IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEAL CASE NO: A143/2021

COURT *A QUO* CASE NO: 77802/16

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

24.06.2022

SIGNATURE **DATE**

In the appeal between:

PLASTILON VERPAKKING (PTY) LTD **APPELLANT**

(The defendant in the *court a quo*)

and

MARGARET MEYER **RESPONDENT**

(The plaintiff in the *court a quo)*

JUDGMENT

AC BASSON, J

Introduction

[1] This appeal concerns a claim of damages instituted by the plaintiff (Mrs. Margaret Meyer – the plaintiff in the court *a quo*) against the defendant (Plastilon Verpakking (Pty) Ltd – the defendant in the court *a quo*) for damages arising out of an incident that occurred on 3 December 2014 at the premises of the defendant when a box fell on her from a shelve in the defendant's store. For the sake of convenience, the parties are referred to as in the court *a quo*.

[2] At the commencement of the trial and by agreement between the parties, the court *a quo* ordered a separation of issues. In terms of this order the issues relating to the liability of the defendant was to be decided first in terms of rule 33(4) of the Uniform Rules of Court.

[3] The court *a quo* found the defendant liable, with costs, to compensate the plaintiff for her agreed or proven damages. This appeal serves before us with leave of the court *a quo.*

The pleadings

[4] The pleaded case of the plaintiff is that on the day of the incident, she attended the defendant's store as a client for purposes of doing some shopping. Whilst walking down one of the aisles, a heavy box fell on top of her from one of the upper shelves causing her to suffer injuries. The plaintiff claims that the defendant and/or its employees had a legal duty to - (i) prevent harm; (ii) ensure that the merchandise packed onto the open shelves are placed in such a fashion that it will not fall off by itself or be pushed off the shelves easily; (iii) ensure that safety measures are put in place to prevent items situated on upper shelves from falling onto customers whilst walking down the different aisles. She claims that the defendant and/or its employees had breached their legal duty it owed to her, negligently and wrongfully causing the incident that led to her injuries by (i) failing to ensure that the merchandise and/or packing material are packed properly onto the respective shelves to ensure that they will not fall off by itself; (ii) failing to put measures in place to prevent merchandise / packaging from falling onto the public and more in particular the plaintiff whilst walking down the aisle; (iii) negligently pushing off one of the boxes whilst loading merchandise onto the shelves; (iv) failing to avoid the incident when through the exercise of

reasonable care and skill they could and should have done so.

[5] In its plea, the defendant admits that it has a legal duty to act as a *diligens paterfamilias* and take reasonable steps to prevent harm to persons entering and visiting its premises but denies that it, or its employees, acted wrongfully and/or negligently in any manner whatsoever. In the alternative, the defendant pleads that, should it be found that the defendant acted wrongfully and negligently then, at the very least, the plaintiff was also negligent and that there should be an apportionment of damages in that the plaintiff of her own accord attempted to remove a box from a shelf which caused a box to "*topple*" onto her.

The evidence

Evidence on behalf of the plaintiff

[6] The court *a quo* comprehensively summarized the evidence of all the witnesses. I do not intend repeating the evidence led at the trial save for a few comments.

[7] It is common cause that a box fell on the plaintiff ("*the incident*"). She claims that she was severely injured as a result thereof. Her daughter, Ms Marais ("*Marais*"), and an erstwhile employee of the defendant, Mr. Edward Kwinda ("*Kwinda*") testified on her behalf.

[8] The upshot of the plaintiff's evidence was that she had no idea how the incident happened as she did not see the box fall on her nor did she see where the box fell from. She also could not tell whether the box was pushed causing it to fall or whether the box spontaneously fell on her head. The plaintiff was, however, adamant that she did not attempt to remove a box from a shelve as was suggested to her in cross-examination.

[9] Marais's did not witness the incident. She only arrived on the scene after she was called by a man whom she identified as Kwinda who informed her that the plaintiff
[i] was injured. Her evidence is thus confined to what she observed when she arrived at

the scene *after* the incident and what was told to her. She testified that she saw the plaintiff on the floor holding her neck with a box lying next to her. It is not the defendant's case that there was more than one box lying next to the plaintiff. Marais picked up the box and insisted that it be weighed. She also took a photo of the box. The photo shows that the box weighed 9.09 kg. The fact that the box was weighed was not in dispute and was in fact confirmed by Ms Fawles (*"Fawles"*) who was a sales manager at the time. Marais also confirmed that she took a further 3 photos of the shelves on the day of the incident. I will return to my own observations regarding the photos.

[10] The long and short of Kwinda's evidence in chief was that he heard something fall and, upon investigation, he found a woman on the ground with a box next to her. He was then asked by the plaintiff to find Marais which he did. Kwinda was subjected to vigorous cross-examination particularly about whether he was even there on that day as he was often absent due to ill health.

[11] Although the court *a quo* found Kwinda to be a "*difficult witness*" the court nonetheless held that his evidence not to be "*untrustworthy or unreliable*". Before us, Mr Potgieter for the defendant submitted that Kwinda was not a credible witness at all, and that no reliance could be placed on his evidence. Although I am mindful of the fact that credibility finding may be overturned on appeal, particularly where the finding of credibility is gainsaid by the record and not essentially based on personal impression of the witness,[1] and, although I agree with Mr Potgieter that Kwinda was a difficult witness and that he contradicted the evidence of the plaintiff and Marais in some respects, he remained consistent on one issue and that is that he "*heard*" something fall whereafter he went to investigate. What is further clear from Kwinda's evidence (to

[1] See *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and another* 2002 (4) SA 408 (SCA): *"[24] A trial court has the obvious and important advantage of seeing and hearing the witnesses and of being steeped in the atmosphere of the trial. These advantages were not possessed by the Full Court and indeed this Court. Although Courts of appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour but predominantly upon inferences from other facts and upon probabilities. In such a case a Court of appeal with the benefit of an overall conspectus of the full record may often be in a better position to draw inferences, particularly in regard to secondary facts. (See, for example, R v Dhlumayo and Another S v Robinson and Other and Hoffmann and Zeffertt The South African Law of Evidence.)"*

the extent that it can be relied upon) is that he also did not witness the actual incident – he only "*heard*" something fall.

Evidence on behalf of the defendant

[12] The first witness on behalf of the defendant, Fawles, also did not witness the incident. Her evidence was confined to the events *after* the incident when she was called to assist the plaintiff. She confirmed that she saw a woman sitting on the floor holding her head with her legs out in front of her. She also confirmed that she weighed the box and conceded that the box that she weighed was the one that fell on the plaintiff. Fawles confirmed that procedures were in place at the defendant's store regarding how boxes must be packed on the shelves. She confirmed that boxes mut be packed neatly on top of another so that they are stable and do not fall. She also confirmed that the top shelf boxes must not be less than 1 meter from the ceiling and confirmed that, if the adjoining shelves are aligned, one can push a box through from the back shelve to the front shelf.

[13] The defendant's second witness, Mr Machiel Botha (*"Botha"*) was the general manager at the time. He likewise did not witness the incident. His evidence mainly focussed on discrediting Kwinda's evidence that he was in fact at work that day. Although the court did not find him generally to be unreliable, the court *a quo* nonetheless rejected his evidence regarding Kwinda's leave of absence forms and found that Kwinda was at work on the day of the incident. But, as far as the accident is concerned, his evidence is not helpful.

[14] The defendant's third and last witnesses Mr Victor Matumba (*"Matumba"*) and Mr Mudau (*"Mudau"*) were called to give direct evidence regarding the incident and testify to the defendant's version that the plaintiff pulled a box from one of the bottom shelves which caused the box at the top to topple and fall on the plaintiff. It took not long for both to unravel dismally during cross-examination to such an extent that Mr. Potgieter was constraint to concede in argument before us that the court *a quo* was correct in its assessment of the evidence of both witnesses as being unreliable and improbable.

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[15] Despite lengthy evidence led over a period of 10 days, the court *a quo* was none the wiser about what caused the box to fall and was left with selecting one of the plaintiff's versions. Ultimately the court *a quo* concluded that, given that no one was in aisle 25 as there was no evidence before the court to this effect, it was unlikely that a box was pushed from the top shelf of aisle 25 through to aisle 23 causing it to fall on the plaintiff. The court held that it was more likely that, having regard to the photos taken by Marais on the day of the incident and the height to which the boxes were packed, that one of the boxes was not correctly or safely packed, causing one of them to eventually topple over and fall on the plaintiff. In failing to ensure that the boxes were safely packed, the court *a* quo held that the defendant was "*clearly negligent"*.

[16] I agree with the conclusion arrived at by the court *a quo* as the most likely conclusion to be drawn on the objective evidence that served before the court. Before us Mr. Potgieter agreed that the evidence of all the witnesses regarding the incident and the alleged cause of the box that fell on the plaintiff, should be ignored and that the matter should be decided on the objective facts before the court. I agree with this approach.

[17] Although it is common cause that a box fell on the plaintiff whilst she was in aisle 23 of the defendant's store, no credible evidence was placed before the court *a quo* as to the *why* the box fell from the top shelve onto the plaintiff. The plaintiff simply does not know what caused the incident. Marais, Kwinda, Fawles and Botha did not observe the incident and, once the evidence of Matumba and Mudau is rejected (as was correctly done by the court *a quo*), there is no evidence before the court as to what caused the incident. Also, once the evidence of Matumba and Mudau is rejected to the effect that the *plaintiff* caused the box to fall, the defendant's plea of contributory negligence on the part of the plaintiff, also fell away. I will return to this issue.

[18] I am in agreement with the submission that there can only be three possible and plausible causes of the incident:

[1] The large box fell off from the top shelf because it was not packed properly (*"first possibility"*).

[2] The large box fell off from the upper shelves after being pushed accidentally during the packing of the shelves (*"second possibility"*).

[3] The plaintiff herself tried to remove a box from a shelf when it was not safe to do so which caused a box to topple on her. Accordingly, the plaintiff acted negligently and caused her injuries. In the alternative, if the plaintiff is not wholly negligent, then at the very least there should be an apportionment of damages made in terms of the *Apportionment of Damages Act*[2] (*"third possibility"*).

[19] The second possibility was correctly rejected by the court *a quo* as no credible evidence was placed before the court to support that possibility. The third possibility was advanced by the defendant at trial. In view of the defendant's concession that no reliance could be placed on the evidence of Matumba and Mudau (both of whom were called to advance this version at trial), this possibility can likewise not be entertained. That left the court with the first possibility only.

[20] Before us it was submitted on behalf of the defendant that the maxim of *res ipsa loquitur* should find application in this matter and that an inference of negligence could be made on the common cause facts before court. Before I briefly return to what facts were placed before the court, a brief observation regarding this maxim. The Supreme Court of Appeal rightly observed in *Goliath v Member of the Executive Council for Health in the Province of the Eastern Cape ("Goliath")*[3] that this maxim is not a "*magic formula*". Whether or not the maxim is applicable, even in those instances where the facts speak for itself (as they do in the present matter), the only enquiry at the end of each case is whether the plaintiff has discharged the onus resting upon her in respect of the issue of negligence. The maxim is not a presumption of law but merely a permissible inference which a court may employ if upon all the facts it appears to be justified. Ultimately this maxim merely serves as a guide to a court to determine whether a *prima facie* case was made out by the plaintiff. The court in *Goliath* explains:

"[10] Broadly stated, res ipsa loquitur (the thing speaks for itself) is a

[i] [2] Act 34 of 1956.
[3] [2015] JOL 32577 (SCA).

convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a prima facie case against him. The maxim is no magic formula (Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) at 573E [also reported at [1962] 2 All SA 506 (A) - Ed]). It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts it appears to be justified (Zeffert & Paizes The South African Law of Evidence (2ed) at 219). It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself (see Groenewald v Conradie; Groenewald en andere v Auto Protection Insurance Co Ltd 1965 (1) SA 184 (AD) at 187F) - where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the onus nor the rules of pleading (Madyosi v SA Eagle Insurance Co Ltd 1990 (3) SA 442 (A) at 445F [also reported at [1990] 2 All SA 408 (A) - Ed]) - it being trite that the onus resting upon a plaintiff never shifts (Arthur v Bezuidenhout and Mieny at 573C). Nothing about its invocation or application, I daresay, is intended to displace common sense. In the words of Lord Shaw in Ballard v Northern British Railway Co 60 Sc LR 448 "the expression need not be magnified into a legal rule: it simply has its place in that scheme of and search for causation upon which the mind sets itself working" (cited with approval in Naure NO v Transvaal Boot and Shoe Manufacturing Co 1938 AD 379 and Arthur v Bezuidenhout and Mieny at 573F-G).”

“[12] Thus in every case, including one where the maxim res ipsa loquitur is applicable, the enquiry at the end of the case is whether the plaintiff has discharged the onus resting upon her in connection with the issue of negligence (Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd 1982 (4) SA 890 (A) at 897H-898A). That being so, and given what Holmes JA described as the "evolved mystique of the maxim", the time may well have come for us to heed the call of Lord Justice Hobhouse to jettison it from our legal lexicon. In that regard he stated in Ratcliffe v Plymouth and Torbay Health Authority [1998] EWCA Civ 2000 (11 February 1998):

> *"In my judgment the leading cases already gives sufficient guidance to litigators and judges about the proper approach to the drawing of inferences and if I were to say anything further it would be confined to suggesting that the expression res ipsa loquitur should be dropped from the litigator's vocabulary and replaced by the phrase a prima facie case. Res ipsa loquitur is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case is being made out. Where expert and factual evidence has been called on both sides at a trial its usefulness will normally have long since been exhausted."*

[21] Bearing in mind the above, I now turn to the evidence before the court *a quo*. It is common cause that that a box fell on the plaintiff whilst she was in aisle 23 of the defendant's store. Having excluded two possible causes for the box having fallen on her, only one possibility remained, namely that the box fell from the top shelf because it was not packed properly ("*first possibility*").

[22] Having regard to the common cause fact that a box fell onto the plaintiff where the defendant has a duty of care towards its customers to ensure that reasonable steps are taken to safeguard the safety of its customers,[4] it can be inferred, *prima facie*, that the defendant was negligent. Is this *prima facie* inference of negligence justified having regard to the facts that were placed before the court *a quo*? Apart from the fact that a box fell on the plaintiff in circumstances where that ought not to have happened, having regard to the photos taken by Marais of the shelves on the day of the incident and the minutes of the inspection *in loco* conducted by the court *a quo* of the premises of the defendant (and more in particular of aisle 23 where the

[4] See *inter alia*, *Probst v Pick n Pay Retailers (Pty) Ltd* [1998] 2 ALL SA 186 (W) at p 200 D – E: "*"As a matter of law, the defendant owed a duty to persons entering their shop at Southgate during trading hours, to take reasonable steps to ensure that, at all times during trading hours, the floor was kept in a condition that was reasonably safe for shoppers, bearing in mind that they would spend much of their time in the shop with their attention focussed on goods displayed on the shelves, or on their trolleys, and not looking at the floor to ensure that every step they took was safe."*

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incident had occurred), I am of the view that an inference of negligence is justified. It is evident from the photos that numerous boxes containing the defendant's merchandise are packed tightly onto open shelves (made of wood) which are supported on the sides by a frame (the packaging structure) made of steel. The frames of the packaging structures each have adjustable notches to ensure that the shelves can be adjusted up and down as and when required. These frames of the packaging structures are arranged in numbered aisles and are arranged back-to-back. When the back-to-back shelves are on different levels, boxes from the shelves cannot be pushed through from the back shelve to the front shelve. Where the back-to-back shelves are on the same level, that can be done. In the plaintiff's recordal (in the minutes of the inspection *in loco*) it is noted that after some boxes were removed from the top shelf it was clear that the two shelves were aligned with no obstructions between the adjoining shelves which allowed that boxes could be pushed from one adjoining shelf to the next. The height of the top shelf is 2.6m as measured from the ground. Employees can reach the top of the structure with a ladder to pack or to retrieve items that are stored on the top of the structure. Some of the boxes contained a description on the outside of the box indicating what it contains whereas others do not. A large box with the same product code as the one that fell on top of the plaintiff was found on the top shelf (in other words the 4th shelf) in one of the aisles. The box was opened, and it was recorded to contain silver aluminium mild tart trays (1000 per box in total).

[23] From my own observation having regard to the photos, the boxes (also the bigger ones on the top shelf) are unevenly stacked one on top of the other with some boxes protruding over the edge of the shelf (particularly) on the top shelf. Having regard to the height to which the boxes are stacked up one on top of the other; the fact that some boxes are unevenly packed; and the fact that some boxes protrude over the edge of the shelves, an inference of negligence in the sense that one of them was not correctly or safely packed and eventually toppled over and fell onto the plaintiff, is justified[5].To borrow from *Meyers v MEC, Department of Health, Eastern*

[5] *SAVE-A TYRE v GLORIA DOLOROS BOWERS* CA 247/2010 where a mag wheel hanging from a hook on a ceiling beam fell and struck her on the shoulder. The court held as follows*: "[21] In my view this is a case where the maxim res ipsa loquitur applies. The cause of the mag wheel falling was unknown and unexplained, and the mag wheel was under the control of the appellant. In the normal course of affairs, a mag wheel which is properly secured does not fall. If it does, the inference can be*

[i]

Cape,[6] "*[t]hat being so, the spectre of negligence on the part of the attending surgeon [in the present case the defendant] loomed large*." The court explains:

> *"[69]A court is not called upon to decide the issue of negligence until all of the evidence is concluded. When an inference of negligence would be justified, and to what extent expert evidence is necessary, no doubt depends on the facts of the particular case. Any explanation as may be advanced by or on behalf of a defendant forms part of the evidential material to be considered in deciding whether a plaintiff has proved the allegation that the damage was caused by the negligence of the defendant…"*
>
> *"[71]We are here concerned with an unconscious patient who has suffered an admitted injury. That being so, the spectre of negligence on the part of the attending surgeon loomed large. At the close of Ms Meyers' case before Revelas J, her evidence, together with that of Dr Pienaar and the documentary exhibits, was sufficient as to place an evidentiary burden upon Dr Vogel to shed some light upon the circumstances attending Ms Meyers' injury. Failure to do so meant that, on the evidence as it then stood, he ran the risk of a finding of negligence against him. For, whilst Ms Meyers, as the plaintiff, bore the overall onus in the case, Dr Vogel nonetheless had a duty to adduce evidence to combat the prima facie case made by Ms Meyers. It remained for him to advance an explanatory (though not necessarily exculpatory) account that the injury must have been due to some unpreventable cause, even if the exact cause be unknown."*
>
> *"[82]In my view, at the close of Ms Meyer's case, after both she and Dr Pienaar*

drawn that it was not properly secured, and hence an inference of negligence can be drawn. A heavy object suspended from a ceiling beam in an area where customers are present, should be properly secured to prevent it from falling. If it is not properly secured injury to persons in its vicinity is foreseeable. The appellant was unable to explain how the mag wheel fell and therefore the appellant did not displace the inference of negligence. It did not assist the appellant to say that it had not happened before and the occurrence was therefore not foreseeable. The mag wheels were sold and replaced and each time a replacement was hung up the appellant had a duty to ensure that it was secure. De Souza herself said that the mag wheels were checked. [22] The respondent therefore proved that the negligence of the appellant caused the mag wheel to fall and injure her.?"

[6] [2020] 2 All SA 377 (SCA).

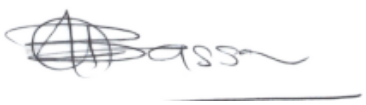
had testified, there was sufficient evidence which gave rise to an inference of negligence on the part of Dr Vogel. In that regard it is important to bear in mind that in a civil case it is not necessary for a plaintiff to prove that the inference that she asks the court to draw is the only reasonable inference; it suffices for her to convince the court that the inference that she advocates is the most readily apparent and acceptable inference from a number of possible inferences. That inference remained undisturbed by the evidence of Dr Vogel. And, as I have attempted to show, Prof Bornman's evidence did not tip the scales against Ms Meyers. In short, when Prof Bornman's evidence is read together with the evidence of Dr Pienaar (as, to my mind, it should be), no reasonable suggestion has been offered as to how the injury could have occurred, save for negligence on the part of Dr Vogel."

[24] In the face of the *prima facie* case of negligence established by the plaintiff, an evidentiary burden was placed upon the defendant to shed light upon the incident that resulted in the injuries sustained by the plaintiff. The defendant placed no evidence before court to contest or disturb the *prima facie* case (an inference of negligence on the part of the defendant) established by the plaintiff. In light of this, the court ***a quo's*** conclusion that, by failing to ensure that the boxes were safely packed, and one eventually toppled over and fell on the plaintiff, the defendant was "*clearly negligent*", is unassailable.

Order

[25] In the event the following order is made:

"The appeal is dismissed with costs".

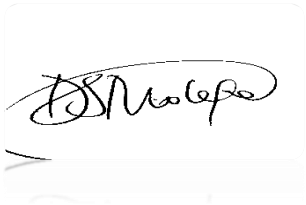


A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree,



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JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

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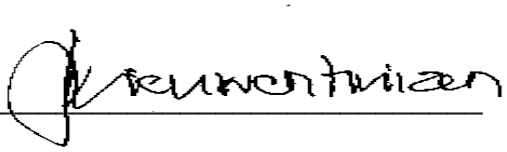

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JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 June 2022.

Date of hearing

[i] 18 May 2022

Appearances

For the appellant	:	Adv TALL Potgieter SC
Instructed by	:	Savage Jooste & Adams Inc
For the respondent	:	Adv SG Maritz
Instructed by	:	Tiaan Smuts Attorneys

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