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

REPUBLIC OF SOUTH AFRICA

Case Number: **65018/2020**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 10 October 2022

SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

CHRISTINA MATLAKALA MTHEMBU Plaintiff

and

BIG SAVE STORE, MABOPANE (PTY) LTD Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] A casual trip to purchase groceries ended in disaster for the plaintiff when she slipped and fell on the defendant's premises. The plaintiff instituted this action to claim damages for the injuries she sustained during the fall.

[2] The incident occurred when the plaintiff exited the store via a descending slope that was uneven. It is the plaintiff's case that the angle of the slope and its uneven surface was potentially dangerous and caused her to slip and fall.

[3] The parties agreed to separate the issue of liability from the quantum and such an order was granted in terms of the provisions of rule 33(4) of the Uniform rules of court. In the result, the trial only proceeded in respect of the liability issue.

Issues in dispute

[4] Insofar as wrongfulness is concerned, it is not in dispute between the parties that the defendant had a legal duty to its customers to take reasonable steps to avoid possible injury to customers.

[5] The issue of negligence remains in dispute between the parties. In this regard the plaintiff alleged as follows in her particulars of claim:

"8. The defendant at all material times knew, alternatively reasonably ought to have known, that:

8.1 its customers use the descending ramp to exist the store;

8.2 having a descending ramp carries the inherent risk of its customers stumbling, slipping and falling;

8.3 the ramp is made of paving bricks which creates an uneven surface;

8.4 such a ramp would constitute a hazard likely to cause bodily injuries to customers who may slip, stumble and fall as a result of the hazard; and

8.5 customers of the store would rely upon the owners of the store to take reasonable steps to avoid such hazard and warn customers about the existence of the ramp."

and

"12. The defendant failed to discharge its legal duty when it reasonably could done so in order to prevent the plaintiff from falling in that it failed to:

12.1 ensure that the ramp does not form a hazard to customers existing the store;

12.2 ensure that the ramp can be used safely;

12.3 install railings on the sides of the descending ramp;

12.4 ensure that the ramp, the area near the ramp and the exit way of the store has visible warning signs to indicate the:

12.4.1 uneven surface; and

12.4.2 descending ramp.

[6] The defendant pleaded contributory negligence in the event that the court should find that it was negligent and alleges that the plaintiff was negligent in the following respects:

6.1 the plaintiff failed to keep a proper look-out when she descended the ramp;

6.2 the plaintiff failed to take steps to prevent the accident from happening when she could and should have done so;

6.3 the plaintiff carried heavy items on her head in a large container which caused and/or contributed to the accident and had she not done so, she would have been able to alleviate the accident;

6.4 the plaintiff failed to descend the ramp when it was safe for her to do so.

Evidence

[7] The plaintiff and her husband testified in the plaintiff's case. The plaintiff testified that she and her husband visited the defendant's store, Big Save Store ("the store") on 15 December 2017 to purchase groceries and other items. The plaintiff stated that it was not her first visit to the store and that she visited the store at least once a month.

[8] At the entrance of the store there are no notices to warn customers of potential danger when existing the store. It is clear from the photographs introduced during the plaintiff's evidence that there are no such notices.

[9] The plaintiff and her husband were referred to photographs that depicted two notices at the exit of the store. The first notice is quite high up next to the top of the rolling door. The notice is of medium size and printed in black and white. The word "**CAUTION**" appears at the top of the notice and the words "**SLIPPERY WHEN WET"** appears directly underneath it.

[10] A smaller notice is directly underneath the first notice and is somewhat smaller than the first notice. The notice has a drawing of a person stumbling over an obstruction on the ground and is encased in yellow. On top of the drawing the word" **CAUTION**" appears and underneath the drawing in smaller print, the words "**UNEVEN GROUND**" appears.

[11] Both the plaintiff and her husband denied that these notices were there on the day of the incident.

[12] In respect of warning signs outside the exit of the store, it is common cause between the parties that the defendant erected a fairly large warning sign after the incident occurred. The sign is on a pole directly in front of the exit and in clear vision of anyone exiting the store.

[13] The sign is mainly yellow and at the top of the sign the word **"CAUTION"** is written in large print. Just underneath the word caution and in smaller print, the following words appear: "**WATCH YOUR STEP WHEN WET ; STEEP SLOPE UNEVEN SURFACE**". Underneath the aforesaid warning are two drawings, one of a person slipping and another of a person stumbling over an object on the ground.

[14] It is, furthermore, common cause that the defendant, subsequent to the incident, installed handrails on the wall next to the exit door. There are, however, no handrails on the parking area side of the descending slope.

[15] Returning to the day of the incident, the plaintiff testified that she and her husband proceeded to the cash registers, once their shopping was done. From the video footage shown in court, one can clearly see the plaintiff and her

husband paying for the groceries and other purchases and loading the items into a shopping trolley. All the shopping could not fit into the trolley and some of the smaller items were placed in a plastic basin. The plaintiff placed the basin with ease on her head.

[16] The plaintiff and her husband exited the store and turned left onto the descending slope. The plaintiff moved the basin to her left shoulder and carried it using both her hands. The plaintiff followed her husband and walked close to the parking area side of the slope. When she almost reached the end of the slope she slipped and fell down.

[17] The plaintiff testified that she threw the basin aside whilst she was falling and grabbed for something to stop her fall. There are no handrails on the parking area side of the slope and she fell on the ground.

[18] The plaintiff testified that she did not stumble over any object, but slipped and lost her footing because the slope is slippery.

[19] During cross-examination it was put to the plaintiff that she should have collected another shopping trolley for the items that did not fit into the first trolley. The plaintiff answered that only a few items could not fit into the trolley and as the items were light, she had no difficulty in carrying it in the plastic basin.

[20] It was also put to the plaintiff that she would not have been able to grab onto anything as she had the plastic basin in her hands. The plaintiff reiterated that she threw the basin aside when she started slipping and that she endeavoured in vain to grab onto something. There was however nothing to grab onto.

[21] Lastly it was put to the plaintiff that she fell, because she did not keep a proper look-out. The plaintiff denied this and stated that she did not stumble over an object but slipped on the uneven and slippery slope.

[22] The plaintiff's husband's evidence corroborated her evidence in all material respects.

[23] The defendant called only one witness, to wit, Mr da Siva, a previous employee of the defendant, who worked at the store when the incident occurred.

[24] Mr da Silva did not witness the incident and his evidence concentrated mainly on the warning notices that were at the exit of the store. Mr da Silva testified that the notices were there on the day of the incident. Mr da Silva stated that the store never had any incidents of customers falling either inside or outside the store prior to the day of the incident.

[25] During cross-examination, Mr da Silva confirmed that the store kept an incident register in which record of all incidents occurring at the store were entered. When asked why the register was not discovered to confirm his evidence that no similar incidents had occurred at the store in the past, Mr da Silva could not offer an explanation.

Legal principles and discussion

[26] The plaintiff's claim for damages is based on the *actio legis Aquiliae*. In order to succeed on the issue of liability, the plaintiff must proof:

26.1 wrongfulness, which could manifest itself in the breach of a duty to care;

26.2 negligence; and

26.3 causation.

[See: *Amler's Precedents of Pleadings,* Harms, 7th edition]

[27] As stated *supra* the issue of wrongfulness is no longer in dispute between the parties.

[28] In respect of negligence, the plaintiff has to proof that a reasonable person in the position of the defendant:

28.1 would foresee the reasonably possibility that the conduct (whether an act or omission) would injure another's person or property and cause that person patrimonial loss,

28.2 would take reasonable steps to guard against such occurrence, and

28.3 that the defendant failed to take such steps.

[See: *Kruger v Coetzee* 1966 (2) SA 428 A]

[29] It is clear from the angle of the slope and the uneven surface, that a reasonable store owner would have foreseen the reasonable possibility that the ramp would injure its customers.

[30] The question then arises which reasonable steps the defendant should have taken to avoid injury to its customers. The plaintiff alleges that the defendant

should have installed handrails on both sides of the descending ramp and, furthermore, should have erected visible warning signs alerting customers of the danger.

[31] Some of these measures were taken by the defendant after the incident and confirms the plaintiff's allegations in this regard. Even if the two small signs plastered to the wall next to the exit door between other advertisements were present on the day of the incident, I am of the view that the signs were, bearing the potential danger posed by the slippery and uneven descending slope in mind, not enough to prevent harm befalling its customers.

[32] In the result, I find that the defendant failed to take reasonable steps to prevent injury to its customers.

[33] The last question to be answered is whether there is a causal connection between the defendant's negligence and the plaintiff's damages. In the matter of *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 A, the test for causation was explained as follows at 700 E- 701 D:

"As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a

hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'. (See generally Minister of Police v Skosana 1977 (1) SA 31 (A) at 34E - 35A, 43E - 44B; Standard Bank of South Africa Ltd v Coetsee 1981 (1) SA 1131 (A) at 1138H - 1139C; S v Daniëls en 'n Ander 1983 (3) SA 275 (A) at 331B - 332A; J Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) at 914F - 915H; S v Mokgethi en Andere, a recent and hitherto unreported judgment of this Court, at pp 18 - 24.) Fleming The Law of Torts 7th ed at 173 sums up this second enquiry as follows:*

'The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.'

[34] A handy example of the application of the legal causation test is to be found in *Napier v Collett and Another* 1995 (3) SA 140 A. A race horse, Shooting Party, was insured against an accident causing the death of the animal. During a race

Shooting Party sustained a fracture of the near forelimb and surgery was conducted to treat the injury. Complications arose from the surgery, and it was decided to perform an arthroscopic examination under general anaesthetic. Shooting Party died during the course of the procedure. In finding that there was no legal causation, the court proceeded as follows at page 146 E - H:

"The question now to be considered is whether Shooting Party died as a result of the accident on 27 September 1990. Purely as a matter of factual causation the answer must be yes. Had Shooting Party not suffered the accident he would not have undergone surgery, no dispute would have arisen about the seriousness of his condition after the operation, arthroscopy would not have been decided upon to resolve this dispute, and the fatal anaesthetic would not have been administered.
The question then is whether there was a sufficiently close relationship between the accident and the death to render one the legal cause of the other.
This question can best be examined, I consider, by working backwards from effect to cause. The direct physical cause of Shooting Party's death was heart failure or lung collapse or both. They were in turn caused by the administration of anaesthetic. This was necessary for the arthroscopy, which was performed by Prof Gottschalk to show Dr Azzie that the latter's diagnosis was wrong, which in fact it was. Had there not been this incorrect diagnosis the arthroscopy would not have been performed and the horse would not have died.
The causal relationship between the accident and the death is accordingly an indirect and fortuitous one. The accident itself was not fatal."

[35] Insofar as factual causation is concerned, the following passage in *ZA v Smith and another* 2015 (4) SA 574 SCA (*"ZA matter"*), is incisive:

"[30] The criterion applied by the court a quo for determining factual causation was the well-known but-for test as formulated, eg by D Corbett CJ in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) ([1989] ZASCA 138) at 700E – H. What it essentially lays down is the enquiry — in the case of an omission — as to whether, but for the defendant's wrongful and

negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty. (See eg Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741; [2002] ZASCA 79) para 25; Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA 98) para 33. See also Lee v Minister for Correctional Services 2013 (2) SA 144 (CC) (2013 (2) BCLR 129; [2012] ZACC 30) para 41.) G

[36] The wrongful and negligent conduct in *casu* is the defendant's failure to erect a visible warning sign at the exit of the store and its failure to install handrails on both sides of the descending slope.

[37] Insofar as the factual caution is concerned, one should pose the question of whether the plaintiff would have slipped and fell if there was a visible warning sign and handrails? In respect of the first failure, to wit a visible warning sign, Ms Keijser, counsel for the defendant, contended that the sign would have made no difference as the plaintiff visits the shop at least once a month and would have been well aware of the outlay of the ramp.

[38] I do not agree. It is human nature to react to a prominent warning sign that is placed directly in one's line of vision. A visit to the store once a month, would in all probability not change this behaviour. Each time one is confronted with a warning sign, it is a reminder to proceed with caution.

[39] The second and to my mind more important failure is the absence of handrails on both sides of the ramp. Ms Keijser submitted that the presence of handrails would not have prevented the plaintiff from falling. According to Ms Keijser the fact that the plaintiff was using both hands to carry the plastic basin on her left shoulder would have prevented her from grabbing onto the handrail.

[40] In this regard, Ms Keijser relied on the authority of *The Memorable Order of Tin Hats v Els* 2022 JDR 1747 SCA. The plaintiff, Mr Els attempted to assist Mr Levengs, who was wheelchair bound to exit the building via a flight of stairs. In addressing the issues of wrongfulness, negligence and causation, the court held as follows at para [23] and [24]:

> *"[23] Despite that fact that the precise manner of the accident is not clear, it is apparent that while helping Mr Levengs, Mr Els overbalanced, tripped and fell backwards, with Mr Levengs and his wheelchair falling onto him. As stated above the combined weight of Mr Levengs and his wheelchair was estimated by the witnesses to be in the region of 120 kilograms. I am prepared to accept for purposes of this judgment that the M.O.T.H's omission to install a second handrail on the stairs was negligent and wrongful.*
>
> *[24] That, however, is not the end of the enquiry. The element of causation also had to be proved by Mr Els. In my view, he failed to prove a culpably causative relationship between the omission and the harm. It is more probable than not that, when Mr Els overbalanced and fell, a handrail on his side of the stairs would not have averted the harm. Even if he had been able to grab onto such a handrail, the force of 120 kilograms falling*

onto him from above, would have broken his grip – and he would have fallen and injured himself despite it being present…"

[41] The facts in this matter differ markedly from the facts in the *Els* matter *supra*. The plaintiff testified that she threw the plastic basin aside in order to free her hands to grab onto something. It is difficult to determine the exact mechanics of the plaintiff's fall from the video footage that was presented in court, but one can observe the basin being thrown away during the fall. It is also clear from the video footage that the plaintiff no longer had the basin in her hands after the fall.

[42] Applying the test in the *ZA* matter, *supra,* to the evidence, I am of the view that "*it is more likely than not"* that the presence of handrails would have prevented harm from befalling the plaintiff.

[43] In the result, the evidence does not support a finding that the carrying of the basin caused the plaintiff to slip and fall. Having established factual causation between the defendant's wrongful and negligent conduct and injuries the plaintiff suffered, the question of legal causation remains.

[44] The injuries suffered by the plaintiff are to my mind, directly attributable to the defendant's failure discussed *supra* and legal causation has, as a result, been established.

[45] Lastly the defendant's plea of contributory negligence needs to be considered. The only allegation that has a bearing on the facts of the matter is the carrying of the plastic basin by the plaintiff.

[46] Ms Keijser submitted that the heavy plastic basin that the plaintiff carried on her left shoulder contributed to her injuries. The heavy basin caused the plaintiff to be unstable and made her more prone to slipping and falling.

[47] The plaintiff and her husband denied that the basin was heavy and testified that only a few items were placed in the basin. It is, furthermore, clear from the video footage that the plaintiff had no difficulty in lifting the basin onto her head. The plaintiff also managed to proceed with the basin on her left shoulder without incident until she was three quarters down the ramp.

[48] Having regard to the fact that the basin was not heavy and that the plaintiff carried the basin without incident until she was three quarters down the ramp, I am of the view that the carrying of the basin did not contribute to the plaintiff slipping and falling.

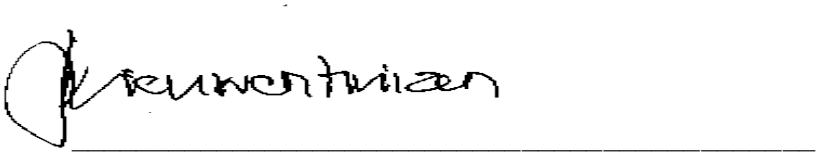
Conclusion

[49] In the premises, I am satisfied that the plaintiff has established on a balance of probabilities that the defendant is liable for the injuries she suffered as a result of her slipping and falling at the defendant's store.

ORDER

In the premises, I grant the following order:

1. The defendant is ordered to pay the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the costs.



N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD: 18,19 August and 02 September 2022

DATE DELIVERED: 10 October 2022

APPEARANCES

For the Plaintiff: Advocate JA du Plessis

Instructed by: Lekhu Pilson Attorneys

For the Defendant: Advocate L Keijser

Instructed by: E Botha and Y Erasmus