IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

Case number 35421/2009

1/6/2012

In the matter of

YVONNE MAUD NIEMAND Plaintiff

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓
1/06/2012
DATE SIGNATURE

OLD MUTUAL INVESTMENT GROUP PROPERTY INVESTMENT (PTY) LTD Defendant

---

JUDGMENT

BAM AJ

1. The plaintiff claims damages from the defendant, the owner of a shopping mall in Pretoria, commonly known as Menlyn Park Shopping Centre, as a result of injuries sustained by the plaintiff when she slipped and fell on a slippery substance on the floor of a loading bay on the premises. This trial, as agreed upon between the parties, concerns the issue of liability of the defendant.

2. The plaintiff's case is based on delictual liability of the defendant. It is alleged by the plaintiff that the defendant was negligent in failing to keep the relevant area properly clean, causing her to slip on a spilled substance and fall, which resulted in the plaintiff sustaining certain injuries. The defendant's opposition to the claim is twofold. Firstly it denies liability in that it was not negligent as alleged by the plaintiff, and secondly, that it did not act wrongfully on the basis that notices of disclaimer of liability were displayed at all the public entrances and parking bays on the premises.

3.

3.1 An inspection *in loco* was conducted upon request by counsel for the applicant, Mr Vorster. Mr Ferreira SC for the defendant abided. The primary purpose of the inspection was to afford this Court the opportunity to observe the area where the incident occurred in order to enable the Court to fully appreciate the surrounding circumstances regarding the facts of the matter.

3.2 The following was observed by the Court, which observations were consistent with what is depicted in the photographs of the area that formed part of the evidence contained in the bundles of documents, before this Court, as agreed upon by the parties:

(i) The loading zone where the incident occurred is an open area where several delivery vehicles were parked at the time of the inspection;

(ii) The entrance to the loading zone faces a Northern direction. At the time of the inspection, approximately 10h45, the sun shone directly into the loading zone.

(iii) The surface of the loading zone is cement based;

(iv) Between the left wall of the loading zone and the first parked delivery vehicle a pedestrian can pass with ease;

(v) At the back of the loading zone is a stair case consisting of about twelve steps leading to a platform at the back of the loading zone;

(vi) From the platform access can be gained to the inside of the mall;

(vii) A disclaimer notice is affixed to the wall behind the platform (the specific wording of the notice will be referred to below);

(viii) At one of the main entrances a similar disclaimer notice is affixed to the wall next to the entrance.

3.2 To these observations Mr Ferreira added that disclaimer notices are displayed at all eight main entrances as well as the six parking bay entrances. This was not conceded by Mr Vorster. It was stated by Mr Ferreira that the disclaimer notice, now affixed to the rear wall of the loading zone, had not been there at the time of the incident.

Mr Ferreira further pointed out that some or other construction was presently in progress to the left (East), of the entrance to the loading zone. The area is cordoned off with some sort of black covering. It was however pointed out by Mr Ferreira that the said construction had not been there at the time of the incident.

Nothing further was added by either counsel.

3.3 It is recorded that during the inspection certain remarks were interchanged by counsel. These remarks were informal and I was not requested to take specific notice of same or to have it recorded. It had nothing to do with the aforesaid observations.

4. The plaintiff, Yvonne Maud Niemand, testified. Her evidence can be summarized as follows. On 20 June 2006, at approximately 9h15, the plaintiff, a woman of 51 years, an employee of Stuttafords, a tenant of the defendant at the mall, entered the building through what is known as a loading zone. At that stage she had been employed at Stuttafords as a beautician consultant for a period of approximately two months. She was properly dressed as required by her employer and wearing standard walking shoes. After having walked a few paces, crossing the floor of the loading zone in the direction of a stair case leading to a door granting access to the inside of the premises, the plaintiff slipped on a spilled substance and fell. She did not observe the spillage beforehand. As a result of the fall she sustained certain injuries. She was unable to get up on her own accord and was assisted to get on her feet by a security guard, apparently employed by Stuttafords. She only reported the incident in the afternoon due to work conditions. Later, the same day, she investigated the area where she fell in order to determine what the spillage consisted of. She then discovered that the spillage, in the diameter of plus-minus 15 centimeters, had a partly hardened basis, the top part felt slippery and had the appearance of vomit or spilled ice-cream. Her clothes were also partly smeared with the said substance. She did not see any disclaimer notice like the one now attached to the rear wall of the loading zone. She used to enter the premises through the loading zone as required by her employer. She conceded having visited the mall as an ordinary shopper before the incident but denied having seen any disclaimer notice at the entrance she used on that occasion.

5. The defendant adduced the evidence of Mr Erens Mothlalu and Ms Veronica Purdy. The former is an operational manager employed by the defendant. From his evidence it became clear that the defendant took proper precautions regarding the cleaning of the mall by inter alia contracting an independent entity, Fidelity Supercare Cleaning (Pty) Ltd, as cleaning contractor, of which the second witness was the regional manager. It was uncontested that inside the mall, at the relevant time, 98 cleaners were employed, by the cleaning contractor, and tasked with cleaning the premises of spillages and the like. Any spillage would be cleaned up within ten minutes after having been reported. At the loading bay, however, cleaning took place between 22h00 and 6h00, after normal business hours. During the day, because of the normal activities of off-loading, no continuous cleaning took place. If however a spillage is reported, it would also be cleaned up, like inside the mall, within ten minutes after it has been reported. The reporting of spillages in the loading zone was dependent on the observation of a security guard who attended to the security situation outside the building complex. The security guard, who would pass the loading bay from time to time, had instructions to report any spillage. The reporting of spillages was further dependent on any other person using the bay or being in the area at any given time, which persons could include members of the public, any person involved with off-loading or dispatching and employees of tenants entering or exiting the building.

6. The salient facts of this matter are as follows:

(i) The plaintiff was employed by a tenant at the Menlyn mall, owned by the defendant. She used to enter the mall at a loading zone as required by her employer. On 20 June 2006, at approximately 8h30 to 9h15, the plaintiff slipped on a substance on the floor of the loading zone. As a result she fell and injured herself. The plaintiff was oblivious of the spillage.

(ii) The floor of the loading zone is cement based and smooth. The loading zone is primarily used by delivering vehicles. The said area is also used by other employees of divers tenants to enter the building. Employees of tenants have been forbidden by their employers to enter the building through any of the main public entrances. This is well known to, appreciated, and accepted by the defendant.

(iii) The defendant contracted an independent contractor to attend to the cleaning of the entire area of the mall, including the loading zones. It is a specific term of the cleaning contract that any spillage, wherever it may occur, has to be attended to and cleaned up within ten minutes after it had been reported. Failure to comply with this term would result in the contractor being visited by a substantial pecuniary penalty. The defendant further established extensive means to ensure that the mall is kept clean of, amongst others, spillages of any kind. The said means included inspection tours throughout the premises, referred to as walkabouts, conducted by members of defendant's own staff.

(iv) The loading zone is a busy area throughout the day and is only cleaned between 22h00 and 6h00. Any spillage, however, has to be attended to within ten minutes after having been reported.

(v) Inside the main shopping area specific employees are designated to attend to, amongst others, any spillage that may occur. At the loading zone nobody was specifically designated to attend to any spillage that could occur in that area. Reporting of spillages of any kind at the loading zones depended upon a security guard patrolling the outside of the building who had instructions to report spillages, members of the public passing by and employees of tenants or other persons who may be in the area where the spillage occurred.

(vi) At all eight main public entrances to the mall, as well as the six parking garages, defendant properly displayed clearly legible disclaimer notices, roughly in the following format but with the same wording.

"The Landlord of the Premises, or its Agents
Are not Liable for any Damages or Loss
Which you May Sustain
Of Whatsoever Nature or From Whatsoever
Cause Arising, Including but Not Limited to
Damage or Loss Caused by Fire, Theft, Negligence
Or of any Other Cause."

(vii) On 20 June 2006, the day of the incident, no disclaimer notice was affixed to either the entrance to the loading bay or the rear wall of the loading bay. The notice that was observed by the Court during the inspection was attached subsequent to the 20th June 2006.

(viii) No written record of a report of any spillage at the loading bay was discovered by the defendant. Reports of that nature, prior to 20th June 2006, were however discovered by the defendant. No evidence was adduced that the spillage the plaintiff had slipped on had been reported or cleaned up.

(ix) The spillage in question was slippery and consisted of a partly hardened base and had the appearance of vomit or spilled ice cream.

7. In view of the fact that the appellant's case is based on delict, the questions to be answered are whether wrongfulness and fault *(culpa)* had been proved by the plaintiff.
   See **Randfontein Traditional Local Counsel v Absa Bank Ltd 2000(2) SA 1040 (W)** at 1057 C-H and **Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A)** at 832H.

It was submitted by Mr Ferreira that although it is usually done the other way around, this Court should first deal with the question of negligence *(culpa)* and secondly with the question of wrongfulness. The second issue concerns the defendant's defense of absence of wrongfulness, based on the defendant's display of the disclaimer notices.
This submission was sound in the circumstances and I found it expedient to consider the said issues in that order.

8. Pertaining to the issue of negligence, in my view the plaintiff was not negligent at all. There was no evidence indicative thereof that the plaintiff could have avoided her fall.

Regarding the question whether the defendant was negligent, as averred by the plaintiff, Mr Ferreira referred to the reported matter of **Chartaprops 16 (Pty) Ltd and Another v Silberman 2009 (1) SA 265 SCA.** In the said matter it was held that a principal could not be held liable for wrongs committed by an independent contractor, or its employees, contracted specifically for the purpose of keeping the property clean, in failing to remove a spillage upon which somebody slipped and fell. Mr Ferreira submitted that the defendant could also not be held to be vicariously liable for any fault of the independent contractor. The defendant, at all relevant times, acted reasonably in that regard by specifically employing the cleaning contractor.

9. It was *inter alia* submitted by Mr Vorster that the evidence showed that the defendant was, apart from the agreement it had with the independent cleaning contractor, aware of the lack of proper monitoring and a cleaning system in place at the loading zone during day

time, and, accordingly thatit was reasonably foreseable by the defendant that somebody could get injured when a spillage would not be timeously observed and attended to. The defendant was therefore negligent. In this regard Mr Vorster referred me to **Checkers Supermarket v Lindsay 2009 (4) SA 459 (SCA).**

10. In order to decide whether the defendant was negligent as alleged by the plaintiff, an objective reasonable test has to be applied to the facts. The relevant facts regarding this issue are the following:
    (i) The defendant contracted an independent contractor in terms of a specific contract to attend to the cleaning of the premises. The terms of the contract are comprehensive and clear. The relevant term of the contract stipulates that cleaning of any reported spillage had to be done within ten minutes after the report thereof.
    (ii) Apart from the duties of the cleaning contractor in terms of the contract, the defendant on its own took additional steps to ensure that cleaning up of the premises is monitored and controlled by its own employees. In that regard I refer to the defendant's employees conducting walkabouts for that purposes and the defendant depending on security guards and other people to report spillages.
    (iii) The defendant on its own evidence actively participated in, at least, the monitoring of the premises and the cleaning up process.
    (iv) The spillage in question should have been cleaned up within ten minutes of it being reported.
    (v) The spillage had apparently not been reported, or if it had been reported, had been cleaned up within the required ten minutes, or at all.

11. Taking into consideration the relevant facts and the arguments of counsel, I am of the opinion that the defendant was in fact negligent in not taking reasonable steps to keep the loading zone properly monitored and clean and in not ensuring the safety of anybody entering the area. I base my conclusion in this regard on the following:

(i) The defendant's own employees were actively involved in the cleaning process in conducting walkabouts for purposes of checking or monitoring the premises. The defendant also tasked security guards to assist in reporting, amongst others, spillages. Despite the agreement between the defendant and the cleaning contractor, the defendant did therefore not delegate all responsibilities pertaining to the cleaning up of the mall to the contractor. The defendant clearly reserved certain monitoring and

controlling duties pertaining to the cleaning of the premises, or shared obligations and duties in that regard with the contractor. The defendant, in being actively involved in the whole process in keeping the premises clean, did not depend solely on the contractor.

(ii) This is not a situation where the defendant is vicariously liable for any wrong doings of the contractor. My conclusion regarding defendant's negligence is based on defendant's own conduct and obligations.

(iii) On the day of the incident, 20th June 2006, the spillage had not been reported by anybody, or cleaned up, between the time of the plaintiff's fall at about 9h00 and later the same day, apparently during the afternoon, when plaintiff went to investigate the spillage. The fact that the loading bay is cleaned between 22h00 and 6h00, for practical reasons, is of no consequence. The problem was the spillage on the floor of the loading zone.

(iv) Unlike the situation inside the mall, no specific person was designated to check upon the cleanliness of the loading bay, more specifically pertaining to possible spillages during day time. To depend on the observations of a passing security guard or other people, to report any spillage, is clearly insufficient. The fact remains that no spillage or removal thereof had indeed been recorded on the specific day. If it had been reported and/or attended to, one would have expected some record or evidence thereof. The spillage was still there at the time the plaintiff went to investigate the nature thereof during the afternoon. On the probabilities the only inference that can be drawn from this situation is that the floor of the loading zone was not properly monitored, if at all.

(v) The defendant was aware of, and appreciated and accepted the fact that a substantial number of various categories of people, including employees of tenants, daily used the parking bay for different purposes. Accordingly the defendant was reasonably obliged, in the circumstances, to have the loading zone properly observed and cleaned of spillages, which it failed to do.

(vi) The fact that a proper system was in place to keep the mall clean from spillages, and that the loading zone was part of the mall, do not avail the defendant in circumstances. The fact is that at the loading zone the monitoring of the floor surface and cleaning up of spillages were not properly attended to.

(vii) Although there is no evidence on record at what time the spillage had occurred, and how it came to be on the floor, if the location where it was spilt is borne in mind, the plaintiff's fall could have been prevented if there had been proper monitoring and cleaning of the area after 6h00. Proper monitoring of the area, to my mind, would have constituted reasonable precautions to avoid injury to any person.

(viii) Proper means to ensure the safety of any pedestrian entering the loading bay were clearly not employed by the defendant. If the same system pertaining to monitoring and cleaning inside the mall had been employed at the loading zone, the reasonable safety of anybody entering the loading zone would have been ensured.

(ix) In the circumstances the defendant ought reasonably to have foreseen that its failure to put a system into place at the loading zone to ensure that it was properly monitored and cleaned if and when spillages occurred, could have caused damages to somebody. The defendant failed to take the reasonable steps to guard against such occurrence. See **Kruger v Coetzee 1966(2) SA 428 (A)** at 430 E-H

12. I now turn to the issue of wrongfulness. The defendant relies in this regard on a defense that the plaintiff accepted the terms of the disclaimer when she entered the building, in accordance with the law stated in **Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999(1) SA 982 (SCA).**

It was argued by Mr Ferreira that the defendant had complied with all requisites pertaining to the issue of disclaimer notices. According to Mr Ferreira the wording of the disclaimer notices, to which I have alluded to above in par 6(iv), which notices were properly displayed at the relevant time at all eight public entrances and the six parking bays of the mall, clearly stated that the defendant would not incur liability in respect of any injury or damage resulting from negligence or otherwise. These terms, Mr Ferreira argued, were accepted by the plaintiff.

13. The law pertaining to this issue, discussed in **Durban's Water Wonderland** case, is, with respect, clear. The said decision re-states the principle followed by our courts regarding the so-called *ticket cases*. Anybody entering premises where disclaimer notices with wording, as in this matter, are properly displayed, is subject to the terms of the disclaimer notice. The fact that the disclaimer notices, displayed at all the public entrances, had not been read by any specific person, would not be of any avail to anybody entering the building at those entrances.

14. In this matter it was common cause that no disclaimer notice was affixed to the rear wall of the loading zone, where it is presently affixed, neither was any disclaimer notice affixed at the entrance to the loading zone at the time of the incident. It was not explained by the defendant why disclaimer notices were not so affixed at the time, and why, subsequent to the incident in question, a disclaimer notice has now been affixed to the rear wall. The inference to be drawn from this state of affairs is that the defendant realized that the loading zone was not covered by the disclaimer notices at the public entrances and the parking garages.

15. It was common cause that the loading zone was daily used by people who would not make use of any of the main entrances or the parking bays. It was never even suggested that any disclaimer notice at any of the other entrances was visible from the loading zone.

16. The main question to be answered in this matter, pertaining to the issue of exclusion of liability, is whether the display of the disclaimer notices at the eight main entrances and the six parking bays, was sufficient and adequate in order to entitle the defendant to rely on the contents thereof and to claim that anybody entering the loading zone, would also be subject to its terms.
The defendant bore the onus in this regard. See **Durban's Water Wonderland** at 991.

17. The plaintiff conceded that she had previously entered the mall at one of the main public entrances. She however stated that she had never been aware of any disclaimer notice or that she had read the contents thereof. She could however not dispute that the disclaimer notices had been affixed at the entrances and the parking garages at the time she visited the mall as an ordinary shopper. The plaintiff testified that she entered the mall at the loading zone, daily, for a time period of two months prior to the incident. Her husband used to drop her at the loading zone each and every morning and would pick her up in the afternoon. She told the Court that she had not been aware of any disclaimer notice at the loading zone at all.

18. In my opinion, the defendant would have been entitled to rely in law on the contents of the disclaimer notices if, at the time, the relevant notices had been displayed at the entrance of, or at least, the rear wall of the loading zone, where such notice is presently displayed. In my opinion, to find that the plaintiff should have been aware of a disclaimer because she should have read the notice on a previous occasion when she entered the mall through one of the main entrances, would be totally unreasonable, unfair and not justified in the circumstances. The fact remains that the plaintiff, for approximately two months before the incident, whilst entering the mall at the loading zone, had not been made aware of any disclaimer notice.

19. By not having displayed any disclaimer notice at the entrance to the loading zone, or the rear wall, for that matter, at the time in question, creates the impression that the defendant did not consider the loading zone a potential danger area on the same basis as the inside of the mall. This inference is also borne out by the evidence that the loading zone, albeit for

practical purposes, was not attended to, or monitored, on the same basis as the inside of the mall to which the general public had access. The subsequent affixing of the disclaimer notice to the rear wall of the loading zone further creates the impression that the defendant, belatedly, realized that the displaying of the disclaimer notices at the public entrances was inadequate.

20. The defendant was well aware of the fact that people were daily using the loading zone. It is quite clear that the defendant could not reasonably have expected every person present at the loading zone at any given time, including people casually involved with off-loading, to have known about the disclaimer notices displayed at the main entrances or parking garages.

21. Accordingly I find that the defendant's defense based on the disclaimer notice should be rejected.

22. The following order is made:

1. The defendant is held liable for the damages to be proved by the plaintiff allegedly sustained on 20 June 2006 at Menlyn Park Shopping Centre, Pretoria.

2. Costs reserved; to be determined at the end of the trial on *quantum*.

3. The matter is postponed *sine die*.

A J BAM ACTING JUDGE OF THE HIGH COURT. 1 JUNE 2012