IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG CASE NO: 39502/08

DATE:2009-11-11

In the matter between

BOTH CORNELIA Plaintiff

And

POST OFFICE CAFÉ BAZAAR CC Defendant

J U D G M E N T

WILLIS, J:

[1] The plaintiff has claimed damages as a result of her having tripped, stumbled and fallen at the defendant's premises being a Spar Supermarket situated at 674, Voortrekker Street (corner 19th Street) Brakpan on 2 October 2006.

[2] In paragraph 4 of the plaintiff's particulars of claim, it is pertinently alleged as follows:-

> "On or about 2 October 2006, the plaintiff was on the premises when defective flooring on the premises caused the plaintiff to trip, stumble and fall ("the accident")".

[3] In the defendant's plea to this allegation, the defendant says as follows:-

> "Save to deny that defective flooring caused the plaintiff to trip, stumble and fall, the defendant admits the allegations of plaintiff."

According to the pleadings it is therefore common cause that the plaintiff tripped. This has a significance which will later become more fully apparent.

[4] In paragraph 6 of the particulars of claim, the plaintiff alleges as follows:-

> "As a consequence of the accident, the plaintiff sustained soft tissue injuries to the left shoulder and neck as well as a fracture of the neck on the left humerus, suffering as a consequence damages in an amount of R213 913.19 …".

[5] The defendant pleads as follows to these allegations:-

> "The defendant has no knowledge of the allegations in this paragraph, accordingly denies

> the plaintiff's allegations, does not admit the same and puts the plaintiff to the proof thereof."

[6] At the commencement of the trial, the parties made application for there to be a separation of the question of quantum from the merits and that the trial should proceed on the merits only at this stage. The application was brought in terms of Rule 33(4). I was pleased to grant such an order.

[7] By the end of the trial, it was common cause that this was all-or-nothing case. In other words, this was not a case where there should be an apportionment. The plaintiff was either to succeed to the extent that the plaintiff was liable for 100 percent of her proven damages or there was to be absolution from the instance.

[8] As I have already said, the defendants operate a so called Spar Supermarket. The plaintiff was born on 18 July 1951. Therefore, while not being particularly youthful, she is not singularly elderly. She was a fan of the supermarket, having being a regular patron there in order to purchase bread which she describes has having been "delicious". She described how, on the day in question, she went accompanied by a person referred to as "Gladys" to buy bread and, while in the supermarket, she tripped and fell. The plaintiff described how she had been wearing sandals on the day in question and that she had not been in a hurry. She experienced excruciating pain as a result of her fall, had

to receive medical attention and on the day in question, simply did not know what it was that had caused her to trip and fall.

[9] The next day, she went to that supermarket in the company of one Jolene Boshoff, who at the time had lived next door to her and was the daughter of her neighbour. When they went to the supermarket, the plaintiff pointed out to Jolene Boshoff the whereabouts of her accident and asked Boshoff to slide her feet across the floor to determine if there was any obstruction. Jolene Boshoff pointed to a tile that protruded in a corner, some half a centimetre to a centimetre above the rest of the tiles that were on the floor. This, the plaintiff seems to suggest, was the obstruction that caused her to trip and fall. Some considerable time later, she returned to the store with her attorneys but it seemed that the protruding tile had been "made good".

[10] It is common cause that the accident was recorded on closed circuit television which had been operating in the supermarket at the time. The plaintiff, in addition to testifying herself, called Jolene Boshoff who confirmed, in every material respect, the evidence of the plaintiff relating to Ms Boshoff's discovery of the protruding tile.

[11] The plaintiff yesterday sought an adjournment in order to call the person known as "Gladys". The court was informed that Gladys was unwell due to a middle ear infection. Reluctantly, I agreed to stand the matter down until this morning, at 10:00 am. This morning, the witness

was not available. I then agreed to stand the matter down until 11:30 am. The witness still did not make any appearance. Mr *Meyer*, who appears for the plaintiff, asked for a postponement. I refused the postponement but reserved the question of costs. I should at this stage mention that the defendant's own witness proceeded to describe the incident from what he could see from a closed circuit television video recording. According to the defendant's witness, the person referred as Gladys, who had been in the plaintiff's company at the time of the accident, had been in front of the plaintiff at the time of the accident and turned around only after the plaintiff had fallen. She would not, therefore, have been able to add materially to the factual dispute, if at all. It seems, however, from the argument of Mr *Meyer*, who appeared for the plaintiff, that he had intended to call Gladys on the question of whether or not the plaintiff had spoken to the defendant's witness, Mr Chris Phillippou on the actual day of the accident. This, of course, is a collateral issue and relatively unimportant. It has no real bearing on how the accident actually occurred but, rather, has to do with the question of credibility.

[12] The defendant called only one witness, the aforementioned Mr Philippou. He described himself as a "partner" in the business of the Spar Supermarket. He said that he had seen the plaintiff personally on the day of the accident. This is a matter that is in factually in dispute because the plaintiff said she did not see him on that particular day. He confirmed that the incident had been recorded on closed circuit television. The record of that recording he said "disappeared from the

motherboard of the computer". The reason he gave for this was that there was the "storm damage".

[13] The witness, Mr Philippou, denied that there was any protruding tile and he denies that any protrusion had been made good after the accident. As I have already recorded, the evidence of the plaintiff was that she went a considerable time afterwards to inspect the scene with lawyers and that at that time the protrusion had been made good.

10 [14] Mr Philippou said that he had watched the accident as recorded on a closed circuit television several times. In response to a question by myself, he replied that he was certain that the plaintiff had tripped and not slipped, although, interestingly, in the report form that he submitted to Santam, his insurance in respect of public liability, which he completely fairly soon after the accident, he described the plaintiff as having "slipped" and then "fell to the ground". Although he observed this recording several times, he could not say why it was that the plaintiff had tripped.

20 [15] In evaluating the evidence, I am mindful of the well known passage set out in the case of *SFW Group Limited & Another v Martell et Cie & Others,* 2003 (1) SA 11 (SCA) at paragraph [5] as follows:-

> On the central issue as to what the parties actually decided, there are two reconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the

probabilities. The technique generally employed by the courts in resolving factual disputes may conveniently be summarised as follows:

To come to a conclusion on the disputed issues, a court must make findings on:

a) The credibility of the various witnesses;

b) Their reliability;

c) The probabilities.

As to (a) the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a number of subsidiary factors not necessarily in order of importance such as:

(i) The witness' candour and demeanour in the witness box;

(ii) His bias, latent or patent;

(iii) Internal contradictions in his evidence;

(iv) External contradictions in what pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions;

(v) The probability or improbability of particular aspects of his version;

(vi) The calibre and cogency of his performance compared to that of other witnesses testified about the same incidents or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv), (v) above, on

(i) the opportunity he had to experience or observe the events in question; and

(ii) the quality, integrity and independence of his recall thereof.

As to (c),, this necessitates an analysis and evaluation of a probability or improbability that each parties' 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. The hard case which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors equipoised the probabilities prevail.

[16] The plaintiff indeed impressed me as an honest and careful witness. So too, was I impressed with the candidness of Jolene Boshoff who one may describe as being a largely independent witness. She obviously had some affinity with the plaintiff. Nevertheless, as I already indicated, she corroborated the evidence of the plaintiff regarding the protruding tile.

[17] Mr *Pieterse*, who appears for the defendant, on the other hand, submitted that I could only find that there was a protruding tile if I were to find that the witness on behalf of the defendant, Mr Philippou, had been a deliberately dishonest, if not full fraudulent witness regarding the question of there having been no protrusion and its not having been made good. There are criticisms that can be made in the evidence of Mr

Philippou. I was not impressed with his inability to describe how it was that the plaintiff tripped. On his own version of events, he had watched this video several times. I am somewhat surprised that the closed circuit television recording of the accident became irretrievably lost, bearing in mind that the defendant was aware that there was a potential claim. The defendant must have been aware of the importance of the video evidence at a very early stage. It surprises me that they had not taken steps to have it recorded in some indestructible way, such as on a compact disk ("CD") or a memory stick or some other device. I also find it interesting that when I warned him to be careful with his answer when I pertinently asked him whether the plaintiff had tripped or slipped, he was adamant in his reply that plaintiff tripped not slipped. On the other hand in his statement, regarding the possibility of a public liability that which he submitted to Santam he did say, I have said, that the plaintiff slipped.

[18] Mr *Pieterse* attempted to make light of the difference between "tripping" and "slipping". I shall revert to that aspect later on. Nevertheless, I accept that it is a considerable *quantum* leap, in the circumstances of this case, to find that Mr Philippou was deliberately lying to regard to the alleged protrusion of the tile and in regard to the failure of the defendant to have been party to "covering up" the offending part of the floor.

[19] The question then arises as to whether I indeed need to find that there was a precluding tile which explains the accident. As I have

already mentioned, the plaintiff described how she had been wearing sandals on the day in question and that she had not been in a hurry. Her injuries in respect of which she claims do not suggest that she fell, as so often happens with women of a certain vintage, as a result of suffering from osteoporosis – i.e. that the bones in their body first break as a result of which they fall (rather than the other way round). Her injuries record no injury to her legs.

[20] The defendants, in effect, confessed and avoided the allegations relating to the injuries which the plaintiff sustained. In other words, there was no real dispute in regard thereto. The plaintiff was merely required to prove her injuries. If, therefore, one has regard to the fact that the plaintiff appears to have suffered injuries to her neck and shoulder, rather than her legs or, to put it in more colloquial terms, her "backside", this suggests that she did indeed trip and not slip.

[21] I shall also have recourse to that good, old-fashioned standby, *The Oxford Dictionary* in order to see whether I am correct in my view, that there is, in common parlance, a difference between "tripping" and "slipping". To "slip" is described in the *Oxford Dictionary* as to "loose one's balance or footing and slid unintentionally for a short distance". To "trip", on the other hand, is defined as "to catch one's foot on something and stumble or fall". Mr *Pieterse* attempted valiantly to persuade me that the defendant's witness would not really have understood the difference between "tripping" and "slipping". I accept, from the accent of Mr

Phillippou, that he may not have been thoroughly familiar with in the English language. Nevertheless, it seems to me that, when I put the question, “Did she trip or did she slip?”, he had no difficulty understanding that there was a difference between the two and confirming that indeed the plaintiff had tripped. He seemed quite clear in his mind about this. Regardless of the finer niceties of the definitions that may appear in the *Oxford Dictionary*, in my view a tripping entails a falling forward, whereas slipping entails a falling backwards. The plaintiff, fell forward. The significance of the distinction for purposes of this case, is that the plaintiff obviously did not slip on some “errant bean” lurking where it should not be - to use as an example the hard facts with which I was confronted in the case of *Monteoli v Woolworths (Pty) Limited*, 2000 (4) SA 735 (W). She could not have slipped on oil or water or anything of that kind. There must have been some or other obstruction on the floor which caused the plaintiff to trip.

[22] I do not think it is necessary for me to go so far as to find that the obstruction was a protruding tile. Obviously, however, if one accepts the plaintiff’s version, that may be an explanation. The fact is that there must have been an obstruction. I say so because she did not slip. Moreover, she was not so elderly as to have suffered an osteoporotic fall. The pleadings do not suggest any injury to her leg or a broken hip or indeed any injury to her “backside” (all of which would have been probable if she had slipped). As I have already indicated, the witness describes how she had tripped. This fact of her having tripped was not disputed. The plaintiff

has also said she was not in hurry. There is no reason to disbelieve her. Given her age, it is unlikely that she would have been running like a child, impervious as to the possibility of any obstacle in her way. She described how she was walking. There is nothing to suggest that the sandals which she was wearing may have caused her to trip. The plaintiff has denied that this could have been the cause. There must, as I have said, been some or other an obstacle.

[23] If one has regard to the most recent case of *Chartaprops (Pty) Limited & Another v Silberman*, 2009 (1) SA 265 (SCA) which deals with the liability of a defendant operating shops, such as the one in question, where accidents such as this one occur, it seems that any obstacle that was on the floor over which the plaintiff may have tripped, is an obstacle which should not have been there. The trend of cases entail that it is strongly suggestive of negligence and unlawfulness if supermarkets allow obstacles to be on the floor, which should not be there and which cause persons to have accidents.

[24] I accordingly find that the plaintiff tripped and fell as a result of some or other obstacle on the floor of the supermarket which should not have been there and for which the defendant is liable on the basis of the well known test in *Kruger v Coetzee*, (1962) SA 428 (A) at 430E:

> For the 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 cause him patrimonial loss; and

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

(b) the defendant failed to take such steps.

[25] I turn now to deal with the question of costs. It is correct that we lost almost an entire day because of the plaintiff's potential witness not being available and the difficulties which the plaintiff had in making up her mind as to whether or not she would proceed without that witness and whether or not she wanted a postponement. It therefore seems to me that the defendant should be ordered to pay the costs of the trial but that these costs should be limited to one day court day only in the actual trial itself.

[26] The following is the order the court:

1. The defendant is to pay the plaintiff 100 percent of her proven damages arising from the accident which occurred at the defendant's premises on 2 October 2006;

2. The defendant is to pay the plaintiff's costs of the trial on the merits, but these costs are limited to one day only of the trial proceedings before this court.

Counsel for the plaintiff: Advocate S Meyer

Counsel for the defendant: Advocate J E Pieterse

Attorneys for the plaintiff: De Jager Du Plessis

Attorneys for the defendant: Cliff Decker Hofmeyer Incorporated.

Dates of hearing: 10 and 11 November 2009

Date of judgment: 11 November 2009.

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