



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 520/2021

In the matter between:

CENPROP REAL ESTATE (PTY) LTD
NAHEEL INVESTMENTS (PTY) LTD

FIRST APPELLANT
SECOND APPELLANT

and

NICOLENE HOLTZHAUZEN

RESPONDENT

Neutral citation: *Cenprop Real Estate (Pty) Ltd v Holtzhausen* (Case no 520/2021)
[2022] ZASCA 183 (19 December 2022)

Coram: ZONDI, MOLEMELA and MABINDLA-BOQWANA JJA and MOLEFE
and SALIE-HLOPHE AJJA

Heard: 16 September 2022

Delivered: 19 December 2022

Summary: Law of delict – claim for damages due to injuries – slipping and falling – whether plaintiff negligent – whether owner and manager of the mall negligent – whether disclaimer notices absolve owner from liability.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Sher J with Allie and Samela JJ concurring, sitting as full court):

The appeal is dismissed with costs.

JUDGMENT

Molefe AJA (Zondi, Molemela, Mabindla-Boqwana JJA and Salie-Hlophe AJA concurring):

[1] On the rainy morning of Saturday, 1 June 2013, the respondent, Nicolene Holtzhauzen, a 31-year-old woman, went to the Goodwood Mall (the mall) in Voortrekker Road, Goodwood to draw money from the ATM. On her way to the ATM, she slipped and fell on the tiled floor inside the mall and suffered a fracture on the elbow. She instituted a claim in the Western Cape Division of the High Court, Cape Town (the high court) for damages arising from her injury against the management company in charge of the mall and its owner. The matter proceeded only on the merits by agreement between the parties.

[2] The first appellant, Cenprop Real Estate (Pty) Ltd (Cenprop), managed the mall on behalf of the second appellant, Naheel Investments (Pty) Ltd (Naheel) which was the owner of the mall at the time of the incident, in terms of a management agreement concluded with Naheel. In terms of the management agreement, Cenprop was to maintain the buildings and grounds in good condition, but taking cognisance of cash flow pressures.

[3] After hearing evidence, the trial court (per Gamble J), dismissed the respondent's claim. Aggrieved by the dismissal of her claim, the respondent appealed to the full court.

The full court upheld the appeal and substituted the trial court's order with an order granting the respondent's claim. The appeal against the full court's judgment is with the special leave of this Court.

The pleadings

[4] The grounds for negligence that were pleaded by the respondent were the following. First, that the appellants knew that the surface area was slippery when it became wet and posed a danger to the members of the public including the respondent. Second, the appellants failed to ensure that the surface did not become slippery. Third, they allowed the floor to remain slippery despite knowing that the members of the public used the area when entering and exiting the mall.

[5] The appellants denied negligence and/or causation. They pleaded that the incident was caused solely by the respondent's own negligence in that she did not keep a proper lookout and did not take reasonable care.

[6] Naheel pleaded further that it had employed Cenprop as a competent independent contractor, specialising in property management, to manage, physically inspect the premises on a regular basis, and more specifically after any contractors had done work, and assist in maintenance, including the surface area of the floors, which Cenprop did. Cenprop was at all material times in control of the premises.

[7] The appellants further pleaded that Cenprop appointed a professional cleaning company, JKL Cleaning Solutions CC (the cleaning company) to, inter alia, spot clean daily any spillage in walkways with warning signage. It also appointed a professional security service provider, Gabriel Protection Services (Pty) Ltd (the security company) to, inter alia, call the cleaning staff, if none was available, for spillage and litter in corridors. By appointing these independent contractors, the appellants pleaded that they took adequate steps to ensure safety of members of the public and prevent the respondent in particular, from slipping and falling as alleged. This defence is based on this Court's decision as articulated in *Chartaprops 16 (Pty) Ltd and Another v Silberman*

(*Chartaprops*).¹ Notably, in this matter the cleaning company was not joined as a party in the litigation.

[8] In the alternative, the appellants pleaded contributory negligence on the part of the respondent. In the further alternative, the second appellant, Naheel contended that it was excused from liability by the terms on the signage placed at the entrance and/or exit of the mall (own risk sign which excluded liability).

The evidence

[9] The evidence presented on behalf of the respondent was that on the morning of the incident, the floor in this particular passage of the mall was wet because of the rain outside. There was a 'wet floor' sign placed at the entrance used to warn customers visiting the mall. The tiles used on the floor in the mall, when wet, would have been slippery. Although the evidence established that there was a liability disclaimer notice placed at the entrance/exit of the mall, there was a dispute as to whether the notice was visible to the shoppers on the day of the incident.

[10] The respondent testified that she was wearing rubber-soled boots. She proceeded slowly and carefully along the corridor given that the floor was wet, but nonetheless fell after walking for about 20 paces (14 metres). As a result of the fall, the respondent suffered severe bodily injuries, particularly on her right elbow, which was fractured. At the time of her accident, the respondent was holding her 11-month old baby. She was also accompanied by her 13-year-old daughter and 8-year-old nephew. After her fall, she instructed her daughter to fetch her mother, who was employed at a Pick 'n Pay supermarket in the same mall at the time. During the trial, the respondent's mother, Ms Holtzhauzen senior, confirmed the spot on which she found the respondent lying on the tiled floor and had noticed that the tiles were very wet. With the assistance of the security guard and a passer-by, the respondent was subsequently taken to hospital for medical attention.

¹ *Chartaprops 16 (Pty) Ltd and Another v Silberman* [2008] ZASCA 115; [2009] 1 All SA 197 (2009); 2009 (1) SA 265 (SCA) (*Chartaprops*).

[11] Ms Holtzhausen senior testified that when she arrived at the scene of the incident shortly after her daughter's fall and found her lying on the wet floor, the respondent was taken for medical treatment in a wheelchair. She further testified that on the Monday following the incident, she met with the manager of the mall, Mr Albert de Jager (Mr de Jager), who confirmed to her that he knew of the incident. He told her that, 'when it rains, he cannot put up wet signs everywhere, and he cannot clean everywhere, and it is not his problem or his responsibility'.

[12] The respondent called Mr Michael Bester, an architect, to testify as an expert witness. Mr Bester testified that the tiles used in the mall were not appropriate because they lacked sufficient 'non-slip' qualities. They were smooth and would be dangerously slippery when wet. Rainwater from the outside could be 'carried into' the mall by those walking into the mall, as the mat that was placed at the entrance door was not sufficiently wide to prevent water from being transported into the mall on pedestrians' shoes. He further testified that, in order to keep the tiles safe, one would have to take considerable care with maintenance and cleaning. In wet weather this would pose a challenge on an ongoing basis as it may be difficult to keep the floor dry with high levels of public traffic constantly walking in from rainy conditions. In this regard, one 'would have to have somebody cleaning behind every person to keep the floor entirely dry. . . Those tiles are undoubtedly slippery when wet, and it would be almost impossible to keep them sufficiently dry so as to not be slippery when you've got wet weather'.

[13] The appellants called Mr de Jager, who was the shopping centre manager at the time of the incident and an employee of Cenprop. He testified that he was an experienced manager having worked in different malls. In June 2013, Cenprop had a contract with the cleaning company which was appointed to attend to the cleaning service at the mall, as an independent contractor. He found this company there in 2010. Although the contract discovered was unsigned, he and the owner of the cleaning company agreed on the scope of work as embodied in the unsigned written contract. Cenprop also had a contract with the security company who would alert cleaners of spillages. He testified further that on a daily basis between 06h00 and 11h00 there would be three cleaners on duty and

two cleaners would join at 11h00 and the earlier shift would leave at 14h00. It was his practice to conduct a physical inspection of the premises of the mall daily to find out, other than the cleaning, if anything further needed to be done. He would liaise with the cleaning team from time to time, and if the need arose, he would give them additional duties to attend to, where necessary.

[14] In cross-examination, he conceded that it was possible for water to be walked in, depending on the quantities. It was put to him that he had told Ms Holtzhauzen senior that he was unable to put wet signs everywhere because of the rain, but his response was that, such a statement did not sound like something he would say. He further stated that the mall had disclaimer signs outside, warning shoppers that they were entering at their own risk. These signs, however, reflected the owner of the mall as St Tropez Property Group (Pty) Ltd (St Tropez) and not Naheel. From the photographs presented in court, the sign mounted adjacent to the entrance used by the respondent on the day of the incident, was hidden behind merchandise displayed by the hardware store that was a tenant at the mall. However, these photographs were taken about nine months after the incident.

[15] The appellants also called an expert witness, Mr Anthony Hockly, an architect. Mr Hockly testified that the make of the tiles at the mall was adequate for wet conditions and used by other malls. He however was in agreement with Mr Bester that the tiles would be slippery when wet. In his opinion, the 'tile could be considered as potentially dangerous underfoot only in the circumstance of the surface being wet and the wet conditions not being easily perceived. "Perceived", meaning "seen" or "experienced" if one is unaware of the [surface]'.

Issues on appeal

[16] There are three issues for determination in this appeal. First, whether the respondent was negligent. Second, whether the appellants had discharged their duty of care that the premises were safe, by the employment of independent contractors (the

Chartaprops defence) and lastly, whether a disclaimer or display of a disclaimer notice indemnified the second appellant from liability of the respondent's injuries.

Negligence

[17] As a point of departure, it is important to set out what the test for negligence is as stipulated in the oft-quoted case of *Kruger v Coetzee (Kruger)*, since it also applies to negligence in respect of the appellants, namely that:

'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
- (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.²

[18] The appellants contended that there was no negligence on their part and that if there was any negligence present, it was caused solely by the respondent by not keeping a proper lookout and not taking reasonable care under the circumstances in which she found herself. According to them, having encountered a wet surface, she took the risk of walking into the mall, holding a child in hand.

[19] It was contended on behalf of the appellants that the respondent knew the mall very well and had often visited it in the past, even on rainy days. On the day of the incident, she was fully aware that the floor was wet and could therefore be slippery. She even saw the 'wet floor' warning signs at the entrance of the mall and walked 20 paces on the same wet surface before she fell. She could not explain why she did not fall earlier if the cause

² *Kruger v Coetzee* 1966 (2) SA 428 (A) Ibid at 430E-G.

of her fall was the wet floor. It was therefore, submitted that on the probabilities, it was not the wet floor that caused the respondent to fall but her clumsiness or inattentiveness.

[20] It was further contended by the appellants that there were no reasonably foreseeable steps that they could or should have taken to prevent the respondent's fall as there was no evidence that anyone else had ever fallen, rainy or dry, for the previous three and a half years, nor was there evidence that anyone else had fallen on the day of the incident. The appellants contended that it was, therefore, not reasonable to expect them to have taken either of the two steps suggested by the full court, namely to prevent the public from accessing the relevant surface areas which would mean closing the mall on rainy days; and putting different and longer walking mats at the entrance of the mall. They submitted that their expert also suggested that the mat would create an additional hazard.

[21] On the other hand, the respondent contended that there was no negligence on her part that caused the fall. Instead, her fall was caused by the wet floor in the mall, which resulted from the rainwater brought in by pedestrian shoppers who were soaked from the rain. Furthermore, the appellants failed to carry out their duties to ensure that the wet floors were kept dry and safe for shoppers entering the mall, in particular the respondent. On the day in question, the respondent was wearing rubber-soled boots, and upon entering the mall she noticed that the floors were wet and so proceeded with caution by walking slowly and carefully along the corridor as she also had a child in her arms, which prompted her to take further caution. Despite her best efforts she still fell and was injured as a result.

[22] In *Probst v Pick n Pay Retailers (Pty) Ltd*, Stegmann J stated that:

'When the plaintiff has testified to the circumstances in which he fell, 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 the duty to take reasonable steps to keep his premises reasonably safe *at all times when members of the public may be using them* . . .³ (My emphasis.)

[23] The respondent's evidence that on the morning of the incident the floor she slipped on was wet as a consequence of the rain remained uncontroverted. The respondent's evidence that she proceeded slowly along the tiled corridor but slipped and fell due to the wet tiles that were slippery and posed danger to her is unimpeachable. Under the circumstances, there is no basis to find the respondent in any way negligent.

The *Chartaprops* defence

[24] In *Chartaprops*, this Court dealt with questions of whether a principal may be held liable for the negligence of an independent contractor. The respondent in that case sued the shopping mall owner, *Chartaprops* and a cleaning company, Advanced Cleaning. The majority judgment remarked about varying legal positions that were adopted by courts on this issue. It set out principles to be followed when dealing with the liability of a principal and an independent contractor. It observed that 'the correct approach to the liability of a principal for the negligence of an independent contractor is to apply the fundamental rule of our law that obliges a person to exercise that degree of care that the circumstances demand.' In this regard, it referred to *Cape Town Municipality v Paine*,⁴ where it was held: 'The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established, and it only remains to ascertain whether it has been discharged. . .'⁵

[25] The Court distinguished between the category of cases where work is committed to a contractor and if properly done no injurious consequences could arise and those cases where work is to be done from which mischievous consequences would arise, unless preventative measures were taken. In the latter category it said, 'if liability is to

³ *Probst v Pick n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W) at 197.

⁴ *Cape Town Municipality v Paine* 1923 AD 207 at 217.

⁵ *Chartaprops* fn 1 above para 39.

attach to the principal it would be in consequence of his/her negligence in failing to take preventative measures to prevent the risk of harm from materialising that a reasonable person in those circumstances would have taken, other than in accordance with a proposition framed in terms of non-delegable duty.’⁶

[26] It endorsed the general rule in *Langley Fox Building Partnership (Pty) v Da Valence*⁷ that a principal is not liable for the civil wrongs of an independent contractor except where the principal was personally at fault and restated the classic test for *culpa* as set out in *Kruger*.⁸ In determining the answer to the second enquiry into negligence set out in *Kruger*, it noted the following factors emphasised in *Langley*, namely, ‘the nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and their independent contractor respectively; and the means available to the employer to avert the danger’.

[27] Having set out the principles, the majority in *Chartaprops* then found:

‘This plainly is not the type of case where it can be said that *Chartaprops* negligently selected an independent contractor or that it so interfered with the work that damage results or that it authorised or ratified the wrongful act. The matter thus falls to be decided on the basis that the damage complained of was caused solely by the wrongful act or omission of the independent contractor, Advanced Cleaning, or its employees.

Chartaprops did not merely content itself with contracting Advanced Cleaning to perform the cleaning services in the shopping mall. It did more. Its centre manager consulted with the cleaning supervisor each morning and personally inspected the floors of the shopping mall on a regular basis to ensure that it had been properly cleaned. If any spillage or litter was observed, he ensured its immediate removal. That being so it seems to me that *Chartaprops* did all that a reasonable person could do towards seeing that the floors of the shopping mall were safe. Where, as here, the duty is to take care that the premises are safe I cannot see how it can be discharged better than by the employment of a competent contractor. That was done by *Chartaprops* in this case, who had no means of knowing that the work of Advanced Cleaning was defective. *Chartaprops*,

⁶ Ibid paras 40 and 41.

⁷ *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) at 13B.

⁸ *Chartaprops* fn 1 at 42.

as a matter of fact, had taken the care which was incumbent on it to make the premises reasonably safe.

...

Chartaprops was obliged to take no more than reasonable steps to guard against foreseeable harm to the public. In this regard, it is well to recall the words of Scott JA in *Pretoria City Council v De Jager*:

“Whether in any particular case the steps actually taken were to be regarded as reasonable or not *depends upon a consideration of all the facts and circumstances of the case*. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the enquiry involves a value judgment.”.⁹ (My emphasis.)

[28] Turning to the facts of this case, the appellants’ argument that they were not liable because of the employment of the cleaning company, as an independent contractor, which was responsible for ensuring that the floors of the mall were clean, dry and safe, should be rejected for the following reasons. Firstly, in the joint minutes prepared by the experts, they agreed that ‘[t]he tile used in the [m]all could be considered slippery underfoot when wet. That being the case reasonable measures had to be taken to guard against members of the public slipping’. Hiring a cleaning company cannot be seen as all that a reasonable person in the circumstances would do to discharge its duty towards the members of the public. In my view, a reasonable person would ensure that, given the potential danger posed by the wet tiles in rainy conditions, adequate measures are put in place. Secondly, if ensuring the premises are safe in those conditions is the duty of the contractor, that must be clearly set out in the scope of duties. I say so because this, as the full court found, is not a case of spillages that sprout unexpectedly at the mall. It is a reasonably foreseeable situation that is posed by the rainy conditions. Details as to what the cleaning company was expected to do in these circumstances are scant. Annexure ‘B’ attached to the unsigned agreement only refers to cleaning of spillages.

⁹ *Chartaprops 16 (Pty) Ltd and Another v Silberman* [2008] ZASCA 115; [2009] 1 All SA 197 (2009); 2009 (1) SA 265 (SCA) paras 45, 46 & 48.

[29] Lastly, it cannot be disputed that in rainy conditions, more resources would be necessary to be put in place. According to Mr De Jager there were two cleaning shifts. Three cleaners started at 06h00 in the morning. At 11h00 they would be joined by two. The earlier shift would be released at 14h00. It appears the incident would have occurred when there were three cleaners servicing the mall. In this regard, for instance, Cenprop would have had to ensure that an adequate number of cleaners are provided for 'contractually', in rainy weather given the wet floors at entrances caused by the water carried in by customers in rainy weather. It does appear that during lunch hours, the staff complement increased because of the shifts joining from 11h00 to 14h00. This helped alleviate the pressure during that busy period, if regard is had to Mr de Jager's evidence. So, a measure recognising the uniqueness of the situation could be put in place even during the rainy weather. Mr de Jager was ambivalent whether more cleaners would have been required in rainy weather.

[30] I am mindful of what is said in *City Council of Pretoria v De Jager*¹⁰ quoted in *Chartaprops* above,¹¹ that the fact that a harm that is foreseeable eventuates does not mean steps taken were necessarily unreasonable. In this case the only step that seems to have been taken by the appellants was to appoint independent contractors but how they were expected to carry out their function, given the slippery nature of the tiles and constant carrying-in of water drops or wetness into the mall by customers during rainy weather, is not explained. It may be different if the conditions were sudden, then in those circumstances one would have to test what would be regarded as reasonable steps then. The situation in this case seems to be different, there were tiles that posed potential danger when wet. The fact that no one else had fallen in the past does not mean steps ought not to have been taken to avert a danger that was reasonably foreseeable. This is so because even Mr Hockly, the appellant's own witness, stated that the evaluation of what level of slipperiness is acceptable or not, is determined by common sense,

¹⁰ *City Council of Pretoria v De Jager* [1997] 1 All SA 635 (A); 1997 (2) SA 46 (A).

¹¹ Fn 9 above.

experience and the circumstances of the application. This is all the more so because the tiles were, according to Mr Hockly, safe only when they were dry.

[31] I take into account the inference that all tiles would potentially be dangerous when wet. Unlike the situation of ad hoc spillages, rainy weather posed a special and foreseeable situation which ought to have been mitigated. In this situation the role played by the security company would not really assist, as the security guards would simply notify the cleaners when they noticed a spillage. There was already a wet signage at the door, which signalled knowledge of the wet conditions.

[32] So, to conclude on this issue: firstly, the extra attention required to keep the floors dry during rainy conditions is not covered anywhere in the scope of work given to the cleaning company. The fact that Mr de Jager interacted with cleaners in the mornings and conducted an inspection to find out if additional work needed to be done, apart from normal cleaning, is not helpful in this case because wetness brought by rainy conditions was, unlike spillages that would be unknown to the management of the mall, clearly visible. The rainy conditions on that day made it reasonably foreseeable that possible danger and harm would occur, thus the appellants as the *diligens paterfamilias* in this regard should have foreseen the possible danger that would be caused by trafficking in of rainwater brought in by the shoppers and should have then taken active reasonable steps to guard against this possible danger.

[33] Secondly, the appellants have given very cryptic and vague evidence as to the appointment and competence of the cleaning company. They tendered as evidence an unsigned job description with only one reference to cleaning 'spillages'. When employing the cleaning company, the scope should have taken into account the rainy seasons since it must be reasonably foreseeable that the rainwater brought by the shoppers caused wet floors and there must have been a system on how to manage that. The cleaning staff employed seemed inadequate.

[34] Thirdly, the issue of the make of the tiles, which directly implicates the principal, could not be put at the foot of the cleaning company. While experts differ as to the textural suitability of the tiles, their evidence converge on the fact that when wet the tiles were potentially dangerous. The circumstances of this case seem to put it in the category of cases where the owner and manager would be personally at fault. That is why the *Chartaprops* defence cannot come to the appellants' aid.

Disclaimer defence

[35] In relation to the defence based on a disclaimer notice (disclaimer defence), the second appellant alleged that they had placed the disclaimer signs, which were conspicuous and visible at the entrances to the mall, stating that the shoppers enter the mall at their own risk. They contended that the disclaimer signs exempted them from liability. The respondent testified that she had never seen the disclaimer notices, either on the day of the incident and prior to it.

[36] The second appellant's defence based on disclaimer should fail for the following reasons. The disclaimer notices on which the appellants were relying, displayed the name of St Tropez Property and not the current owner, Naheel. However, it does not matter whose name was on display – the issue is whether the disclaimer was there. There was no evidence that it was there during the period of the incident. Even assuming it was, it was not visible based on the photographs that were tendered for evidence. The disclaimer notices as correctly found by the full court, were hidden or obstructed by the merchandise displayed by a hardware store and could therefore not have been easily visible to shoppers, let alone the respondent.

[37] In this matter, even though the disclaimer notices may have been stuck to the wall at the entrances of the mall, the appellants did not take all necessary steps to ensure that the disclaimer board placed inside the mall was visible to the shoppers, as there were objects obstructing the notice and neither the second appellant as the owner, or the first appellant's manager, did anything to remove that obstruction. Therefore, the disclaimer defence cannot stand.

[38] In conclusion, it is clear from the evidence that there was no basis on which it could be said that the respondent was negligent. The appellants were negligent, as they were personally at fault by failing to take reasonable steps to prevent harm that was reasonably foreseeable. Accordingly, the defence that Cenprop employed a cleaning company does not come to their assistance. Further, assuming the disclaimer notices were displayed at the mall during the period of the incident, such were not visibly displayed so as to come to the attention of customers, let alone the respondent. There is accordingly no reason to interfere with the decision of the full court.

[39] In the result, the appeal is dismissed with costs.

D S MOLEFE
ACTING JUDGE OF APPEAL

APPEARANCES

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