THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable
Case No: 900/2020

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD **APPELLANT**

and

CHERYLENE SARAH PILLAY **RESPONDENT**

Neutral citation: *Pick 'n Pay Retailers (Pty) Ltd v Pillay* (900/2020) [2021] ZASCA 125 (29 September 2021)

Coram: NAVSA ADP, MOCUMIE, MAKGOKA, SCHIPPERS and GORVEN JJA

Heard: 6 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h30 on 29 September 2021.

Summary: Negligence – foreseeability of harm – failure to guard against – shopper injured when struck by automated boom gate – exit of parking area frequently used by shoppers at shopping centre – after incident certain safety measures implemented – shopping centre owner negligent.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Poyo-Dlwati J and Govindasamy AJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Schippers JA (Navsa ADP, Mocumie, Makgoka, and Gorven JJA Concurring):

[1] The issue in this appeal, which is before us with the leave of this Court, is whether the appellant, Pick ’n Pay Retailers (Pty) Ltd (the defendant), was negligent in the operation of an automated Centurion Sector boom gate (the boom) controlling the exit of vehicles from a parking area for persons with special needs and parents with small children at Pick ’n Pay Hypermarket in Durban North (the shopping centre). The respondent, Ms Cherylene Pillay (the plaintiff), was struck on her head by the boom as it descended from a vertical position.

[2] The basic facts are uncontroversial. The boom consists of a three-metre aluminium pole painted in white and red, which is fairly prominent. The pole weighs 2.4 kg. The box containing the mechanism of the boom is bright yellow and plainly visible. The boom is located on a sidewalk, directly opposite an entrance to the shopping centre. Directly adjacent to the entrance is a pedestrian sidewalk all along the building, running parallel to the road in respect of which the boom controls egress. There are bollards between the road and the sidewalk,

to discourage pedestrians from walking in the road. At the entrance to the shopping centre opposite the boom, for a short distance, the bollards are joined by chains to prevent pedestrians from walking directly under the boom in its vertical position.

[3] On 10 December 2015 the plaintiff and her colleague, Ms Geraldine Leach, had finished shopping at the hypermarket and were walking on the road towards the parking area to Ms Leach's car. They were engaged in conversation. The plaintiff was in a hurry and did not pay attention to her surroundings. She looked straight ahead. She did not see the boom in the vertical position and said that had she seen it, she would not have walked under it.

[4] The boom descended and struck both the plaintiff and Ms Leach. The plaintiff sustained an axial impact type of injury to her head, was disoriented and suffered concussion. She was hospitalised on two separate occasions, once in 2015 and then in 2016. She was diagnosed as suffering from moderate concussion and sustained a strain-sprain injury to her cervical spine. The plaintiff had to undergo physiotherapy and received pain medication for cervical neck spasm. Due to the injury the plaintiff may continue to suffer episodes of neck spasm and headache on a regular basis which would require pain relief and physiotherapy. Ms Leach also sustained an injury in the region of her eye, which had caused bleeding.

[5] The plaintiff instituted proceedings against the defendant in the Durban Magistrate's Court. In the particulars of claim she alleged that the incident was caused by the sole negligence of the defendant. The asserted grounds of negligence were as follows. The boom was positioned immediately adjacent to a popular pedestrian walkway. Its descent mechanism operated without due regard

to the presence of pedestrians and there was no warning sign or sound to alert pedestrians to its operating danger. The defendant should reasonably have foreseen the possibility that the boom could cause injury to persons frequenting the shopping centre, and failed to take steps to guard against such occurrence.

[6] These grounds of negligence were denied in the plea. The defendant alleged that it had implemented and maintained reasonable systems to ensure that the parking area was clear of obstacles and hazards, which would render it unsafe for the public. In the event that the plaintiff established that the defendant, its employees or agents were negligent as alleged, the defendant denied that such negligence caused the incident. Alternatively, the defendant pleaded that the incident occurred as a result of contributory negligence on the part of the plaintiff and the defendant. The defendant also alleged that a tacit agreement had been concluded between the parties that it would not be held liable for any loss or damage. This defence was based on what the defendant said were prominent notices informing the public that they entered the shopping centre at their own risk.

[7] The magistrate's court dismissed the plaintiff's claim. It concluded that the plaintiff had not proved that she had been injured by the boom or that the defendant had been negligent. The court also found that the notices disclaiming liability for loss or injury, prominently displayed at the shopping centre, constituted a tacit agreement between the parties which absolved the defendant from liability. The defendant, advisedly, did not persist in this defence on appeal to this Court.

[8] An appeal to the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Poyo-Dlwati J and Govindasamy AJ), succeeded with costs.

The high court found that the defendant should have foreseen the possibility of harm. It was not uncommon for shoppers to walk on the road right next to the boom, instead of using the pedestrian walkway. Indeed, this was the route of choice for shoppers to get to their vehicles. They would then walk under the boom when it was in the raised position, instead of walking safely past it.

[9] The high court found that the risk of harm presented by the boom was reasonably foreseeable. Shoppers could be struck by the boom which would automatically and unexpectedly descend. The court concluded that the plaintiff had been inattentive; that she had failed to observe or pay proper attention to the boom; and that she could have avoided it. The plaintiff was thus contributorily negligent. The high court set aside the magistrate's order and replaced it with an order directing the defendant to pay 60% of the plaintiff's proved or agreed damages.

[10] Before us the argument was confined. Counsel for the defendant conceded that the plaintiff had established that a reasonable person in the position of the defendant would have foreseen the reasonable possibility of the boom descending and striking a person. This concession was rightly made. The plaintiff sustained an injury at a busy shopping centre with a large parking area. Ms Lerina Coles, the shopping centre manager, conceded in evidence that shoppers with trolleys usually walked on the same section of road where the boom was in operation and where the plaintiff had been injured; that there was no warning sign in that vicinity drawing attention to the danger of the boom; and that the route taken by the plaintiff and Ms Leach to get to the parking area was the route of choice for shoppers.

[11] What is more, in September 2015, about three months before the incident, the boom had descended unexpectedly and struck a person, breaking the frame of his glasses. Fortunately, he sustained no injuries. As a result of that incident, a prominent four-sided warning sign stating, 'CAUTION BOOM OVERHEAD' was erected at the entrance to the shopping centre and next to the yellow box of the boom, so that persons approaching the boom from either direction would be alerted to it. The word 'CAUTION' is shown in red lettering against a white background and below it, the words 'BOOM OVERHEAD' appear in white lettering against a red background. These signs however had not been erected when the plaintiff was injured. Significantly, Ms Coles testified that the erection of the sign had no effect on pedestrian traffic patterns.

[12] Although the risk of the boom descending and striking a person was reasonably foreseeable, counsel for the defendant submitted that the plaintiff had not proved that the defendant was negligent. The risk of injury was negligible, so it was submitted, because the impact of being struck by the boom was equivalent to a 'pat on the shoulder'. Put differently, counsel on behalf of the defendant submitted that a reasonable person in the position of the defendant would not have foreseen the possibility of injury being caused. In this regard emphasis was placed on the lightweight aluminium material and that the boom was designed to reverse upon touching an obstacle. This is an aspect explored further, later in this judgment, when the expert evidence is scrutinised.

[13] In *Kruger v Coetzee*[1] Holmes JA formulated the test for negligence as follows:

'For the purposes of liability *culpa* arises if:

(a) A *diligens paterfamilias* in the position of the defendant-

[1] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'

[14] In *Sea Harvest Corporation*[2] Scott JA stated that dividing the issue of negligence into various stages, however useful, was no more than an aid or guideline in resolving the issue: in the final analysis the true criterion for determining negligence was whether in the particular circumstances the conduct complained of fell short of the standard of the reasonable person.[3] There is no universally applicable formula which would prove to be appropriate in every case.[4]

[15] In the light of recent authorities, J R Midgley and J C van der Walt in *Lawsa* have made the following observation:[5]

'When assessing negligence, the focus appears to have shifted from the foreseeability and preventability formulation of the test to the actual standard: conduct associated with a reasonable person. The *Kruger v Coetzee* test, or any modification thereof, has been relegated to a formula or guide that does not require strict adherence. It is merely a method for determining the reasonable person standard, which is why courts are free to assume foreseeability and focus on whether the defendant took the appropriate steps that were expected of him or her.'

[16] Applied to the present case, the question is thus whether in the particular circumstances, the defendant took appropriate steps to avoid injury to pedestrians. In support of the argument that the risk of injury was negligible, the defendant's

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[2] *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA); [2000] 1 All SA 128 (A) para 21.
[3] *Sea Harvest Corporation* fn 2 para 21; *Minister of Safety and Security v Carmichele* 2004 (2) BCLR 133 (SCA); 2004 (3) SA 305 (SCA) para 45.
[4] *Sea Harvest Corporation* fn 2 para 22.
[5] 15 *Lawsa* 3 ed at 284 para 155.

counsel relied on the evidence of Mr Shalendra Parbhoo, the project manager (formerly a senior technician) of the company which had installed and serviced the boom. He testified that it was likely that he would have tested the operation of the boom when it was installed in 2012.

[17] At the entry to the parking area, the operation of the boom was remotely controlled by a security guard, who would open it. A metal sensing loop installed in the roadway underneath the boom would detect the presence of a vehicle. Upon the lapse of five seconds (a default factory setting), the boom would close only after a vehicle had cleared the sensing area of the loop. According to the factory default settings generally used, it took two seconds for the boom to move from the fully lowered position to the fully raised position. The boom would remain in the raised position for 15 to 20 seconds, and return to the lowered position in two seconds, covering a distance of about three metres along a curve.

[18] At the exit of the parking area, the position was different to entry. The boom operated automatically. In the exit direction the vehicle would drive over a second metal sensing loop which caused the boom to move to its raised position. It would close only after metal had been detected and then cleared from the metal-sensing safety loop beneath the pole.

[19] When the boom was installed Mr Parbhoo tested the operation of the boom as it came down from the raised to the lower position, using a vehicle and his body. The boom has a built-in circuit that allows it to change direction when it comes into contact with a person or an object. In the case of a vehicle, a sensor in the boom caused it to stop and go back to its fully open position. When he stood under the boom as it was returning to the lower position, Mr Parbhoo conducted two tests, standing and facing the pole: the first with his shoulder; and the second,

with an outstretched arm under it. In the first test, Mr Parbhoo described the impact of the boom coming down on his shoulder as ‘a firm pat on the shoulder’; the boom stopped and reverted to its fully open position. In the second test, his arm was pushed down as it was not strong enough to stop the boom but when he used both arms, that was sufficient to reverse the operation of the boom and caused it to return to the fully open position.

[20] I do not think that it can be inferred from these controlled tests – with an expectation that the boom will impact a person on a particular part of his body – that the risk of injury to members of the public was negligible, and consequently that the defendant was not required to take appropriate steps to protect them from injury. It is striking that Mr Parbhoo did not place his head or any part of his face in the path of the boom. One’s head is obviously less capable of yielding than one’s shoulder. That the defendant was required to take reasonable steps is grounded in common sense and illustrated by the facts of this very case.

[21] A boom weighing 2.4 kg coming from it’s raised to its lowered position over a distance of some three metres in two seconds, and which strikes a pedestrian without warning, is likely to cause injury. In this case, it struck the plaintiff and Ms Leach simultaneously, causing the plaintiff to sustain a moderate to severe injury with long-term effects. This is how the plaintiff described the incident:

‘The boom, I did not see it, I continued walking. Suddenly there was almost a burning sensation, pain, it was sudden pain, and I screamed and I turned around and my friend also made some sort of murmur and when I turned around Geraldine was bleeding from her eye . . . as I turned to my right to look at her, she was on the right of me, I saw blood trickling down her face.’

[22] Then there is the incident in September 2015 when the boom unexpectedly struck a pedestrian, breaking the frame of his glasses. That incident too, could have resulted in serious injury, for example, if the lenses of the glasses had been broken. The only step taken after the September 2015 incident was to order and wait for the warning sign. So, pedestrians were not protected any more than they had been when the incident occurred. Since there was a person operating the boom for entry to the parking area, reasonable steps would at least have required that a person operate it at the exit while the warning sign was being manufactured.

[23] The fact that the path taken by the plaintiff was the route of choice for shoppers with their trolleys, cannot be overemphasised. Mr Parbhoo said that a metal trolley would activate the boom, and thus move it to its fully raised position. He had tested this with a sheet of metal, roughly the size of an A4 book. There obviously was no vehicle near the boom when it struck the plaintiff and Ms Leach. It is inevitable that a trolley would activate the boom and inattentive pedestrians or those engaging in conversation would be unaware of a boom in a raised position for 15 to 20 seconds, particularly in the absence of a vehicle. The boom would then return to its lowered position in two seconds, which is likely to cause injury to persons in its path.

[24] It is therefore not surprising that after the incident involving the plaintiff, the vehicle-sensing loop at the exit of the parking area was decommissioned. Mr Parbhoo testified that the operation of the boom at the exit was no longer automated but remotely controlled by a security guard, as was the case at the entrance to the parking area.

[25] The defendant also had the speed of the rising or lowering of the boom increased from two seconds to 4.6 seconds. Mr Parbhoo conceded that the slower

speed of 4.6 seconds was much safer and would give a person in its path an opportunity of avoiding a slower descending boom. The defendant would never have taken these steps if it considered that the risk of injury to members of the public was negligible.

[26] That the defendant appreciated that the risk of injury was significant, is also illustrated by the fact that it had taken steps to erect warning signs after the September 2015 incident. The defendant recognised that a warning had to be given that was simple, immediate and compelling. It would be read by members of the public and alert them to the operation of the boom. As stated, there was no warning sign when the plaintiff was struck by the boom in December 2015.

[27] For these reasons, the defendant's reliance on the Australian case of *Livsey*,[6] was misplaced. In that case it was held that although the risk of contact with a boom gate was foreseeable, it was difficult to identify a significant risk of harm where the boom gate ascended upon contact. Moreover, there was no evidence that the boom gate descended with such force as to cause injury.[7] As was said in *Kruger v Coetzee*:[8]

'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.'

[6] *Livsey v Australian National Car Parks Pty Ltd* [2014] NSWDC 232.
[7] *Livsey* fn 6 para 31.
[8] Footnote 1 at 430.

[28] The high court was correct to hold that in the particular circumstances, the defendant's conduct fell short of the standard of the reasonable person. In the result the appeal is dismissed with costs.

A SCHIPPERS
JUDGE OF APPEAL

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