IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN

Case Number: 1484/2019

In the matter between:

STEPHEN CHINEDU EZE **Plaintiff**

and

ADDERLEY BODY CORPORATE **First Defendant**

PERMANENT TRUST PROPERTY MANAGEMENT (PTY) LTD **Second Defendant**

JUDGMENT DELIVERED ELECTRONICALLY: MONDAY, 22 JANUARY 2024

NZIWENI, J

Introduction

[1] The plaintiff brought this action against the defendants, alleging that they acted negligently. In so doing, the plaintiff instituted this action to recover damages for personal injury he allegedly sustained on 10 March 2016, when a piece of rotten wood allegedly fell off from the ceiling that overhangs the sidewalk located along the premises known as the Adderley Building ("the Adderley building"), in Adderley Street. He sustained an injury as a result of the wood.

[2] The overhang is on the front side of the Adderley building, that faces the public pavement, and hangs over the pavement. The first defendant is responsible for the management and maintenance of the property in question.

[3] Though the plaintiff did not see the objects falling from the ceiling, it is the case of the plaintiff that a piece of plank fell from the ceiling of the Adderley building, overhanging the pavement.

[4] In this delictual claim the plaintiff seeks compensation for his alleged injury from the Adderley Body Corporate [first defendant] and Permanent Trust Property Management (Pty) Ltd [second defendant] ("the defendants"). According to the plaintiff, the first defendant was responsible for the management and maintenance of the Adderley building. And the second defendant as an agent of the first defendant, exercised the management and maintenance of the Adderley building.

[5] The plaintiff's action for damages for personal injuries is based on the alleged defendants' negligence. During the opening and closing argument it was strenuously submitted that the plaintiff's claim is predicated, *inter alia,* on the doctrine of *res ipsa loquitur*.

[6] Further, it is undisputed that the ceiling that overhangs the pavement in Adderley Street, near the Adderley building is managed by the first defendant. Parties agreed that the quantum and merits should be separated, as a result, at the commencement of the trial and by agreement between the parties, this Court ordered

a separation of issues in terms of rule 33(4) of the Uniform Rules of Court. Consequently, this Court is only seized with the determination of liability.

[7] Pursuant to this Court reserving judgment, the plaintiff sent an email that amongst others stated the following:

> "Find attached hereto our Filing Notice for Amended pages, and Amended Pages of Plaintiff's Particulars of Claim attached, which has been duly served on the Defendant".

[8] Given the fact that the handing down of the judgment was the only outstanding issue, I became confused by the further step taken by the plaintiff. I then asked the counsels to come to my chambers to ascertain what was going on. I was then informed by both counsels that there was no objection to the amendment and as such the amendment was effected.

[9] *Inter alia,* the amended particulars of claim alleges that:

> ". . . **Duty of care**
>
> 6 At all material times the First and/or the second Defendants owed the public utilising the premises and the Plaintiff in particular, a duty of care which duty of care entailed that:
>
> 6.1 The premises be kept in a clean and safe condition for use by the public and the plaintiff in particular;
>
> 2. The premises did not constitute a source of danger when used by the public and the plaintiff in particular;

3. The premises were regularly inspected, properly and regularly maintained, and promptly repaired or otherwise appropriately addressed;
4. Adequate and effective warning signs/ notifications were displayed in reasonably prominent positions to alert pedestrians and plaintiff in particular of the condition, dangers, defects or malfunctions as well as any potential safely risks associated with the premises; and
5. Members of the public, including the plaintiff, would be prevented from walking in the vicinity of the potential danger under the circumstances in which the condition of the ceiling posed any risk of harm or injury to them and that a safe and reasonable alternative route be provided.
6. Within the context of reasonability, the First and/or Second Defendant had and continues to have an obligation to regularly inspect and further appropriately and timeously address the condition of all areas of the building, in particular the ceiling of the balcony of the building which overhangs the public pavement on Adderley Street, which posed any sort of concern and/ or potential safety risk. This duty of care is reasonably owed to the members of the public, in particular the Plaintiff, who walks on the public pavement below the ceiling of the balcony of the building.

Causal negligence

8. A reasonable person in the position of the First and/or Second Defendant could or should have foreseen the reasonable possibility that failure to take reasonable steps to guard against the occurrence of the incident could cause a member of the public utilising the premises or the Plaintiff in particular, to sustain serious bodily injuries, causing such member of the public or the Plaintiff in particular, patrimonial loss. The incident was therefore caused by the sole negligence of the First and/or Second Defendant's employees, whilst acting as aforesaid, in one or more or all of the following respects, alternatively, the Second Defendant's employees, whilst acting as aforesaid failed to take one or more or all of the following steps:

1. They failed to keep the premises in a safe condition for use by the public utilising the premises and the plaintiff in particular;
2. They failed to keep the premises from constituting a source of danger when used by the public utilising the premises and the plaintiff in particular;
3. They failed to regularly inspect and properly and/or regularly maintain and repair the premises; and
4. They failed to mark the danger properly and draw the attention of the public utilising the premises and the plaintiff in particular to the danger and /or prevent them from walking in the vicinity of the source of danger..."

Evidence

[10] The plaintiff in his endevours to prove his case testified and called an employee of the first defendant to come and testify on his behalf.

[11] The evidence of the plaintiff may be summarised as follows: He is Nigerian and has been living in South Africa for 11 years. At the time of the incident, he worked as a security guard. He is currently self-employed. He has a stand where he sells jackets.

[12] According to the plaintiff, on the morning in question he was on his way to his uncle's shop. His uncle's shop is sufficiently close to the building [Adderley building], as they are adjoining properties. When he was two to three feet from his uncle's shop, two pieces of wood fell from the ceiling, and one struck him on his left shoulder, knocking him to the ground. It was a heavy (piece of) wood; in length it was almost a meter long. The thickness of the wood was 7.5 cm, and its width was 12 cm. The wood fell from the place depicted in Exhibit 'B36'. The place where the wood fell from was covered with a ceiling and the ceiling had a water damage and the wood of the ceiling was rotten and open. The ceiling that the wood fell from is the ceiling of the building.

[13] Two of his friends came to help him up and put him on a seat. One of the friends went to the defendants' property [the Adderley building] to report the incident.

[14] The plaintiff further testified that he did not see the wood falling. He only felt the wood on his shoulder. He took notice of the wood after it hit him on his shoulder. He

did not even see where it fell from. He is however adamant that it fell from the ceiling of the building.

[15] Mr. Warren De Bryn from the building came and took the picture of the wood that hit him and he [De Bryn] took the wood away. De Bryn told him to go to hospital and bring the report to the manager. He went to hospital, and he experienced heavy pain, but because of the wait he left and went to the pharmacy and was given pills. The next day he went to the hospital again, but he was not helped. He is still on pain killers.

[16] The people from the building did not get back to him. On 4 April 2016, he went to see a doctor and he [the doctor] gave him pain tablets and a report. During cross examination he denied that he had a stall on the sidewalk where he sold CDs at the time the incident occurred. According to him, they put CDs on a crate outside the shop to get tips. They would put the crate next to the door of the shop and not on the pavement. That is a brief synopsis of his evidence.

[17] Warren De Bryn testified that he has been employed since 2012 by the Adderley Body Cooperate [first defendant] as a building supervisor. The incident involving the plaintiff was reported to him on the day it happened. He indicated that on the day in question he was called by a concierge of the building and he [the concierge] informed him about an incident involving the plaintiff. He immediately went outside. Outside, he observed two wooden planks on the ground and the plaintiff on the chair and presenting himself as though he was in pain. He thinks the planks came from the ceiling as they had bird droppings and birds lived in that roof.

[18] He noticed an opening in the ceiling, between two balconies. The opening or hole in the ceiling was due to water leaking through the balcony on to the ceiling. The area was always wet. The hole was situated where the "X" is depicted in photo 'B36' of Exhibit "A". The open section was about 300 - 400 mm wide. The hole was shaped like a square. He took the pictures of the ceiling at the time and sent them to the manager with the report and the planks. It was his testimony that the photographs introduced at this trial did not depict the hole or its condition at the critical time.

[19] He compiled a report on 10 March 2016, relating to the incident. He made the report to the building manager Tracy Lee Paulsen. In 2018, renovations were done under the balcony. The pictures depicted from page 1-3 in Exhibit "B" were taken in 2018. Then pictures depicted in picture 4-5 of Exhibit "B" were taken in 2014.

[20] His reason for taking the pictures in 2014 was because they had terracotta balcony, and the moulding of the columns was brittle and exposed cracks. He then sent the pictures to the building manager. The main purpose he took the photos in 2014, was to report the problems on the columns and balcony and not the hole on the ceiling. He cannot recall if he wrote a report regarding the hole in the ceiling.
He thinks the ceiling in 2016, when the incident happened looked as depicted in Exhibit "B4". The repairs were made to the ceiling in 2018.

[21] They have a practise of doing inspections once a month and when they see something wrong, they take pictures and then send them to the building manager. They have times to do the inspections. If they see something wrong, they would inform the manager about the location of the problems and what is wrong in the picture.

[22] He used to see the Plaintiff before the incident. He knew him as a regular visitor to the area. The plaintiff had his own business in the area selling CDs on the pavement, in front of the Adderley building.

[23] Following the evidence led by the plaintiff the defendants closed their case without presenting evidence.

Evaluation

[24] The question at issue in this trial is whether the plaintiff has discharged the burden of proving that the defendants were negligent at all as far as their overhanging building ceiling is concerned. Put differently, whether the incident in question occurred as a result of the negligence of the defendants.

[25] Accordingly, the plaintiff in this case bears the burden to prove negligence on the part of the defendants. As previously mentioned, in this matter, the defendants elected not to call any witnesses. However, it bears mentioning that the fact that the defendants offered no witness testimony does not automatically mean that the plaintiff's evidence must be accepted. For that matter, I got the distinct impression that the defendants by doing so [not tendering evidence], actually put the plaintiff to his burden of proof and relied upon the plaintiff's failure to discharge his burden, through proving negligence on their [the defendants'] part.

Credibility and reliability of the witnesses

[26] Despite the extensive and grueling cross-examination, the plaintiff and De Bryn struck this Court as honest, credible and reliable witnesses. In as much as they were subjected to probing cross examination by the defendants' counsel, they never wavered from their positions. Despite the fact that the plaintiff did not see the place from where the plank fell from, this did not affect the reliability of his testimony. In the same vein, the fact that his [the plaintiff's] evidence is not clear as far as to whether he sold Compact Disks on the pavement next to his uncle's shop or not is not material. As such, it does not affect his credibility.

[27] Notably, De Bryn had absolutely no reason or motive to lie to this Court. Moreso, if regard is had to the fact that he is still an employee of the first defendant. Importantly, it appears that the plaintiff and the De Bryn were not acquaintances and De Bryn thus had no motive to be biased towards the plaintiff.

Condition of the ceiling

[28] It is important to note in this case that there is uncontroverted evidence that originates from the first defendant's employee that reveals that at the critical time, there was a hole in the ceiling in question. And that at the time of the incident the relevant roof was occupied by birds. Moreover, the undisputed evidence of De Bryn reveals that the hole at the place in question was always wet.

[29] It is a fact that though De Bryn did not witness the planks falling down from the ceiling, his evidence supports the version that the planks fell down from the ceiling overhang in question and that there were problems with the condition of the ceiling at the critical time.

[30] Notably, the only evidence on the state of the building was introduced by the plaintiff. Likewise, it is only the plaintiff who tendered evidence regarding the condition of the hole during the critical time.

[31] Axiomatically, the evidence presented by the plaintiff demonstrated the ceiling in question, *inter alia,* as always being wet, had a hole and was a birds' shelter. Perhaps more importantly, at no point did the defendants present evidence to show that the plaintiff's evidence in this regard was exaggerated, or that the evidence presented by the plaintiff failed to reflect the state of the ceiling at the critical time. Instead, the defendants chose not to place any form of evidence before this Court, to challenge the version of the plaintiff. As such, the defendants offered no evidence to gainsay or negate the plaintiff's version of events.

[32] In the circumstances of this case, I regard De Bryn's testimony as not only having importance in relation to the facts of this case but as assisting the Court as to the assessment of the plaintiff's reliability. In view of the uncontested version that the wood fell down from the ceiling, there is no reason why this Court should not believe the plaintiff's version in this regard.

Duty of care

[33] In general, a party who professes to have been hurt on the premises or building of another person; has to prove that the accident was caused by unsafe conditions created by the defendant or known [to the defendant] or should have been known to the defendant. This particular scenario leaves nothing to conjecture and postulates that a mere occurrence of an accident does not give rise to a presumption of negligence.

[34] In terms of the law, a defendant who is in control or managing a building or premises is expected to keep it in a reasonably safe condition. This is so to prevent the occurrence of foreseeable injuries.

[35] In this case, it is not in dispute that the defendants were in control or managing the building. Therefore, there is no question that the defendants had a duty of maintaining the building in a reasonably safe condition. And that this duty extended to the overhang on the public pavement.

[36] The defendants in the present case had a duty to make sure that the hole in the ceiling was repaired and the ceiling was reasonably cared for. Particularly, if regard is had to the fact that the ceiling overhangs a public pavement, an area that is used by the public.

Has negligence been proven?

[37] Though the plaintiff has pleaded specific averments of negligence, the plaintiff also avers that the circumstances surrounding the accident engender the inference of

negligence. According to the plaintiff, the inference of negligence is created by the application of the doctrine of *res ipsa loquitur*. In the instant case, amongst others, the plaintiff had pleaded that the defendants failed to regularly inspect and properly and/or regularly maintain and repair the premises. In essence, the plaintiff pleaded that the defendants failed to maintain the premises in a safe condition for use by the public utilising the pavement area under the overhang in question.

[38] Although the De Bryn testified about the monthly inspections that the defendants do, sight cannot be lost of the fact that he also testified that the hole in the ceiling was due to water leaking.

[39] It is however significant to keep in mind that the averments of specific acts of negligence do not deprive a plaintiff of the benefit of the doctrine of *res ipsa loquitur.* Ordinarily, as mentioned previously, the mere happening of an accident does not give rise to an inference of negligence. However, it is trite that the existence of negligence may be established through circumstantial evidence. It is also prudent to keep in mind that each case must be determined on its own circumstances.

Res ipsa loquitur

[40] Undoubtedly, *res ipsa loquitur* is applicable to cases involving falling objects. Hence, a fall of an object from a ceiling that overhangs a public pavement may sometimes well warrant an inference of negligence. The question is whether, in the context of this case, the proven facts justify an inference of negligence. The plaintiff in this matter did not present direct evidence which could explain why the planks fell

down from the ceiling. Though each case turns on its own unique facts, it is so that our law still recognises a situation that allows an inference of negligence to be drawn against the defendant from the mere happening of an accident.

[41] Obviously, the statement that the mere occurrence of an accident does not afford negligence is in total conflict of *res ipsa loquitur*. The application of *res ipsa loquitur* denotes that the plaintiff is entitled to an inference of negligence from the mere happening of an accident.

[42] In the present case, it was strenuously contended on behalf of the plaintiff that negligence on the part of the defendant can be inferred from the surrounding circumstances of the case. Thus, the surrounding circumstances of a particular accident may be very relevant in giving rise to a delictual liability against a defendant. Res *ipsa loquitur* primarily makes delictual liability seem straightforward in certain circumstances as a court may determine delictual liability based on circumstantial evidence.

[43] In LAWSA, third Edition 157, *res ipsa loquitur* is described as:

> "a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a prima facie case against him... It is invoked when the occurrence itself is the only known fact from which a conclusion of negligence can be drawn and the incident does not ordinarily occur in the absence of negligent conduct." Own emphasis. See also *Goliath v MEC For Health* 2015 (2) SA 97at 103 G-H.

[44] Schultz JA, in *Mostert v Cape Town City Council*, 2001 (1) SA 105, explained at 120B-D, that *res ipsa loquitur* is form of reasoning by inference. The learned Judge further stated that:

> "It is described in Hoffmann and Zeffert's *The South African Law of Evidence* 4th ed at 551 in this way: 'If an accident happens in a manner which is unexplained but which does not ordinarily occur unless there has been negligence, the court is entitled to infer that it was caused by negligence.'

[45] I have already found that the plank that struck the plaintiff fell down from the celling in question. While it is undeniable that, there is nothing extraordinary about a person being injured by a fruit falling down from a tree, it is equally undeniable that it is unusual for a person to be injured by an object falling down from the ceiling. Planks do not ordinarily fall from a ceiling if proper care has been taken to see that the ceiling is safe.

[46] It is obvious therefore that falling of an object from a ceiling ordinarily does not occur in the absence of someone's negligence. Put differently, in the ordinary course of thing; the presence of a hole in the ceiling and fall of rotten planks from the same hole do not occur in the absence of negligence.

[47] Needless to say, it has been shown through evidence that there are several oddities about the place from which the planks fell from. The first oddity is that a ceiling that overhangs a public pavement had a hole of the size as described in this matter. The second oddity is that according to De Bryn, an employee of the first defendant, water damage caused the hole in the ceiling. In other words, an employee of the first

defendant was aware that there was a hole in the ceiling caused by water damage. The striking feature of this case is the fact that De Bryn's testimony demonstrates that he was fully aware that there were birds that lived in the roof in question and that there was a water leak through the balcony on to the ceiling. The third oddity is that objects fell from the damaged ceiling.

[48] According to the plaintiff, the extraordinary occurrences are attributable to the defendants' conduct.

The defendants' election not to proffer an explanation.

[49] At the conclusion of the plaintiff's case, the plaintiff had adduced evidence regarding the happening of the accident and the circumstances surrounding it. Yet on the other hand, the defendants did not even attempt to adduce evidence to overcome the inference of negligence or to account that the accident was due to some other cause for which they are not responsible. Consequently, the defendant did not offer any non-negligent explanation for the occurrence of the accident. Thus, there is nothing to neutralise the inference of negligence. There is no alternative reasonable explanation for the occurrence of the accident. Thus, the plaintiff's circumstantial evidence stands unrefuted.

[50] Plainly, *res ipsa loquitur* at certain instances expects a defendant to give an explanation consistent with absence of negligence on his or her part. Therefore, it may be necessary for the defendant to account to the court why the accident is no evidence

of negligence. This is so because an accident may be explained in many ways consistent with the lack of negligence.

[51] Therefore, in the context of this case, this Court can not speculate and find that, the falling down of planks from the ceiling would ordinarily occur even in the absence of negligence.

Conclusion

[52] It is apparent from the evidence of De Bryn that the water damaged the ceiling. De Bryn's evidence further reveals that the hole was due to water leaking through the balcony on to the ceiling and that the area was always wet. He also testified that the place where the plank fell from, had birds in it.

[53] The evidence led by the plaintiff demonstrates that the ceiling in question was in a state of disrepair. The condition of the relevant ceiling at the time of the accident are more likely to produce situations where accidents similar to the instant case do occur. There is no question that the conditions of the ceiling increased the risk of an accident. The incident would not have happened if reasonable care had been taken by the defendants.

[54] The falling of the planks from a ceiling, the state of the ceiling, together with the fact that the birds were using the roof in question as a shelter; ultimately afford reasonable evidence in the absence of explanation from the defendants, that the accident arose from want of proper care. In the circumstances, it is my firm view that had the defendants wanted to dispel the inference of *res ipsa loquitur*, that imputes

negligence upon them [the defendants]; it was incumbent upon them to explain the accident.

Thus, in the context of this case, if regard is had to the proven facts of this matter, the inescapable inference is that the ceiling was not properly maintained. Hence, this Court finds that, in the ordinary course of things, the accident would not have occurred if reasonable care had been used.

[55] In this case, there is nothing to dispel the inference of negligence. As such, in this matter, it cannot be said that it is unclear why the planks fell from the ceiling. The case is obviously one wherein plaintiff is entitled to the benefit of the doctrine of *res ipsa loquitur*, which in itself establishes an inference of negligence.

There is sufficient evidential material that provides proven facts from which inference of negligence can be drawn. Effectively, there is sufficient circumstantial evidence to establish evidence of negligence on the part of the defendants. Consequently, I find that the defendants and or their employees were negligent in failing to take the requisite reasonable steps to avoid a foreseeable harm. I also find that the negligent conduct by the defendants and or their employees led to the plaintiff's injury.

[56] It is for these aforegoing reasons that I grant the following order:

a) The Defendants is liable for such damages as the plaintiff may prove to have been suffered by him, as a result of an injury sustained by him when he was struck by a falling plank on 10 March 2016, on the sidewalk located along the premises known as the Adderley Building, in Adderley Street, Capet Town, Western Cape.

b) The Defendant shall pay Plaintiff's costs of suit including services of a Counsel.

[redacted]

CN NZIWENI
Judge of the Western Cape High Court

APPEARANCES

Counsel for the Plaintiff	:	Adv. M Aggenbach
Instructed by	:	A Batchelor & Associates Inc.
		Mr E Louw
Counsel for the Defendant	:	Adv. H McLachlan
Instructed by	:	Visagie Vos Inc.
		Mr J van der Westhuizen