IN HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)

CASE NO: 3373/2010

In the matter between

IDA ELIZABETH FRITZ Plaintiff

and

SAL-VRED DEALERS CC 1995/021563/23 Defendant

JUDGMENT DELIVERED ON 14 APRIL 2010

YEKISO J

[1] The plaintiff, Ida Elizabeth Fritz, is described in the particulars of claim as an adult entrepreneur, born on 3 November 1946 and resides at 23 Housewood Road, Heather Park, George, in the province of the Western Cape.

[2] The defendant is Sal-Vred Dealers CC 1995/021563/23, a close corporation duly incorporated and registered in terms of the provisions of the Close Corporations Act, 69 of 1984, and used to carry on business as such under the name and style of Super Spar Hartenbos, a grocery undertaking, with its principal place of business at the corner of Cape of Good Hope and Kompanje Streets, Hartenbos, in the province of the Western Cape. It, however, emerged in evidence during the course of trial that the defendant has since sold the business undertaking and no longer carries on business under that name at the physical address mentioned in the particulars of claim.

[3] The plaintiff's claim against the defendant is for recovery of delictual damages arising from an incident which occurred on 26 September 2007 when the plaintiff slipped and fell at the defendant's then supermarket at Hartenbos. It is common cause between the parties that plaintiff did indeed slip and fall at the defendant's business premises so that the issues which called for determination, once the pleadings were closed, were a question of the defendant's liability, the plaintiff's alleged contributory negligence and the quantum of plaintiff's damages. In its plea the

defendant raised several defences on which I shall elaborate later in this judgment.

[4] At the commencement of trial it appeared that the parties were *ad idem* that it would be prudent that the question of liability first be determined and that the quantum of plaintiff's damages be left over for later determination should a need arise to do so. Consequently, I was requested by the parties at the commencement of trial to order a separation of these issues in terms of Rule 33(4) of the Uniform Rules of Court. I made the appropriate order as requested by the parties.

FACTUAL BACKGROUND

[5] The facts and the circumstances out of which plaintiff's claim arise may be briefly stated as follows:

[5.1.] Since on or about 2006 upto and including 26 September 2007 the plaintiff, according to her evidence, had been in the employ of her husband, Thomas Johan Fritz, a sales representative, who carries on business under the name and style Fruit Hall Prime Cut. The main activity of the business undertaking is to supply merchandise to several business outlets including

Super Spar, Hartenbos. The operational area of the business undertaking spans from Riversdale up to Plettenberg Bay including other areas outside the Garden Route, such as Oudtshoorn. Since her employ by her husband, so the plaintiff stated in her evidence, she accompanied him in the course of the delivery of such supplies. At each business outlet where they delivered such supplies, her husband would effectively offload the supplies from the delivery vehicle and carry these into the receiving division or department of the business outlet concerned. The supplies would first be checked by a receiving clerk, verify if the items delivered reconcile with the quantity specified in the invoice, keep the original invoice and hand a copy to the person delivering such supplies. The process involved unpacking the goods from the container; have the quantity thereof verified; reconcile the quantity of the goods with the number specified in the delivery invoice; repack the goods in the container; and ultimately take the goods through to the shop floor of the business undertaking concerned. The plaintiff's husband would attend to the labour intensive part of the process, i.e., offloading and carrying the goods supplied whilst the plaintiff would attend to the paper work, the handing in of the invoices and retaining a copy thereof as proof of acknowledgement of receipt of the supplies so delivered.

[5.2.] Her monthly salary was in an amount of R2,500-00. Her position in her husband's undertaking, according to her evidence, was that of a packer or merchandiser, the latter being a term commonly referred to in evidence in the course of trial. From the year 2004 upto 2006 she was employed by Just Water, ostensibly an undertaking which supplied preserved bottled water, as a sales representative. However, the fact of her employment by her husband as a merchandiser, is in dispute. Mr Henko Stander, who was the manager at Super Spar, Hartenbos when the incident occurred, and who was called as one of the defendant's witnesses, disputes that the plaintiff was employed as a merchandiser. He makes this assertion because the plaintiff was never introduced at Super Spar, Hartenbos as the merchandiser. In this regard Mr Stander stated in his evidence that it was the defendant's policy that persons operating in the business outlet as merchandisers would fist have to be introduced to management by the sale representatives before recognition would be accorded to them as a merchandiser.

[5.3.] On the date the incident occurred, the plaintiff had accompanied her husband in the course of delivery of supplies to various business outlets

including that of the defendant, Super Spar, Hartenbos. Entrance into the Super Spar, Hartenbos was required to be made through the back entrance leading to the defendant's delivery area situate at the back of the business outlet where the merchandise supplied would be delivered, checked and verified. Once the merchandise would have been checked and verified, her husband would then carry the merchandise into the shop floor area which is accessible through an entrance door leading from the delivery area, for packing onto the shelves in an area of the shop floor designated for such goods. It is in such designated area where the goods would be unpacked and placed on display shelves. Whilst her husband had gone through to the shop floor area, she remained behind finalising the paper work with the receiving clerk. Once the paper work had been completed, the plaintiff proceeded to the shop floor area and, in dong so, had to walk down a sloping surface (ramp) joining two different surface levels and from there she would have had to turn right to the entrance door leading to the shop floor area.

[5.4.] Whilst walking on the sloping surface (ramp) on her way to the shop floor area, the plaintiff slipped and fell on her bottom side and in the process suffered serious bodily injuries more fully described in various

medical reports filed of record. After she had fallen, her husband was notified and called to the scene. Mr Stander also came to the scene, ostensibly before her husband had arrived on the scene. After she had been stabilised her husband assisted her through to the delivery vehicle and, ultimately, took her through to Bay View Hospital where she was admitted and subsequently received medical treatment. She states in her evidence that she had a pair of denim jeans on and a pair of cream/beige shoes made of synthetic leather and rubber soles. Once again, the type of shoes plaintiff had on is in dispute. Whilst the plaintiff claims to have had on shoes of the colour and texture just described, it is pleaded on behalf of the defendant that she had a pair of slip-ons on which were clearly and visibly smooth underneath. Whilst her husband assisted her into the delivery vehicle, he felt moisture at the bottom end of her pair of jeans ostensibly caused by a transparent and, ostensibly, slippery substance which could have been spilled on the sloping surface. She had in her possession a transparent bag in which there was a pair of scissors and a piece of cloth these, according to her evidence, being items and equipment she used to cut boxes open and to clean shelves in the course of placing the goods in the designated display shelves.

[6] After approximately two hours after the incident occurred, the plaintiff's husband returned to the defendant's supermarket and took photographs of the delivery area where the incident occurred including the photograph of the sloping surface where plaintiff slipped and fell. These photographs were admitted in evidence as Exhibit "A". Exhibit "A" consists of twelve (12) photographs in all. Three of the photographs were taken on the date the incident occurred, approximately two hours after its occurrence. The three photographs depict empty cardboard boxes strewn all over the surface in the delivery area except the sloping surface where plaintiff fell. The substance painted on the sloping surface designed to prevent the sloping surface being slippery, is clearly visible and shows signs of peeling off. The steps leading to the upper surface of the delivery area from where the slope descends are not visible and are clearly concealed by the empty cardboard boxes. The rest of the photographs were taken a few days before the commencement of trial. The steps leading to the upper surface of the delivery area are clearly visible in photographs 6, 7 and 9. The steps are situated on the right hand side adjacent to the ramp (sloping surface) referred to earlier in this judgment. According to the plan, drawn not to scale, and admitted in evidence as Exhibit "C", the surface of the ramp measures 2,3 x 1,2 m². The height from the upper surface level

from where the ramp descends to the lower surface level measures 700mm. This then concludes the description of the background and the circumstances under which the plaintiff slipped and fell in the delivery area resulting in the plaintiff sustaining the injuries complained of.

[7] Based on the facts briefly described in the preceding paragraphs the following facts appear to be common cause, at the very least, or not seriously disputed by either of the parties, and these are:

[7.1.] That on 26 September 2007 the plaintiff slipped and fell whilst walking on the ramp leading from the upper surface level to the lower surface level in the goods delivery area which, as has already been stated, is situate at the back of the defendant's business premises;

[7.2.] That the area where the plaintiff slipped and fell is on a ramp leading from the upper surface level and to the lower surface level of the store area;

[7.3.] That based on the evidence tendered at trial it appeared to be common cause that the portion of the premises where the plaintiff fell is a

goods receiving area where the defendant's supplies are delivered and received.

[7.4.] That the persons having access to the defendant's delivery area where goods supplied are received, and also persons using the ramp are the defendant's employees, the representatives of the suppliers of goods and their merchandisers. The plaintiff alleges in her particulars of claim that the defendant owed persons having access to its delivery area and, in particular, all such persons using the ramp, a duty of care that such persons would not be exposed to any potential hazard arising from any act or omission caused by the defendant. It is the defendant's case that whatever duty of care it owed to persons entering its business premises, such duty of care is limited to the category of persons just described, i.e., the defendant's employees, the representatives of the suppliers of goods and their merchandisers.

THE BASIS OF PLAINTIFF'S CLAIM

[8] The plaintiff alleges in her particulars of claim that she slipped on a surface covered with an unknown, invisible and slippery substance; that the unknown, invisible and slippery substance was a spillage on the ramp

surface in the delivery area of the defendant's business premises; that such spillage occurred within the course and scope of operational activity in the defendant's delivery area; that at the time the incident occurred the defendant owed members of the public and, in particular, the plaintiff, a duty of care to take reasonable steps to ensure that:

[8.1.] the premises, including the ramp in the delivery area, are safe for use by persons entering the business premises;

[8.2.] the premises, including the ramp in the delivery area, was free of spillage and substances which would pose a potential hazard to persons entering and moving about the business premises including the ramp in the delivery area;

[8.3.] the defendant has a system in place to make those in authority aware of the existence of a potential source of danger, both on the surface of the shop floor and the delivery area including the ramp, and to remove such potential source of danger or hazardous situation without delay.

[9] The plaintiff further alleges in her particulars of claim that the defendant failed in its duty of care in that it failed to ensure that its business premises and, in particular, the delivery area inclusive of the ramp, was safe for use by members of the public including plaintiff and, more specifically, the defendant failed to ensure:

[9.1.] that the steps in the delivery area were accessible for use;

[9.2.] that the steps in the delivery area were free of obstruction;

[9.3.] that the ramp did not pose danger to those persons using it by fitting rails along the wall adjacent the ramp;

[9.4.] that the ramp did not pose danger to those persons using it by covering it with anti-slippery devices and/or substances designed to ensure that the surface is not slippery.

[10] Except to admit that the incident complained of occurred in the delivery area at the back of the defendant's business premises, the defendant denies that the plaintiff fell in the category of persons it owed a duty of care; that if it is found that the defendant owed plaintiff a duty of care, the

defendant denies that it negligently failed to discharge such duty of care; and that if it is found that the incident complained of was reasonably foreseeable, and the defendant had a duty to guard against it, the defendant denies that it failed to take reasonable steps to guard against the incident complained of occurring. In the alternative to the aforementioned defences, the defendant pleads that the plaintiff was partly culpable for the mishap which befell her, and that if it is found that the plaintiff was so culpable, that whatever damages she may have suffered as a result of the incident complained of, such damages ought to be reduced to the extent and the degree of her culpability in terms of the provisions of section 1(a) of the Apportionment of Damages Act, 34 of 1956. Based on the pleadings, therefore, it would appear that the first issue which calls for determination is whether the defendant owed plaintiff a duty of care.

DUTY OF CARE

[11] Neethling et al: *Law of Delict*: 5th Edition p137 note that in the determination of a question whether a duty of care was owed, the criterion was traditionally whether a reasonable person in the position of the defendant would have foreseen that his conduct might cause damage to the plaintiff. The authors go on to observe that this issue (the duty issue)

is a policy-based value judgment in which foreseeability plays no role as to whether interests should be protected against negligent conduct. In *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) 833 the court emphasized that the "duty issue" is not at all concerned with reasonable foresight; it has to do with a range of interests which the law sees fit to protect against negligent violation.

[12] In paragraph 6 of her particulars of claim the plaintiff pleads that at the time the incident complained of occurred the defendant had a duty to members of the public and, in particular the plaintiff, to ensure that its business premises, including the sloping surface in the delivery area where the plaintiff slipped and fell, was safe, free of spillage and that the defendant had a system in place to ensure that any spillage which might occur, be immediately and effectively brought to the attention of management in order that it be speedily and effectively removed. The plaintiff goes on to plead in paragraph 7 of her particulars of claim that the defendant failed to discharge its duty of care by failing to ensure that the sloping area where the incident occurred was free of hazardous material and safe for use by members of the public and, in particular, the plaintiff. Further, the plaintiff pleads in paragraph 7.2 and 7.3 of her particulars of

claim that the defendant failed its duty of care by failing to ensure that a proper and effective system was in place to guard against any unknown, transparent and slippery substance spilling over the ramp, and that such substance is detected in order that it be speedily and effectively removed.

[13] The question as to whether persons in control of areas where members of the public have access, as for an example, areas under the control of municipalities accessible to members of the public and owners of shops and supermarkets stores have a duty of care to persons using access to such areas, has been considered on a number of occasions in decisions such as *Steward v City Council of Johannesburg* 1947 (4) SA 179 (WLD); *Alberts v Engelbrecht* 1961 (2) SA 644 (TPD) 646C; *Mulcahy v Model Delicacy Store* 1963 (4) SA 331 (D & CLD); *Gordon v Da Mata* 1969 (3) SA 285 (AD); *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W) and *Kriel v Premier, Vrystaat & Andere* 2003 (5) SA (OPD) 71 I-J to mention but few of such decisions.

[14] In *Probst v Pick 'n Pay Retailers (Pty) Ltd,* supra*,* Stegman J made the following observation at 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."

The remarks by Stegman J were made in the context of a duty of care owed to persons entering and, walking on a shop floor area of a supermarket store. But the remarks by Stegman J are not limited to shop floors of shops and supermarkets but extend to all such areas of a business concern where members of the public have access.

[15] Whilst the defendant admits that it owed a duty of care in relation to persons entering its business premises such as sales representatives and merchandisers, the defendant denies that the plaintiff, in the instance of this matter, falls in the category of such persons for the simple reason that, according to the defendant, the plaintiff was not introduced to management as a merchandiser and that, therefore, the plaintiff was not a merchandiser to whom it owed a duty of care.

[16] There are conflicting versions as regards whether the plaintiff was a merchandiser or not and also as regards the type of shoes the plaintiff had on when the incident occurred. Whilst the plaintiff alleged in her pleadings and stated in her evidence at trial that she was employed by her husband as a merchandiser, the defendant, on the other hand, pleaded and tendered evidence in an attempt to show that when the plaintiff visited its business premises on the date the incident occurred, her presence at its business premises was not in her capacity as a merchandiser and therefore did not fall in the category of persons to whom it owed a duty of care. Furthermore, whilst the plaintiff stated in her evidence that she had on a pair of cream/beige shoes made of synthetic leather, it is, on the other hand, pleaded on behalf of the defendant and evidence was tendered at trial which was intended to show that plaintiff had a pair of slip-ons on which were clearly and visibly smooth underneath.

[17] As to the question as to whether the plaintiff was a merchandiser, the plaintiff stated in her evidence that on each occasion she accompanied her husband on visits to various shops and supermarket outlets, she did so as a merchandiser and in that capacity. She testified that on each such visit her duty involved liaising with the relevant receiving clerk to have the goods

supplied checked, to have the quantity of the goods so supplied verified,, to attend to an acknowledgement of receipt of such goods and, ultimately, to attend to the display of the goods so supplied on the designated display shelves on the designated shop floor area. That the plaintiff was involved in such activity is corroborated by one of the defendant's witnesses in the person of Miss Jansen who stated in her evidence at trial that she regarded the plaintiff as a merchandiser (*buite merchandiser*). Plaintiff testified that she visited the defendant's premises on a weekly basis as a merchandiser throughout the period of her employ by her husband from 2006 upto and including September 2007.

[18] Mr Stander conceded in his evidence under cross-examination that he could not dispute that the plaintiff visited the defendant's business premises on a weekly basis and that she had to use the ramp to access the shop floor area. The plaintiff stated further in her evidence that on the day the incident occurred, she had in her possession a pair of scissors and a piece of cloth with which to cut boxes open and to clean display shelves. These appear to be duties consistent with those of a merchandiser. She stated further in her evidence that at no single occasion, since her employ by her husband, was she prevented from having access to the defendant's

business premises on the basis that she was not a merchandiser. She had been known at the store and had been visiting the store on a regular basis over the past 11 years. She was not aware that she had to introduce herself to those in authority as a merchandiser and was at no stage called upon to do so. She stated in her evidence that on the date the incident occurred, she was at the defendant's premises not as the defendant's employee but as a member of the public and in her capacity as a merchandiser.

[19] The evidence of Mr Stander, on the other hand, is that plaintiff is not a merchandiser for the simple reason that the plaintiff was not introduced to management as such. He stated in his evidence that it was the policy of the defendant that persons entering the defendant's premises as merchandisers had to be introduced to those in authority as such. It is not clear on the basis of the evidence tendered at trial how and in what shape or form was this policy implemented and communicated to the sales representatives and, in particular to the merchandisers. Mr Stander further stated in his evidence that for the whole period the plaintiff had been in her husband's employ, he had never seen plaintiff performing duties of a merchandiser. This is not surprising as Mr Stander was in management

and could therefore not have been in a position to have seen every merchandiser performing his or her duties in the defendant's premises more so that the plaintiff visited the defendant's supermarket once on a weekly basis.. A person ostensibly in charge of the admission register in the delivery area, who probably may have shed light as regards whether the plaintiff used to visit the supermarket as a merchandiser, was not called by the defendant to testify. Mr Stander had, however, seen the plaintiff, on a few occasions, sitting in her husband's delivery vehicle in the delivery area. This may well be so, especially when her husband would have been offloading and taking the supplies to the delivery area for the necessary check and verification.

[20] *Mr Van der Berg* who appeared for the defendant, makes a point in his submissions and in argument that, in instances where there are conflicting versions of evidence, a court must be satisfied that the version of the litigant upon whom the onus rests is true and that the other version is false, citing the *National Employers Mutual General Insurance Association v Gany* 1931 (A) 187 as authority for this proposition. Wessels JA, in *National Employers Mutual General Insurance,* supra, at 199 made the following observation:

> "Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version and that in this case absolute reliance can be placed upon the story as told by A Gany."

[21] The remarks of Wessels JA cited in the preceding paragraph were criticised in subsequent decisions such as *Maitland & Kensington Bus Company (Pty) Ltd v Jennings* 1940 CPD 489 and in *International Tobacco Co (SA) Ltd vs United Tobacco Co (South) Ltd (1)* 1955 2 SA 1 (W) to mention but few of the decisions in which the remarks by Wessels JA were a subject of criticism. In *Maitland & Kensington Bus Co (Pty) Ltd,* supra, Davis J remarked that the word "absolute" in the last sentence of the remarks by Wessels JA set too high a standard of proof in civil trials whilst Clayden J in *International Tobacco Co (SA) Ltd,* supra, remarked that "(t)hough a 'strong possibility' may be less than 'absolute reliance' it still seems, with respect, that an unnecessary adjective (the adjective being "absolute") has been introduced" and went on to choose the usual preponderance of probability test. In my view, the approach adopted by

Wessels JA is too stringent a test to apply in civil trials and its criticism, as pointed out by *Mr Van der Berg* in his submissions, is, in my view, justified. The more acceptable approach, based on a preponderance of probabilities, is too valuable, settled and an acceptable assessment tool to be sacrificed on the altar of too stringent a test as applied in the authority *Mr Van der Berg* seeks to rely on and, with the greatest respect, I have no hesitation to depart therefrom.

[22] On the basis of the evidence tendered by the plaintiff as well as her husband, Mr Fritz, I have no hesitation to find that the plaintiff was employed by her husband as a merchandiser and that on each occasion, during the course of her employ by her husband, she visited the defendant's premises in that capacity. I am making this finding, not on the basis that the version offered by Mr Stander is false and, accordingly, falls to be rejected, but on the basis that the plaintiff's version, viewed on the basis of evidence as a whole, is more probable than that offered by Mr Stander. In my view, the standard of proof applied in the authority *Mr Van der Berg* relied on equates the standard of proof applied in civil disputes over centuries to that of proof beyond reasonable doubt applied in criminal trials.

[23] *Mr Van der Berg* makes a point in paragraphs 22.3 and 22.4 of his submissions that plaintiff, in a consultation with Dr Dan Potgieter, an orthopaedic surgeon who compiled a medical report annexed as annexure "A" to the plaintiff's particulars of claim, did not indicate that she was employed by her husband as a merchandiser. In paragraph 1 of the medical report compiled by Dr Potgieter dated 25 March 2008 there is reference to the plaintiff's employment history in the banking industry; a reference to an employment as a sales consultant by an undertaking known as Annique Gesondheidsreeks and as an executive administrative officer in the couple's small business undertaking which she successfully manages together with her husband. When confronted about the fact of her employment by Annique Gesondheidsreeks plaintiff pointed out that she worked for this undertaking purely on casual basis and that she did mention this fact to Dr Potgieter in the course of such consultation. In any event there is nothing contained in paragraph 1 of the report by Dr Potgieter which negates the plaintiff's assertion that she was employed by her husband as a merchandiser.

[24] There is evidence to suggest that the ramp on which the plaintiff fell is the busiest surface used at the store, not only by the defendant's employees, but also by members of the public in the form of sales representatives and merchandisers. The defendant thus owed a duty of care, not only towards its employees but also to the members of the public in the form of sales representatives and merchandisers, to guard against any source of danger occurring on the ramp surface.

THE DEFENDANT'S NEGLIGENCE

[25] The plaintiff alleges in her particulars of claim that the defendant was negligent in one, more of all of the following respects, namely:

[25.1.] that the steps in the delivery area were not accessible to her ostensibly in view of the fact that empty boxes were strewn all over the surface in the delivery area except on the floor on the upper level in the delivery area and ramp;

[25.2.] that the plaintiff was thus compelled to use the sloping surface on her way to the shop floor area;

[25.3.] that the sloping surface was dangerous to use under the circumstances;

[25.4.] that an unknown, hardly visible slippery substance was spilled on the sloping surface;

[25.5.] that the defendant did not have a system in place to ensure that any spillage which could pose a potential source of danger could be detected and brought to the attention of management;

[25.6.] that because of the absence of a proper system in place, the defendant did not detect the spillage on the sloping surface and, ultimately, have it speedily removed;

[26] *Mr Coetzee,* who appeared for the plaintiff, makes a point in his submissions, and correctly in my view, that with regards to the sloping surface (ramp), the following facts appear to be common cause or, at the very least, were not seriously contested by either of the parties, and these being the measurement of the sloping surface (ramp); that the plaintiff, as at date the incident occurred, was not aware of the existence of the steps adjacent to the sloping surface (ramp); a Mr Joubert, a sales representative who in the past also visited the delivery area in the defendant's business undertaking, was unaware of the existence of the steps adjacent the sloping surface; that the steps, at the time the incident occurred, were inaccessible to the plaintiff; that the defendant used portion

of the delivery area, excluding the sloping surface, as an area where empty boxes were strewn; that the plaintiff, in order to access the shop floor area, had had to use and walk on the sloping surface; that the sloping surface was the most used and the busiest portion in the defendant's business undertaking; that there were no warning signs in the vicinity of the sloping surface designed to warn persons using the sloping surface of any risk or potential danger; that there were no hand rails adjacent to the sloping surface on which persons walking on the sloping surface could cling on in order to avoid slipping and falling; that the plaintiff, over the years, used the sloping surface without falling; that the defendant was aware of the potential danger the sloping surface posed and, for this purpose, used a particular adhesive paint, referred to in evidence as a Plascon paint, to guard against the sloping surface being slippery; that the pellets, when loaded on a forklift vehicle, scratched the surface of the ramp when goods are removed from the upper floor level to the lower floor level of the delivery area; that within two weeks of the paint being applied, the paint on the sloping surface starts peeling off; that the defendant applied paint on the sloping surface at six monthly intervals; and for this reason, Mr Stander had to concede in his evidence under cross-examination that once the peeling off starts manifesting, and this, according to his evidence, occurred

within two weeks of the application of the adhesive paint on the sloping surface, same remained unserviced for the remaining period of twenty four (24) weeks of the six (6) monthly interval.

[27] Further, *Mr Coetzee* makes a point in his submissions that I ought to find that the sloping surface used to descend from the upper floor level to the lower floor level, and in the absence of an alternative route having been accessible to plaintiff, posed, and indeed constituted a source of danger to those persons using it relying heavily on such authorities as *Kriel v Premier, Vrystaat*, supra, at 71E; *Mulcahy v Model Delicacy Store,* supra, at 333B; *Probst v Pick 'n Pay Retailers (Pty) Ltd,* supra, at 200; and *Lindsay v Checkers Supermarket* 2008 (4) SA 684 (NPD).

[28] In *Kriel v Premier, Vrystaat,* supra, para [10] at 71E Hattingh J observed:

> "'n Okkupeerder van 'n perseel is onder 'n regsplig om redelike sorg te dra dat persone wat verwag kan word om op die perseel te kom nie beseer word as gevolg van 'n gevaarlike situasie wat op die perseel aanwesig is nie. … Dit beteken natuurlik nie dat so 'n okkupeerder ook aanspreeklik is vir die gevolge van 'n gevaar situasie wat ontstaan het as gevolg van die onregmatige en onvoorsienbare optrede van 'n vreemdeling nie, tensy die okkupeerder daarvan

bewus geword het en versuim het om die redelike stappe te neem om skade te verhoed."

[29] In *Mulcahy v Model Delicacy Store,* supra, at 333B Warner J observed as follows:

"In my view it is inherently dangerous in a shop such as the one in question to have a floor which is on two levels. Although this has been described as a step, it seems to me that it cannot be compared with a flight of steps. It is proper to consider it as a floor on two levels and in my view it is in the nature of a trap. Consequently, there was a dangerous situation of which the defendant was aware."

[30] In *Probst v Pick 'n Pay Retailers (Pty) Ltd*, supra, at 200f Stegman J had this to say:

"The duty on the keeper of a supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, within reasonable promptitude."

[31] And finally, Van der Reiden J, had this to say in *Lindsay v Checkers Supermarket,* supra, at 639B:

> "I am satisfied, notwithstanding the plaintiff's inability to pinpoint the approximate time of the spillage in question, that the evidence led by the defendant does not provide support for the argument that it had an adequate cleaning system in place. Common sense and the application of legal principles dictate that the system in place on the day in question was inadequate to deal timeously with hazardous spillage."

[32] Based on the aforementioned authorities *Mr Coetzee* submits that the sloping surface (ramp) constituted a source of danger to which the defendant had a duty to guard against; that, on the day in question, no adequate system was in place or, whatever system there was in place was inadequate to detect the spillage on the ramp in order that those in authority could timeously deal with and remove such hazardous spillage without delay.

[33] *Mr Van der Berg,* in his submissions, moves from the premise that in as much as the defendant acknowledges it owed a duty of care to all those persons mentioned in paragraph [7.4] of this judgment, i.e., the defendant's employees; the representatives of the suppliers of goods; and their merchandisers, the defendant denies that it owed such duty of care to the plaintiff on the basis that the plaintiff did not fall in the category of those

persons to whom it owed a duty of care, relying on PQR Boberg: *The Law of Delict* volume 1 p31 for this proposition. The submission is based on an assertion that the plaintiff did not fall in the category of foreseeable plaintiffs to whom harm was reasonably foreseeable. This is based on a contention that at the time the incident complained of occurred, the plaintiff was not a merchandiser and thus did not fall in the category of persons to whom the defendant owed a duty of care. In paragraph [22] of this judgment I made a finding that the plaintiff was indeed employed by her husband as a merchandiser; that when she visited the defendant's store on the date the incident occurred, she visited the defendant's store in that capacity and that, therefore, plaintiff falls in the category of persons to whom the defendant owed a duty of care for the reasons stated in that paragraph.

[34] Now that I have found that plaintiff falls in the category of persons to whom the defendant owed a duty of care, the next question I have to determine is whether the defendant negligently failed to discharge that duty of care as against the plaintiff. It would appear that the defendant was well aware that the sloping surface where plaintiff fell posed a potential hazardous situation hence its practice of applying adhesive paint thereon at six-monthly intervals to prevent the sloping surface being slippery. But

there is also evidence tendered on behalf of the defendant that the kind of paint applied on the sloping surface starts peeling off within two weeks of its application; that the paint would gradually peel off for the remaining period until its re-application on the sloping surface once a period of six months shall have expired. There is further evidence tendered on behalf of the defendant that the sloping surface where plaintiff slipped and fell is the most used and busiest area in the defendant's delivery area. There is further evidence tendered on behalf of the defendant that prior to the occurrence of the incident a truck full of load delivered supplies of varying kinds in the defendant's delivery area and that it was the defendant's practice that such load, which appeared to emanate from the defendant's head office, had to be offloaded from the truck as quick as possible in order that, amongst other things, perishable goods be moved either to the cool room for storage or to the shop floor area for packing and in doing so, the same ramp where plaintiff slipped and fell had of necessity had to be used. Thus, it is probable that in the process of such busy, labour intensive activity, substances emanating from such products could have been spilled on the sloping surface causing same to be slippery. The question which ultimately has to be determined is whether the defendant had an adequate

system in place to detect any potential hazard in the light of this labour intensive and busy activity.

[35] In paragraphs 7.2 and 7.3 of her particulars of claim the plaintiff pleads that the defendant failed its duty of care by failing to ensure that a proper and effective system was in place to guard against any unknown transparent and slippery substance spilling over the sloping surface and that such substance is detected and be speedily and effectively removed. In this regard there is undisputed evidence that after the plaintiff had left the defendant's delivery area and on being assisted into her husband's delivery vehicle, she felt that there was moisture at the bottom end of her pair of trousers caused by a slippery, tough and sticky substance. The plaintiff's trousers did not have such moisture before the incident occurred so that the only reasonably inference that could be drawn under these circumstances was that such moisture may have been caused by a substance which may have spilled on the sloping surface in the course of removal of produce to elsewhere in the delivery area from the upper surface level *via* the sloping surface (ramp). On the basis of evidence tendered at trial it appeared that, except for meat products, all produce delivered at the defendant's then supermarket, including perishables, were

received through the defendant's delivery area at the back of the supermarket and thereafter moved over the sloping surface to the rest of the store area or elsewhere in the supermarket.

[36] In paragraph [34] of this judgment I referred to a truck load of varying kinds of products having been delivered at the defendant's delivery area which had to be removed without delay over the sloping area to the rest of the defendant's store room and the perishable products either to the cool room or to the shop floor area for packing where appropriate. This activity occurred shortly before the plaintiff walked, slipped and fell on the sloping area. I have also mentioned in paragraph [34] of this judgment that in the course of such labour intensive and busy removal process, it is probable that substances emanating from such products, which probably could be slippery, could have been spilled on the sloping surface thereby introducing a further source of danger to persons walking on the sloping surface. In this regard the plaintiff alleges in her particulars of claim that the defendant did not have a proper and pro-active system in place to detect whatever spillages there could have been or could have been caused by removal of such products from the upper floor surface, *via* the sloping surface (ramp) and to the lower floor surface level. Mr Stander, who tendered evidence

for the defendant, testified about the cleaning system the defendant had in place at the time which he described as “Hazard Analysis & Critical Control Points” but had to concede in his evidence under cross examination that such system was merely reactive and not pro-active in the sense of being capable of detecting any source of danger which could cause harm to the person of another.

[37] Based on the evidence I have just outlined, I have no hesitation to find that the plaintiff slipped and fell on the sloping surface as a result of some slippery and transparent substance spilled on the sloping surface shortly before plaintiff walked thereon; that such slippery and transparent substance was not visible to the naked eye; that the cleaning system the defendant had at the time was merely reactive, and not pro-active in the sense of detecting whatever spillages there could have been in order to guard against any potential harm that could be caused to the person of another; that the plaintiff slipped and fell on the sloping surface as a result of a transparent and slippery substance spilled on the sloping surface during the course of removal of the products delivered from the upper floor level to the lower floor level in the defendant’s delivery area. In this regard, it is appropriate to reiterate the remarks of Van der Reiden J, in

Lindsay v Checkers Supermarket, supra, that the evidence led on behalf of the defendant does not provide support for any contention that it had an adequate cleaning system in place designed to detect any potential hazardous situation arising which could harm the person of another.

[38] In arriving at the conclusion I arrived at in the preceding paragraph, I have obviously taken note of *Mr Van der Berg's* submissions, supported by oral argument, that in view of the plaintiff having used the sloping surface in the defendant's delivery area on many occasions and for many years without falling and that during all those many years she at no stage regarded use and walking on the sloping surface a risk, thus making a point that the mishap which had befallen plaintiff could not have been reasonably foreseeable. This contention, in my view, does not carry any weight in view of what appears to be a common cause fact that the sloping surface where the plaintiff slipped and fell is the most used and the busiest portion of the defendant's then premises which, in itself, ought to have imposed a concommittant duty on the defendant to adopt such measures and systems as would have enabled it to detect any potential hazard arising and to guard against such hazardous eventuality.

CONTRIBUTORY NEGLIGENCE

[39] In its plea, the defendant relies on the following allegations in support of its contention that the plaintiff was negligent, namely, that the plaintiff walked on the sloping surface with footwear that was smooth underneath; that the plaintiff did not keep a proper lookout; and that plaintiff failed to remove the obstruction, namely, the empty boxes, that were strewn on the steps leading to the upper floor level. The last mentioned ground of negligence was not pursued in argument so that a determination on whether the plaintiff was indeed negligent will be made on the basis of whether the plaintiff kept a proper lookout and on an allegation that the plaintiff walked on a sloping surface with footwear that was smooth underneath. It appears that it is accepted between the parties that the defendant bears the onus to prove negligence on the part of plaintiff.

[40] With regards to the plaintiff's alleged failure to keep a proper lookout, it is contended on behalf of the defendant that in view of a clear visibility and absence of any form of obstruction on the sloping surface as depicted in photograph 2 in Exh "A", the tough, transparent substance on the sloping surface which may have been the cause of the plaintiff slipping and falling ought to have been clearly visible. No evidence was led as to the nature

of the substance that may have been spilled on the sloping surface and its measure of visibility, so that any finding as regards the nature of such substance and the visibility thereof will be based on sheer speculation. The only evidence which was led at trial is that the plaintiff felt moisture on the bottom end of her pair of trousers which appeared to have been caused by an ostensibly slippery substance which may have been spilled on the sloping surface. In my view, the defendant has not established, on a preponderance of probability, that whatever substance that could have been spilled on the sloping surface was capable of any form of visibility with the naked eye so that this ground of alleged negligence on the part of plaintiff ought to fail.

[41] And then there is an allegation of footwear which was smooth underneath that the plaintiff had on on the day the incident occurred. The evidence led on behalf of the defendant, in as far as this aspect of the matter is concerned, is that of Mr Stander and Miss Jansen. All that Mr Stander and Miss Jansen could tell the court is that on the day the incident occurred the plaintiff had slip-ons on of the kind similar to Exh 2 produced at trial. The best that Mr Stander and Miss Jansen could say was that they saw that the slip-ons that plaintiff had on were smooth underneath. No

evidence was led as to the texture of the slip-ons, or on the smoothness or otherwise of the sole of such slip-ons that plaintiff allegedly had on at the time. In any event, the defendant's case on the pleadings is not based on the plaintiff having had slip-ons on at the time the incident occurred but rather that the plaintiff, on the day of the incident, had on shoes whose soles were smooth or shoes which were smooth underneath. Mr Stander went so far as to testify in his evidence in chief that plaintiff slipped and fell mainly as a result of the type of shoes she had on but when questioned on this aspect in his evidence under cross-examination Mr Stander changed tack and denied having said the plaintiff fell mainly as a result of the type of shoes she had on. As far as Miss Jansen is concerned, it needs to be stated from the outset, that she was not a reliable witness. When it was suggested to her that it would be argued that her evidence be rejected on the basis that it is unreliable, she responded by saying that perhaps (*miskien*) that will be a correct approach to follow. Consequently, Miss Jansen's evidence can only be relied on where there is sufficient corroboration. The evidence of Mr Stander is suspect particularly as regards the sole cause of the plaintiff slipping and falling which justifies this aspect of his evidence being viewed with great circumspection.

[42] In any event, at the hearing of this matter, I had all the opportunity in the world to observe the way the parties tendered their evidence regarding the footwear plaintiff had on at the time the incident occurred; the manner they tendered their evidence and their demeanour. Based on this approach I am not persuaded that the version of the plaintiff together with that of her husband, namely, that on the day the incident occurred the plaintiff had on shoes similar to those produced at trial as Exh 1; and that the plaintiff always had a pair of shoes on similar to those produced at trial as Exh 1 whenever she visited the defendant's premises, is incorrect; nor am I persuaded that the plaintiff had on footwear similar to that produced at trial as Exh 2. It therefore follows that the defendant failed to show that the plaintiff was negligent in the sense of having had on footwear similar to that produced at trial as Exh 2 or any other form of negligence.

[43] In conclusion, I thus have no hesitation to find that the defendant was negligent in that it failed to discharge the duty of care it owed to plaintiff by ensuring that the steps leading to the upper level floor adjacent to the sloping area were accessible to plaintiff; failed to ensure that the sloping surface did not pose danger to those persons using it; failed to ensure that the steps leading to the upper floor level were free of obstruction; failed to

apply effective anti-slippery devices and/or substances designed to ensure that the sloping surface would not be slippery, and that it had an effective system in place to detect any source of danger that could cause harm to the person of another.

[44] It therefore follows that the injuries the plaintiff sustained as a result of having slipped and fell on the sloping surface in the defendant's delivery area was as a consequence of negligence on the part of the defendant.

[45] In the result the following order is made:

[45.1.] It is hereby determined that the incident which occurred on 26 September 2007, when the plaintiff slipped and fell on the sloping surface (ramp) in the defendant's delivery area, was as a result of negligence on the part of the defendant and/or its employees;

[45.2.] That the defendant is liable to plaintiff in respect of damages sustained the quantum of which is yet to be proved.

[45.3.] The defendant is ordered to pay plaintiff's costs, on a party and party scale, duly taxed or as agreed.

N.J Yekiso, J