HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

09-03-2020 P.A. Meyer
Date Judge P.A. Meyer

Case no: 27949/2017

In the matter between:

BRADLEY RUSSEL STEARNS Plaintiff

and

ROBISPEC (PTY) LTD Defendant

***Case Summary*: Negligence – Liability for – Exemption clause - Injuries sustained when rack in grocery store fell over.**

JUDGMENT

MEYER J

[1] The plaintiff, Mr Bradley Russel Stearns, a 51 year-old man, sues the defendant, Robispec (Pty) Ltd, for damages arising out of an incident in which he sustained a ruptured left bicep when he was shopping at a Pick n Pay store in Hartbeespoortdam (the store) during the morning on 3 April 2017, which store was owned and managed by the defendant.

[2] Only the question of liability is presently relevant, a consensual order separating the questions of liability and the quantum of damages in terms of r 33(4) of the Uniform Rules of Court having been granted at the commencement of the trial. The plaintiff testified and called as his witnesses Mr Peter Nkosi, a shelving installer and project manager employed by Storeworks (Pty) Ltd, which company initially installed the shelves and racks in the store a month before its opening on 24 November 2011, and Mr Pieter Erasmus, a mechanical engineer with expertise in shelving. The defendant called as its only witness Mr Geoff le Roux, who has been the manager of the store since its opening. By agreement between the parties, CCTV footage taken by security cameras inside the store as well as various photographs were presented in evidence.

[3] The background facts are quite straightforward and largely undisputed. I deal with the plaintiff's evidence and the CCTV footage together. The CCTV footage did not capture the incident from beginning to end but corroborates the plaintiff's evidence in certain respects and gives a good sense of the incident. On the morning in question the plaintiff collected a shopping trolley outside the entrance to the store and entered the store pushing the shopping trolley in front of him. The store was 'fairly' busy. He was walking at a leisurely pace, pushing his shopping trolley in search of items he wished to purchase. As he was walking down what was referred to as the main aisle, he passed a lady cleaning the floor and to his left, at the entrance to an aisle into which he intended to turn, a gentleman busy packing products from a trolley onto shelves.

[4] On entering that aisle, the plaintiff took a wide turn with his shopping trolley because of the presence of the gentleman and the trolley. In executing the wide turn, he bumped the right front side of his empty shopping trolley slightly against a steel tube attached to a rack (known as a 'power-wing'), on which rack batteries were hanging on display. As he bumped the rack, it started falling and he lunged forward over his shopping trolley and reached out to grab the rack to prevent it from falling onto the floor. The CCTV footage shows that he then bent backwards, grabbing his left arm. The rack nevertheless fell onto the floor in a forward direction across the aisle in front of him with a slight angle away from him. The plaintiff immediately felt pain in his left arm; his bicep was torn. No-one else was injured.

[5] The plaintiff's evidence is that he was aware of the presence of other people in his immediate vicinity in that aisle; the gentleman who was packing products onto

shelves to his left, although he was unsure exactly where he was, somebody pushing a shopping trolley towards him on the left of the aisle and someone looking at items on a shelve to the right. He said he grabbed the rack instinctively and to prevent it from falling onto the floor. In his words: 'It fell, and I grabbed it. It happened so fast.' Wisdom of hindsight revealed that he would not have been injured by the rack falling onto the floor had he simply stood still, nor anyone else. He testified that he 'could not make that decision at the time; it was too quick'.

[6] Mr Nkosi has been employed by Storeworks for the past fourteen years, initially as a shelving installer and for the past seven years as a project manager. He is familiar with the installation of shelving, including power-wings. He inspected the rack in question at the store, but subsequent to it having been reinstalled after the incident involving the plaintiff. He, *inter alia*, commented on the current state of certain racks in the store as depicted in the photographs that were shown to him when he testified. Although he was not involved in the installation of the shelving at the store in 2011, it is in his view unlikely that they would have been so improperly installed as depicted on the photographs.

[7] Mr Erasmus, *inter alia*, was appointed to design a shelving system to carry vehicle components for the Volkswagen Parts Distribution Centre in Midrand during 2010 after its shelving system had collapsed. He is indisputably qualified and experienced to express an opinion on the probable causes for the collapse of the rack in the store on 3 April 2017, as depicted on the CCV footage and the various colour photographs which he had viewed. He also inspected the rack and other racks in the store after the event on 30 April 2019. He testified that the power-wing rack system is a safe one to use, and he further gave evidence as to the way the rack was designed and meant to be installed. I do not need to go into the technical detail of his evidence and opinions.

[8] Mr Erasmus testified that shopping trolleys are anticipated to make contact with racks and shelves during the normal shopping process by members of the public and the racks and shelves should not be in a condition or state that will allow them to collapse at the slightest impact or bump from a shopping trolley. If a rack, such as the one in question, is secured as it is designed to be, a large impact would be required to dislodge it, a vertical force upwards and a horizontal force outward.

[9] With the rack fully loaded at the time of the incident, it would, in the opinion of Mr Erasmus, have required considerable upward and outward forces to free the rack off its brackets, which held it in place and secured it, and to dislodge it. The impact of the shopping trolley, in the opinion of Mr Erasmus, applied only a horizontal force of fairly low momentum. The direction of such force can in his view not disengage the rack from its brackets since it lacks the vertical component. The rack, at the time of the incident, in his opinion, was not secured in the manner it was designed and intended to be secured. Although it was not possible for him to say how long it will take a rack in the condition the rack in question is depicted in the photographs to fail, it would, in his opinion, not have taken six years since its installation to collapse; it was, in his words, 'an accident waiting to happen'. Mr Erasmus' opinion regarding the primary cause of the rack collapsing in simple terms is to the effect that the rack was not properly secured because of missing components. His inspection after the fact revealed that a significant number of racks in the store were not fastened or not fastened securely with screws missing, loose screws, bent screws and other components missing. In some instances, the racks were even capable of swinging or pivoting.

[10] The opinion of Mr Erasmus was underpinned by proper reasoning that was explained and premised on essentially undisputed facts and logic. The fact that Mr Erasmus merely did a rough calculation in determining the force with which the plaintiff's shopping trolley bumped the rack and the forces it would take to dislodge the rack, and not a scientific determination, does not in any way detract from his logical conclusion, which is to the same effect as that testified to by Mr le Roux, viz that an empty trolley bumping slowly into a rack, such as the one in question, should not cause it to collapse and fall over. The defendant did not present any conflicting expert opinion. I am in all the circumstances unable to doubt the correctness of Mr Erasmus' reasoning and conclusion. (See *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA), paras 34–40.)

[11] The store manager, Mr le Roux, testified that an incident of this nature had not occurred since the opening of the store in 2011, and he never encountered a power wing falling over in the 24 years of his involvement in the retail industry. He, however, conceded that the incident should not have happened. The store is very busy, especially on weekends and month ends, with a variety of customers, including old

people, mothers with children and people in wheelchairs. People bumping into each other and into shelves and racks with shopping trolleys is to be expected. Mr le Roux conceded that the plaintiff was walking slowly; his trolley was empty; that the wide turn he made with his shopping trolley on entering the aisle in question is not exceptional; that his shopping trolley bumped into the rack very slowly; that one would not expect the rack to have fallen over in those circumstances and for it to have remained in place even if it had been struck much harder by a shopping trolley.

[12] Mr le Roux conceded that the racks and shelves in the store have been subjected to 'general wear and tear' since their installation in 2011; they were subjected to bumping by shopping trolleys, their screws breaking, and racks and shelves bending in time. He conceded that the racks and shelves were inspected, and a compliance check was conducted prior to the opening of the store on 24 November 2011, and all were found to be properly installed. When he was shown the photographs presented in evidence depicting the current state of *inter alia* other power wings in the store, he conceded that Pick n Pay or the defendant would not have accepted the racks if they were in their current condition at the time of installation.

[13] Mr le Roux testified that he walks the store floor daily to monitor stock levels and the general condition of the store and its contents. There was no formal procedure in place regarding the physical inspection of the racks and shelves and no maintenance system in place. General maintenance, such as the occasional replacement of a missing screw when one is noticed, is done by Mr le Roux and other members of staff, but, in his words, 'the professionals' are called in for 'serious damage'. Mr le Roux is the person primarily dealing with the maintenance aspects of the store relating to smaller issues. During his employment he performed visual inspections of the power wings in the store, but no physical inspections were ever done. He also conceded that after the incident none of the other power wings were inspected or defects as depicted in the photographs, repaired. That concludes the factual narrative.

[14] The evidence establishes on a balance of probabilities that a number of racks in the store were in a state of poor repair as a result of wear and tear when the photographs were taken after the event and that it is improbable that they were in such a state when they were initially installed during October/November 2011. The

defendant had no formal procedure regarding the physical inspection of racks and shelves in place, no regular physical inspections of the racks and shelves have been done, and no maintenance system has been in place by which defects are promptly remedied by appropriately qualified technicians.

[15] On the pleadings the defendant admitted that it owed members of the public a duty of care to take reasonable steps to ensure that its premises were kept in a condition that was reasonably safe for them entering the premises. The evidence establishes that the defendant negligently breached that legal duty of care. A reasonable person in the defendant's position: (a) would foresee the reasonable possibility of its conduct - in not adequately inspecting the racks and shelves for defects regularly and in not having any defects found repaired promptly by appropriately qualified technicians in circumstances where the racks and shelves in such a store are subjected to wear and tear - causing harm resulting in patrimonial loss to a person entering the store; (b) would take reasonable steps to avert the risk of such harm; and (c) the defendant failed to take such steps. (See *Kruger v Coetsee* 1966 (2) SA 428 (A) at 430E; *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another* 2000 (1) SA 827 (SCA) at 839-840.)

[16] The general nature of the harm that occurred and the general manner in which it occurred, was reasonably foreseeable. As was said by Brand JA in *The Premier of the Western Cape Province v Loots NO* (214/2010) [2011] ZASCA 32 para 13, 'our courts have adopted the relative approach to negligence as a broad guideline, without applying that approach in all its ramifications'. Furthermore-

'. . . the relative approach does not require that the precise nature and extent of the actual harm which occurred was reasonably foreseeable. Nor does it require reasonable foreseeability of the exact manner in which the harm actually occurred. What it requires is that the general nature of the harm that occurred and the general manner in which it occurred was reasonably foreseeable.'

The harm which the plaintiff actually suffered was of a general kind reasonably foreseeable if a rack loaded with products in a busy grocery store, falls over. In other words, bodily injury is a generally foreseeable consequence of a failing rack loaded with products in a busy grocery store.

[17] The reasonable measures which could have been taken to prevent or minimise the risk of harm are obvious, and include having a formal procedure in place regarding

safety inspections of the racks and shelves, regular physical inspections, and having a maintenance system in place by which any defects found are promptly repaired by appropriately qualified technicians. It follows, in my view, that the defendant is negligent with regard to the harm that the plaintiff has suffered.

[18] A defence advanced by the defendant is that of contributory negligence on the part of the plaintiff in causing his bodily injuries. The acts of negligence on the part of the plaintiff raised in argument by the defendant's counsel at the conclusion of the trial are twofold: First, that a reasonable person in the position of the plaintiff, particularly on seeing the power-wing in front of him, would not merely have pushed his shopping trolley, without reason or cause, directly into it and thereby colliding with it, but could and would have taken the simple step of shifting the trolley to the left and avoiding contact with the power-wing. Second, a reasonable person in the plaintiff's position could and would have foreseen that a falling power-wing, of the size and weight of the one in question, could cause damage if such a person tries to catch it with one hand and that the plaintiff could and should have stood still and watched the power-wing fall to the floor as it was falling away from him.

[19] The evidence, in my view, simply does not establish negligence on the part of the defendant. On the contrary, the evidence establishes that bumping into racks and shelves with shopping trolleys in a store, such as the defendant's one, is a common everyday occurrence and that the racks and shelves are designed to withstand such bumping. The plaintiff's shopping trolley was empty and bumped the rack without much force. One would not have expected the rack to have fallen over in those circumstances, not even if the rack was struck much harder by a shopping trolley. Furthermore, the forces required to free the rack off its brackets, which hold it in place and secure it, were absent. There is simply no factual basis to conclude that a reasonable person in the position of the plaintiff at the time would foresee the reasonable possibility of his act in bumping the rack slightly with his empty shopping trolley, causing bodily injuries resulting in patrimonial loss.

[20] Furthermore, the plaintiff's evidence is that he reacted to the rack falling in a split second and instinctively by attempting to prevent it from falling onto the floor. He was aware of the presence of other people in the vicinity of the falling rack, although he is unable to say whether the falling rack posed a danger to anyone. When cross-

examined the plaintiff said that, although he was guessing after the fact because the incident happened so quickly and he reacted instinctively, he believes that he thought he could stop the rack from falling onto the floor. He was aware of other people in his immediate vicinity and had he been 100% sure that no-one would get hurt, he might have reacted differently. The evidence establishes that the net weight of the rack in question was 35 kilograms. We do not know the weight of the products it carried. It was not suggested to the plaintiff that it was physically impossible for a man of his build and strength to stop a rack of that size and carrying the weight it did from falling, without injuring himself, nor did the defendant present evidence to such effect.

[21] An inference of negligence, in my view, cannot be drawn from the plaintiff's act in attempting to stop the rack from falling onto the floor. I accept that it is common human behaviour for many, if not most, people in the position in which the plaintiff found himself at the time, to rather stand still, step back, or get away from a falling rack in a store in order to prevent injury. But to find that the plaintiff's reaction to the dangerous situation created by the defendant was unreasonable and to ascribe contributory negligence to him in the prevailing circumstances he found himself in at the time, would, in my view, amount to the adoption of an over-critical *ex post facto* armchair approach. Notional reasonable persons faced with the same danger and prevailing circumstances may well react in the same way the defendant did, attempting to prevent damage to the store owner and injury to others. Here, the elements of foreseeability on the part of the plaintiff and the omission to take reasonable steps to guard against the harm, have not been proved on a balance of probabilities.

[22] Another defence advanced by the defendant is that the causal link between its negligence and the harm suffered by the plaintiff was too tenuous to justify the imposition of delictual liability on the defendant for that harm. In the law of delict, it is trite, causation involves two distinct enquiries. First into factual causation, which is generally conducted by applying the 'but for' test as described by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-G, and then into whether the negligent conduct is linked sufficiently closely or directly to the harm suffered for legal liability to ensue, which enquiry is referred to as legal causation or the remoteness of damage. The criterion for determining legal causation is 'a flexible test, also referred to as a supple test'. Issues of remoteness of damage 'are ultimately determined by broad policy considerations as to whether right-minded people,

including judges, would regard the imposition of liability on the defendant for the consequences concerned as reasonable and fair'. Tests that were applied in the past, such as foreseeability, adequate causation and direct consequences, are still applied, 'but in a flexible manner so as to avoid a result which most right-minded people will regard as unjust and unfair'. (Per Brand JA in *Loots NO* paras 16-18.)

[23] In *De Klerk v Minister of Police* 2018 (2) SACR 28 (SCA), Rogers AJA said this:

[29] . . . Factual causation is tested by asking whether the harmful consequence would have occurred, but for the wrongful act. Legal causation (or remoteness of damage) places a policy-based limit on the factual consequences for which the wrongdoer is held liable.

[30] The test for legal causation is supple, consistent with its foundation of public policy. Before this supple test was authoritatively established, there were conflicting views as to how to test for legal causation, the main competing views being the direct consequences test and the foreseeability test (P Q R Boberg *The Law Delict* 439-448). This court has held that, in applying the supple test, a court should have regard to these and other tests but should not apply them dogmatically. In a recent affirmation of the approach, this court said the following in *Merchant Commercial Finance (Pty) Ltd v Katana Foods CC* 17 (1238/2016) [2017] ZASCA 191 (20 December 2017) para 22 (citation of authority omitted):

"Turning to the question of legal causation (or remoteness of damage as it is sometimes called), the issue is one to be determined by considerations of policy. It serves as a measure of control to ensure that liability is not extended too far. It recognises that liability should not be imposed where, despite the other elements of delictual liability being present, rightminded persons, including judicial officers, will regard it as untenable to do so. In determining whether damage is too remote, tests involving foreseeability, proximity, direct consequences, all of which are relevant, 'should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable." . . .

[32] A moment's reflection will reveal that there are many cases where the act of a third party, itself having causal effect, intervenes between the act of the wrongdoer and the harmful consequence but where the wrongdoer is still held liable for the harmful consequence. This may be so whether the act of the third party is lawful or unlawful. . . . '

[24] 'But for' the rack collapsing, the plaintiff would not have been injured. Factual causation is therefore not the real issue. As to legal causation the defendant contends that there was a disconnection between the defendant's negligence and the plaintiff's injury by him lunging forward over his shopping trolley and attempting to catch the falling rack. The plaintiff's conduct, so the defendant argues, was not foreseeable in

the context of legal causation, was unreasonable, and severed the causality between any negligence on its part and the harm suffered by him.

[25] It is so that the plaintiff's act in trying to catch and hold the falling rack, which in itself has causal effect, intervened between the negligent act of the defendant and the harmful consequences. But, an acceptance of the defendant's contention that delictual liability should therefore not ensue, in my view, would require a strict dogmatic application (as opposed to a flexible one) of both the foreseeability test and the direct-consequences test, and would lead to a result in this case which is so unfair and unjust that it will be regarded as untenable. Members of the public are entitled to expect the integrity of shelves and racks when they enter a grocery store. The plaintiff reacted instinctively and in a split second to the danger created by the defendant. It can, in my view, not be said that considerations of reasonableness, justice and fairness dictate that the defendant should not be held liable for the harm suffered by the plaintiff.

[26] Finally, the defendant relies on the display of a notice next to the only public entrance to the store containing a disclaimer or exemption of liability for negligence. The plaintiff's claim is founded in delict and the defendant thus relies on a contract in terms of which its liability for negligence is excluded. The defendant bears the onus, firstly, of establishing the terms of the contract. (See *Durban's Water Wonderland (Pty) Ltd v Botha and another* 1999 (1) SA 982 (SCA) at 991C.) The notice reads:

'Pick n Pay will not be held responsible for any loss, damage or injury sustained on its premises.'

Disclaimers of this kind are not uncommon. As was said by Scott JA in *Durban's Water Wonderland* at 991A,

'[i]n the context in which they are used they mean that liability will not be incurred'.

Here, the language used is simple, unambiguous and makes it plain that the defendant will not be liable for any loss, damage or injury sustained by anyone on its premises. The plaintiff, as I understand, does not take issue with this interpretation of the disclaimer.

[27] The plaintiff concedes that he was aware that notices containing disclaimer clauses are often displayed at shopping centres. However, he testified that he did not see the notices displayed outside the defendant's store nor did he read them on the morning in question or at any other time. In these circumstances, as was held in *Durban's Water Wonderland* at 991F-992A, the defendant is obliged to establish that

the plaintiff is bound by the terms of the disclaimer on the basis of quasi-mutual assent. This involves an inquiry whether the defendant was reasonably entitled to assume from the plaintiff's conduct in proceeding into the store that he assented to the terms of the disclaimer or was prepared to be bound by them without reading them. Scott JA continued in saying that the-

'. . . answer depends upon whether in all the circumstances the [defendant] did what was "reasonably sufficient" to give patrons notice of the terms of the disclaimer. The phrase "reasonably sufficient" was used by Innes CJ in *Central South African Railways v McLaren* 1903 TS 727 at 735. Since then various phrases having different shades of meaning have from time to time been employed to describe the standard required. (See *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643G-644A.) It is unnecessary to consider them. In substance they were all intended to convey the same thing, viz an objective test based on reasonableness of the steps taken by the *proferens* to bring the terms in question to the attention of the customer or patron.'

[28] Immediately to the left of the entrance is a shopping trolley bay of about five metres long where three rows of shopping trolleys are kept for use by customers of the store. At the front end of the shopping trolley bay are two notice boards of equal size mounted on the wall at eye level next to each other and immediately to the left of the public entrance to the store. The two notice boards have been there since the opening of the store in 2011. To the right of the entrance is an area for promotions and an ATM is located there. Shopping trolleys are also kept in that area.

[29] The notice board furthest away from the entrance has a white background with a heading, 'Warning', in red and relatively large script. Below the heading in smaller black script is stated:

'This store is monitored off-site with digital surveillance cameras.'

Below that is a depiction of a white surveillance camera with a red background. In the same black script is then stated:

'The keys to the safe are held by the security company. The staff of this store have no access to the safe.'

And below that is a depiction of a key on a blue background with a red line across the depiction from top left to bottom right.

[30] The notice board closest to the entrance has white writing in relatively small script with a blue background. At the top of the notice is a heading, 'Trading hours', in bigger script than the rest of the notice, and below that in smaller script is stated:

'Mon to Thurs	8am – 7pm
Friday	8am – 7pm
Saturday	8am – 6pm
Sunday	8am – 5pm
Public Holidays	8am – 5pm'

Then follows a heading 'Right of admission reserved', in the same script as the heading at the top of the notice, and below that in the same smaller script as the rest of the notice is stated:

'Pick n Pay will not be held responsible for any loss, damage or injury sustained on its premises.'

Below that is a depiction in one line of a camera, a roller skate boot, a cigarette and a dog. Each depiction is in black with a white background and has a line through it from top left to bottom right, and underneath that is stated:

'Guide dogs accompanying blind persons are allowed in this store.

By law smoking is not permitted in this store. Any person who fails to comply with this notice shall be prosecuted and may be liable for a fine.

We are a Pick n Pay Franchise Store independently owned and operated.'

[31] I accept that the notices were prominently displayed, but I am not, in all the circumstances, satisfied that the steps taken by the defendant to bring the disclaimer to the attention of customers were reasonable and that a contract subject to its terms was concluded by the plaintiff when he entered the store on the morning in question. It is rather the notice furthest from the entrance with its white background and large red caption, 'Warning', to which attention is drawn. I accept, as was submitted by the defendant, that once attention is drawn to that notice, attention is also drawn to the notice closest to the entrance, containing the disclaimer. However, that notice contains only two headings in larger script; one at the top of the notice, stating 'Trading hours', and one about one third down, stating 'Right of admission reserved'. The disclaimer is not distinguished by a heading which would draw attention to it. Its script is also the same smaller script as the rest of the notice advising the public of the store's trading hours and the further information it contains.

[32] A disclaimer should be pertinently brought to the attention of a customer and not by way of an inconspicuous clause. The notice, by only having the headings 'Trading hours' and 'Right of admission reserved', could not reasonably be expected to alert customers that it also contains a disclaimer clause. Furthermore, the heading 'Right of admission reserved' immediately below which the disclaimer provision appears, is confusing and misleading insofar as the disclaimer is concerned. It does not relate to the exclusion of the plaintiff's liability for any loss, damage or injury sustained by anyone on its premises. (*Cf. Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) para 33; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 318C; *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) at 495I- 496A.)

[33] In the result the following order is made:

(a) The defendant is liable for such damages as the plaintiff may prove at the resumed hearing.

(b) The defendant is to pay the costs of this preliminary hearing.

P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	9 March 2020
Plaintiff's counsel:	Adv SLP Mulligan
Instructed by:	Van Zyl Johnson Inc., Woodmead
Defendant's counsel:	Adv WA de Beer
Instructed by:	Whalley & Van der Lith Inc., Parktown-North