REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

26/09/2014
DATE

SIGNATURE

26/9/14

CASE NO: 32665/2010

S.J. GORDON — **PLAINTIFF**

AND

SHOPRITE CHECKERS (PTY) LTD — **FIRST DEFENDANT**

GERHARD POTGIETER MAINTANANCE & CLEANING t/a MR CLEAN — **SECOND DEFENDANT**

JUDGMENT

THOBANE AJ,

[1] The Plaintiff has instituted an action against the Defendants for damages arising out of an incident that occurred on the 6th February 2009. The issues for determination are contained in the pre-trial minute and furthermore were read into the record at the commencement of proceedings. Although stated broadly in the pre-trial minute and in the opening address at the commencement of the trial, they are two fold. Firstly, liability of the defendants and secondly, whether or not the claim has prescribed as it pertains to the second defendant.

[2] At the commencement of the proceedings the parties indicated that a separation of issues in terms of rule 33(4) of the uniform rules was called for, with the result that liability as well as prescription were to be considered first and *quantum* at a later stage. A separation was accordingly ordered.

[3] The plaintiff was the only witness to testify in support of her claim. No witness was called on behalf of the first defendant and only one witness testified on behalf of the second defendant. After the plaintiff had closed her case it was indicated that there was agreement between the parties that the second defendant would lead evidence first, which he subsequently did. Thereafter the first defendant closed its case.

PLEADED CASES

[4] The plaintiff initially issued summons against the first defendant only. At some stage but before trial, she applied and was allowed to join the second defendant to the action. Plaintiff alleged in her particulars of claim that on the 6th February 2009 within the branch of the first defendant at Menlyn, the employees of the first defendant, alternatively of the second defendant, were cleaning/ washing the floor of the first defendants's shop. On that day the plaintiff, slipped on the wet floor and fell. In the process she sustained certain

bodily injuries. The contention was further that the incident was caused by the sole negligence of the first defendant, alternatively the second defendant's employees in that:

1. They failed to take reasonable steps to ensure that use of the floor by members of the public was safe,
2. They cleaned/washed the floor without warning boards/signs alerting members of the public that the floor was wet and that they could slip and fall,
3. They washed/cleaned the floor without drying it soon thereafter,
4. They failed to secure the area being washed/cleaned and failed to warn the public of the looming danger, whereas they were in a position to do so,
5. They failed to take reasonable steps to avert a dangerous situation in circumstances where they were in a position to do so,
6. They failed in their legal obligation to protect members of the public.

Various other grounds were advanced in the particulars of claim.

[5] The first defendant denied the incident, negligence as well as the the averments in connection therewith. In the alternative, the first defendant pleaded that in the event the court finds that there was negligence resulting in injuries, then in that event they plead that the negligence was not causally linked to the incident or injuries. Further alternatively and in the event it is found that the negligence was causally linked to the injury,in that event the plea was that the plaintiff contributed to the negligence by inter alia failing to keep a proper lookout, exercising reasonable care and avoiding the incident. It was further pleaded that should the plaintiff be found to have been negligent, then what ever damages should be apportioned. It was further pleaded that cleaning services were contracted to the second defendant.

[6] The second defendant pleaded a few days before trial. The defence of prescription was raised essentially indicating that in view of the summons having been issued on the 4th June 2010 and served on the 13th July 2010 against the first defendant, and the fact that no summons were issued against the second defendant prior the 28th March 2014, being the date of notice of intention to amend, means that the notice of amendment was issued outside three years, hence the contention that the claim had prescribed. In the alternative, that already on the 6th February 2009 the plaintiff knew or is reasonably expected to have known that the second defendant was responsible for cleaning services in the premises of the first defendant. Further, it was pleaded that on the 6th February 2009 employees of the second defendant performed cleaning services on the premises. That on the day there was a dedicated employee deployed on a full time basis on the aisle in which the plaintiff allegedly fell. That customers in general and the plaintiff in particular were warned by the placement of boards on each end of the aisle with the words "Caution, wet floor", inscribed on them. That negligence is denied and that should the court find that there was negligence, that such negligence was not linked causally to the injuries sustained. That should the court find that there was negligence and that it was linked causally, that the plaintiff was also negligent and her negligence contributed to her injuries and that should damages be awarded they should accordingly be apportioned. Further, that the wetness on the floor was as a result of moisture emanating from the fridges next to the aisle.

[7] The plaintiff replicated to the second defendants plea indicating therein that until the stage where the first defendant had pleaded, they were not aware about the identify of the second defendant, and the facts giving rise to the claim. The plaintiff further stated that it was not reasonable possible to have acquired the information about the identity of the second defendant and/or facts giving rise to the claim prior that date. Prescription was

denied. During the plaintiff's cross examination a verbal notice of intention to amend the plaintiff's particulars of claim was given. The particulars of claim were subsequently amended with leave of the court. The essential amendments were to indicate that in view of the fact that the second defendant had pleaded that there was moisture emanating from the fridges, the second defendant's employees therefore had negligently failed to attend to the moisture. The first defendant was equally, through the proposed amendment, alleged to have been negligent in other respects.

PLAINTIFF'S EVIDENCE

[8] The plaintiff gave testimony in support of her claim. She indicated that she is employed at Specsavers. She testified that on the 6th February 2009 and during her lunch break, she walked into Checkers within the Menlyn Mall using the entrance situated next to Maxis Restaurant. She headed towards the fridges where she intended to purchase cool-drink for herself. The first defendant trades at the said premises. She was wearing shoes with a rubber sole and the floor was covered in tiles. On entering the isle she looked ahead of her. She walked a few steps then slipped and fell. On standing up she realized that her denim below the knees were wet. According to her, there were no warning boards the entire length of the aisle indicating that the floor was wet. With difficulty she picked herself back on her feet. The substance that was on the floor that had caused her to fall was clear, without color. There was another inter-leading aisle and as she walked into it she saw a cleaner in maroon uniform with the name "Mr Clean" on it standing there with three other persons mob in hand talking. She asked her where the signage was and her reply was that she doesn't have it. She then told her that she had fallen. She was referred to another person and eventually ended in one of the offices where she was given details about who to call and how to claim if she so wished. No one, so she testified, told her at any stage that the person or party who was responsible for cleaning was the second defendant and

that the person in maroon uniform with the name Mr Clean on it, was not in in the employ of the first defendant. She testified further that although a Service Level Agreement between the first and the second defendant was made available to her through her lawyers, the copy made available was not signed and missing therefrom was an annexure referred to as Schedule 1 to the said agreement. As a result of the fall, she sustained bodily injuries.

[9] During cross examination on behalf of the first and second defendants, she agreed with the assertion that she didn't know where the water came from and that they could have been from anywhere. She also didn't know for how long the water had been there. Although she said the floor was being washed, she personally didn't see any person engaged in the process of cleaning or washing it. She inferred that the person she saw with a mob was in fact washing the floor. She indicated further that because she fell within the premises of the first defendant, the first defendant had to be responsible for her fall although she conceded when it was put to her that there was nothing that the second defendant had done wrong that resulted in her falling. Although the person with the words "Mr Clean" on the uniform wore maroon uniform, according to her she believed that the person, wore a uniform as a cleaner but was in the employ of the first defendant. It did not occur to her that she could google "Mr Clean" on the internet to establish who it was. She disputed the area being pointed out to her in a photo added to Bundle 5 - Post Pre-Trial Documents and marked 39. She denied that there were boards placed on the aisle in which she fell on the day in question. According to her the area in which she fell was more to the right of what was depicted on the said photo. She was taken to an office after she fell and was given a number to contact to lodge a claim. At no stage was she told that "Mr Clean" is not part of the first defendant but that it was independently contracted to perform cleaning services. She was advised to lodge a claim including the submission of all

medical records, which she did. The person she sent the claim to was one Wendy. She was never advised about the outcome of the claim whereupon she approached her lawyer at the time for further assistance.

[10] The plaintiff was further cross examined in detail after the pleadings were amended. It was put to her that her case had evolved into what it was not all about from the beginning and also when she testified in chief. Pertinently, it was put to her that initially she had claimed that water on the floor had caused her to fall and that after the amendment there was an issue about the fridges which had been introduced after some five years. It was put to her that as a result of the amendment the first defendant would have to call witnesses to testify as to how fridges worked as well as the cause of the leakage or moisture.

SECOND DEFENDANT'S EVIDENCE

[11] As was agreed between the parties the second defendant was to lead evidence first. Wendy Jane Rieken testified that she was a Claims Negotiator at Glenrand which has since been taken over by AON, at the time of the incident giving rise to the action. In that capacity she communicated with the plaintiff with the view to considering her claim. She wrote an e-mail, marked as page 85, addressed to the plaintiff wherein she requested the plaintiff to send a statement about the incident as well as copies of all medical accounts. I interpose to indicate that although the e-mail is marked "without prejudice or acceptance of liability", the first defendant waived any privilege or confidentiality attached to the e-mail. She notified Mr Clean of a possible claim and after speaking with the store manager, they were of the view that there was no negligence on the side of first defendant. On the 25th March 2009, she then wrote an e-mail to the plaintiff advising her that her claim had been rejected and that they had referred everything to Mr Clean. When there was no response

she sent another e-mail on the 20th April 2009, without contents but simply redirecting the original e-mail. According to her, she never received any notification that the e-mail address she used was incorrect nor did she get any response to both e-mails.

[12] During cross examination she conceded that although she testified that she had sent the e-mails to the plaintiff's e-mail address, there was a possibility that the plaintiff did not received them.

THE LAW

[13] The test for negligence in matters such as this is trite and was spelled out in ***Kruger v Coetzee***[1] where Holmes JA said:

> *"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 causing him patrimonial loss; and*
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> *(ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.*

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

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[1] Kruger v Coetzee 1966 (2) SA 428 (AD) at 430E-G

[14] The onus of proving negligence on a balance of probabilities rest with the plaintiff. The observation therefore, below, by Wallis JA, in ***Monteoli v Woolworths (Pty) Ltd***[2] is very apposite;

> *"[25] It is absolutely trite that the onus of proving negligence on a balance of probabilities rests with the plaintiff.*
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> *[26] (See, for example,* ***Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A)*** *at 574H and 576G;* ***Sardi and Others v Standard and General Insurance Co Ltd 7977 (3) SA 776 (A)*** *at 780C - H and* ***Madyosi and Another v SA Eagle Insurance Co Ltd 1990 (3) SA 442 (A)*** *at 444D -G.)*
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> *[27] Sometimes, however, a plaintiff is not in a position to produce evidence on a particular aspect. Less evidence will suffice to establish a prima facie case where the matter is peculiarly in the knowledge of the defendant.*
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> *[28] (See, for example,* ***Union Government (Minister of Railways) v Sykes 1913 AD*** *156 at 173-4;* ***Gericke v Sack 1978 (1) SA 821 (A)*** *at 827D - H and* ***Macu v Du Toit en 'n Ander 1983 (4) SA 629 (A)*** *at 649B - 650F.)*
>
> *[29] In such situations, the law places an evidentiary burden upon the defendant to show what steps were taken to comply with the standards to be expected. The onus nevertheless remains with the plaintiff."*

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[2] Monteoli v Woolworths (Pty) Ltd 2000 (4) SA 735 (WLD) at 742A-G

[15] I find the approach adopted in the ***Probst v Pick 'n Pay***[3] matter valuable and plan to apply some of the principles therein to the current facts.

ANALYSIS

[16] I find the following to be common cause;

- That the plaintiff entered Checkers, the second defendant's store, on the 6th February 2009,
- That she, while walking on one of the aisles, slipped over a liquid or substance that was on the floor and fell,
- That she interacted with the employees of the first defendant and subsequently lodged a claim with them through their then insurers Glenrand.

[17] The plaintiff was not cross examined about the substance on the floor by any of the defendants save to inquire if she knew what it was, for how long it had been on the floor, it's origins and also how it looked. The defendants' pleaded case was to deny that there was substance on the floor and pleaded various alternatives. The second defendant in particular pleaded as one of his alternatives as follows:

> *6. Without derogating from the generality of the a foregoing, the second defendant pleads that:*
>
> > *6.1. on the day of the alleged incident, the second defendant allocated a full-time employee to the section within which the aisle in which the plaintiff allegedly slipped and fell is situated;*

[3] Probst v Pick 'n Pay Retailers (Pty) Ltd [1998] All SA 186 (W)

6.2. in cleaning the floor of the aforementioned aisle the employee had warned consumers in general, and the plaintiff in particular, that the floor was wet by erecting and placing a luminous yellow warning board at both ends of the aisle;

6.3. the aforesaid warning boards had the words "Caution, wet floor" inscribed upon them;

6.4. under the circumstances consumers in general and the plaintiff in particular, were adequately and effectively notified of the wet floor.

[18] The second defendant further pleaded thus;

11. Without derogating from the generality of the above, second defendant:

11.1. Pleads that the wetness on the floor where the incident took place was the result of moisture caused by refrigerating units next to the aisle;

11.2. Pleads that second defendant allocated a full-time employee to clean the aforesaid moisture;

11.3. Repeats the contents of paragraphs 6.2, 6.3 and 6.4 as if specifically pleaded here also.

[19] The plaintiff did not know the source of the water on the floor this was established when she was being cross examined by the first defendant's legal representative. All she knew was that the shelves on the aisle in which she fell was adjacent to the fridge. According to her, she inferred that the water or substance on the floor was from the washing of the floor, in view of the fact that there was a person standing nearby with a mob. Pertinently it was put to the plaintiff during cross examination by the second defendant's legal representative, that the source of the water on the floor was "constant leakage from the fridges". It was also put to the plaintiff that the person she saw with mob

in hand was actually placed in the area permanently to attend to the leakage. Further, that every hour or so the supervisor, one Mr. Makgau, would roam the area to inspect the fridge are and presumably have it attended to in the event moisture had been deposited on the floor. It was put to her that a witness will testify to that effect. It is therefore not necessary to speculate or even infer what the source of the water was. It is also not necessary to deal with the question as to how long the moisture had been deposited prior to the plaintiff entering the shop. The conclusion is inescapable, having regard to the probabilities, that the water or using the second defendant's terminology, the "moisture", emanated from the fridges that were leaking consistently and that were adjacent to the shelves where the plaintiff intended to purchase her cool drink.

[20] I now turn to consider the duty that rested on the defendants in relation to their customers. Stegmann J in dealing with a slip and fall case put it as follows in ***Probst v Pick 'n Pay Retailers (PTY) Ltd***[4];

> *"The duty on the keepers of a supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude."*

It is trite that negligent omissions on the part of a shop owner, to clear hazardous matter from the shop floor is actionable[5]. Moreover a reasonable person in control of a shopping mall would clearly foresee that spillages might occur in the passages and cause harm if

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[4] Probst v Pick 'n Pay Retailers (PTY) Ltd [1998] 2 All SA 186(W)

[5] Alberts v Engelbrecht 1961 (2) SA 644 (T); Probst v Pick 'n Pay Retailers (Pty) Ltd [1998] 2 All SA 186 (W); Monteoli v Woolworths (Pty) Ltd 2000 (4) SA 735 (W); Brauns v Shoprite Checkers (Pty) Ltd 2004 (6) SA 211 (E), Charterprops 16 (PTY) Ltd and Another v Silberman 2009 (1) SA 265 (SCA).

they are permitted to remain, and would take reasonable steps to guard against harm occurring.[6] That such a duty existed has been established.

[21] In my view, it was foreseeable that there was possibility of harm. The question that arises therefrom is whether there was an adequate system in place to deal with harzadous matter as and when it got deposited on the floor. It can be accepted in this matter that the first defendant had contracted the second defendant to provide cleaning services on the premises. What system is required would differ from case to case. Of importance though is whether in a particular case such a system is adequate. See ***Lindsay v Checkers Supermarket***[7] where Van der Reyden J, had the following to say;

> *The adequacy of the system has also to be considered against the number of cleaning staff allocated to deal with spillages and the floor area and number of shopping aisles. If for example a supermarket has 4 or 5 aisles where, from experience, it is known that spillages do occur, the system can only respond with promptitude if a cleaner is stationed at each of these potential hazardous zones. No hard or fast rule can be laid down. Obviously each case has to be considered on its own facts.*

[22] The evidence of the plaintiff is that she was made aware, after the first defendant had pleaded, that there existed an agreement between the first defendant and the second defendant for the latter to provide cleaning services. The first defendant pleaded thus;

> *9.1. The allegations are denied;*
>
> *9.2. The Defendant contracted, with an independent contractor, namely Gerhard Potgieter Mainatanance Cleaning Services (Witbank) CC t/a Mr. clean, to attend to all cleaning services at the Defendant's premises.*

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[6] Kruger v Coetzee 1966 (2) SA 428 (A)

[7] Lindsay v Checkers Supermarket 2008 (4) SA 634 (NPD)

It was argued on behalf of the plaintiff that despite discovery processes, they were not favored with the written agreement between the first and the second defendant. The discovered document, (Service Level Agreement) is contained in pages 66 to 84 of Bundle 3 - Discovery. This document was picked apart by Mr Du Plessis. He advanced two reasons why he was of the persuasion that it can not be relied upon. Firstly, he argued that it was unsigned. Secondly, that it was incomplete. In the latter regard he pointed out that there was no commencement date and also that there was no Schedule 2 thereto. The portions which he attacked are couched as follows in page 68 of Bundle 3 - Discovery;

"Commencement Date"	*the date referred to in paragraph 3 of Schedule 1*
"the Premises"	*the Shoprite, Checkers or Checkers Hyper branch defined on paragraph 1 of Schedule 2, it being recorded that there can be multiple of Schedule 2 depending upon the number of branches the parties agree to allocate to the Service Provider;*

Although Schedule 1 is attached to the unsigned agreement, the attached Schedule doesn't have a page 3 referred to therein. Mr Stoop argued on behalf of the second defendant, that though unsigned, the body of the agreement is a true reflection of what the parties agreed upon. Mr Du Plessis was at pains to argue that in view of the fact that Schedule 2 was to have contained a cleaning plan and the level of service expected, it's absence meant that the defendants can not say that there was a cleaning system in place.

[23] I agree with the submission that the Service Level Agreement is unreliable in view of the deficiencies raised on behalf of the plaintiff. I find that the existence of a contract and / or agreement has not been proven. However, Mr Stoop did not base his submission on the

adequacy or otherwise of the cleaning system entirely on the Service Level Agreement. He went further to put a version to the plaintiff that there was a cleaner permanently placed in that aisle to attend to the constant leakage emanating from the fridges. He stated that the said employee had sadly died. However, he indicated that he would call the supervisor Mr Makgau, to testify about, *inter alia*, the place where the plaintiff fell and the cleaning system that was in place at the time of the plaintiff's fall. Further, that Mr Makgau would testify that every hour or so an inspection would be carried out to determine if there was water on the floor. Despite such a version being put to the plaintiff, Mr Makgau was not called to testify. In this regard, I was asked to draw a negative inference considering, so it was argued, that Mr Makgau was sitting outside court clad in Checkers uniform when the second defendant closed its case without calling him.

[24] I do not find it necessary to resort to inferences. One has to look at the evidence placed before court. The plaintiff testified in person whereas the second defendant chose to lead the evidence of Wendy Rieken. Her testimony was limited to the question as to whether the plaintiff would have been aware that the person responsible for the cleaning services was the second defendant. The second defendant sought to argue that through correspondence by e-mail, the plaintiff was made aware of this. What the second defendant sought to do was to establish whether or not the plaintiff's claim has prescribed. With regard to the adequacy of a cleaning system in place at the premises, she would not have known given that she was working for the insurers. In fact no evidence was led by her in that regard. It stands to follow therefore that the defendants failed to show that there was a system in place let alone that such a system was adequate.

[25] The plaintiff testified that on the day of the incident she asked the person who had been carrying a mop, a Mr Kekana, where the warning boards were. The reply was that

the person did not have them. When the plaintiff was at the office there was again a discussion about the warning boards. She was told that there were a number of boards that could have been used. It is also during such a discussion when she was told that if she wants money she must sue. What stands out for me is the fact that it was put to the plaintiff that the boards were placed there "as a rule". The plaintiff was adamant that on the day in question the boards were not there. In view of the fact that Mr Makgau was not called to testify, the evidence of the plaintiff must be accepted.

[26] What was put to the witness is that there was moisture leaking from the fridges on a constant basis. That such a leak necessitated the placement of an employee, on a permanent basis, to attend thereto. That there were warning boards on each end of the aisle and that such boards were placed there as a rule. That the supervisor Mr Makgau would patrol the area every hour to inspect if the moisture was being attended to. The fact that there was a person posted next to the fridge means that the defendants treated the leakage as a matter of routine. That being the case it was expected of them to put measures in place to prevent harm to customers. The approach by Mr Stoop to project that there was a system in place by merely putting it to a witness and not leading evidence of such a system is in my view fatal.

[27] Even if one were to follow the approach adopted by Stegman J in ***Probst v Pick 'n Pay Retailers (PTY) Ltd***[8], that of the maxim *res ipsa loquitur,* the result would be the same. This *dictum* encapsulates my point;

> *"..... this case is presently relevant to the question of the applicability of maxim res ipsa loquitur, and the burden of proof. When (as in the present case) the pleadings are such as to fix on the plaintiff the burden of proving negligence on the part of the*

[8] Cited above page 195 para i.

defendant, evidence adduced on the plaintiff's behalf which may be sufficient to justify an inference of negligence on the part of the defendants on such reasoning as is encapsulated in the maxim res ipsa loquitur, does not serve to shift the burden of proof to the defendants: its consequence is that judgment will be entered for the plaintiff unless the defendant adduces such evidence as is sufficient to displace the inference of negligence - a less stringent test than evidence required to prove the absence of negligence on the balance of probabilities."

[28] Stegmann J, went further to say;

"When the plaintiff has testified to the circumstances in which he fell, and and the apparent cause of the fall and has shown that he was taking proper care for his own safety, he has ordinarily done as much as it is possible to do to prove that the cause of the fall was negligence on the part of the defendant who, as a matter of law, has a duty to take steps to keep his premises reasonably safe at all times when members of the public may be using them..... It is therefore justifiable in such a situation to invoke the method of reasoning known as res ipsa loquitur and, in the absence of an explanation from the defendant, in infer prima facie that a negligent failure on the part of the defendant to perform his duty must have been the cause of the fall. As explained in ***Arthur v Bezuidenhout and Mieny*** *(supra), this does not involve any shifting of the burden of proof onto the defendant: however, it does involve identifying the stage of the trial at which the plaintiff has done enough to establish, with the assistance of reasoning on the lines of res ipsa loquitur, a prima facie case of negligence on the part of the defendant, so that unless the defendant meets the plaintiff's case with evidence which can serve, at least, to invalidate the prima facie inference of negligence on his (defendant's) part, and so to neutralize the plaintiff's case, judgment must be entered for the plaintiff against the defendant."*

[29] In conclusion, I must apply the facts of this case to the principles in ***Probst v Pick 'n Pay Retailers,***

1. There was a duty on the defendants owed to the plaintiff and other members of the public, to keep the floor of the shop safe for use;
2. The duty required that a system be in place to attend to spillages as and when they occurred, with reasonable promptitude. More so because the fridges seemed to leak moisture on a consistent basis.
3. The first defendant contracted the second defendant to perform cleaning services. The nature, detail, standard terms, level of service and indemnity, if any, between them, has not been proven. It follows therefore that they both are liable for any negligence.
4. A cleaning system has not been proven to exist or to be adequate.
5. The plaintiff has not been shown to have been negligent or to have contributed to her fall.
6. The cause of the plaintiff's fall is the water and/or moisture on the floor, which she stepped on and which she didn't see.
7. A *prima facie* inference that the plaintiff's fall was occasioned by the defendants' negligent failure to ensure that the floor was free of any water or moisture, is justified.
8. No evidence was presented by any of the defendants, to displace such *prima facie* inference.

PRESCRIPTION

[30] The second defendant contends that the plaintiff's claim, as it pertains to it, has prescribed. The second defendant submits that the plaintiff knew about the identity of the

second defendant when summons were issued initially against the first defendant only or alternatively that with the exercise of reasonable care, ought to have known that the person who performed cleaning services in the premises of the first defendant, was the second defendant. The second defendant pleaded as such. The plaintiff on the other hand, is of the view that she only became aware of the identity of the second defendant when the first defendant pleaded to her claim.

[31] The relevant portions of the ***Prescription Act***[9] i.e. section 12, provides

> *12.* ***When prescription begins to run***
>
> *(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.*
>
> *(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*
>
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.*

Only the provisions of subsection (3) find application in this matter. The narrow issue in this regard, in view of the fact that the plaintiff knew of the facts giving rise to the debt i.e. that she fell as a result of water on the floor, is whether the plaintiff can be deemed to have

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[9] Prescription Act 68 of 1969

had such knowledge. Such a finding requires a determination as to whether with the exercise of reasonable care, she could have gained such knowledge.

[32] The incident that gave rise to the action occurred on the 6th February 2009. Summons were served on the first defendant on the 13th July 2010. That is some one year five months and seven days later. On the 4th April 2011, being two years one month and some 28 days later, a plea was served on the plaintiff. The plaintiff contends it is from this day that her three year prescription period should commence. That being the case, her claim would prescribe on the 4th April 2014. The notice of intention to amend was given on the 28th March 2014 with the date of service of the amended particulars of claim, on the second defendant as the 29th April 2014.

[33] The evidence of the plaintiff is that in her mind the person with a mop clothed in maroon uniform that bore the name Mr Clean, was an employee of the first defendant. Throughout the interaction with the insurer Glenrand and the members of staff of the first defendant, she was never informed that Mr Clean was a separate entity contracted to conduct cleaning services. Her thinking at the time must be distinguished from a person who does not know the identity of a debtor. The test in section 12 (3) of the Prescription Act, that: *Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care,* does not find application in the current circumstances because the identity of the debtor was, in the mind of the plaintiff, thought to have been the first defendant.

[34] The cross examination of the plaintiff on this aspect was lengthy. What was extracted therefrom *inter alia* was a concession from the plaintiff was that had she conducted elementary enquiries from the shop, she would have been made aware that Mr Clean was

a separate entity. Further, that no one misled her into believing that Mr Clean and Checkers were one entity. In this regard it was argued by Mr Stoop that her assumption that they were, was unreasonable. I do not agree. Once the plaintiff had formulated in her mind, the view that the cleaner clad in maroon was an employee of the first defendant it can not be said that it was unreasonable to make that assumption given that her testimony was to the effect that the maroon uniform was, in her mind, different so as to distinguish cleaners from other employees of the first defendant. The testimony of Ms Renken that she by e-mail notified the plaintiff on the 25th March 2009, of the rejection of her claim and advising her that the second defendant was contracted to conduct cleaning service, is in my view uncorroborated and falls to be rejected.

[35] I therefore find that the plaintiff's claim against the second defendant has not prescribed and that the first and second defendant negligently caused the plaintiff's fall and subsequent injury.

COSTS

[36] I was advised that there were costs reserved previously. The parties are in agreement that they should be costs in the cause. In this matter I see no reason why costs should not follow the event.

[37] In the result, I make the following order:

1. The plaintiff's claim against the defendants on the merits succeeds and the defendants are liable to the plaintiff for such damages she may have suffered in consequence of her fall in the first defendant's shop on the 6th February 2009,

2. The first and second defendant are ordered to pay the plaintiff's costs relating to the issues disposed of by this order.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT