Judgements 2012

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. 2006/26230

DELETE WHICHEVER IS NOT APPLICABLE

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

23/1/12 .....

DATE

SIGNATURE

In the matter between:

**BRICKHILL, KAREN** **Plaintiff**

and

**COPPER SUNSET TRADING 223 (PTY) LTD t/a**

**RETAIL CROSSING SUPERSPAR** **Defendant**

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**JUDGMENT**

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**NICHOLLS, J**

[1] During the midmorning of 28 January 2010 Karen Brickhill, the plaintiff, an occupational therapist in her mid-forties, went shopping at her local supermarket, the SuperSpar, at the Retail Crossing Shopping Centre which is owned and controlled by the defendant. While approaching the refrigerators to select fruit juices, she slipped and fell. It is this incident which caused the plaintiff to claim damages for bodily injuries against the defendant.

[2] At the commencement of the trial the court, with the consent of the parties, granted an order in terms of rule 33(4) that the merits be separated from the quantification of the plaintiff's damages. Accordingly the only issue for determination at this stage is whether the defendant is liable for the bodily injuries sustained by the plaintiff.

[3] The plaintiff's case is that she slipped in a puddle of water caused by water leaking from an adjacent fridge/freezer. It is pleaded that the defendant owed the plaintiff a duty of care to ensure that the premises were safe for public use and should have foreseen that the puddle could cause a member of the public to trip and fall thereby sustaining injuries. It is further alleged that:

> *"8. A company in the position of the plaintiff would have taken reasonable steps to guard against such an occurrence in the following manner:*
>
> *8.1 ensuring that the walkway of the aisle is in a safe and proper condition for use by the public;*
>
> *8.2 taking adequate measures to prevent injury to their customers who made use of the walkway;*
>
> *8.3 placing warning signs around the puddle of water to warn the customers not to step into it;*

*8.4 adequately preventing water leaking from the adjacent aisle's freezers and/or fridges into the aisle in which the accident occurred.*

*9. The defendant and/or its employees breached its duty of care in that:*

*9.1 they failed to inform customers of the wet floor with signage or at all;*

*9.2they failed to prevent water from running under the fridges into the adjacent aisles;*

*they failed to take reasonable precautions to prevent the incident, when by the exercise of reasonable care, it could and should have done so."*

[4] The defendant admitted owing a duty of care but denied that it breached such duty. It pleaded that it took reasonable care to ensure its walkways and aisles were safe by employing staff to clean the aisles and ensure that any spillages were promptly cleaned up. It went on to plead that should such a puddle of water have accumulated in one of the aisles, it was not there for a material length of time. Furthermore that the defendant was not aware of the presence of the puddle or in a position to have prevented the water from accumulating.

[5] An inspection in loco was conducted at the premises of the defendant prior to the commencement of the trial. The following was noted:

5.1 The approximate position of the plaintiff when she slipped was in the aisle next to a refrigerator unit in which fruit juices are stored.

5.2 The refrigerators back onto a bank of freezer units in which frozen foods are stored.

5.3 There is an aisle on either side of the refrigerators and the freezers.

5.4 The flooring in this vicinity consists of pale 600 x 600 cm matt ceramic tiles intersected by a diagonal strip of polished black tiles of a higher sheen.

5.5 The freezers consist of three units, each having its own door. At the bottom of each freezer unit is a removable panel containing two fans.

5.6 If water is poured into the freezer unit it disappears down a drain connected to an underground pipe. The unit is specifically designed not to leak.

5.7 Water poured onto the floor in front of the freezer unit runs underneath the unit due to the tiles sloping in the direction of the refrigerators.

5.8 Water poured on the floor in the refrigerator aisle in the approximate position of the incident remains stagnant.

[6] That the plaintiff slipped next to the refrigerators on that specific day is not disputed. What the defendant disputes are the issues of wrongfulness, foreseeability and whether the injuries suffered by plaintiff occurred as a result of the incident on that day.

[7] The plaintiff testified that she was walking in the refrigerator aisle pushing her trolley about to select fruit juices when she suddenly slipped and fell. Her right leg slipped from under her and shot out with her foot sticking out to the side. She did not however fall to the ground as she managed to hold on to the shopping trolley.

[8] The plaintiff said that she did not see what caused her to slip nor did she observe any water on the floor either prior to her fall or subsequent thereto. She was in agony and did not pay much attention to her surroundings. Because her leg was sticking out at right angles she was unable to sit or move. Mr Dolf Louw (Louw), a fellow shopper, came to her assistance. She used his cell phone to call her husband who was brought to the supermarket by a colleague Ms Elene Strydom (Strydom).

Thereafter she was taken to the Flora Clinic by ambulance where she was diagnosed as having dislocated her hip.

[9] Louw testified that when he went to assist the plaintiff after she fell, she was about half a meter from the refrigerator with one hand on the trolley and the other holding her back. She was unable to move. He did not see her slip but testified that the plaintiff told him that she slipped in a puddle of water. He noticed a pool of water approximately 600 x 600cm on the white tiles behind the plaintiff. He saw nothing to indicate that she had stepped into it.

[10] Strydom testified that when she brought the plaintiff's husband to the scene she was told by an employee of the supermarket that the plaintiff had slipped in a pool of water which formed when the fridge/freezer unit was being cleaned. This is hearsay evidence which takes the plaintiff's case no further. Strydom did not herself see any water on the floor.

[11] This being the totality of evidence for the plaintiff, at the close of the plaintiff's case the defendant asked for absolution from the instance. The test to be applied when absolution is sought at the end of the plaintiff's case is whether there is sufficient evidence led by the plaintiff upon which a court could or might (not should or ought) reasonably find for the plaintiff.[1] The court has a discretion whether to grant absolution from the instance or not. In exercising such discretion it has to determine whether it is in the interests of justice to bring the litigation to an end. Where the legal position is uncertain the interests of justice are better served by the refusal of absolution.[2]

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[1] *Claude Neon Lights SA (Pty) Ltd v Dlamini* 1976(4) SA 403 (A); *Gascoyne v Paul* and 1917 TPD 170; *Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88.
[2] *Carmichele v Minister of Safety and security and Another* 2001( ) SA CC at para 26 and 29

[12] Despite the plaintiff's inability to point to the cause of her fall, there was evidence that a puddle of water had formed near to the plaintiff. The defendant in its opening address admitted that the plaintiff slipped and fell in a puddle of water, giving rise to a prima facie inference of negligence. However, at the close of the plaintiff's case and on realising that there was no evidence to show that the puddle of water was the cause of the plaintiff's fall, the defendant sought to argue that this admission was worthless unless evidence was led. Counsel could not rely on any authority for this submission. Once an admission has been made it cannot be withdrawn unless an application is made to withdraw the admission, which application will not be lightly granted. [3] No such application was made. For these reasons I refused absolution.

[13] The measures put in place to keep the floor of the store clean were conceded by the plaintiff. Four cleaners are employed for this purpose, two on duty from 7H00 to 16H00 and the other two from 11H00 to 20H00. The cleaners operate two large industrial cleaning machines which run continuously throughout the day. They start at opposite ends of the store and criss-cross the entire floor up and down the aisles until they reach the opposite side. It takes 15 to 20 minutes for a machine to cover the shop, meaning that at any given point there would be no dirt or spillage left without being cleaned for a period of longer than seven and a half to ten minutes.

[14] According Mr Andre Dreyer (Dreyer) the manager of the defendant, although the freezer units are designed to automatically defrost, a couple of times a year they require to be defrosted manually due to the build-up of ice on the coils. Dreyer further testified that once a week the freezers in the supermarket are unpacked and cleaned with a bucket and sponge. This is done not by the cleaners but by the merchandisers and takes place in the absence of the customers.

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[3] The Civil Practice of the High Courts, Herbstein and Van Vinsen 5th ed, p 683 - 685

[15] The defendant admitted that at the time of the incident, or shortly before, the freezer unit which backs onto the refrigerators where the plaintiff fell, was being manually defrosted. For this purpose a fire-hose is utilised. Dreyer denied that this would result in excessive spillage but conceded that it was possible that water could end up outside the freezer which could then seep under the freezer unit and the refrigerator unit and could end up in the refrigerator aisle where the plaintiff slipped and fell. As is customary, warning signs were put up in the aisle near the freezers to indicate that cleaning was in progress.

[16] Dreyer stated that there is no supervision of the manual defrosting and cleaning operation and that he relies on the person cleaning the fridge or defrosting the freezer to take the appropriate action if he or she observes spillage. However based on his experience over a period of 6 years as the manager of the SuperSpar he believed that it was highly improbable that there would have been sufficiently large spillage to have caused a pool of water as described by Louw to accumulate in the refrigerator aisle. He stated that such an incident had never occurred before.

[17] Mr Gerald Mugawa (Mugawa) was the merchandiser who was manually defrosting the freezer on that day. He has been defrosting the freezer for 15 years in the same manner and was adamant that no water could have been spilled on the floor. He explained that the reason for this is because the fire-hose is inserted directly into the freezer unit which is sealed. If he had seen water spilt on the floor he would have immediately cleaned it up but that did not happen on that day nor has it ever happened before. When pressed under cross examination he said it was possible that a few drops of water could have fallen on the outside of the freezer.

[18] That the defendant's supermarket is exceptionally clean, spacious and airy was clearly evident at the inspection in loco. It has been the

recipient of various awards for its customer service and cleanliness. For five consecutive years it has been voted one of the Top 10 Spar outlets in the country. It has, on occasion, won the prize for the best Spar in South Africa. The plaintiff herself said the reason she liked shopping there was because it was very clean, beautifully laid out and well maintained.

[19] Counsel for the plaintiff argued that the plaintiff slipped in a pool of water which had accumulated in the fridge aisle as a result of the freezer on the other side being defrosted with a fire-hose. This caused undue spillage which seeped through to the aisle on the other side. The defendants initially agreed that this was the probable cause of the plaintiff's fall but did not agree on the size of the puddle. It was submitted that the comprehensive cleaning system did not cater for such an occurrence. The defendant was criticised for the fact that the defrosting operation was not supervised but was left to the individual employee to monitor. It was further argued that where a fire hose is utilised to defrost a freezer, the foreseeable possibility is that there will be excessive water spillage. This should have been noted and steps taken to deal with it. No evidence was given to support this theory which, to the contrary, was directly contradicted by Mugawa.

[20] The defendant's case is based the absence of wrongfulness and whether the defendant did in fact suffer injuries as a result of the incident on that day. I deal first with the latter argument that the plaintiff did not suffer injuries. This is premised on alleged discrepancies in the medical records. Dr Cakic in his report of 7 July 2011 referred to a fall in February 2010 which resulted in a fracture dislocation of the right hip; in his theatre notes for the 14 June 2010 he refers to it as a "traumatic fall" in February 2010 which resulted in a fractured rib. Likewise the biokineticist, Klingbiel referred to a fall in February 2010. The defendant

argued that all the medical reports refer to 'a fall' when the plaintiff did not in fact fall, but only slipped.

[21] It was put to the plaintiff that the injuries she suffered were not as a result of the incident on 28 January 2010 but a later traumatic fall that took place in February 2010. She vehemently denied that there had been another fall a few days after the 28 January 2010. She could not explain the errors in above medical reports. She said that she had an arthroscopic procedure to her hip the year prior to the incident and had had a hip replacement in June 2010 after the incident.

[22] It is common cause that the plaintiff slipped in the Spar on 28 January 2010. It was undisputed that her right foot was sticking out at right angles and that she was wracked with pain and totally immobilised. Moreover the x-rays taken at the Flora Clinic at 12.33.44 on 28 January 2010 indicate that she had a right posterior hip dislocation. The report of a subsequent x-ray taken a few days later at 11.22 on 1 February 2010 refers to *"a recent posterior hip dislocation"* and shows a *"marginal chip fracture or avulsion"*. In light of the x-ray reports it is inconceivable that the plaintiff dislocated her hip in another fall occurring in February 2010. The plaintiff's injuries as recorded by the radiologists are undoubtedly consistent with the fall that occurred on the 28 January 2010. The argument of the defendant on this aspect is rejected.

[23] That the defendant owed the plaintiff a duty of care is not in issue. I turn to deal with the question of whether that duty of care was breached, and in particular whether there was any wrongful conduct on the part of the defendant. It is trite that delictual liability arises where the following essential requirements are present: "*harm sustained by the plaintiff; conduct on the part of the defendant which is wrongful; a causal*

*connection between the conduct and the plaintiff's harm; and fault or blameworthiness on the part of the defendant"*[4].

[24] In other words the plaintiff has to show that the defendant acted culpably. Whether culpa or fault arises, which in this case takes the form of negligence, involves a twofold inquiry. The time-honoured formulation was set out by Holmes JA in *Kruger v Coetzee* 1966(2) SA 428 (A) at p430 as follows:

> *"(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; and*
>
> *(ii) would take reasonable steps against such occurrence; and*
>
> *(b) the defendant failed to take such steps*

Later cases have emphasized that this formulation should be utilized with flexibility and the test is in fact whether some harm should have been foreseeable to someone in the position of the plaintiff. In other words the true test is whether the conduct complained of falls short of the standard of care required of a reasonable person.[5]

[25] The established principle of our law is that negligent conduct giving rise to loss is not actionable unless it is also wrongful. Where the negligent conduct manifests in a positive act that causes physical harm this is prima facie wrongful. However, a negligent omission will only attract liability when the legal convictions of the community impose a legal duty as opposed to a mere moral duty, to avoid harm to others by a positive act.[6]

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[4] LAWSA Volume 8 part 1 page 4
[5] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage* 2000(1) SA 827 (SCA)
[6] *Local Transitional Council of Delmas and another v Boshoff* [2005] 4 All SA 175 (SCA); *Minister van Polisie v Ewels* 1975(3) SA 590 (A); *McIntosh v Premier, Kwa Zulu Natal & Another* 2008(6) SA 1 (SCA); *Trustees, Two Oceans Aquarium Trust v Kantey & Templar (Pty) Ltd* 2006(3) SA 138 (SCA)

[26] It has been described in the following manner by Vivier ADP in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus Curiae)* 2003 (1) SA 389 (SCA). Para 9:

> *"Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff.*
>
> *The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, inter alia, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered."*

[27] The onus of proof rests with the plaintiff. The first step is to adduce evidence that that gives rise to an inference of negligence. Only then is the defendant obliged to rebut the inference by adducing evidence of the measures taken to avert the harm. A defendant is obliged to take no more than reasonable steps to guard against foreseeable harm to the public. Neither does it follow that because the foreseeable harm did eventuate, the steps taken to avoid it were necessarily unreasonable.[7] What has to be shown is that the defendant, did not take adequate and reasonable measures to minimise the risk of harm. The onus of proving this omission rests on the plaintiff.

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[7] *Pretoria City Council v De Jager* 1997(2) SA 46 (A)

[28] Counsel for the plaintiff and the defendant referred me to various cases dealing with spillage as support for their submissions. In the first *Chartaprops 16 (Pty) Ltd and Another v Silberman* 2009(1) SA 265 (SCA) the plaintiff instituted an action for damages when she slipped and fell in the passage of a shopping mall as a result of a slippery substance left on the floor. It was held that the shopping centre's duty to ensure the premises were safe was fulfilled when it appointed a competent, independent cleaning service. Her claim against the cleaning contractors was upheld on the basis that the evidence established that spillage was on the floor for a period in excess of 30 minutes at a time when pedestrians were present in the mall.

[29] In *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W) the plaintiff slipped on oil which could have lain on the floor for up to six hours. The court held that the defendant owed a duty to persons entering its shop during trading hours, to take reasonable steps to ensure that the floor was kept in a condition that was reasonably safe for shoppers, bearing in mind that they would spend much of their time in the shop with their attention focused on goods displayed on the shelves, or on their trolleys, and not looking at the floor to ensure that every step they took was safe. The duty on the keeper of a supermarket to take such reasonable steps was not so onerous as to require that every spillage had to be discovered and cleaned up as soon as it occurred. However, it did require a system which ensured that spillages were not allowed to create potential hazards for any material length of time, and that they would be discovered, and the floor made safe, with "reasonable promptitude".

[30] As was stated by Stegmann J in that case "*The onus is on the plaintiff to prove that his injuries and damages were caused by negligence on the part of the defendant ie by a failure on the part of the defendant to show towards the plaintiff the degree of care in his conduct which is to be expected of the reasonable man in order to avoid causing foreseeable harm to another. To*

*discharge that onus, it would not necessarily be enough for the plaintiff to show that there had been a dangerous pool of almost invisible oil on the shop floor. That would leave open the possibility that a spillage had occurred moments earlier, leaving the defendants no reasonable opportunity to discover the spillage or to clean it up. The defendants' duty to the plaintiff was not that of an insurer. The plaintiff's evidence would therefore have to go further in order to establish a prima facie case of negligence on the part of the defendants. Of course, once such a prima facie case had been established, there would be an "evidentiary" onus on the defendants to lead evidence to rebut the prima facie case, or to face judgment against themselves. But the "overall" burden of proof always remains the plaintiff's."*

[31] The final case was that of *Monteoli v Woolworths (Pty) Ltd* 2000(4) SA 735 (W). In that matter a majority decision of the full bench of this division held that Woolworths could not be found liable for the injuries suffered by the plaintiff when she slipped on a green bean on the floor of the shop. The mere presence of spillage on the floor during shopping hours was not in itself prima facie evidence of negligence. Willis J set out the circumstances which give rise to an inference of negligence in the context of a supermarket as follows:

> *"...before the presence of produce such as green beans on the floor can give rise to an inference of negligence, there must be some evidence of either a direct or circumstantial nature that the defendant, at the time of the accident:*
>
> *(i) ought to have taken steps to prevent the presence of beans on the floor from occurring; alternatively,*
>
> *(ii) knew; or*
>
> *(iii) ought to have been aware of their presence; and*
>
> *(iv) failed to take reasonable steps to remove the offending items forthwith. "*

[32] Returning to the present case, whether the puddle of water was caused by water being spilt on the floor whilst defrosting the freezer, or whether it arose from any other cause, is not decisive as to whether negligent conduct has been established. If the defrosting did indeed result in spilt water seeping under the freezer and refrigerator units to pool in the

refrigerator aisle, then this was not reasonably foreseeable. Such an occurrence was unknown in the fifteen years that the Spar had been operating. Signage was placed in the aisles where the staff were defrosting the freezers to warn shoppers of the operation. It could not be reasonably expected of the defendant to put up signs in adjacent aisles in the unlikely event of water seeping into those aisles from the freezer aisle.

[33] There is no evidence to indicate that the employees of the defendant were aware that the water either could, or ever had, seeped through to the adjoining aisle. To the contrary, until the incident on 28 January 2010 occurred, no-one considered that such an occurrence was possible. In fact Mugawa and the cleaner both stated that the water did not seep into the refrigerator aisle on that day either. If indeed the puddle of water was caused by the defrosting of the freezer, it was not foreseen that there could be seepage to an adjoining aisle.

[34] What is clear is that the defendant, by introducing such a thorough and comprehensive cleaning system, took every reasonable precaution to guard against possible harm caused by spillage. At no point was it possible for any substance to remain on the floor for a period of longer than 8 to 10 minutes. It is difficult to imagine what more could have been done to ensure the floors were clean and safe for shoppers at all times. To require the defendant to appoint a supervisor to oversee the manual defrosting of the freezer is not realistic, and would not necessarily have prevented any water from seeping into the adjacent aisle, if this was how the puddle had formed.

[35] It is insufficient that the plaintiff establish that there was a pool of water on the floor, or even that the defendant should have foreseen that a pool

of water could cause harm to the public. What the plaintiff's evidence fails to show is that the defendant foresaw the harm, could have taken reasonable steps to avert it, and failed to do so. That there may have been other steps that could have been taken does not amount to negligence liability on the part of the defendant, as long as it took adequate and reasonable steps in the circumstances.

[36] On a consideration of the evidence I am of the view that the defendant did everything reasonably expected of it to provide a safe and clean shopping environment. I therefore conclude that the plaintiff has not discharged her onus to show that the harm she suffered was as a result of wrongful conduct by the defendant that a diligens pater familias in the position of the defendant would have foreseen and taken steps to avert. On the facts placed before this court the plaintiff's case must fail.

In the result, I make the following order:

The plaintiff's claim is dismissed with costs

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**C HEATON NICHOLLS J**

**JUDGE OF THE SOUTH GAUTENG**

**HIGH COURT – JOHANNESBURG**

**Appearances**:

Counsel for the plaintiff: Adv. C. van Bergen

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|---|---|
| Plaintiff's Attorneys: | Munro Flowers and Vermaak Attorneys |
| Counsel for the defendant: | Adv. G. Beytel |
| Defendants' Attorneys: | Madlela Gwebu Mashamba Inc. |
| Date of hearing: | 21st October 2011 |
| Date of Judgment: | 23 January 2012 |