuries sustained by her because of the alleged defendant's breach of the legal duty to care or the defendant's causal negligence.

[2] The parties have agreed to a separation of the merits and quantum and an order had been made to such an effect. The quantum is postponed sine die. The matter proceeds on merits with this court being tasked to make a determination thereon.

[3] What is common cause between the parties is that the plaintiff's son and the defendant were engaged to be married and stayed together. Out of their relationship a male child was born, the plaintiff being the grandmother. The engagement was later broken off and the relationship terminated approximately on April 2012.

[4] It is also common cause that the plaintiff, the defendant and the plaintiff's son were all co-owners of the immovable property, a townhouse where the plaintiff sustained the injuries.

[5] The plaintiff's case is that the defendant, as the co-owner of and in control of the property and as such, had a duty to maintain the premises and ensure the safety of visitors. She was supposed to take

all reasonable steps to avoid incidents which could cause visitors, in particular the plaintiff, any harm.

[6] With regards to the above, the defendant is alleged to have failed to comply with the duty to maintain the premises and as a result thereof which the incident occurred, the plaintiff was injured and she suffered damages.

LAW

[7] In **Kruger v Coetzee** [1] the test for negligence requires of a diligent person, in the position of the defendant, to have foreseen the risk of harm to another and to have acted in order to avoid such harm. Furthermore in **Minister of Safety and Security v Carmichelle**[2] Harms JA states as follows:

"*Negligence*

[45] The test for determining negligence is that enunciated in Kruger v Coetzee:41 (41)

' For the purposes of liability culpa arises if-

(a) a diligens paterfamilias in the position of the defendant-

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[1] 1966 (2) SA 428 (A)
[2] 2004 (3) SA p327 paragraph 45

(i) would foresee the reasonable possibility of his conduct injuring another ..... and causing him..... loss; and

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

(b) the defendant failed to take such steps.'

BUT

' it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for this resolving this issue.

It is probably so that there can be no universally applicable formula which will prove to be appropriate in very case.' 42 (2)

And

'it has been recognised that, while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed foreseeable'.

Further

' In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called " the insidious subconscious influence of ex post facto knowlege" (in S v Mini 1963(3) SA 188 (A) at 196E-F). Negligence is not established by showing merely that the occurence happened (unless the case is one where res ipsa loquitur), or by showing after it happened how it could have been prevented. The diligens paterfamilias does not have " prophetic foresight". (S v Burger (supra at 879 D).) In Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) 1961 AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414G- H (in all ER):

"After the event , even a fool is wise. But it is not hindsight of a fool, it is the foresight of the reasonable man which alone can determine responsibility." 44 (44)".

[8] I now turn to inquire whether a reasonable person in the position of the defendant would have foreseen that a tile could have caused harm.

EVIDENCE

[9] The witnesses were the parties themselves and the plaintiff's son, Mr Terrence Muller.

[10] The plaintiff testified that on 22 March 2013, that being a Friday, she visited the premises and took take care of her grandson whilst the defendant was at work. She stayed at the premises over the weekend. The Sunday morning, 24 March 2013, she walked to the outside through the lounge using the sliding door with steps leading down. On her return she stepped on the top step which is level with the inside floor, when a loose tile moved causing her to slip. She fell and got badly injured in the ribs as a result of the loose tile. When the incident took place only the plaintiff's grandson was present and he assisted her thereafter. The defendant was not at the premises.

[11] Under cross examination the plaintiff stated that the tile appeared intact, she would not have stepped on a tile if it had been loose. She admitted that she had used the same steps when she initially went outside. She stated that the accident occurred when she was going up the steps. She further stated that she seldom used the sliding door leading to the steps and or loose tiles. On re-examination by her Counsel she stated that she only saw the loose tile for the first time when she fell.

[12] The plaintiff could not explain the reason her clinical notes, which were discovered by her; stated that she fell on the stairs into a water fountain. She did not dispute that it was wet outside and that she could have fallen because the tiles were slippery as a result of her having been outside.

[13] She further stated that approximately two weeks subsequent to the incident she visited her grandson. During this visit a friend of her grandson slipped and fell on the loose tiles. Her grandson picked up a few loose tiles and complained to his mother about the dangerous situation. The defendant disputed that there was any incident involving her son after the occurrence with the plaintiff.

[14] The plaintiff testified that her son went to the premises to take photographs in 2015 which were tendered as evidence.

[15] The plaintiff further testified that she had no role to play with regard to the property albeit she was a co-owner. Subsequent to the separation of the defendant with her son neither the plaintiff nor her son had any role in the control and the administration of the property. The plaintiff's co-ownership of the property was as a result of the plaintiff assisting the defendant and her son to obtain a bond over the property. They would otherwise not have been able to qualify for a mortgage bond on their joint salaries. The plaintiff never occupied the property except for visiting her grandson. The property was sold in April 2015 and the proceeds were received by the defendant.

[16] The plaintiff further stated that she understood her son and the defendant's terms of separation to include that the defendant was responsible for almost everything pertaining to the premises. These included the bond payment, insurance and maintenance of the

property, as a result she would have exclusive control of the property and would be entitled to any profit made on the sale of the property.

[17] However under cross examination she did not proffer any reasons why, on her injury questionnaire, she said she fell down the stairs of her son's house. Furthermore, under cross examination she submitted that when she signed the documents of the property she was under the impression that she was signing surety documents. She only knew about her co-ownership of the property when the house was sold. The plaintiff's version is an attempt to distance herself from the shared responsibility of taking care of the premises.

[18] Mr Terrence Muller, the plaintiff's son collaborated his mother's evidence. He stated that on the day he took photographs he removed the loose tile from its position, where it was neatly placed, in order to take photographs. He insisted on the defendant's role to take care of the maintenance of the house because of the oral agreement amongst them.

[19] The defendant's testimony is that she was not aware of any loose tile. The steps used by the plaintiff were used on regular basis without any incident and that there has not been other incidents in the house. The said averment was never disputed by the plaintiff. She further stated that there was no agreement of maintenance and sole responsibility for the property amongst her, the plaintiff and the latter's son.

[20] The defendant's denial that there was such an oral agreement is supported by the undertaking given by all three owners on 26 May 2015, almost three years post incident, to the purchaser. The undertaking made by the three of them was for the repair of certain items that the new owner identified. Amongst the said items there was no mention of any tiles.

[21] The defendant further testified that the plaintiff, as the co-owner of the property in that capacity, was under similar obligations to that of the defendant. Furthermore the plaintiff was familiar with the property as she was a regular visitor and should have been aware of any faults. The plaintiff therefore should have avoided the incident and she acted negligently for not avoiding it. Be that as it may as stated above that the plaintiff on her own version fell on a tile which showed no signs of being loose.

[22] Under cross examination the defendant stated that the proceeds of the house approximately between R150 000 and R200 000 were ceded to her. This is because the proceeds were in exchange for the appliances her former fiancée took. Furthermore the said arrangement was made in order not to disrupt and upset their own son. She also stated that the house insurance was always under her name even before their separation and it only covered the movables. The plaintiff could not counter the defendant's evidence.

[23] The defendant further stated that she took control and responsibility of the maintenance of property without consulting the other co-owners. There is nothing much to make out of the defendant's alleged responsibilities towards the maintenance of the property. This is not pleaded by the plaintiff in her particulars of claim.

ASSESSMENT OF THE EVIDENCE

[24] The plaintiff testified in a coherent and lucid manner, however her failure to explain the reason she stated that she fell on a water fountain and her late explanation of her surety status in the premises puts her credibility in doubt. The gravamen of this matter is the injury caused by the loose tile which she herself testified appeared intact.

[25] The above account by the plaintiff is in line with the defendant's version; which was never disputed by the plaintiff. The defendant's version is that she was not aware that there was a loose tile. It is rather perplexing for the plaintiff to persist on the defendant's alleged liability. I do not want to make any speculation about her claim which appears to have no basis at all.

[26] Mr Terrence Muller's evidence particularly in respect of the photographs taken 30 months later, with him admitting to removing the tiles is of no assistance at all. His evidence in respect of the co-ownership of the property and the defendant's sole responsibility for the maintenance of the property has been countered above.

[27] The defendant was coherent, logical composed and credible. When her credibility was questioned because of the circumstances surrounding her taking the insurance cover, she was honest and did not try to make up things. For example she admitted that although she believed that the three of them had the same responsibilities towards the maintenance of the property; there were times she would have acted on her own accord without consulting the other co-owners.

[28] The most important concession made by the plaintiff is that the tile appeared intact and that she would not have stepped in a loose tile. It is reasonable probable true that the plaintiff slipped because it was wet outside as it was raining the night before. I sympathise with the plaintiff, no one deserves to be injured in whatsoever manner. The evidence tendered on behalf of the plaintiff did not prove that the defendant was aware of the loose tile. Therefore the legal requirement of a reasonable man and foreseeability of harm should not be expected from the defendant. She could not have been expected to avoid or repair anything that was not in her foresight.

[29] Furthermore on evidence tendered by the defendant; that the sliding door was used regularly as it was the middle door, in the event there was something wrong she would have seen or foreseen it. The defendant in her testimony also stated that she used to sit on the same steps when she was smoking. The same door was used by her young child and the plaintiff's son when he came to visit their son.

[30] Taking into account the above, I am of the view that the defendant would not have exposed herself and her child to the danger by ignoring the loose tile if there had been one. The undisputed fact that the defendant sat on the steps on regular basis, should be seen as an opportunity for her to notice any kind of harm particularly a loose tile.

[31] On the evidence tendered she would not have foreseen any harm because there was none even at a general level. Regarding the above even though the law leans on the general manner of the occurrence of harm, the law still requires that it must indeed be reasonably foreseeable. This requirement is lacking in the present matter.

[32] On the facts from the evidence tendered I find that there was no loose tile. Therefore the defendant had no duty to take reasonable steps to forbid the incident which led to the plaintiff's injury. The plaintiff has not succeeded to prove the negligence of the defendant. The plaintiff's claim must fail.

[33] In the result I make the following order;

33.1 The plaintiff's claim is dismissed with costs.

N.P. MALI

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:	Adv. J van DER MERWE
Instructed by:	Markus Moritz Haasbroek Attorneys
Counsel for the Defendant:	Adv. W W Geyser
Instructed by:	Savage Jooste & Adams Inc.
Date of hearing :	26 April 2016
Date of Judgment:	24 August 2016