IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no. A 69/2008

In the matter between:

JENEPHER CONSTANCE MARY REGINA GILSON Appellant

v

SHOPRITE CHECKERS LIMITED Respondent

JUDGMENT GIVEN THIS MONDAY, 25 AUGUST 2008

CLEAVER J:

[1] The appellant, to whom I shall refer as the plaintiff, a 62 year old grandmother at the time, fell and injured herself while shopping at the supermarket of the respondent, to whom I shall refer as the defendant, in Meadowridge, Cape Town on 16 June 2004.

[2] The plaintiff then unsuccessfully sued the defendant in this court for damages resulting from the injuries which she had sustained, but her claim was dismissed by Van Reenen J who held that she had failed to discharge the onus of showing on a balance of probabilities that the defendant was in law liable for any damages suffered by her. The plaintiff now comes on appeal to the full court, with the leave of the trial judge.

[3] The case for the plaintiff was that she had slipped on the floor while she was standing at a till and placing items which were in her shopping trolley on the counter. Her fall was said to have been due to the sole negligence of the

defendant who in the particulars of claim was alleged to have been negligent in one or more of the following respects:

- By allowing the floor to be full of dust and extremely slippery;
- By failing to put up warning notices advising customers that the floor was unsafe and slippery;
- By failing to clean the shop floor and keep it free of risk to customers and
- By failing to take reasonable steps to avoid the shop floor becoming dangerous to customers when it was in a position and able to do.

[4] The defendant denied that it was liable in the respects claimed, or any of them, and in the alternative pleaded that in the event of the court finding that the defendant was negligent, the plaintiff's negligence contributed to her falling.

[5] The plaintiff testified that on the morning in question she had gone to the defendant's store to make certain purchases. She says that the floor of the store was very slippery that morning and ascribed this to dust on the floor. In the light of the view which I take in regard to the plaintiff's evidence as to how she slipped, I think it is necessary to say that save for the bald statement that the floor was very slippery, the plaintiff did not give any evidence that her feet had slipped on the floor at any stage prior to the incident giving rise to the action. It is common cause that at the time building or construction activities were taking place in the shopping centre either in relation to a Woolworths store which was being erected and/or alterations which were being made to the parking lot. As will be seen, counsel for the plaintiff submitted that it was likely that the dust to which the plaintiff referred

would have originated from the building operations. The plaintiff says that she wore lace up *"veldskoens"* with *"almost a rubbery sole"* because she was careful not to have slippery footwear. She explained that in September 2001 she had tripped and fallen on her left shoulder in a car park. This resulted in a fracture of the humerus. A total shoulder replacement was performed and subsequently she had different operations to stabilise the shoulder and finally had prosthesis inserted. In the result she was left with a very weak shoulder girdle which meant that she was very much reliant on her right arm. In the result she required assistance whenever she had to purchase a large number of items. On the morning in question she purchased only a few items which she placed in a small trolley and then pushed the trolley to checkout counter number six which is depicted on a plan which was before the court. Precisely how she came to fall is not entirely clear from her evidence. She says that once she had reached the checkout counter she remembered starting to transfer items which she had bought from the trolley to the counter by leaning over to her left hand side where the trolley was and using her right hand to effect the transfer. At this stage she says:

> *"Well I was like getting my balance right and my balance is fine and something slipped and my leg slipped and all I did was, it was, I slipped and I went flying backwards onto my bottom, my glasses went flying off and then I was just in immediate pain."*

In cross-examination and when questioned about her balance, she said:

> *"Well it wasn't, I've never had a doubt about my balance I was in the process of adjusting my legs to sort of accommodate where I was standing and putting on the counter."*

Finally she said:

> *"No, I – I displaced my weight to my right foot and why I'm pretty sure of that, that this is something that I normally do because I am so aware of my left arm that I move, you know, to my – I mean, that is me, that's what I*

always do. So I'm sure I walked up, stood like that and would have moved slightly to the right of me, I would have."

It is not entirely clear to me how the plaintiff slipped and fell, but the impression which I gain from this evidence is that the plaintiff did not slip while moving her right foot from one position to another, rather that the slip occurred when she transferred her weight to her right hand side in order to reach across to the trolley to take items from it.

[6] It is common cause that Mr I de Waal ("De Waal"), the Fresh Foods Manager at the store, helped the plaintiff up. De Waal says that when he helped the plaintiff to her feet, he took her to a chair which was positioned directly opposite the parcels counter and tried to make her comfortable there. It is apparent from the plan filed of record that the parcels counter is more or less opposite tills ten and eleven. He forthwith reported the incident to the Administration Manager, Mr Lance Day ("Day") whose office is very close to the parcels counter and the latter came and spoke to the plaintiff while she was sitting on the chair. De Waal says that he then left the matter in Day's hands and left the scene. Day says that he merely took salient details from the plaintiff who was then assisted out of the store by a member of his staff who took the plaintiff to the parking lot where she was met by a friend and taken home. De Waal had nothing to do with the matter thereafter which was dealt with by Day.

[7] The evidence of the plaintiff, Day and De Waal differs in respect of Day's involvement. As already mentioned, De Waal says that he called Day from the latter's office to the plaintiff where she was sitting on the chair. Day says that De

Waal brought the plaintiff to his office where he took down her particulars, while the plaintiff denies that she spoke to Day at all on the day in question. However it is clear that on the following day, 17 June, Day reported the incident to his Head Office and that by then he had spoken to the plaintiff.

[8] Both De Waal and Day testified that shortly after the incident, they had gone to the area where the plaintiff had slipped and fallen to examine the floor surface. Both testified that there was no sign of any spillage, water or anything untoward on the floor. In answer to a question put to him by the presiding judge as to whether he specifically focused on dust when he examined the area where the plaintiff had fallen, Day testified:

> *"Well, I focused on the floor as a whole, in the area where she'd slipped, and looked for anything that could have caused it, whether it was dust, whether it was a bit of water, or something that had dropped on the floor, maybe a lettuce leaf or things that people would usually slip on, but I didn't see anything of the sort, anywhere."*

The plaintiff did not testify that when she saw De Waal or Day after she had fallen she had told either of them that she had slipped because the floor was dusty and both De Waal and Day testified that in fact she made no such communication to them.

[9] Relying on the proximity of the building operations in the centre as a source for dust on the floor of the store, plaintiff's counsel submitted that the plaintiff's evidence to the effect that the entrance door or doors to the premises were open at the time should be accepted. The plan which was put before the trial court showed entry and egress to and from the defendant's store to be gained through two wind

lobbies. The wind lobbies are situated in front of the store and the plan shows that on the outside and the inside of each lobby provision is made for a pneumatically operated door which opens automatically when persons approach the door. Day testified that the doors were in place in the year 2000 when he took up employment with the owners of the defendant's store and that they were also in operation at the time of the incident. The plaintiff's evidence in this regard is in my view not convincing. Her initial testimony was that on the day in question the doors leading into the shop were not as shown on the plan and she says that *"it was not a double door both of them sliding it just wasn't .... you walked in the entrance I think the inner door if there was one was always open, the outer door I'm pretty sure didn't even open was open anyway it was not the same double doors at all".* In cross-examination she said the following in regard to the wind lobby:

> *"Well I know it was not used as a wind lobby because even in the last 18 months that people, I've sat there and for people have gone in and out they say this is wonderful it opens and it closes and it never used to be like that. It was not like that, that it automatically opened and closed and there was a double wind barrier, there wasn't."*

Later on she reiterated that it was not used as a double door wind lobby:

> *"....that I will swear of because people have commented about it since, it's nice now."*

[10] The impression that I gain from this evidence is that the plaintiff's assertion that the doors were open at the time of the incident stems from the fact that after the event, she noticed that the doors opened and closed. In other words, her evidence seemed to have been based on a reconstruction. The evidence of both De Waal and Day was that the sliding doors had been in operation well before the date of

the incident and were in operation at the time. The trial judge recorded that he was unable to reject the evidence of Day to the effect that the automatic operation of the sliding doors could be deactivated but that it happened only on wind free days. He also recorded that there was no evidence of the wind conditions on the day in question. In any event, he concluded that since

- The entry and egress points to each lobby were not situated directly opposite each other and
- The checkout counters where the plaintiff fell were not opposite the wind lobbies;

it was highly unlikely that dust in concentrations sufficient to have constituted a danger to customers would have been blown on to the floor in the area where the plaintiff fell in the three to four hours after the floor would have been cleaned. (As to the cleaning see para [20].)

In my view the trial judge was correct in coming to this conclusion.

[11] Mrs G M Graham also testified on behalf of the plaintiff. She is related to the plaintiff in the sense that her husband's brother is married to the plaintiff's daughter. She testified that she had slipped, but not fallen, in the defendant's store in the same week that the plaintiff had slipped and fallen, but prior to that incident. She also testified that building operations were taking place in the vicinity of Woolworths in the centre. Mrs Graham's evidence was that she slipped, not at one of the checkout tills, but near the cold meat section. Her evidence as to what caused her to slip is by no means convincing.

" *You didn't say what you slipped on? --- I slipped on the floor.*

But you don't know what it is that you slipped on, you don't know whether it was dust or water do you? --- No it certainly wasn't water.

But you don't know what you slipped on. --- No I distinctly slipped.

You slipped, that I accept Mrs Graham but I'm putting it to you that you don't know what you slipped on. --- No I would have remembered the water because when Mrs Gilson said she fell I was, as I said wow the same thing happened to me.

So you think you would have remembered the water? --- Yes.

But you don't know what it was that you slipped on? --- No it was definitely on a dusty floor and I'm very sensitive to dust I wear contact lenses.

So now you're saying it was definitely on a dusty floor? --- It was on the floor yes.

It was on the floor. --- Ja.

That I understand it was on the floor but you're saying that the floor was dusty. --- It was dusty because I've never slipped there before."

In my view the trial judge correctly disregarded the evidence of Mrs Graham. As I have already attempted to show, her evidence was unconvincing. Her evidence was further to the effect that she was in the store on a week day after work, whereas the plaintiff slipped and fell on a public holiday. Furthermore, her experience at the store occurred at the end of a working day and not three or four hours after the store would have been cleaned. Finally, and perhaps most importantly, her similar fact evidence is of very little probative value. No basis was laid to show that at the time when she slipped conditions were sufficiently similar to give any probative value to the evidence.

[12] The plaintiff testified that the person who assisted customers in packing their goods into packets at the checkout counter where she fell was Ms Celeste Ruiters who assisted her out of the shop. Ms Ruiters, who testified on behalf of the defendant, denied that she had assisted the plaintiff out of the shop and also denied the plaintiff's evidence that she had told the plaintiff that one of the

managers had slipped and fallen in the store two weeks previously and that other people had nearly fallen as the floors were slippery. She did however confirm De Waal's evidence to the effect that it was he who had helped the plaintiff up after she had fallen and that he had then ensured that the plaintiff was seated on a chair in front of the parcels counter. Her evidence also differed from that of the plaintiff in that she said that the plaintiff fell as she approached the checkout counter. At this stage she said, the plaintiff's trolley was in front of the till. After the event she looked to see whether something had perhaps fallen onto the floor to cause the plaintiff to fall, but found nothing of any nature. She also found that the floor was dry. It was put to her by the trial judge that the plaintiff had said that there was dust on the floor wherever she looked. Ms Ruiters answered that she could not say that this was so. In answer to a direct question as to whether she could say whether there was dust on the floor, she answered that there was no dust and dust is something which a person cannot see (*"stof is iets wat mens nie kan sien nie"*). I understand this answer to mean that the dust which was being referred to was so fine that it would not have been visible. She also testified that no-one had said anything about dust at the time.

[13] In seeking to persuade us that there was dust which was obviously visible to all and sundry on the floor throughout the store and that the plaintiff had slipped on dust, counsel for the plaintiff relied heavily on certain correspondence from the plaintiff after the unfortunate event. In a letter to the defendant's insurers on 7 July 2004, the plaintiff recorded that:

- Mr de Waal had helped her up with great difficulty after her fall and had told her that he was aware of the slippery floors, that it was their fault and that they accepted responsibility. In the letter she also recorded that after she had taken her doctor's report to the store, a young packer at the store named Anne helped her with her shopping and told her that quite a lot of people had either slipped or had had near falls as the floor was so slippery. (Anne was not called as a witness.)
- When she brought her medical bills in to Day, Day told her that they had a real problem with the slippery floors and assured her that her fall had been reported to the insurers and that her medical costs would be covered. She recorded further that Day had also said that the problem was that a new Woolworths store was being built in the shopping centre and the digging up of the parking area outside Shoprite had caused a lot of dust to form on the floors making them very slippery and that they had to keep mopping the floor which made it worse.

[14] Both De Waal and Day denied that they had made the alleged admissions to the plaintiff. Day's report to the insurers recorded that he had asked the plaintiff if the floor was wet or if something was lying there and that the plaintiff had replied that there was nothing on the floor, 'she just slipped'. Both also testified that it was the company policy that no admissions of the type referred to by the plaintiff could be made by any members of staff.

[15] It was submitted that failing to accept what plaintiff had averred in her letter of 7 July as to what the defendant's employees had said to her after the incident

would mean that she had made this up. Although the letter cannot simply be ignored, it still remains for the plaintiff to prove what had caused her to slip and fall on the day in question.

[16] Plaintiff's counsel submitted that since it was never put to the plaintiff that De Waal and Day would say that she did not tell them that she had slipped on dust, their evidence to this effect should not be relied upon. However, the fact is that the plaintiff herself did not testify that she had told either De Waal or Day that she had slipped on dust.

[17] It was also submitted that Day's evidence should be rejected since he testified that the plaintiff had been brought to his office whereas De Waal testified that he had called Day to see the plaintiff where she was sitting on the chair at the parcel counter. I do not consider this discrepancy to be of such import as to justify the rejection of Day's other evidence to the effect that he did not make any of the alleged admissions to the plaintiff.

[18] It was contended on behalf of the plaintiff that the defendant had not established at which till the plaintiff had slipped and fallen and that it had also not established that there was no dust in the aisle of that till. In this connection it is necessary to point out that since the plaintiff bore the onus[1], it was not incumbent on the defendant to establish at which till the appellant slipped and fell nor did it have the onus to establish that there was no dust in the aisle of that till.

[1] *Monteoli v Woolworths (Pty) Ltd* 2000 (4) SA 735 (W)

[19] In my view, the plaintiff did not establish that she fell at till no 6, as she initially testified, or six tills down from the information desk as she later testified; and I am satisfied that the trial judge was correct in accepting the evidence of De Waal, Day and Ruiters that she fell approximately opposite the parcels counter, thus in the area between tills 10 and 12.

[20] In deciding whether the plaintiff had discharged her onus, the trial judge took into account that the floor of the defendant's store had probably been thoroughly cleaned on the morning in question, some three or four hours before the plaintiff slipped and fell, thus minimising the time when dust might have entered the store. Counsel for the plaintiff criticised this finding as there had been no direct evidence as to how the floor had been cleaned that morning. Both Day and De Waal explained that the cleaning of the floor had been contracted out to an independent third party known as Mr Clean. Each testified that employees of Mr Clean would arrive at the store at approximately 06h00 every morning when the floor was thoroughly cleaned with a detergent and/or soapy water being applied with mops and thereafter dried. This operation was always completed by 07h45 prior to the store opening at 08h00. This was a standard procedure and was observed by them when they arrived at the store before opening hours. On occasions it was expected of them to be at the store when it opened for the cleaning operation at 06h00. In the light of the evidence of both De Waal and Day that it was standard practice for the floors to be cleaned every morning, I am of the view that the trial judge was entitled to find that the shop floor had in all probability been cleaned in

the usual manner on the morning in question prior to the shop opening for business. De Waal and Day also testified as to the procedure adopted if spilling occurred during the day. They explained that in such event, a warning sign would be put up on the floor to warn customers of the danger and that one of three cleaners who were on duty all day would spot clean the affected area. The trial judge was of the view had the plaintiff been able to show that dust had accumulated in sufficient quantities, she would have established that a hazardous situation had arisen. He therefore concluded that the evidence of the defendant's witnesses as to the spot cleaning had been tendered to merely negative any inferences of negligence, without however displacing the evidentiary burden resting on the plaintiff. At the risk of stating the obvious, it must be remembered that the issue as to whether or not there were adequate cleaning facilities in place on the day in question will only arise if the plaintiff has been able to establish, on a balance of probabilities, that sufficient quantities of dust had accumulated on the floor to cause it to be slippery and that the defendant ought to have been aware of this.

[21] An architect called by the plaintiff testified that there were three possible ways in which dust could have entered the supermarket, namely

- Through the ducted air-conditioning system;
- By being brought in by persons entering the supermarket from the storage areas at the rear; and
- By being blown in by the wind through the sliding doors of the wind lobbies.

[22] The judge correctly, in my view, rejected the first two possibilities on the basis that there was no evidence to support them. As to the third possibility, he concluded that having regard to the position of the wind lobbies and sliding doors in relation to the check out counters where the plaintiff fell, it was highly unlikely that dust in concentrations sufficient to have constituted a danger to customers would have blown there in a relatively short time. In my view he was justified in coming to this conclusion.

[23] This means that we are left with the evidence of the plaintiff on the one hand, who says that the floor of the store was extremely slippery because of the presence of dust and the evidence of De Waal, Day and Ruiters on the other hand who were not aware of any significant amounts of dust being present and who all confirmed that nothing untoward could be seen on the floor in the area of the store where the plaintiff fell. Significantly also, the plaintiff did not tell either De Waal or Day that the dust on the floor had caused her to fall when they spoke to her.

[24] It was also submitted that the defendant's action in receiving and considering the plaintiff's medical bills was an indication that the defendant accepted liability for her damages. However, as pointed out by the trial judge there was no reason to disbelieve Day's evidence that the defendant's staff were not authorised to make any admissions since the defendant carried insurance for claims of the nature of plaintiff's claim. His evidence was that they merely assisted the plaintiff by passing her bills on to the insurance company.

[25] Plaintiff's counsel also asked us to draw an adverse inference against the defendant resulting from the disappearance of a so-called Incident Book in which Day had recorded the incident at the time. Day was no longer in the employ of the defendant at the time of the trial, having left the Meadowridge store at the end of 2004. Consequently he was unable to explain what had happened to the Incident Book, but an affidavit filed by the insurance manager of the defendant revealed that the book could not be traced as it had become misplaced at the store. It appears that older Incident Books could also not be located and the deponent recorded that in her view the older Incident Books had also been disposed of. No doubt the Incident Book would have been helpful, but the judge recorded that although its disappearance raised suspicion, that in itself did not warrant an inference that other incidents of slipping or falling had occurred or been had been reported.

[26] The trial judge concluded that in the light of the evidence given by Day, De Waal and Ruiters and the unlikelihood of dust having entered the supermarket in the relatively short time-span which applied, the evidence of the plaintiff that the floor was extremely slippery was not sufficient to discharge the onus which rested on her. This was for her to establish, on a balance of probabilities, that sufficient dust had accumulated on the floor of the store where she fell to make it reasonably foreseeable that a customer might slip and fall on the dust. The mere fact that the defendant slipped is no evidence of negligence on the part of the defendant, for

> *"People slip and fall daily, due to some negligence or inadvertence or oversight on their part or for other reasons."*[2]

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[2] *Koenig v Hotel Rio Grande (Pty) Ltd* 1935 CPD 93 at p 99

[27] In reaching his conclusion the trial judge found the plaintiff's description as to how she came to slip and fall difficult to follow, as indeed I did. Why she should have shifted her weight onto her right leg in order to lean across to her left hand side is by no means clear.

[28] In my view the trial judge was correct in concluding that the plaintiff failed to show on a balance of probabilities that the defendant was in law liable for any damages suffered by her and in the circumstances I would dismiss the appeal with costs.

R B CLEAVER

TRAVERSO AJP

I agree and it is so ordered.

J H M TRAVERSO

YEKISO J

I agree.

pp. **N J YEKISO**