REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 110/97

In the matter between:

THE BODY CORPORATE OF
DUMBARTON OAKS — Appellant

and

EUNICE FAIGA — Respondent

Coram: SMALBERGER, HOEXTER, NIENABER, HARMS and STREICHER JJA

Heard: 13 NOVEMBER 1998

Delivered: 26 NOVEMBER 1998

JUDGMENT

HARMS JA/

HARMS JA:

Dumbarton Oaks is a residential block of flats in Killarney, Johannesburg. It is a sectional title development and the appellant (the first defendant in the court below) is the juristic person exercising control over the common property. There are fifty-five flats on five floors, and the sixth floor houses servants' quarters and the motors of two elevators. The building was erected during the early 1960s, and two elevators, fairly unsophisticated, were then installed. One is for passengers only and the other for goods, but the latter is used habitually by residents and others for passenger service.

During mid 1994, Mrs Faiga, (the plaintiff, now the respondent) through a close corporation, purchased a flat on the third floor. Her son occupied it temporarily. On a visit to him on 26 October 1994 to deliver a cake, she used the goods lift and on making her exit fell forward and injured herself. Within a year she sued for damages, first, from the body corporate but also, jointly and severally or in the alternative, from Allied Elevator

Company (Pty) Ltd ("Allied") as the second defendant. Allied was engaged by the body corporate to inspect, service and maintain the lifts on a regular and ongoing basis. Her case was that the body corporate, in exercising control over the common property, and Allied, who had to maintain and repair the elevators, had a duty of care towards her which was negligently breached in a number of ways:

> "6.1 they failed to maintain and/or failed to ensure that the elevator was maintained in good condition and proper working order;
>
> 6.2 they knew or should have known that by not maintaining the elevator in proper working order and good condition it posed a danger to the users thereof including the Plaintiff;
>
> 6.3 they failed to take any or adequate steps to prevent the said danger;
>
> 6.4 they knew or should have known that the said elevator was defective and/or functioned defectively;
>
> 6.5 they failed to give any or adequate warning of the presence of danger to the Plaintiff or the public at large;
>
> 6.6 they failed to ensure that the elevator was safe for passengers including the Plaintiff;
>
> 6.7 they failed to take any steps when they could and should have done so to prevent residents of whom Plaintiff was one, and/or members of the public from sustaining injuries."

4 In the event, Joubert AJ held the body corporate liable on ground 6.5. (His judgment is reported as Faiga v Body Corporate of Dumbarton Oaks and Another 1997 (2) SA 651 (W).) The other grounds were found not proven and Allied was absolved from the instance. The body corporate's application for leave to appeal was dismissed by Joubert AJ, but its petition for leave to the Chief Justice succeeded. There is no cross-appeal and Joubert AJ's findings on the other grounds of negligence are accepted by counsel on both sides.

The initial inquiry is to determine the reason for the plaintiff's fall. In the particulars of claim it is alleged that she fell due to a step which had formed unbeknown to her between the elevator and the third floor. She refused to divulge in her trial particulars whether the step was in an upward or downward direction. However, in a preceding letter to the body corporate's insurer, her attorney - who, by the way, was her brother - attached a statement by her. It was terse and to the point: she had stepped forward to get out of the

lift but tripped over a step that had been created unbeknown to her, "by the lift stopping some centimetres below the level of the third floor." That this was her version is to some extent corroborated by the fact that a son of hers, an accident assessor by profession, shortly after her fall took the trouble of taking a series of photographs showing that on various floor levels the elevator floor stopped between 0,5 and 1,5 cm below the floor level.

At the trial, however, she was adamant that she did not know why she had fallen. She had assumed, she said, that the lift was not level with the floor and that she had tripped. She could not see the floor level because she was carrying half a cake in a so-called Checkers box. Concerning the statement sent to the assurer, she did not deny that she had made it although she had some reservation about whether she would have used a metric measurement. In the end she agreed that the statement represented what she had believed had happened.

Shortly before the trial the plaintiff located an eye witness, Mrs

Martha Shiloane, a domestic servant who worked on the third floor and who lived in the servants' quarters. She alleges that she saw the plaintiff falling, she rushed to her and when she looked around to see what had caused the fall, she noticed that the lift had stopped some eight inches (20 cm) above floor level. The doors of the elevator, on her version, remained open. She also suggests that the malfunctioning lasted for a day or so until it was repaired. The court a quo (at 663H -I), relying on Mrs Shiloane's evidence, found that the elevator overshot the landing by an estimated 20 cm but that the problem rectified itself almost immediately because, on the evidence of a Mrs Sharp, the plaintiff was taken away by me paramedics in the goods lift shortly afterwards. 1 interpose to note that no malfunctioning of the lift was reported as a result of the incident, nor was it attended to by the maintenance contractor during this period.

The occurrence, Joubert AJ found (at 663J - 664A), was unexpected and remains unexplained. It was not maintenance related. The

undisputed expert evidence is that such "once-off occurrence" is highly improbable and "very, very unlikely". Indeed, Mr Fisher, the managing director of Allied had in his 25 years in the business never encountered such an incident, and the plaintiffs expert witness did not testify about ever having encountered a similar experience.

Mrs Shiloane's evidence was not uncontradicted. The said Mrs Sharp testified that she, and not Mrs Shiloane, was first on the scene, something corroborated by the plaintiff. At that stage the lift doors were closed. On her version, Mrs Shiloane did not witness the incident at all. She may have arrived at a later stage. As mentioned, Mrs Sharp's evidence that the lift operated normally after the incident, was accepted.

The court below accepted Mrs Shiloane's evidence on the basis of demeanour only (at 658B-C). No reference was made to the probabilities of her evidence in the light of the other evidence. It seems that the judge below failed to distinguish between demeanour and credibility. To decide a

case on demeanour where the evidence is interpreted from one language to another, requires a brave adjudicator. In S v Kelly 1980 (3) SA 301 (A), Diemont JA dealt with demeanour in these words (at 308B - E):

> "There can be little profit in comparing the demeanour only of one witness with that of another in seeking the truth. In any event, as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour - 'that vague and indefinable factor in estimating a witness's credibility' (per HORWITZ AJ in R v Lekaota 1947 (4) SA 258 (O) at 263) - can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour. As was stated by WESSELS JA in Estate Kaluza v Braeuer 1926 AD 243 at 266 more than half a century ago in this Court:
>
> > 'A crafty witness may simulate an honest demeanour and the Judge has often but little before him to enable him to penetrate the armour of a witness who tells a plausible story.' On the other hand an honest witness may be shy
>
> or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.
>
> Nevertheless, while demeanour can never serve as a substitute for evidence, it can, and often does, 'reflect on and enhance the credibility of oral testimony.'"

And in Germani v Herf and Another 1975 (4) SA 887 (A) 903C-E, Trollip JA, dealing with a similar problem, said:

> "Those observations were based almost wholly on the demeanour of the witnesses. They are, of course, deserving of great weight on this aspect of the appeal, especially in a case of this kind, and the resulting conclusion based on them will ordinarily not be lightly disturbed. But the learned Judge, in coming to that conclusion, should also have considered the probabilities relating to certain important, disputed incidents, and especially their effect upon the parties' respective credibility (cf. Arter v Burt, 1922 AD 303 at p. 306). Some of those incidents have already been mentioned where the probabilities appear to support the appellant's version. Others will be dealt with presently. Those probabilities seem to have been overlooked by the learned Judge; hence the advantages which he enjoyed of observing the witnesses testifying should not be overemphasised in this case (cf. Protea Assurance Co. Ltd. v Casey, 1970 (2) SA 643 (AD) at p. 648E)."

The judge's failure to decide the case without regard to the wider probabilities is a clear misdirection and entitles us to reassess Mrs Shiloane's evidence. It was also wrong of the judge to consider that a non-acceptance of her evidence of necessity requires a finding that she is a deliberate liar and

perjurer (at 661B-C). That is an emotional approach. In a civil trial the question is whether her evidence is, on the probabilities, correct. Few witnesses whose evidence is not accepted can be described as deliberate liars and perjurers. If his test were the correct one, the same question might be asked of Mrs Sharp's evidence. She appears to have been a good neighbour who harboured no ill-feelings against the plaintiff.

In view of the technical evidence recited earlier, Mrs Shiloane's evidence is inherently improbable. Something unexplained, inexplicable and not yet experienced happened to this elevator. Her evidence also does not fit in with other evidence. The plaintiff's evidence was accepted on the ground of demeanour (at 657B-C), but what the court below failed to take into account was that she herself had been unaware of Mrs Shiloane's presence and confirmed that Mrs Sharp was the first person the scene. Since Mrs Shiloane insisted that it was she who first tried to assist the plaintiff and only thereafter went to call Mrs Sharp, her evidence cannot be reconciled with that of the

plaintiff on this point.

Falling down a step of 20 cm produces a completely different sensation from tripping over an impediment. I do not believe that ordinarily a person would confuse the two. The court below for no good reason simply discounted the plaintiffs own initial sensation and belief which are incompatible with the evidence of Mrs Shiloane. Walking through a standard sized doorway reduced in height by 20 cm also produces a sensation which the plaintiff could not have missed. I hold the view that the court below, in the light of this, should have attached more weight to the plaintiffs pretrial statement that she had tripped and that his refusal to attach any significant value thereto (at 656I - 657A) is based upon a misreading of her evidence as summarized earlier in this judgment.

The plaintiff fell against a railing, some 3 metres from the door of the elevator. This, counsel submitted, points to the probability of a fall from an abnormal step of about 20cm created by the elevator not stopping

flush with the floor level. This fact is consistent with such a fall, but it is also consistent with a fall caused by tripping or falling over one's own feet. The other factors relied upon in argument flow from an acceptance of Mrs Shiloane's evidence and do not assist in the inquiry.

I accept that Mrs Sharp was not in all respects a satisfactory witness - she was rather timid - and I do not suggest that her evidence should have been accepted in preference to that of Mrs Shiloane. I am nevertheless convinced that her evidence was rejected, and that of Mrs Shiloane accepted, without reference to the probabilities and the evidence as a whole. In my judgment the court a quo should have held that the plaintiff had failed to prove on a balance of probabilities that the cause of the incident was as described by Mrs Shiloane.

The plaintiffs case as presented in the court below and the judgment of Joubert AJ were both premised upon the acceptance of Mrs Shiloane's evidence. It was conceded before us that we cannot make a finding about

another probable cause of the fall which can conceivably be laid at the door of the appellant if that evidence is not accepted. In the result, its rejection is the end of the plaintiff's case and I refrain from expressing any views on the law as expounded by Joubert AJ (at 664G - 669E) and especially his implicit finding that a warning notice would have prevented the incident.

Costs: Although not strictly relevant in the light of my earlier conclusion, it is necessary to express my strongly held views concerning the costs order lest the learned judge's reasoning (at p 670) should find favour with another court. Having absolved the second defendant because of the finding that the elevators were properly maintained, Joubert AJ thought it "manifestly unfair" to order the body corporate to pay all the second defendant's costs, but nonetheless found that "justice demands" that it should pay half of those costs.

The plaintiff was entitled to join both defendants in the same action, especially in the light of the allegation that both had failed to maintain the elevator properly. The body corporate joined issue on the basis that it had

taken reasonable precautions against malfunctioning by engaging a specialist in the field. The plaintiff failed to prove this part of its case against both defendants. Why then should the body corporate be liable for its own costs on such a substantial issue and why should it be liable for a portion of the second defendant's costs? To me it seems manifestly unfair. I would have thought that the plaintiff should have paid both defendant's costs because those costs concerned a separate issue and were easily severable.

No doubt the court a quo had a discretion and such discretion could, in a case against two defendants where the one is absolved, involve an order that the one pay the costs of the other. The typical case where such an order is made is where the unsuccessful defendant makes common cause with a plaintiff to pin liability on the eventually successful defendant. See Parity Insurance Co Ltd v Van den Bergh 1966 (4) SA 463 (A) 483B-E; Ngubetole v Administrator, Cape and Another 1975 (3) SA 1 (A) 15A; Olivier v Botha and Another 1960 (1) SA 678 (O) 687F-H.

15 The body corporate did not try to pin any blame on Allied. As far as the technical aspect of the case is concerned, it kept a rather low profile. To the extent that it made common cause with Allied, it was successful. I fail to understand the basis on which a party which is successful on an issue should be ordered to help the unsuccessful party pay another successful party's costs. Exceptional circumstances may dictate otherwise, but none such is here present. The proper approach to the matter is to be found in Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another 1980(3) SA 415 (W) 419 in fine - 420: Had the plaintiff sued the second defendant separately, there would presumably have been an order of absolution with costs at the close of the plaintiffs' case; the fact that it was convenient to join the two defendants in one action does not mean that the plaintiff could ride on the back the first defendant.

In the result the appeal has to succeed and the following order is made:

1. The appeal succeeds with costs.

2. Paragraph 1 of the order of the court a quo is substituted by an order absolving the first defendant from the instance with costs.

3. Paragraph 2 of the order is amended by the deletion of the words "such costs to be borne in equal shares by plaintiff and the first defendant".

LTC HARMS
JUDGE OF APPEAL

SMALBERGER JA) HOEXTER
JA) Concur NIENABER JA
) STREICHER JA)